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**MORE THAN AN ATHLETE: CONSTITUTIONAL AND  
CONTRACTUAL ANALYSIS OF ACTIVISM IN PROFESSIONAL  
SPORTS**

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**INTRODUCTION**

Athlete activism is not a new issue. Rather, athletes at all levels and sports have used their platforms to protest long before Colin Kaepernick took a knee. During the 1960s and 1970s, at the height of the Civil Rights Movement, athletes including Muhammad Ali, Bill Russell, Jim Brown, and Arthur Ashe advocated for civil rights.<sup>1</sup> As the fight for civil rights settled, so did athlete activism.<sup>2</sup> In the 1980s, 1990s, and 2000s, prominent athletes shied away from social movements most likely due to the fear of financial repercussions, such as losing endorsements.<sup>3</sup> Even LeBron James, 14 time National Basketball Association (NBA) All-Star, commented in 2008 that “sports and politics just don’t match.”<sup>4</sup>

Recently social justice and civil rights issues are back at the forefront of national discussion, and athlete activism has increased.<sup>5</sup> While the number of athletes who engage in activism

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<sup>1</sup> Danielle Sarver Coombs & David Cassilo, *Athletes and/or Activists: LeBron James and Black Lives Matter*, 41 J. OF SPORT & SOC. ISSUES 425, 426 (2017).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 427.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

is small, the breadth of issues addressed by athletes are vast.<sup>6</sup> Colin Kaepernick, a former National Football League (NFL) quarterback for the San Francisco 49ers, protested the inherent inequities within American society by kneeling during the national anthem.<sup>7</sup> Toni Smith, a Division III women's basketball player, protested the United States economic structure and military involvement in the Middle East by turning her back to the flag when the national anthem was played before games.<sup>8</sup> Kevin McMahon, a two-time Olympic champion, wore a white ribbon on his singlet during the 2001 Goodwill Games to signify "solidarity with all workers in the athletic apparel industry whose efforts and great dire circumstances are going unrecognized and underpaid."<sup>9</sup> Craig Hodges, a professional basketball player, wore a dashiki during the Chicago Bulls visit to the White House in 1991 and delivered a note to President Bush Sr. seeking a response for the racial injustices in the U.S.<sup>10</sup>

Unfortunately, athlete activism is often met with immediate, intense backlash that potentially compromises the athlete's career.<sup>11</sup> For instance, Denver Broncos linebacker Brandon Marshall lost two endorsement deals (CenturyLink and Air Academy Credit Union) when he kneeled during the national anthem for eight consecutive games.<sup>12</sup> Marshall also received hate mail and negative comments on his social media accounts,<sup>13</sup> a grave fear that may keep the majority of athletes silent. This harsh response likely stems from the thought that sports exist outside

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<sup>6</sup> Peter Kaufman, *Boos, Bans, and Other Backlash: The Consequences of Being an Activist Athlete*, 32 HUMAN & SOC'Y 216 (2008).

<sup>7</sup> Tom Krasovic, *Colin Kaepernick Takes a Knee During National Anthem in San Diego and is Booed*, L.A. TIMES (Sept. 1, 2016), <http://www.latimes.com/sports/nfl/la-sp-chargers-kaepernick-20160901-snap-story.html>.

<sup>8</sup> Kaufman, *supra* note 6, at 222.

<sup>9</sup> *Id.* at 227–228.

<sup>10</sup> *Id.* at 233.

<sup>11</sup> *Id.* at 216.

<sup>12</sup> Jeff Legwold, *Broncos' Brandon Marshall Loses 2nd Endorsement, Will Meet with Denver Police Chief*, ESPN (Sept. 12, 2016), [http://www.espn.com/nfl/story/\\_/id/17531965/denver-broncos-linebacker-brandon-marshall-loses-second-endorsement-national-anthem-controversy](http://www.espn.com/nfl/story/_/id/17531965/denver-broncos-linebacker-brandon-marshall-loses-second-endorsement-national-anthem-controversy).

