

COLLEGE COACHES, COLLEGE ATHLETES, AND THE FIRST AMENDMENT

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A relatively new phenomenon in sports is the exercise of free speech rights by athletes and coaches.¹ The 24/7 news cycle and the explosion of social media provide them multiple platforms to advance their agendas, whether charitable, political, social, or simply self-aggrandizing.²

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¹See, e.g., Oller, Athletes Finding Their Voices on Key Issues, Columbus Dispatch (July 29, 2018), <http://www.dispatch.com/sports/20180728/rob-oller—athletes-finding-their-voices-on-key-issues?rssfeed=true>.

There are isolated instances of athletes taking political positions in the past. Perhaps the most famous was the black power salute by Tommie Smith and Juan Carlos, members of the United States track and field team, during the playing of the national anthem at the medal ceremony at the 1968 Mexico Olympic Games. Brown, They Didn't #Take the Knee: The Black Power Protest Salute that Shook the World in 1968, Washington Post, (September 24, 2017),

https://www.washingtonpost.com/news/retropolis/wp/2017/09/24/they-didnt-takeaknee-the-black-power-protest-salute-that-shook-the-world-in-1968/?utm_term=.d5565d69a1c7. A protest that did not happen was the planned wearing of black armbands by 14 African-American athletes on the 1969 University of Wyoming football team. Wyoming was playing BYU at a time when it discriminated against African-Americans. The Wyoming head coach dropped the players from the team when they told him they planned to protest. His action was upheld by the university. Mullen, Do Politics Go With Football? 50 Years Ago Wyoming's Black 14 Said Yes, KUNC.org. (August 12, 2018), <http://www.kunc.org/post/do-politics-go-football-50-years-ago-wyomings-black-14-said-yes>.

² Martina Navratilova, a world-class tennis player, addressed controversial subjects at a time when most athletes were silent. She believes that social media makes activism much more possible by giving players an independent outlet to get their stories out. See Wertheim, Sports Illustrated (July 2, 2018).

The Fourteenth Amendment to the U.S. Constitution governs the actions of state actors,³ including, of course, public universities, as those actions affect First Amendment and other constitutional protections guaranteed by the Bill of Rights.⁴ In this article I address the First Amendment parameters of government regulation of “issues” speech⁵ by athletes and coaches⁶ at state universities.⁷

I. THE FIRST AMENDMENT AND CITIZEN SPEECH: “FREEDOM OF EXPRESSION IS THE MATRIX, THE

³ See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833); *The Civil Rights Cases*, 109 U.S. 3 (1883). Primarily to guarantee equal protection to racial minorities, the Supreme Court expanded the definition of state actor to include private entities that perform a traditional state function or whose functions and authority are pervasively intertwined with public functions. See, e.g., *Constitutional Law: Cases and Materials* 1017 to 1034 (14th ed. 2009); Varat, Amar, Cohen, ed.); *Weise v. Syracuse University*, 522 F.2d 397, 405-06 (2d Cir.), cert. denied, 419 U.S. 874, 95 S.Ct. 135, 42 L.Ed.2d 113 (1974); *Wahba v. New York University*, 492 F.2d 96, 101(2d Cir. 1974). See Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 *Colum.L.Rev.* 656, 661-62 (1974).

⁴ Bill of Rights protections apply to the states through the doctrine of incorporation. See, e.g., *Benton v. Maryland*, 395 U.S. 784 (1969); *Duncan v. Louisiana*, 391 U.S. 145 (1968).

⁵ As discussed in the article, “issues” speech is speech, and expressive activity treated as speech for purposes of the First Amendment, that addresses general public policy concerns and interests rather than matters that primarily involve individuals and their particular situations and predilections.

⁶ Coach and athlete speech also sit in other areas for which specific First Amendment rules apply. These include libel and slander actions by and against coaches and players and the ability of college players to market their names/images/likenesses. See Josephine (Jo) R. Potuto et al., *The Collegiate Mark, The Collegiate Model, and the Treatment of Student-Athletes*, 92 *Ore. L. Rev.* 879 (2014).

⁷ The NCAA is an unincorporated association of public and private universities; it is not a state actor. *Tarkanian v. NCAA*, 488 U.S. 179, 196-97, (1988); *NCAA Const. art. 4.02.1*. Its bylaws apply to nonmember coaches and student-athletes through enforcement by a university. By contrast to the NCAA, state high school associations, although also unincorporated associations, are state actors for purposes of the Fourteenth Amendment. *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 303, (2001). The Court distinguished the Tennessee High School Association from the NCAA on the ground that virtually all its members were public and, because all of them were sited within the boundary of one state, they could be seen as acting for and with a state in ways that a multi-state NCAA could not. See note 3 *supra* for the standard by which formally private actors are treated as state actors for purposes of the fourteenth amendment.

INDISPENSABLE CONDITION, OF NEARLY EVERY OTHER FORM OF FREEDOM⁸

The Supreme Court evaluates a number of factors to decide whether speech restrictions imposed by a state actor are constitutional. It looks at content and viewpoint restrictions,⁹ speech treated as conduct,¹⁰ and conduct treated as speech.¹¹ The Court evaluates the type speech – commercial speech,¹² libel and slander,¹³ speech disclosing private facts,¹⁴ fighting words¹⁵ and hate speech,¹⁶ political speech, and obscenity. Among them, political speech warrants the most protection¹⁷ while obscenity is unprotected speech.¹⁸

In addition to articulating First Amendment protections based on the type and content of speech, the Court has articulated the constitutional parameters for imposing time, place, and

⁸ *Palko v. Connecticut*, 302 U.S. 319, 327. *Palko's* holding, that the double jeopardy clause was not an incorporated right applicable to the states, was overruled by *Benton v. Maryland*, 395 U.S. 784 (1969).

⁹ *See, e.g.*, *Reed v. Town of Gilbert*, Ariz., 135 S.Ct. 2218, 2229-30 (2015).

¹⁰ *See, e.g.*, *Feiner v. New York*, 340 U.S. 315 (1951) (disorderly conduct).

¹¹ *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397 (1989); *Barnes v. Glen Theatre*, 501 U.S. 560 (1991).

¹² *See, e.g.*, *Virginia State Bd v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Cent. Hudson Gas v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002).

¹³ *See, e.g.*, *N. Y. Times v. Sullivan*, 376 U.S. 254 (1964); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967); *Gertz v. Welch*, 418 U.S. 323 (1974); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

¹⁴ *See, e.g.*, *U. S. v. Caldwell*, 408 U.S. 665, (1972); *Bates v. City of Little Rock*, 361 U.S. 516, (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958). Speech invading privacy interests includes invasion of privacy torts. *Compare Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975) and *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989) with *Sidis v. F-R Publ'g Corp.*, 113 F.2d 806 (2d Cir. 1940).

