

‘The Highest Form of Patriotism:’
Toward an Understanding of First Amendment
Precedents and NFL Protests

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Commentary

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More than any other narrative, the past two seasons of the National Football League (NFL) have been dominated by stories of protest. Beginning in the 2016 preseason, San Francisco 49ers quarterback Colin Kaepernick began sitting during the national anthem in reaction to the increasingly publicized cases of police brutality against people of color in the United States. Eventually he switched from sitting to kneeling, a pose that has now become synonymous with Kaepernick's movement. His demonstration sparked a series of similar protests both across the League and in other sports as well, from Major League Baseball to international women's soccer. Two years later, protests continue to occur in response to both police violence and visible acts of racism in politics.

Of course, Kaepernick's protest did not occur in a vacuum. NFL television ratings, long the envy of every network executive, have been declining since 2015: the year before the on-field protests began. That has not stopped some from blaming Kaepernick for the drop in viewership, though more reasonable minds note that declining NFL ratings mirror a larger industry-wide trend as more households cut cords.¹

Additionally, the campaign to blame Kaepernick for the NFL's woes has been further challenged by a 2017 Marist poll, which found support for the protests to actually be growing. As opposed to an earlier 2016 poll, this one found that most Americans now agreed with his right to protest.² Marist found that 51% of Americans agreed that athletes should be able to protest, with 47% dissenting. Likewise, 52% think the athletes did the right thing by protesting and 41% say they did the wrong thing. These numbers have virtually flipped between fall 2016 and fall 2017, as awareness of Kaepernick's motivations has grown.³

Despite this swing in opinion, or perhaps because of it, advertisers have reportedly gotten more nervous about the direction of the league.⁴ Some stakeholders, including Dallas Cowboys owner Jerry Jones, suggested that a rule be passed requiring players to stand for the anthem, similar to the current rules in the National Basketball Association.

On May 23, 2018, those suggestions were written into reality. NFL owners handed down new team rules stating that, if players were on the field at the time of the anthem, they would be required to stand. It has been observed that the legality of such a policy could withstand any legal action against it, due to the NFL being a private, and not a government, entity. As constitutional scholar and retired Harvard law professor Alan Dershowitz said in an interview on the topic of protest, "The players don't have a First Amendment right in relation to the owners. They only have a First Amendment right in relation to the

¹ Pallotta, Frank. "Yes, the NFL's TC ratings are down, but so is the rest of network television." *CNN*. 26 October 2017.

² HBO Real Sports/Marist Poll: "Growing Support for Anthem Protests." 24 October 2017.

³ Ibid.

⁴ Shields, Mike. "Brands are threatening to pull ads from NFL coverage if NBC keeps covering players national-anthem protests." *Business Insider*. 3 November 2017.

government.”⁵ This interpretation of the law was endorsed by the President of the United States, who ignited another round of protests when he remarked at a rally in Alabama,

Wouldn't you love to see one of these NFL owners, when somebody disrespects our flag, to say "Get that son of a bitch off the field right now, out, he's fired." You know, some owner is going to do that. He's gonna say, "That guy disrespects our flag, he's fired." And the owner, they don't know it. They don't know it. They're friends of mine, many of them. They don't know it. They'll be the most popular person, for a week. They'll be the most popular person in the country.⁶

In a follow-up statement via twitter, the President wrote that “If a player wants the privilege of making millions of dollars in the NFL, or other leagues, he or she should not be allowed to disrespect...our Great American Flag (or Country) and should stand for the National Anthem. If not, YOU'RE FIRED. Find something else to do!”⁷ Both Dershowitz and the President, however, are wrong in their analysis of the situation. As I will show in this commentary, it would certainly be a violation of the First Amendment of the Constitution to pass a rule requiring players to stand for the national anthem. Legal precedent exists showing that professional sport teams, under specific circumstances, can be held to the same standards that government institutions would be, as many would be classified as state actors instead of private actors.