<sup>13</sup> Lindsay H. Jones, *Von Miller May Lose Denver Endorsement Deal for Kneeling, No Surprise to Broncos Teammate*, USA TODAY (Sept. 25, 2017), <https://www.usatoday.com/story/sports/nfl/broncos/2017/09/25/von-miller-loses-denver-endorsement-kneeling-national-anthem-brandon-marshall/702366001/>.

social, political, and economic realms of society.<sup>14</sup> Furthermore, sport is considered merely a source of entertainment, not a platform for social movement.<sup>15</sup>

Despite this erroneous theory, some of the world's most famous athletes have foregone participation in protest. Most notably Michael Jordan and Tiger Woods remained silent throughout their prosperous careers, despite facing racism and their fellow athletes encouraging them to speak out. Jordan's apolitical attitude was solidified in 1990 when he refused to endorse a black North Carolina Democrat, Harvey Gantt, for Senate.<sup>16</sup> Multiple hall of fame athletes, such as Jim Brown and Kareem Abdul-Jabbar, have criticized Jordan for putting business before social justice.<sup>17</sup> Tiger Woods has also displayed a meek stance when it comes to social progress.<sup>18</sup> For example, after Tiger won his first Master's golf tournament, Fuzzy Zoeller, referred to him as "that little boy"<sup>19</sup> and asked him not to request fried chicken and collard greens at the next Champions Dinner.<sup>20</sup> Tiger did not respond to Zoeller's comments.<sup>21</sup> Over a decade later, Kelly Tilghman, a Golf Channel anchor, laughed saying Tiger's competitors should lynch him in a back alley.<sup>22</sup> Tiger responded with a statement calling Kelly a friend, and that he knew Kelly did not have ill-intentions with her poor choice of words.<sup>23</sup>

The United States has witnessed athletes take a stand and suffer severe consequences, while the majority remain silent in the background. Today it seems more athletes are finding their voice

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<sup>14</sup> Kaufman, *supra* note 6, at 216.

<sup>15</sup> *Id.*

<sup>16</sup> Laura Wagner, "Republicans Buy Sneakers, Too," SLATE.COM (July 28, 2016), [http://www.slate.com/articles/sports/sports\\_nuts/2016/07/did\\_michael\\_jordan\\_really\\_say\\_republicans\\_buy\\_sneakers\\_too.html](http://www.slate.com/articles/sports/sports_nuts/2016/07/did_michael_jordan_really_say_republicans_buy_sneakers_too.html).

<sup>17</sup> *Id.*

<sup>18</sup> Carla R. Monroe, *Tiger Woods: Black Activist, Well Sort Of*, THE DALL. WEEKLY (May 29, 2013), [http://www.dallasweekly.com/opinion/article\\_e21f6cb2-c873-11e2-821e-001a4bcf6878.html?mode=jqm](http://www.dallasweekly.com/opinion/article_e21f6cb2-c873-11e2-821e-001a4bcf6878.html?mode=jqm).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

and are willing to risk their careers or brand image to be heard.<sup>24</sup> Athletes have worn hoodies and t-shirts to protest the wrongful killing of young black men, knelt during the national anthem to protest racial inequality, and made public statements addressing the social issues plaguing the United States.<sup>25</sup> It is this explosion of athlete activism that has given rise to the question of whether such actions are protected under the Federal Constitution.

Therefore, this article will examine the current landscape of athlete activism in the United States under various constitutional and contractual paradigms. Part I will provide a brief history of athlete protests. Part II addresses the underpinnings of the First Amendment. Part III investigates the Fourteenth Amendment and the state actor requirement. Part IV provides an analysis of constitutional law and its applicability to professional sports, specifically looking at the state actor requirement and whether a stadium is considered a public forum. Part V explores contractual agreements including Collective Bargaining Agreements (CBAs) and standard player contracts (SPC) for the NFL, Major League Baseball (MLB), and NBA. Part VI discusses the intersection of the National Labor Relations Act and professional sports. Part VII provides a short summary of the pros and cons of athlete activism from the athlete perspective, including an evaluation of morals clauses. Last, Part VIII provides a brief look at the NBA and NFL's current social responsibility initiatives.