¹⁵ *See, e.g.*, *Houston v. Hill*, 482 U.S. 451 (1987); *Lewis v. New Orleans*, 415 U.S. 130, (1974); *Cohen v. California*, 403 U.S. 15 (1971).

¹⁶ *Compare R.A.V. v. City of St. Paul*, 505 U.S. 377 (1972) with *Wisconsin v. Mitchell*, 508 U.S. 476 (1993); *see also* *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). There also is sexual harassment speech under Title IX. *See, e.g.*, *Allison Gas Turbine Div. v. Gen. Motors*, 32 F.3d 1007 (7th Cir. 1994). *See also*, *Kingsley R. Browne, Zero Tolerance for the First Amendment: Title VII's Regulation of Employee Speech*, 27 Ohio N. U. L. Rev. 563 (2001).

¹⁷ *See, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Snyder v. Phelps*, 562 U.S. 443, (2011); *Near v. Minnesota*, 283 U.S. 697, (1931).

¹⁸ *See, e.g.*, *Miller v. California*, 413 U.S. 15 (1973).

manner restrictions on speech.¹⁹ It also treats differently the ways in which government regulates speech. These include fines, license requirements or other government-required permission in advance of speech,²⁰ zoning or other limits on the situs of speech,²¹ injunctions,²² and censorship.²³ Finally, even when speech constitutionally may be regulated, the government still must describe in advance with sufficient specificity the speech to be proscribed,²⁴ and it also must avoid restricting more speech than needed to achieve its government purpose.²⁵

The Supreme Court tests for regulating citizen speech are keyed to the public nature of a site or facility.²⁶ A common misconception is that because a facility is state-owned – i.e., a state university’s football stadium – that it necessarily must be a traditional public forum open to all comers on all subjects for speech purposes.²⁷ Not so. Instead, the question is whether a forum has been opened purposefully and specifically for citizen speech, and in what way.²⁸ Different tests apply to a traditional

¹⁹ See, e.g., *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983).

²⁰ A licensing or permit scheme must include clear standards to guide the exercise of discretion for granting or denying. *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750 (1988); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Kunz v. New York*, 340 U.S. 290 (1951).

²¹ See, e.g., *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973).

²² See, e.g., *Schneck v. Pro-Choice Network*, 519 U.S. 357, 117 S.Ct. 855, 137 L.Ed. 2d 1 (1987); *Madsen v. Women’s Health Center*, 512 U.S. 753, 114 S. Ct. 2516, 129 L.Ed. 2d 593 (1994).

²³ See, e.g., *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963); *Near v. Minnesota*, 283 U.S. 697, (1931); *Freedman v. Maryland*, 380 (1965).

²⁴ See, e.g., *Grayned v. Rockford*, 408 U.S. 104 (1972); *Smith v. Goguen*, 415 U.S. 566 (1974).

²⁵ See, e.g., *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940); *Gooding v. Wilson*, 405 U.S. 518 (1972).

²⁶ See, e.g., *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992). When owners of private property such as shopping malls open their property to the public, states may require them to provide speech opportunities to the public without violating the First Amendment right of the property owner. *Prune Yard Shopping Center v. Robins*, 447 U.S. 74 (1980).

²⁷ See Steele, *The Resurgent, First Amendment Protects Kneeling In Church and On Football Field* (September 24, 2017), https://www.themaven.net/theresurgent/contributors/first-amendment-protects-kneeling-in-church-and-on-football-field-MFxcyJSCzEmW2kitfz_RnA.

²⁸ See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983). The *Perry* Court described the applicable tests governing all public fora.

public forum,²⁹ a public forum designated as open for all speech purposes,³⁰ a limited public forum,³¹ and a non-public (for speech or expressive conduct) public forum.³² A common element in government regulation of citizen speech in all these public fora is the neutrality principle.

The neutrality principle is a critical underpinning of First Amendment doctrine because it otherwise is too easy for government to censor speech. The neutrality principle guards against government overreaching because it requires that government may squash speech it dislikes only when it also squashes speech it likes. This is a much more difficult exercise of regulatory authority and one likely to increase the voices protesting the regulation. The second misconception regarding

²⁹ A traditional public forum is one that from time immemorial has been accessible to and used by the public for speech purposes. The classic examples are public streets and parks. *See id.*

³⁰ The scope of speech in a designated public forum is equivalent to that in a traditional public forum. *See* *Widmar v. Vincent*, 454 U.S. 263 (1981) (university meeting facilities); *City of Madison Joint Sch. Dist. v. Wisconsin Pub. Emp't Relations Comm'n*, 429 U.S. 167 (1976) (school board meeting); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, (1975). In a traditional or designated public forum, government may restrict the content of the speech only if the restriction is neutral for content and viewpoint and the government can show a compelling government purpose for the speech restriction and that no other action will satisfy its purpose and have less impact on speech. The government may impose time/place/manner restrictions so long as they are content and viewpoint neutral, fulfill a compelling interest, and leaves open ample alternative ways to communicate.

³¹ A limited public forum is open for speech, but the speech is tied to a specific purpose; access is available only to a class of speakers or a category of speech that fits within the forum's limited use. *See, e.g., Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666 (1998). Government may not discriminate on the basis of viewpoint unless it can show a compelling government purpose and that no other action will satisfy its purpose and have less impact on speech. The government also may impose time/place/manner restrictions so long as they are content and viewpoint neutral, narrowly tailored to serve the government's interest, and leave open ample alternative ways for the speech to occur. *U. S. Postal Serv. v. Council of Greenburgh*, 453 U.S. 114, 132 (1981); *Consolidated Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 535–536 (1980); *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Schneider v. New Jersey*, 308 U.S. 147 (1939).

³² *See e.g., Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 103 S.Ct. 948, 112, 74 L.Ed.2d 794 (1983). A non-public forum is a public site or facility that is not open for speech. Here the government may reserve the forum for its intended use and may regulate or even prohibit speech or expressive activity so long as the regulation is reasonable and not done with the purpose to suppress content or viewpoint because the government disapproves. *United States Postal Service v. Greenburgh Civic Ass'n*, *supra*, 453 U.S., at 129, 101 S.Ct., at 2684.

government regulation of citizen speech is that the general rules governing freedom of speech apply to all subclasses of speakers. Again, not so. The First Amendment permits greater speech regulation for prisoners,³³ military personnel,³⁴ government employees,³⁵ and students.³⁶ The rules also are different when the government is the speaker.³⁷

II. THE FIRST AMENDMENT AND COLLEGE ATHLETICS

Context matters, both with speech generally and with speech in college athletics. For athletes and coaches, speech takes place on the field (or track or court or in the pool), on the greater campus, or when athletes and coaches are on their own. Speech may relate to matters of general social or political significance or matters specific to athletics – unsportsmanlike conduct, for example.