The First Amendment, adopted as part of the United States' Bill of Rights in 1791, reads:
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.⁸

From 1791 through to the early twentieth century, it had been understood that only federal statutes needed to be compliant with the Bill of Rights and that state and local authorities could restrict those rights through legislation, as they saw fit. This changed in 1925 with *Gitlow v. New York*, where the Supreme Court established that the federal constitution overrides all others. However, the Court upheld the ability of governments to limit speech that could be considered threatening to civilized society, “limited only by the constraint that the legislative estimation of danger not be arbitrary or unreasonable.”⁹ However, in his dissent of *Gitlow*, Justice Oliver Wendel Holmes, joined by Justice Louis Brandeis, argued for a much narrower

⁵ Fink, Jenni. “Constitutional Law Scholar Claimed NFL Protests Only Become 1st Amendment Issue if Gov Does One Thing.” *Independent Journal Review*. 29 October 2017.

⁶ Boegel, Ellen. “First Amendment may protect Trump tweets against NFL protests.” *America Magazine: The Jesuit Review*. 3 November 2017.

⁷ Donald Trump, Twitter post, 23 September 2017, 1:11pm.

⁸ U.S. Const., amend. I.

⁹ Blasi, Vincent. 1988. “The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in *Whitney v. California*.” *William & Mary Law Review*. Page 664.

definition for when the government would be allowed to curtail speech. They believed that only in the presence of “a clear and present danger” should freedom of speech be able to be curtailed.¹⁰ Brandeis further elaborated on this point of view in a powerful concurrent opinion in a later, yet similar, supreme court case: *Whitney v. California* (1927). Joined again by Holmes, Brandeis wrote that:

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. [...] The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind.¹¹

In the almost century since the *Gitlow* and *Whitney* decisions, understandings of the First Amendment have migrated further and further towards Holmes’ and Brandeis’ interpretation of it. Today, there is little chance either *Gitlow* or *Whitney* themselves would have been charged with anything, let alone had their convictions upheld.

This is not to say that freedom of speech is absolute. There are still several ways for the government to legally limit free speech. As the Court decided in *United States Postal Service v. Council of Greenburgh Civic Associations*, the “First Amendment does not guarantee access to property simply because it is owned or controlled by the government.”¹² In areas that are not usually used as platforms to exercise free speech, “the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”¹³ So if exercising speech inordinately impacted the normal operations of an institution, and covers all points of view evenly, the government would be within their rights to curtail it. This was reiterated in a more recent 2001 case, *Good News Club v. Milford Central School*, where,

¹⁰ Holmes, Oliver Wendell. Dissenting opinion, *Gitlow v. New York*, 268 U.S. 652, 653 (1925). *Gitlow* was a socialist, arrested under New York’s Criminal Anarchy Law in 1919 for his writings in the newspaper *The Revolutionary Age*. In the dissent, Justice Holmes both critiqued the plaintiff’s prose and called for his acquittal, writing that “Whatever may be thought of the redundant discourse before us it has no chance of starting a present conflagration.”

¹¹ Brandeis, Louis. Concurrent opinion, *Whitney v. California*, 274 U.S. 357 (1927).

¹² *USPS v. Council of Greenburgh Civic Assns.*, 453 U.S. 114, 129 (1981). Pen. Ed. Ass’n, 460 U.S.

¹³ *Ibid.*

as the Supreme Court has observed, “when the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech.” The basic requirement and clear directive to the government, in such instances, is to avoid discrimination “against speech on the basis of viewpoint.”¹⁴

However, once an area is opened to any type of speech, it becomes a public forum, and must be open to all types of speech. The one constant in First Amendment rulings is that speech restrictions must be applied indiscriminate of viewpoint or they will be considered unconstitutional. In *Widmar v. Vincent*, the University of Missouri-Kansas City attempted to block a religious student group from meeting in university facilities. But since the facilities were frequently used by other groups, they were established as an open forum for free speech and the University were therefore unable to pick and choose who made use of said facilities. As the Supreme Court’s decision read, “The Constitution 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.”¹⁵ Though the University did not need to turn these facilities into areas for free speech, once they did, it could not be reversed for specific groups.