## I. A BRIEF HISTORY OF ATHLETE PROTESTS

As mentioned previously, there is a rich history of athlete activism in the United States.<sup>26</sup> World champion boxer Muhammad Ali used his global stage to protest the Vietnam War by refusing to enlist in the military.<sup>27</sup> Ali's stance cost him three of his prime boxing years and forfeiture of his championship title.<sup>28</sup> A few years later at the 1968 Olympics, Tommie Smith and

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<sup>24</sup> Charles P. Pierce, *Activist Athletes Will Not Be Silenced This Time*, SI.COM, (Nov. 8, 2017), <https://www.si.com/more-sports/2017/11/08/nfl-protests-sports-athlete-activism-trump>.

<sup>25</sup> *Id.*

<sup>26</sup> See generally Kaufman, *supra* note 6, at 220–34.

<sup>27</sup> *Id.* at 221.

<sup>28</sup> Krishnadev Calamur, *Muhammad Ali and Vietnam*, THE ATLANTIC (June 4, 2016),

John Carlos executed a carefully planned demonstration during their medal ceremony. Both men removed their shoes before stepping onto the podium to symbolize poverty, wore beads and a scarf to protest lynchings, and looked at the ground and raised their fists in the air while the national anthem played.<sup>29</sup> Smith and Carlos were forced to leave the Olympic Stadium, and upon their return to the United States they were suspended from the United States track team.<sup>30</sup> Carlos said, “I had a moral obligation to step up. Morality was a far greater force than the rules and regulations they had.”<sup>31</sup>

Collegiate athletes also took a stand when nine Syracuse players (“Syracuse 8”) decided to boycott the 1970 season.<sup>32</sup> At the time Syracuse was a prominent football program, with the legacy of bowl appearances and players making it into the NFL, including Jim Brown and Ernie Davis (two prominent NFL running-backs).<sup>33</sup> The Syracuse 8 drafted a petition requesting equal access to tutors, academic advisors, and medical staff.<sup>34</sup> After their requests went unanswered for over a year, the players decided to boycott the team to garner the attention of the press.<sup>35</sup> In response, these men were harassed and ridiculed; subsequently, none of the men were ever signed to an NFL team.<sup>36</sup> Thirty-six years later, the group was invited back to receive the Chancellor’s Medal and their letterman jackets.<sup>37</sup> The University Chancellor, Nancy Cantor, recognized the men for their courageous actions to

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<https://www.theatlantic.com/news/archive/2016/06/muhammad-ali-vietnam/485717/>.

<sup>29</sup> DeNeen L. Brown, *They Didn’t #TakeTheKnee: The Black Power Protest Salute That Shook the World in 1968*, THE WASHINGTON POST (Sept. 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=.03582022eca8](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=.03582022eca8).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Karen Given & Shira Springer, *Before Kaepernick, The ‘Syracuse 8’ Were Blackballed By Pro Football*, WBUR (Nov. 17, 2017),

<http://www.wbur.org/onlyagame/2017/11/17/syracuse-8-football-boycott-kaepernick>.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

stand up for what they believed in, despite facing strong adversity.<sup>38</sup>

Similarly, in protest of inequalities of prize money between women and men professional tennis players, Billy Jean King threatened to organize a boycott of the U.S. Open if men and women did not receive equal pay.<sup>39</sup> In 1973, the U.S. Open became the first grand slam tournament to award equal prize money to both the men and women.<sup>40</sup> King's action helped pave the path for future women's tennis players to continue the fight for equality.<sup>41</sup> More than thirty years later, Venus Williams demanded women receive the same payout as men at Wimbledon.<sup>42</sup> Williams first made a personal appeal to the governing body in 2005, but her request was dismissed.<sup>43</sup> The club chairman justified the prize discrepancy claiming men's matches were more physically demanding than women's matches.<sup>44</sup> Williams did not let the rejection discourage her, the next year she published a piece in the London Times stating that the prize structure:

devalues the principle of meritocracy and diminishes the years of hard work that women on the tour have put into becoming professional tennis players. The message I like to convey to women and girls across the globe is that there is

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<sup>38</sup> William C. Rhoden, *Syracuse Honors Nine Players Who Took a Stand*, N.Y. TIMES (Oct. 22, 2006),

<http://www.nytimes.com/2006/10/22/sports/ncaafootball/22rhoden.html>.