*A. COACH SPEECH: “[I]T CANNOT BE GAINSAID THAT THE STATE HAS INTERESTS AS AN EMPLOYER IN REGULATING THE SPEECH OF ITS EMPLOYEES THAT DIFFER SIGNIFICANTLY FROM THOSE IT POSSESSES IN CONNECTION WITH REGULATION OF THE SPEECH OF THE CITIZENRY IN GENERAL.”*³⁸

The rights and prerogatives of government employers are equal to private employers³⁹ when government employers deal with employee speech that does not involve matters of public concern.⁴⁰ For such speech, the First Amendment does not insulate government employees from adverse job consequences.

³³ See *e.g.*, *Thornburgh v. Abbott*, 490 U.S. 401 (1989); *Jones v. North Carolina Prisoners’ Union*, 433 U.S. 119 (1977).

³⁴ *Parker v. Levy*, 417 U.S. 733 (1974).

³⁵ See cases and authorities cited at note 40 *infra*.

³⁶ *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986); *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969); *Morse v. Frederick*, 551 U.S. 393 (2007).

³⁷ See *e.g.*, *Walker v. Texas Div., Sons of Confederate Veterans*, 135 S. Ct. 2239 (2015).

³⁸ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968.)

³⁹ While private employers are not constrained by the First Amendment, they of course are subject to state statutes, collective bargaining agreements, or individual employment contracts.

⁴⁰ See, *e.g.*, *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548 (1973); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); *Connick v. Myers*, 461 U.S.

By contrast, government employees are within the ambit of the First Amendment when they speak on matters of public concern, but, even so, First Amendment protection only covers their speech when it does not interfere with a government employer's ability to maintain an efficient and effective workplace.⁴¹ To decide whether employee speech interferes with an efficient and effective workplace, the court looks at the content, form, and context of the speech.⁴² Among the factors it considers are how far up the administrative food chain are the employees, whether the speech occurs at the workplace or at some other venue, whether government employees claim to be speaking for their employers or are perceived as speaking for them, and the actual workplace disruption caused by the speech.

A head coach might write an opinion piece for a newspaper in which that coach attacks a United States resident as incompetent

138 (1983); *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006); *Bd. of Comm'rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668, 679 (1996). The Court extended the government-as-employer speech test to cover the bylaws of a state-actor association that its members must enforce against their employees. *Tennessee Secondary Sch. Athletic Ass'n v. Brentwood Acad.*, 551 U.S. 291, 299 (2007) ("an athletic league's interest in maintaining an efficient and effective workplace may warrant curtailing the speech of its voluntary participants").

⁴¹ See cases and authorities cited at note 40 *supra*. As with any line-drawing, the line between speech on a matter of public concern, and speech that is not, is sometimes blurred. On one side is a government employee who speaks on matters unrelated to the government agency that employs him or the particular job for which he is employed. On the other side is the employee who criticizes a particular supervisor or workplace environment. Two Supreme Court cases illustrate the poles: *Pickering v. Bd. of Educ.*, 391 U.S. 563, (1968); and *Connick v. Myers*, 461 U.S. 138, (1983). *Pickering* involved a public school teacher who was fired for publicly criticizing the local school board for mismanagement of resources; the Board claimed the statements were factually untrue. The Court held that the constitutionality of firing *Pickering* for claimed misstatements of fact should be assessed by using the same First Amendment standard that would apply had *Pickering* been sued for defamation. The Court also held that *Pickering's* statements were on matters of public concern even though he was a school teacher with a personal employment interest in how school funds were spent. 88 S. Ct. at 1736. In *Connick* an assistant district attorney who objected to a job reassignment was fired after she distributed at work a questionnaire to other assistant district attorneys that sought their views on the administration of the office. The Court characterized all but one of the questions as related to personnel matters, not the administration of a public office. The one question that related to a matter of public concern was whether staff felt pressured to work in partisan political campaigns. *Connick*, 461 U.S. at 149-50.

⁴² *Id.* at 138.

to hold office.⁴³ Another head coach might tweet information about a United States president that is demonstrably false.⁴⁴ Their state university employer may not sanction these head coaches because their speech is offensive to the majority or even factually inaccurate. A university's authority to act depends on whether the speech substantially interferes with its ability to maintain an efficient and effective workplace.

A head coach likely is akin to a college dean, or at least a department chair, in a university's administrative structure. Speech by high-level administrators may bear on the public perception of a university. That possibility is heightened with a head coach. A major university in an Autonomy Five Conference⁴⁵ typically has a highly visible athletic program. At these universities, and many others in the NCAA's Division I Football Bowl Subdivision,⁴⁶ head coaches garner much public attention in the media—traditional, new, and social.

In the opinion piece and tweet described above, each head coach explicitly might have said that he spoke for himself only, and not his university. Alternatively, each might have avoided identifying himself as a head coach. Nonetheless, at least for head

⁴³ See Gleeson, Steve Kerr Blasts “Blowhard” Trump, Says He’s ‘Ill-Suited’ for Presidency, USTA Today Sports (May 18, 2017), <https://www.usatoday.com/story/sports/nba/2017/05/18/steve-kerr-blasts-president-donald-trump/101828914/>. The particular example in fact occurred, but the speech was by a coach of a professional, not college, team.

⁴⁴ See Crockett Jr., Washington State Football Head Coach Tweets Fake Obama Video and Then Proves His Ignorance by Arguing About It, *The Root* (June 18, 2018), <https://www.theroot.com/washington-state-football-head-coach-tweets-fake-obama-video-1826920397>; Calkins, Q&A: Days After Posting Doctored Obama Video On Twitter, WSU Coach Mike Leach Has Much More To Say, *The Seattle Times* (July 31, 2018), www.seattletimes.com/sports/wsu-cougar-football/qa-days-after-posting-doctored-obama-video-on-twitter-wsu-coach-mike-leach-has-much-more-to-say/.

⁴⁵ The Autonomy Five Conferences are the Atlantic Coast Conference, the Big Ten Conference, the Big 12 Conference, the Pacific Athletic Conference, and the Southeastern Athletic Conference. These conferences include virtually all of the historic major football programs. See NCAA Bylaw 5.02.1.1, 5.3.2.1.