There exists an intermediate legal classification known as a ‘limited public forum’ as well, “where expressive activity is allowable to a lesser extent than in public fora.”¹⁶ This covers many government buildings, such as schools, libraries, and fairgrounds, where the institution “is not created primarily for the purpose of furthering expression, but is closely associated with the interchange of ideas. In such a forum, first amendment rights may be exercised, so long as the activity does not interfere with the locale’s basic function.”¹⁷

Such is the case for sport stadia. There was never any requirement that they be designated as public fora, but a trip to any sporting event will provide ample evidence that that is indeed what they are. The NFL’s own “My Cause My Cleats” campaign actively encourages employees to take advantage of a stadium’s role as a partial public forum to bring exposure to the causes they care about. Even the national anthem itself represents an act of speech, a viewpoint that, by its own expression, makes room for those that oppose it. Since the act of protesting during the anthem is (A) taking place in a space that has been designated at least a partial public forum, without interfering with the primary duty of the space, and (B) not inciting immediate violence, then any ban on protests there would violate the First Amendment.

Of course, this line of reasoning would only apply to those bound by the U.S. Constitution, such as public universities. This does not normally include private businesses, such as the NFL. But the legal

¹⁴ Calvert, Clay. “Fans and the First Amendment: Cheering and Jeering in College Sports.” *Virginia Sports & Entertainment Law Journal*. Vol. 4:1. Page 14.

¹⁵ Powell, Lewis. *Widmar v. Vincent*. 454 U.S. 263 (1981).

¹⁶ Israeloff, Lawrence A. 1991. “The Sports Fan v. The Sports Team Owner: Does a Franchise’s Prohibition of Spectators Banners Violate the First Amendment?” *Columbia Journal of Law and Social Problems*. Vol. 24. Page 433.

¹⁷ *Ibid*.

concept of state actors allows the rule to be extended to the League as well. State actors are those acting on behalf of the government, and thus bound by the Constitution. Much more than just those that are directly employed by the government, state actors can be anyone indirectly benefiting from a symbiotic relationship with the state or carrying out the duties of the state. There are two ways to establish state action: the ‘public function approach’ and the ‘nexus approach.’

The former is illustrated in the 1966 Supreme Court case *Evans v. Newton*, where a park was left in trust for the exclusive use of white people. The city ordered it desegregated but was sued by park managers and the heirs to the original owner. The Court eventually found, however, that “where private individuals or groups exercise powers or carry on functions governmental in nature, they become agencies or instrumentalities of the State” and thus responsible for upholding the same laws as the state.¹⁸ “Conduct that is formally ‘private’ may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action.”¹⁹ So when a private entity fulfills a role that would traditionally be filled by a government, it is subject to government regulations. This approach does not apply to the current situation.

The nexus approach is much more general. According to this method, “private conduct comes under constitutional scrutiny when it is connected to the government.”²⁰ The nexus approach can be found in the case of *Burton v. Wilmington Parking Authority*, where a state-owned parking garage leased spaces to a private business owner, who then refused to serve the plaintiff because he was black. The plaintiff sued under the 14th Amendment and the Court found “that the relationship between the restaurant and the parking facility conferred mutual benefits” and thus the restaurateur was a state actor.²¹

This relationship is no different from those between governments and teams that occupy their stadia. And while the number of teams with privately-owned stadia is increasing, roughly half still occupy city- or county-owned facilities. These government-owned facilities include Kansas City’s Arrowhead Stadium, Dallas’s AT&T Stadium, Jacksonville’s Everbank Field, Cleveland’s FirstEnergy Stadium, Detroit’s Ford Field, and Philadelphia’s Lincoln Financial Field, among others. So a team like the New England Patriots, who own their own stadium, would be able to establish a team-specific rule on protests, though they would only be able to enforce it during home games and away games at other privately-owned stadia. But as long as at least one team resides in a publicly-owned stadium, the NFL will be unable to enforce any sort of league-wide policy against national anthem protests. In *Burton*, part of what qualified the relationship between the restaurant and state as ‘symbiotic’ was that “the parking facility benefited from increased demand” as a result of the restaurant’s customers and “rent from the restaurant helped finance the parking facility project.”²² Compared to the relationship between cities and their resident franchises, clearly the difference is one of degree, rather than one of kind.