<sup>39</sup> Nadja Popovich, *Battle of the Sexes: Charting How Women in Tennis Achieved Equal Pay*, THE GUARDIAN (Sept. 11, 2015),

<https://www.theguardian.com/sport/2015/sep/11/how-women-in-tennis-achieved-equal-pay-us-open>.

<sup>40</sup> *Id.*

<sup>41</sup> *See id.*

<sup>42</sup> The Reliable Source, *How Venus Williams Got Equal Pay for Women at Wimbledon*, WASHINGTON POST (July 2, 2013),

[https://www.washingtonpost.com/news/reliable-source/wp/2013/07/02/how-venus-williams-got-equal-pay-for-women-at-wimbledon/?utm\\_term=.a1e283db3134](https://www.washingtonpost.com/news/reliable-source/wp/2013/07/02/how-venus-williams-got-equal-pay-for-women-at-wimbledon/?utm_term=.a1e283db3134).

<sup>43</sup> *Id.*

<sup>44</sup> Anjana Sreedhar, *The Inspiring Story of How Venus Williams Helped Win Equal Pay for Women Players at Wimbledon*, WOMEN IN THE WORLD (July 10, 2015),

<http://nytlive.nytimes.com/womenintheworld/2015/07/10/the-inspiring-story-of-how-venus-williams-helped-win-equal-pay-for-women-players-at-wimbledon/>.

no glass ceiling. My fear is that Wimbledon is loudly and clearly sending the opposite message.<sup>45</sup>

Williams' words grabbed the attention of British politicians. When she won Wimbledon in 2007, Williams was the first female player to win the same amount of prize money as her male counterpart.<sup>46</sup>

In 2004, the United States invaded Iraq and Toronto Blue Jays player Carlos Delgado did not agree with the action.<sup>47</sup> In response, Delgado remained seated in the dugout during the playing of God Bless America, which most teams played during the seventh inning stretch post 9/11.<sup>48</sup>

Most recently, athletes have taken a stand against police brutality and social injustice. In 2012, LeBron James, Dwayne Wade, and other Miami Heat team members posed for a picture wearing black hoodies, their heads down and hands in their pockets in protest of the killing of Trayvon Martin, an unarmed black teenager wearing a hooded sweatshirt by a volunteer neighborhood watchman.<sup>49</sup> James posted the picture to his Twitter account with the hashtag #WeWantJustice.<sup>50</sup> In 2014, members of the then St. Louis Rams came out onto the field with their hands up to demonstrate "hands up don't shoot" in protest of the shooting of Michael Brown in Ferguson, Missouri.<sup>51</sup> Over the last year, several athletes have taken to social media to post videos or

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> William C. Rhoden, *Sports of the Times; Delgado Makes a Stand by Taking a Seat*, N.Y. TIMES (July 21, 2004), <http://www.nytimes.com/2004/07/21/sports/sports-of-the-times-delgado-makes-a-stand-by-taking-a-seat.html>.

<sup>48</sup> Craig Calcaterra, *Remembering Carlos Delgado's Protest in the Wake of Kaepernick*, NBC SPORTS (Aug. 29, 2016), <http://mlb.nbcsports.com/2016/08/29/remembering-carlos-delgados-protest-in-the-wake-of-kaepernick/>.

<sup>49</sup> *Heat Don Hoodies After Teen's Death*, ESPN (Mar. 24, 2012), [http://www.espn.com/nba/truehoop/miamiheat/story/\\_/id/7728618/miami-heat-don-hoodies-response-death-teen-trayvon-martin](http://www.espn.com/nba/truehoop/miamiheat/story/_/id/7728618/miami-heat-don-hoodies-response-death-teen-trayvon-martin).