⁴⁶ NCAA Bylaws 3.01.2, 20.01.2. The football bowl subdivision includes the autonomy five conferences as well as a few outlier major football programs such as Brigham Young University that are not members of an Autonomy Five Conference. The football bowl subdivision does not have an NCAA championship in football; instead these football programs compete in bowl games and are eligible for the College Football Playoff.

coaches in football and men's basketball, it is unlikely that their university connection and status will go unnoticed or unremarked.

Even when it is crystal clear that head coaches are speaking on their own dime, fans, donors, and state officials may blame a university for failing to stop the speech. Speech critical of government operations may sour a university's relationship with state officials. Speech expressing a viewpoint that state officials, or their constituents, abhor may prompt efforts to decrease university funding or to limit university discretion in how to spend state funds. Donors may threaten to withhold support. Fewer fans may attend games.⁴⁷

These impacts of head coach political speech may dissipate with time as new matters capture public attention. Even if there is a real and substantial likelihood that over the long run a university's ability to maintain its programs and operations will be affected, these impacts do not appear to be the type of impact to which the Supreme Court directs attention in the government-as-employer speech cases. The Court's focus is on a speech's immediate impact on day-to-day operations and the degree to which they are adversely affected by workplace distraction caused by the speech. If projected downstream consequences were sufficient to sanction head coaches for off-campus speech, then the balance of employer and employee rights would be weighted so heavily in favor of employer workplace disruption that there would be little room left for coaches to speak on matters of public concern.

Not all consequences of coach speech are downstream, however. The expressed disapproval of state officials, even if ultimately it will dissipate, cannot be ignored by university administrators in real time. The faculty senate may debate a coach's speech and pass a resolution seeking administrative action against the coach. Students may protest. Fans will phone and write letters, email and tweet. Local and national news outlets may pick up the story. Advocacy groups likely will be energized to attempt to influence administrative action. University trustees

⁴⁷ See, e.g., Beaton, Poll Shows NFL Fan Interest Remains Lower, Stark Divisions Over Anthem Protests (August 31, 2018), www.wsj.com/articles/poll-shows-nfl-fan-interest-remains-lower-stark-divisions-over-anthem-protests-1535709600.

may exert pressure. Dealing with the aftermath of head coach political speech, therefore, could well entail substantial time and attention from university administrators and, in turn, trigger constitutional university action against a coach.

A question regarding the constitutionality of employee speech regulation is the extent to

which a university must adhere to the neutrality principle. One might argue that the government-as-employer speech test, by including factors such as the administrative rank of the employee and the situs of the speech, already accounts for the degree to which a government employer needs to be neutral. A test so focused on workplace disruption – in other words, focused on the effects of an employee’s speech – likely always will have disproportionate impact on employees with viewpoints that do not reflect prevailing norms or whose viewpoints differ from their government employer.

Speech that toes the prevailing lines of political and social orthodoxy needs little constitutional protection. Unpopular speech or unpopular speakers do. In the context of citizen speech, this reality translates to constitutional doctrine that prioritizes the rights of speakers when speech provokes listener reaction.⁴⁸ It also led the Supreme Court to describe narrowly the elements needed to permit government to proscribe or punish either fighting words⁴⁹ or speech that presents a clear and present danger of violence.⁵⁰ This reality also should inform the balancing test used in the government-as-employer speech test.

Now consider another example of coach speech on a matter of public concern. A head football coach at a public university also is a lay minister. In a sermon he states his opposition to gay marriage and describes as sinful same-sex sexual relations. The university at which he is employed is subject to federal and state anti-discrimination strictures that include discrimination based on sexual orientation. The university is a firm and public adherent of these anti-discrimination policies in general and in their

⁴⁸ See *Feiner v. New York*, 340 U.S. 315, 321-30 (1951) (Black, J., dissenting); Owen Fiss, *Free Speech and Social Structure*, 71 *Iowa L. Rev.* 1405 (1986); *Snyder v. Phelps*, 562 U.S. 443 (2011); *Frisby v. Schultz*, 487 U.S. 474, 484-84 (1988).

⁴⁹ See cases cited at notes 15 and 48 *supra*.

⁵⁰ *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969).

particular application to protection of gay and lesbian students. The university has an active LGBTQIA⁵¹ student organization and has sponsored programs for staff and students aimed at fostering a campus environment open to all.

The head coach's sermon was delivered off campus, and it is clear that he did not speak for the university. At the same time, his sermon is directly counter to the university's message and policies. A head coach's job is to coach, teach, advise, and generally interact with student-athletes. One might argue that a university constitutionally could fire this head coach on the presumption that his known position regarding gays will permeate his relationships with student-athletes and lead either to his unfair treatment of gay athletes or to gay athletes uncomfortable with being coached by him.

Firing head coaches for holding certain public policy views, or speaking about them, however, clearly implicates their free speech right and, in the case of this head coach, possibly also his right to the free exercise of his religion. In the absence of evidence that he discriminated against gay athletes, it would appear that this head coach should have First Amendment protection from employment sanctions because of his views.⁵²

Now consider the result had this head coach shared his views at a team meeting. In this situation he would have interjected his viewpoint during the performance of his job and done so when speech on the subject was not relevant to his job responsibilities. It seems clear that under the government-as-employer First Amendment test, the university now may sanction the head coach.

Suppose now that a gay head coach is a vocal gay rights advocate. He shares his views at a team meeting, criticizing as discriminatory those who oppose gay marriage, including adherents of religions that advocate against gay marriage and gay sex. This coach also interjected his viewpoint during the performance of his job and when the speech was not relevant to his job responsibilities. His speech implicates the university's non-discrimination policies and its efforts to be inclusive. By contrast

⁵¹ LGBTQIA refer to lesbian, gay, bisexual, transgender, queer or questioning, intersex, and asexual or allied.

⁵² See generally, Bernstein, *Defending the First Amendment from Antidiscrimination Laws*, 82 N. C. L. Rev. 224 (2003).

to the lay minister coach's sermon, however, this head coach's speech is consonant with the public policy and message of his university. The demographics of his university also may predict greater sensitivity for gay rights than the rights of religious adherents. If so, then his speech also may cause less campus disruption among faculty and students.

Although there may be room for dispute regarding whether, and the extent to which, the neutrality principle applies generally to cabin a government employer's authority to sanction employee speech, there should be no dispute regarding its applicability when the particulars of employee speech are similar both in the administrative status of the employee speaker and in the situs of the speech. In this situation, a government employer should be obliged to treat the employees similarly. Indeed, a failure to be viewpoint neutral seems likely to increase the external pressures on a university administration.