¹⁸ *Evans v. Newton*, 382 U.S. 296 (1966).

¹⁹ *Ibid.*

²⁰ Israeloff, Lawrence “The Sports Fan v. The Sports Team Owner.” Page 426.

²¹ *Ibid.*

²² *Ibid.* Page 427.

The concept of sport franchises as state actors was explicitly established in *Ludtke v. Kuhn*, which involved a female journalist who was barred from doing locker room interviews because of her sex, per team policy. Melissa Ludtke of *Sports Illustrated* filed a civil rights action asking for an injunction, which was granted. Additionally, the U.S. District Court for the Southern District of New York found, using the *Burton* case as precedent, “that a symbiotic relationship existed between New York City and the Yankees” because the Yankees benefited from “the extensive use of public funds in the renovation and maintenance of Yankee Stadium.”²³ And since the Yankees were the sole tenant of the park, and rent was tied to team revenue, the city benefited as well. Under the nexus method, this qualifies the New York Yankees franchise as a state actor.

This same reasoning was echoed five years later by the United States District Court in Michigan in the case of *Hertel v. City of Pontiac*. Here, the plaintiffs challenged the constitutionality of the NFL’s blackout rule, suing the Detroit Lions, as well as the city of Pontiac (where the stadium is located) and the Pontiac Stadium Authority, which operated the Lions’ stadium. Referencing the *Burton* decision, the court noted that the relationship here was even more interdependent, “thus, the nature of the relationship shown here compels the conclusion that the conduct of the purported private actors should be treated as that of the State.”²⁴ Meeting all the requirements of the nexus test in showing that there was legitimate government interest in the team’s success, the court decided that the team was subject to upholding the same constitutional laws as any other state actor.

In conclusion, the general assumption that the NFL being a private business would preclude teams from having to concern themselves with constitutional freedoms turns out to be wrong. The precedents set in the *Ludke*, *Hertel*, and *Burton* cases plainly establish that professional football franchises located in publicly-owned stadia are state actors and are thus held by the same laws as government agents. Had they taken care to ensure their spaces were never used as platforms for speech, they would have had a metaphorical leg to stand on. But in practice, stadia have always been used for this purpose, and, as state actors, the League cannot pick and choose which points of view to allow. As one legal scholar wrote, sports arenas:

are often designated and dedicated to expressive activities such as rock concerts and commencement exercises, as well as the expressive cheering and booing that takes place at athletic events. The difference between an arena and auditorium then may be merely a matter of semantics and verbal gymnastics, for each is a multi-purpose locale.²⁵

So again, as long as player protests do not result in a clear and present danger, and do not compromise the main mission of the institution, any rule constraining them could likely be successfully challenged in court using these precedents.

²³ Ibid. Page 440.

²⁴ *Hertel v. City of Pontiac*, 470 F.Supp. 603 (1979).

²⁵ Calvert, Clay. “Fans and the First Amendment.” Page 14.

Of course, there is a deeper concern that a legal argument needs to be made at all, that the moral one does not suffice. As New York Mayor John Lindsay said in a 1969 speech, coining a phrase that would continuously be falsely attributed to Thomas Jefferson, “We cannot rest content with the charge from Washington that this peaceful protest is unpatriotic... The fact is that this dissent is the highest form of patriotism.”²⁶ He concluded, “It is the peaceful American way to turn the nation away from a self-defeating course.”²⁷ To attempt to stymie dissenting voices in the public discourse is antithetical to the aspirations of the American political tradition, if not always with its practice. As Justice Brandeis wrote in his previously cited opinion on the *Whitney* case, “The essential character of a political community is both revealed and defined by how it responds to the challenge of threatening ideas.”²⁸ If the idea of America is so insubstantial that it is threatened by the mildest of criticism in such a hyper-nationalistic epoch as this, then this experiment of a country has much more serious problems to address.

²⁶ John Lindsay, “Moratorium to End the War in Vietnam” Speech at Columbia University. 15 October 1969.

²⁷ *Ibid.*

²⁸ Brandeis, Louis. Concurring opinion, *Whitney v. California*, 274 U.S. 357 (1927).

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