<sup>50</sup> *Id.*

<sup>51</sup> *St. Louis Police Officer Angered by Rams' 'Hands Up don't Shoot' Pose*, SI.COM (Nov. 20, 2014), <https://www.si.com/nfl/2014/11/30/st-louis-rams-ferguson-protests>.

make statements about their stance on social injustice, and NFL players continued to kneel during the national anthem.<sup>52</sup>

While fans probably prefer to have sport distract them from today's cultural issues, the current climate of athlete activism climate forces fans to pay attention. In response, to Kaepernick's #TakeAKnee protest, fans boycotted the NFL, burned jerseys, memorabilia, and tickets.<sup>53</sup> Police officers even refused to work security for NFL games.<sup>54</sup> The public outcry was loud and did not go unnoticed. A Reuters' poll revealed, 72% of Americans expressed kneeling for the national anthem was unpatriotic, despite NFL players insisting the protest had nothing to do with the military.<sup>55</sup>

Owners have had various responses to the protest as well. New England Patriots owner, Robert Kraft, released a statement saying: "Our players are intelligent, thoughtful, and care deeply about our community and I support their right to peacefully affect social change and raise awareness in a manner that they feel is most impactful."<sup>56</sup> Miami Dolphins owner, Stephen Ross, also supported the players' right to protest and even contributed to the cause by setting up a nonprofit group to foster race relations.<sup>57</sup> The San Francisco 49ers chief executive officer, Jed York, not only

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<sup>52</sup> Louis Bolling, *NFL Players Use Social Media to Profess and Protest*, HUFFINGTON POST (Oct. 2, 2017), [https://www.huffingtonpost.com/entry/nfl-players-use-social-media-to-profess-and-protest\\_us\\_59d1baece4b0f58902e5cdb5](https://www.huffingtonpost.com/entry/nfl-players-use-social-media-to-profess-and-protest_us_59d1baece4b0f58902e5cdb5).

<sup>53</sup> Cindy Boren, *Colin Kaepernick Protest Has 49ers Fans Burning Their Jerseys*, WASHINGTON POST (Aug. 28, 2016), [https://www.washingtonpost.com/news/early-lead/wp/2016/08/28/colin-kaepernick-protest-has-49ers-fans-burning-their-jerseys/?utm\\_term=.886cc03367dd](https://www.washingtonpost.com/news/early-lead/wp/2016/08/28/colin-kaepernick-protest-has-49ers-fans-burning-their-jerseys/?utm_term=.886cc03367dd).

<sup>54</sup> Intisar Seraaj & Christina Zdanowicz, *From Jersey Burnings to Players Being Uninvited, Backlash to the #TakeAKnee Protest Grows*, CNN (Sept. 27, 2017), <http://www.cnn.com/2017/09/25/us/anthem-protests-burning-nfl-jerseys-trnd/index.html>.

<sup>55</sup> Kenneth Arthur, *Why Fan Reaction to NFL National Anthem Protest is about Racism, Not Patriotism*, ROLLING STONE (Sept. 26, 2017), <http://www.rollingstone.com/sports/news/fan-reaction-to-nfl-national-anthem-protests-about-racism-w505387>.

<sup>56</sup> Allan Smith, *Trump's Friend and New England Patriots Owner Robert Kraft Says He is 'Deeply Disappointed' with the President's Comments*, BUS. INSIDER (Sept. 24, 2017), <http://www.businessinsider.com/robert-kraft-trump-nfl-statement-kneel-national-anthem-2017-9>.