A useful way to think about the neutrality principle in the context of head coach speech is to compare it to a professor's classroom lectures and interaction with students. A professor can teach Shakespeare in an English Literature class from the viewpoint that he was a closet Catholic, or that he was a loyal Elizabethan. The professor also may choose to teach the plays and sonnets without reference to Shakespeare's supposed biographical profile. By contrast, academic freedom does not cover a math professor teaching Shakespeare, no matter what tack the professor chooses to take. In that sense, then, the math professor who teaches Shakespeare, the coach who talks against gay rights, and the coach who talks in favor, all are operating outside their teaching brief. They all three constitutionally may suffer job consequences, and, moreover, the job consequences for the two head coaches should be the same.⁵³ Similarly, neither professor nor coaches should have First Amendment protection if they direct epithets at students, whether anti-gay, or anti-religion, even if those epithets would be protected speech, not fighting words, for

⁵³ The professor's situation is different from the two head coaches. His speech is not related to the subject addressed by the two head coaches so different treatment based on viewpoint will not be an issue. In addition, his professorial status may mean a faculty committee will need to deal with his speech. The requisites of tenure also may trigger different treatment.

citizen speech.⁵⁴ In this case, all three warrant equal treatment because their conduct is similar in all respects except the point of view that led to the epithets.

A head coach who kneels during the national anthem adds another nuance to the question of government employee speech. The first element of an analysis centers on whether a university requirement that a head coach be on the field and stand for the national anthem translates to government-compelled endorsement of a point of view.⁵⁵ The Supreme Court has described saluting the flag as “touching matters of opinion and political attitude”⁵⁶ and held unconstitutional a state requirement that school children salute the flag on pain of expulsion.⁵⁷ Standing silent at the anthem requires less conduct than a flag salute. Establishment clause jurisprudence, although it raises different constitutional concerns, nonetheless may be instructive on this point. The Supreme Court calls it compelled endorsement of religion when a non-believing fan stands silent during a religious invocation delivered before a high school game as the invocation puts pressure on the non-believing fan to be silent rather than to object.⁵⁸ If being compelled to be on the field and stand for the national anthem is seen as a compelled, though modest, endorsement of a university’s viewpoint, then coaches have a constitutionally protected right to decline to be present during the playing of the national anthem.⁵⁹

⁵⁴ Coach speech in this area might be treated as conduct for purposes of the First Amendment – for example, bullying – and, in consequence, would not be protected under the First Amendment. See Maese and Stubbs, *Maryland Football Program under Fire in Wake of Reports on Toxic Culture*, *Washington Post*, (August 11, 2018), https://www.washingtonpost.com/news/sports/wp/2018/08/11/maryland-football-program-under-fire-in-wake-of-reports-on-toxic-culture/?hpid=hp_hp-top-table-main-football%3Aunder-fire%3Ahomepage%2Fstory&utm_term=.05cdf582aa25; Dinich, Rittenberg, VanHaaren, *The Inside Story of a Toxic Culture at Maryland Football*, *ESPN* (August 11, 2018), http://www.espn.com/college-football/story/_/id/24342005/maryland-terrapins-football-culture-toxic-coach-dj-durkin.

⁵⁵ *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47 (2006); *Wooley v. Maynard*, 430 U.S. 705 (1977); *Bd of Educ. v. Barnette*, 319 U.S. 624 (1943).

⁵⁶ *Id.* at 635-636

⁵⁷ *Id.*

⁵⁸ *Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

⁵⁹ Including such a requirement in a coach’s contract, moreover, does not avoid the impact of the law of unconditional consequences.

Now move to an analysis of government employer authority if requiring a head coach to be present and stand for the national anthem is not compelled endorsement of viewpoint. Kneeling during the anthem is speech on a matter of public concern. It also is speech that occurs at the workplace while a coach is performing job responsibilities. In addition, the speech occurs in front of fans who purchased tickets to see a game, not a political protest, however brief.

A prime dividing line in evaluating the reasonableness of citizen speech regulation is whether listeners are free to walk away.⁶⁰ It is unclear whether fans will be treated as a captive audience in assessing their rights,⁶¹ particularly given the extreme brevity of the on-field demonstration. But their presence in the stands is at least an element in assessing whether the coach speech creates workplace disruption. Under the government-as-employer First Amendment test, it appears that a university constitutionally could regulate this coach speech, a conclusion that is reinforced if the university is viewpoint neutral in enforcing its policy.

As noted above, one consideration the court employs in deciding the reasonableness of a government speech regulation is the sanction imposed. It may well be that under the government-as-employer First Amendment test, a university could fire the head coach. That being so, it is clear a university constitutionally could require either that a coach stay in the locker room while the anthem is played⁶² or that a coach be on the field and refrain from kneeling – again with the caveat regarding viewpoint neutrality in enforcing a policy of anthem demonstrations.⁶³

A complication in assessing the impact of government employee speech is government's right to engage in its own

⁶⁰ See, e.g., *Consol. Edison Co. v. Pub. Serv. Comm'n*, 1000 S.Ct. 2325, 2335-36 (1980).

⁶¹ See note 47 *supra*.

⁶² Another alternative, eschewing playing the national anthem, seems a doubtful resolution as it would raise some of the same negative consequences for a university, perhaps even enhanced, as a coach's kneeling would.

⁶³ For what viewpoint neutrality might mean in this context, see text accompanying note 88 *infra*.

speech.⁶⁴ Government is an artificial construct that can only act – or speak – through those it employs. When government conducts public policy it is not neutral, nor can it be. It is nonsense of epic proportions, for example, to expect that a city that designates a street as one way going east must also designate that same street as one way going west.

Government also may advocate for the public policies it adopts, and, in doing so, it will, and should, express only those viewpoints that support its policy choices. It is not always easy to decide when employee speech expressing one viewpoint only is the employee speaking as the government, when no neutrality obligation applies, or when, by contrast, employee speech expressing one viewpoint is that of employees speaking for themselves,⁶⁵ where the government-as-employer speech rules apply and, in turn, neutrality of application might be required. Because characterizing employee speech as that of the government employer avoids any potential obligation to be neutral in permitting similarly situated opposing viewpoints, the identification of speech as employer speech should be closely circumscribed.

So far I have discussed coach speech on matters that clearly are of public concern. Other examples of coach speech are not so clear. Take limits on coach recruiting speech, for example.

Tennessee Secondary School Athletic Association v. Brentwood Academy involved a high school coach who wrote personal notes to prospective student-athletes and was sanctioned for violating the state high school association's rule that prohibited "undue influence" in recruiting.⁶⁶ A near-unanimous

⁶⁴ See, e.g., *Walker v. Texas Div., Sons of Confederate Veterans*, 135 S. Ct. 2239 (2015).

⁶⁵ Compare, e.g., See, e.g., *Walker v. Texas Div., Sons of Confederate Veterans*, 135 S. Ct. 2239 (2015) with *Wooley v. Maynard*, 430 U.S. 705 (1977). See *Rosenberger v. Rector and Visitors*, 515 U.S. 819 (1995).

⁶⁶ *Tennessee Secondary Sch. Athletic Ass'n v. Brentwood Acad.* 551 U.S. 291, 294 (2007). The *Brentwood* litigation involved two visits to the Supreme Court. In the first case, the Court concluded that a state high school association was a state actor for purposes of the fourteenth amendment. *Brentwood v. Tennessee Secondary School Athletic Ass'n*, 531 U. S. 288 (2001).

Supreme Court⁶⁷ concluded that the rule fostered a salutary government purpose of managing athletic competition and, therefore, the coach could be punished for violating the rule despite the fact that there are important First Amendment values in providing full information to prospective students helpful to their choice of high school.⁶⁸ Also relevant to the court's decision was its characterization of coach speech abridging a recruiting rule as "nowhere near the heart of the First Amendment."⁶⁹

Criticism of referees and game officials by head coaches is perhaps the most common instance of coach speech. Such criticism falls within the realm of "issues" speech since one can argue that game officiating implicates the integrity of the game.

The NCAA and college athletic conferences penalize head coaches for publicly criticizing game officials, conference staff, or competitors.⁷⁰ Head coaches are expected to be positive role models for student-athletes as well as for youth generally.⁷¹ The rationale for rules prohibiting criticism of officials extends beyond the role model responsibility of a head coach to the need to maintain confidence in the competence and neutrality of referees, umpires, and other game officials. Prohibiting public criticism also relates to attracting quality individuals to take these jobs and the cost of getting them.

No doubt watching athletes compete is a central preoccupation of many citizens, and head coaches' public criticism

⁶⁷ The lone holdout, Justice Thomas, believed the Court erred by deeming the high school association a state actor in the first place. *Tennessee* 551 U.S. at 306 (Thomas, J., concurring).

⁶⁸ *Id.* at 300. The NCAA also regulates recruiting. See NCAA Bylaw Article 13.

⁶⁹ *Id.* at 296. In *Brentwood*, the party before the Court was the high school, not the head coach whose speech violated the rule. That likely makes no difference, because otherwise, as the *Brentwood* Court said, there could be easy circumvention of athletic rules that are constitutional and policy-defensible. *Id.* at 296, 300.

⁷⁰ The NCAA and college athletic conferences have rules governing coach criticism of officials. For an illustration of conference restrictions on coach comments – in this case of other coaches in a conference – see Jones, SEC Coaches' Remarks to Be Limited, News-Press (Fort Myers), May 29, 2009, at 2C. See also Pedro Moura, Lane Kiffin Apologizes for Comments, ESPN LA (Nov. 2, 2011), http://espn.go.com/los-angeles/nfl/story/_id/7178722/usc-lane-kiffin-apologizes-point-ripping-refs (discussing the PAC-12 imposing public reprimand and \$10,000 fine on head coach for criticizing game referees). NCAA sportsmanship policies also prohibit coaches from using expletives, obscene or racist speech. See Jeff Rabjohns, NCAA Swears It Will Put a Stop to Coaches' Cursing, Indianapolis Star, Oct. 22, 2007, at A1.

⁷¹ NCAA Manual §§10.01.1, 11.1.2.1, 19.01.2 (2009-10).

might help them decide whether games are administered by competent officials in an unbiased way. Even so, there is little doubt that a head coach's criticism is impelled by dismay at a game result or adverse calls, not by general public-spiritedness. Prohibiting criticism of officials may be seen as necessary to maintain effective competition. It promotes civil discourse and respect for process, an appropriate educational goal.⁷² It also is comparable to recruiting speech in its distance from the First Amendment's "heart." It therefore seems that a university's enforcement of conference and NCAA sportsmanship bylaws is a constitutional exercise of its authority as an employer.⁷³

*B. STUDENT ATHLETE SPEECH: "[C]ONDUCT BY THE STUDENT, IN CLASS OR OUT OF IT, WHICH FOR ANY REASON . . . MATERIALLY DISRUPTS CLASSWORK OR INVOLVES SUBSTANTIAL DISORDER OR INVASION OF THE RIGHTS OF OTHERS IS, OF COURSE, NOT IMMUNIZED BY THE CONSTITUTIONAL GUARANTEE OF FREEDOM OF SPEECH."*⁷⁴

As with government regulation of its employees, there is wider scope for constitutional regulation of student speech than government regulation of citizen speech. For students, the operative test derives from *Tinker v. Des Moines Independent Community School District*, in which the Court upheld the right of high school students to wear black armbands to protest the Vietnam War.⁷⁵ Under *Tinker*, it is constitutional for school administrators to regulate or prohibit student speech when it materially and substantially disrupts the academic environment, campus community, or the need for discipline.

The Court articulated the *Tinker* test in the context of political speech by high school students.⁷⁶ The Supreme Court has never directly described how or whether *Tinker* should be applied

⁷² *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681-86 (1986).

⁷³ Cf. *Connick v. Myers*, 461 U.S. 138 (1983). An additional consideration: coaches contractually agree to be bound by NCAA bylaws. NCAA Bylaws §§ 11.2.1, 3.2.4.6, 14.1.3.1, 30.12, 30.3.1, 30.3.3.

⁷⁴ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

⁷⁵ *Id.* at 508

⁷⁶ *Id.* See *Bethel School District v. Fraser*, 478 U.S. 675 (1986); *Morse v. Frederick*, 551 U.S. 393 (2007).

to university students. In another context, the Court disavowed the notion that “because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.”⁷⁷ Although one justly might argue that the scope and purpose of university education and the greater maturity of university students should lead to greater protection for university student speech than that afforded high school students, the *Tinker* test nonetheless is applied by universities to describe student rights and govern student discipline.⁷⁸ When it comes to student-athletes, moreover, *Tinker* may be inapplicable as providing greater First Amendment protection than constitutionally is required when evaluating the athletic-only consequences to student-athletes for their speech. First, students have no constitutional right to compete in a varsity sport.⁷⁹ Second, the reasons that permit regulation of head coach speech – fostering the administration of competition, managing games, and promoting the goals of higher education⁸⁰ – also are relevant to student-athlete speech. Finally, the most severe sanctions a university may impose on student-athletes qua

⁷⁷ *Healy v. James*, 408 U.S. 169, 180 (1972). Healy involved a college’s refusal to recognize Students for a Democratic Society as an official campus student group.