<sup>57</sup> Ken Belson, *Goodell and N.F.L. Owners Break from Players on Anthem Kneeling Fight*, N.Y. TIMES (Oct. 10, 2017), <http://www.nytimes.com/2017/10/10/sports/football/nfl-goodell-anthem-kneeling.html>.



backed his players, but also donated one million dollars to the team's community fund to demonstrate his support for Colin Kaepernick.<sup>58</sup> On the other hand, Jerry Jones, the Dallas Cowboys owner, claimed that if any of his players kneeled during the national anthem, they would be benched.<sup>59</sup>

To reiterate the league's stance on athlete protests, NFL Commissioner Rodger Goodell said in a letter to the owners: "[L]ike many of our fans, we believe that everyone should stand for the national anthem."<sup>60</sup> He further explained that the league cares about the issues the players are fighting for, but "the controversy over the anthem is a barrier to having honest conversations and making real progress on the underlying issues."<sup>61</sup> While the NFL does have a policy in place requiring players to be on the field for the national anthem and standing at attention with their helmets in their hand, the NFL has neither levied fines nor penalized players who have chosen to kneel or remain in the locker room for the national anthem.<sup>62</sup> Even though teams and leagues have not punished players for their activism, it is critical to understand any recourse athletes may have if their team or league opts to do so. Some have argued the right to protest is protected as free speech under the First Amendment; but, not all free speech is constitutionally protected.<sup>63</sup>

## II. CONSTITUTIONAL CONSIDERATIONS UNDER THE FIRST AMENDMENT

The First Amendment of the Federal Constitution states: "Congress shall make no law respecting an establishment of

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<sup>58</sup> *Id.*

<sup>59</sup> Schuyler Dixon, *Cowboys' Jerry Jones Reignites Protest Conversation in NFL*, CHI. TRIBUNE (Oct. 10, 2017), <http://www.chicagotribune.com/sports/sns-bc-us--anthem-protests-nfl-20171009-story.html>.

<sup>60</sup> Lauren Kirschman, *Roger Goodell Pens Letter to NFL Owners, Believes "Everyone Should Stand" for Anthem*, PENN LIVE (Oct. 10, 2017), [http://www.pennlive.com/steelers/index.ssf/2017/10/roger\\_goodell\\_letter\\_anthem.html](http://www.pennlive.com/steelers/index.ssf/2017/10/roger_goodell_letter_anthem.html).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> David Davenport, *The Myth that All 'Free Speech' is Constitutionally Protected*, FORBES (Oct. 2, 2017), <https://www.forbes.com/sites/daviddavenport/2017/10/02/the-myth-that-all-free-speech-is-constitutionally-protected/#46dd8be44fcb>.

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.”<sup>64</sup> The First Amendment doctrine is complex, but can be broken down into four inter-related principles.<sup>65</sup> The first principle is the need to protect the rights and interests of those whose thoughts and ideals run counter to the mainstream.<sup>66</sup> This principle embodies the rule that government cannot impede speech based on audience reaction, unless such speech is intended to incite lawless action.<sup>67</sup> The second principle is the need for tolerance of those with dissenting ideals.<sup>68</sup> This principle is reflected in Justice Brandeis’ concurring opinion in *Whitney v. California* which states, “the function of speech is to free men from bondage of irrational fears.”<sup>69</sup> In other words, if individuals do not show tolerance for differing opinions, free speech may not be realized.<sup>70</sup> The third principle is dissemination of information, thoughts, ideas, and opinions.<sup>71</sup> This is a cornerstone of free speech which demands the greatest amount of information, ideas, and opinions from a myriad of sources.<sup>72</sup> Specifically, the unrestricted flow of information is central to achieving the ideals of free speech. The fourth principle is “more speech, not enforced silence.”<sup>73</sup> Objectionable ideas should not be censored, rather those on the opposing side should defend their ideas and opinions through discussion and education.<sup>74</sup> This principle is rooted in *Texas v. Johnson* which stated, “government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”<sup>75</sup>

These four principles established the Brandeisian concept of counter-speech.<sup>76</sup> Counter-speech is the “constitutionally preferred yet somewhat suspect in security for harmful speech . .

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<sup>64</sup> U.S. CONST. amend. I.

<sup>65</sup> Howard Wasserman, *Symbolic Counter-Speech*, 12 WM. & MARY BILL RTS. J., 367, 383–84 (2004).

<sup>66</sup> *Id.* at 384.

<sup>67</sup> *Id.* at 386–387.

<sup>68</sup> *Id.* at 384.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 385.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 386.

<sup>75</sup> *Id.* at 387.

<sup>76</sup> *Id.*

. . . When used wisely, counter speech may prove to be a very effective solution for harmful or threatening expression.”<sup>77</sup> Counter-speech can be verbal or symbolic.<sup>78</sup> “Symbolic counter-speech [is a] direct response to the symbol on its own terms, employing the symbol itself as the vehicle for the counter-message.”<sup>79</sup> For example, the American flag is the ultimate patriotic symbol, a symbol the Continental Congress passed as the United States’ official flag in 1777.<sup>80</sup> When two New York City firefighters hoisted a worn American flag atop the carnage of the World Trade Center on September 11,<sup>81</sup> this action represented hope for Americans in a time of despair and a sign to those abroad of America’s resiliency.<sup>82</sup> On the other hand, the flag can also give rise to symbolic counter-speech, such as individuals refusing to participate in the national anthem. This type of counter-speech is often met with extreme public disapproval and disgust, with some arguing that the counter-speech disrespects the soldiers who have fought or are fighting for the United States.<sup>83</sup> In fact, most individuals view non-participation in the national anthem the same as burning the flag,<sup>84</sup> because the national anthem has become more than just words; it serves as an affirmation of the United States and its ideals.<sup>85</sup> Standing for the national anthem symbolizes that individuals adhere and adopt these same ideals.<sup>86</sup>

Although First Amendment rights are broad, they are not absolute. Precedent makes it clear some forms of speech garner more protection than others.<sup>87</sup> For instance, incitement, fighting words, and obscenity fall outside the protection of the First

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<sup>77</sup> Robert D. Richards & Clay Calvert, *Counterspeech 2000: A New Look at the Old Remedy for “Bad” Speech*, 2000 BYU L. REV. 553, 555 (2000).

<sup>78</sup> Wasserman, *supra* note 65, at 369.

<sup>79</sup> *Id.* at 369.

<sup>80</sup> Public Broadcasting Service, *The History of the American Flag*, PBS, <http://www.pbs.org/a-capitol-fourth/history/old-glory/> (last visited Jan. 31, 2017).

<sup>81</sup> Wasserman, *supra* note 65, at 368.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 370.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 380.

<sup>86</sup> *Id.* at 380–81.

<sup>87</sup> *What Type of Speech is Not Protected by the First Amendment*, HG.ORG, <https://www.hg.org/article.asp?id=34258> (last visited Feb. 26, 2018).

Amendment.<sup>88</sup> *Brandenburg v. Ohio* established a test for determining whether speech rises to the level of incitement, and therefore is no longer protected under the First Amendment.<sup>89</sup> In *Brandenburg*, the appellant invited a reporter from the Cincinnati television station to a Ku Klux Klan (KKK) rally.<sup>90</sup> The reporter attended the meeting and had a cameraman film the event.<sup>91</sup> Parts of the KKK rally were then aired on the local station and a national network.<sup>92</sup> The film had a few scenes, one displayed 12 hooded figures, some with firearms, gathered around large, burning wooden crosses.<sup>93</sup> Most of the language was incomprehensible, but scattered racial slurs could be understood.<sup>94</sup> Another scene was the appellant delivering a speech:

This is an organizers' meeting. We have had quite a few members here today which are—we have hundreds, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio Dispatch, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our President, our Congress, Our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken. We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups, one group to march St. Augustine, Florida, the other group to March into Mississippi. Thank you.<sup>95</sup>

The last scene captured a similar speech from the appellant, but with the following added language, “personally, I believe the (expletive) should be returned to Africa, the Jew returned to

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*; see also *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969).