⁷⁸ *See, e.g.*, University of Nebraska Bd. Of Regents Policy 5.1.2 (c).

⁷⁹ *See, e.g.*, *Graham v. NCAA*, 804 F.2d 953, 955 (6th Cir. 1986); *Colo. Seminary v. NCAA*, 570 F.2d 320, 321 (10th Cir. 1978); *Bloom v. NAA*, 93 P.3d 621, 624 (Colo. App. 2004); *NCAA v. Yeo*, 171 S.W.3d 863, 865 (Tex. 2005) (stating that “the overwhelming majority of jurisdictions” find no due process constitutional right of students to participate in college athletics competition); *Hart v. NCAA*, 550 S.E.2d 79, 85-86 (W. Va. 2001). Their participation may be conditioned on, for example, consent to drug testing. *Veronia School District 47J v. Acton*, 515 U.S. 646 (1995); *Bd of Educ. of Indep. School District No. 92 of Pottawatomie Cty v. Earls*, 536 U.S. 822 (2002). For a discussion of the limits on the constitutionality of conditioning athletic participation on foregoing otherwise available constitutional rights, see text accompanying notes 79 to 83 *infra*.

⁸⁰ *See, e.g.*, NCAA Manual §§31.02.3, 31.1.1⁰; *see also* NCAA.org, Public Reprimand and Suspension Issued to Lehigh University Football Student-Athlete, NCAA (Dec. 8, 2011), [http://www.nesn.com/2011/10/excessive-celebration-penalties-in-college-football-are-getting-out-of-hand.html](http://www.ncaa.org/wps/wcm/connect/publicNCAA/Resources/Latest+News/2011/December/Public+reprimand+and+suspension+issued+to+Lehigh+University+football+student-athlete. Football's+excessive+celebrating+rule+governs+game+participation. See NCAA, 2011 NCAA Football Rules Committee Action Report 1 (2011); Ben Watanabe, Excessive Celebration Penalties in College Football Are Getting Out of Hand, NESN (Oct.16, 2011), <a href=). The school cases that generated the test, moreover, arise out of student exercise of political speech, the core of the First Amendment.

student-athletes are those to which they have no constitutional right in the first place – exclusion from athletic participation and revocation of an athletic scholarship.⁸¹ Those sanctions neither prevent them from enrolling at another school and competing, nor prevent them from competing in noncollegiate athletic competition.

Much of the discussion of student-athlete political speech tracks the discussion earlier regarding head coach speech. One prime difference is that student-athlete speech would never be confused as the speech of the university at which a student-athlete is enrolled.⁸²

A student who expresses off campus an opinion that white hegemony and privilege are evils that may be eradicated only by restricting the opportunities of whites to go to college or get jobs has not substantially and materially disrupted the academic environment or interfered directly with the rights of other students. The same is true of a student who publicly touts the success and achievements of the white race and opposes affirmative action initiatives that continue more than 60 years after the Supreme Court mandated public school integration as an essential component of equal protection.⁸³ The Supreme Court has underscored that an educational environment is a prime place for the marketplace of ideas that underpins First Amendment doctrine, that in the educational environment “a multitude of tongues” must be heard, and that authoritative selection of a particular viewpoint has no place.⁸⁴ Expression of each of these viewpoints in a classroom, therefore, by students, even student-

⁸¹ A university might also take action against a student-athlete qua student. In this case, the law governing student speech would apply. See generally, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Morse v. Frederick*, 551 U.S. 393, 127 S.Ct. 2618, 168 L.Ed. 2d 290 (2007). For student speech generally, the Court expressly has stated that viewpoint discrimination has no place in student speech regulation unless a school can demonstrate that that singling out a particular viewpoint is required to avoid material and substantial interference with schoolwork or discipline. *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 508, 510-13 (1969).

⁸² There are occasions when their universities may ask student-athletes to speak for them, but in these cases there will not be a conflict between a university and student-athlete regarding the content or viewpoint of the speech.

⁸³ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁸⁴ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508, 510-13 (1969).

athletes, should be permitted when relevant to the subject matter and expressed in ways of polite and respectful discourse.

If the students who made the off campus remarks are student-athletes, an additional analysis is needed to decide whether the speech constitutionally may trigger their dismissal from a varsity athletic team. Even though competing in varsity athletics is a benefit or privilege and not a constitutional right, it is not automatically true that government may condition receiving the benefit on the relinquishment of the right to freedom of speech.⁸⁵

Relevant to the question whether student-athletes may suffer athletic competition consequences because of their speech is how separate was the speech from the student-athletes' status as student-athletes. In the example provided, the speech was off campus and not part of any athletic activity. Assume the student-athletes neither were in uniform nor identified themselves as student-athletes. In this situation, dismissing them from varsity competition because of their speech appears to impose an unconstitutional condition on their status as student-athletes.

Student-athletes, as well as coaches, are held to sportsmanship requirements. As is the case with coaches, and for much the same reasons, these requirements for student-athletes will pass constitutional muster.

Analysis as to whether a university may sanction student-athletes for kneeling at the national anthem also raises many of the same considerations discussed regarding coaches who kneel. The possibility that being required to be on the field and stand is compelled endorsement of viewpoint is heightened with student-athletes as they are still within the educational system and may be seen as more subject to pressure than an adult employer. That said, and as was the case in the discussion of coaches, kneeling at the national anthem moves the needle closer to a conclusion that university regulation would be constitutional.

Kneeling takes place on university property during a university activity. A football field is a non-public forum for speech.⁸⁶ Regulation of speech activities in a non-public forum is

⁸⁵ See, e.g., *Perry v. Sinderman*, 408 U.S. 593, 596-98, 92 S. Ct. 2694, 2697-98, 33 L. Ed. 570 (1972); *Elrod v. Burns*, 427 U.S. 347, 360-61 (1976).

⁸⁶ See cases cited at note 33 *supra*.

constitutionally permitted so long as the regulation is reasonable and is not done in an effort to squash speech with which government disagrees.⁸⁷ Student-athletes are on the field only by virtue of their participation in that activity, and their speech is not a component of that participation. Prohibiting speech not relevant to athletic participation is reasonable, particularly as the most severe sanction that may be imposed is exclusion from participation in a varsity sport.

The second component that permits speech regulation in a non-public forum is that the regulation is not done out of antagonism for the viewpoint expressed. A university would have more difficulty meeting this part of the test. The basic point is the same as described in the discussion above regarding coach speech, viewpoint neutrality, and the effect of the speech on workplace efficiency.⁸⁸ If a negative impact on fans is enough to exempt a university from a conclusion that it targeted a student-athlete because of disagreement with viewpoint, then unpopular speech always is disadvantaged.

Moreover, viewpoint neutrality at a minimum should mean that if kneeling is prohibited then so too must other anthem demonstrations, such as crossing one's arm over one's heart. There also is a tenable argument that the scope of speech regulation must cut a broader swath than what happens at the national anthem and might need to cover other points of free expression during pregame activities.

Consider, again, a university that wants to prohibit kneeling during the playing of the national anthem. Such action may be constitutional, but it also will be controversial,⁸⁹ and much more so if crossing one's arm over one's heart also must be prohibited.⁹⁰ It is far, far easier simply to play the national anthem before coaches and student-athletes take the field.

⁸⁷ See cases cited at note 33 *supra*.

⁸⁸ See text accompanying notes 47 to 53 *supra*.

⁸⁹ Gay, SIU Players Banned from Displays of Activism While in Salukis Uniform, WSPD Local 6 News (August 29, 2018), www.wpsdlocal6.com/2018/08/29/siu-players-banned-from-displays-of-activism-while-in-salukis-uniform/;

⁹⁰ Munoz, SIU Athletics Rescinds Activism Ban, Legal Experts Weigh in on Code of Conduct Addition, SIU Daily Egyptian (August 30, 2018), www.dailyegyptian.com/85792/showcase/siu-athletics-rescinds-activism-ban-legal-experts-weigh-in/.

Anyone who has attended a collegiate sporting event knows that there are a myriad of instances of speech unrelated to the game. These might include, for example, a PA announcement urging fans to support the military or to honor 9/11 victims or to contribute to the United Way. To the extent these require no participation by student-athletes (or coaches) they constitute university expression of viewpoint and may go forward as instances of employer speech.

One final area of student-athlete speech regulation relates to their use of social media. The constitutional considerations governing university regulation of student-athlete speech on social media are no different in kind from government regulation of other ways that student-athletes speak. The proliferation of social media, its ease of use, and the immediacy of posting before thoughtful consideration make it a fertile area, however, for student-athlete speech that universities may seek to regulate.

Some collegiate athletic programs prohibit student-athletes from using social media⁹¹ or monitor their use.⁹² In part, universities do this to protect student-athletes from unpleasant or virulent messages from unruly fans.⁹³ In part, they do this to protect student-athletes from negative impacts on job prospects from ill-considered posts.⁹⁴ In part, they do this to demonstrate institutional control as student-athletes posts may point to their commission of NCAA violations.⁹⁵ Protecting students from

⁹¹ Rovell, *Coaches Ban of Twitter Proves College Sports Isn't about Education*, CNBC (August 8, 2011), <https://www.cnbc.com/id/44058540>.

⁹² Coaches follow their athletes on face book and twitter. Coaches also monitor what recruits are posting. *See, e.g.*, Voigt et al., *Be careful on Twitter, Recruits: College Coaches Are Watching for Bad Social Media Behavior*, Fox News Sports, (August 11, 2014), <http://www.foxnews.com/sports/2014/08/11/be-careful-on-twitter-recruits-college-coaches-are-watching-for-bad-social.html>.

⁹³ Auerbach, *The Good and Bad of Twitter and College Athletes*, USA Today Sports (January 10, 2013), www.usatoday.com/story/sports/college/other/2013/01/10/college-athletes-twitter-criticism-johnny-manziel-kentucky/1823959/.

⁹⁴ Social media comments can haunt a player many years after they were posted. *Tasch, Other Athletes Like Josh Hader Who Came Under Fire For Controversial Social Media Posts*, Daily News.com, (July 18, 2018), <http://www.nydailynews.com/sports/ny-sports-athletes-controversial-social-media-20180718-story.html#>

⁹⁵ A tweet by a North Carolina student-athlete triggered an NCAA investigation and, ultimately, the suspension of several student-athletes for commission of NCAA violations. *Giglio, Austin's Twitter Account Sheds Light on UNC Player*, News and Observer (July 20, 2010) <http://www.newsobserver.com/2010/07/20/v-print/589864/austins-twitter-account-sheds.html>.

interactions with virulent fans, and acting proactively to uncover NCAA violations are sufficient justification for a university to monitor student-athletes social media, particularly as much of what is posted is in the public domain. Whether these reasons also justify an outright ban on the use of social media is not clear, and many argue they do not.⁹⁶

III. GOOD SENSE

The constitution sets minimum standards below which government may not act; a constitutional minimum does not necessarily equate with wise or good policy. Concomitantly, the fact that speech is protected from government regulation does not mean it is socially beneficial to give the speech, or to give it at a particular time and place. An increasingly multicultural society brings dividends in terms of the vibrancy and added texture to society. But it also adds to the difficulty of amicable communication. Today's society is less polite, less tolerant of opposing views. Issues that might be handled amicably, and by compromise, instead result in entrenched opposing camps, especially when a speaker challenges prevailing norms.

In describing the scope of constitutional speech regulation in this article, I by no means endorse university regulation in general nor any fact-specific application. Although I lean quite heavily in favor of permitting speech, I nonetheless recognize that the arguments on each side are not frivolous when it comes to coach and student-athlete speech. A university should balance all interests and project what next may happen depending on how it decides. It should not make a decision based on what is politically most palatable or least likely to generate criticism. Rather, it should do what it thinks is right based on all the variables at play. Hard questions and passionate advocacy means no decision will be immune to criticism.⁹⁷

⁹⁶ See, e.g., Gay, Note, Hands Off Twitter: Are NCAA Student-Athlete Social Media Bans Unconstitutional? 39 Fla. St. Univ. L. Rev. 781 (2012); Walsh, All a Twitter: Social Networking, College Athletes, and the First Amendment 619 20 William & Mary Bill of Rts. J. 619 (2011).

⁹⁷ Smith, Saluki Athletics to 'revisit' Protest Clause in Athlete Handbook, Carbondale Southern Illinoisan (August 31, 2018), https://thesouthern.com/news/local/siu/saluki-athletics-to-revisit-protest-clause-in-athlete-handbook/article_a5b5f7e7-e13b-519d-a587-c7d1b22beeeb.html.