<sup>90</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

Israel.”<sup>96</sup> The appellant was found guilty of violating the Ohio Syndicalism Statute, a ruling affirmed by the intermediate appellate court of Ohio.<sup>97</sup> In a landmark decision, the United States Supreme Court overturned the conviction and found that Brandenburg’s speech was protected.<sup>98</sup> This decision aligns with the principle that the First Amendment guarantees do not allow the government to proscribe the “advocacy or use of force for law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>99</sup> The Fourteenth Amendment and the Incorporation Doctrine have taken these First Amendment protections and limitations and applied them to the states.<sup>100</sup>

### III. CONSTITUTIONAL CONSIDERATIONS UNDER THE FOURTEENTH AMENDMENT AND THE INCORPORATION DOCTRINE

Prior to the ratification of the Fourteenth Amendment, the Supreme Court in *Barron v. Baltimore* ruled that the limitations of the Bill of Rights only applied to the federal government.<sup>101</sup> In *Barron*, the plaintiff was an owner of a highly productive wharf in the Baltimore harbor.<sup>102</sup> The city, exercising its authority over the harbor, diverted streams of water from their natural course.<sup>103</sup> As a result, the plaintiff’s wharf became valueless because the water was too shallow for vessels to ingress and regress.<sup>104</sup> The plaintiff brought a claim under the Fifth Amendment arguing the plaintiff was owed just compensation for his wharf.<sup>105</sup> The Court held the Fifth Amendment was intended solely as a limitation on the federal government and was not applicable to the states.<sup>106</sup>

Thirty-three years later, the Fourteenth Amendment was ratified. This amendment maintains:

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<sup>96</sup> *Id.* at 447.

<sup>97</sup> *Id.* at 1828.

<sup>98</sup> *Id.* at 1830.

<sup>99</sup> *Id.* at 1829–30.

<sup>100</sup> *See generally id.*

<sup>101</sup> *See generally* *Barron v. City of Baltimore*, 32 U.S. 243, 249–51 (1833).

<sup>102</sup> *Id.* at 243.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 244.

<sup>105</sup> *Id.* at 250.

<sup>106</sup> *Id.* at 251.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>107</sup>

This language provides four critical elements. First, anyone born in the United States is guaranteed full citizenship; this included the rights of recently freed slaves at the time the amendment was enacted.<sup>108</sup> Second, no state can abrogate an individual's citizenship.<sup>109</sup> Third, all citizens are entitled to due process or fair treatment within the judicial system.<sup>110</sup> Fourth, all citizens are guaranteed equal protection of the laws, meaning that states cannot discriminate against certain groups of people.<sup>111</sup> The most crucial element of the Fourteenth Amendment is the due process clause which enabled the Incorporation Doctrine. The Incorporation Doctrine is a constitutional doctrine through which the Fourteenth Amendment's due process clause makes the first ten amendments of the Federal Constitution applicable to the states.<sup>112</sup>

The Incorporation Doctrine was first developed in *Chicago, B. & Q.R. CO. v. City of Chicago*.<sup>113</sup> In this case, the city of Chicago wanted to create a public street across the plaintiff's railroad tracks.<sup>114</sup> The Constitution of Illinois provided that "no

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<sup>107</sup> U.S. CONST. amend. XIV, § 1.

<sup>108</sup> *Id.*; see also Garrett Epps, *Second Founding: The Story of the Fourteenth Amendment*, 85 OR. L. REV. 895, 897 (2006).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> David Hudson, *Law Review: The Fourteenth Amendment and Incorporation*, AMERICAN BAR, <https://www.americanbar.org/publications/insights-on-law-and-society/2017/winter2017/law-review-the-14th-amendment-and-incorporation.html> (last visited Apr. 25, 2018).

<sup>113</sup> *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 233 (1897).

<sup>114</sup> *Id.* at 230.

person shall be deprived of life, liberty or property, without due process of law.”<sup>115</sup> Additionally, Article 2, section 13 of the Constitution of Illinois states: “[P]rivate property shall not be taken or damaged for public use without just compensation. Such compensation when not made by the state, shall be ascertained by a jury, as shall be prescribed by law.”<sup>116</sup>

The jury’s verdict for just compensation of the plaintiff was one dollar.<sup>117</sup> The Supreme Court of Illinois affirmed the judgment.<sup>118</sup> The plaintiff appealed the case to the United States Supreme Court and argued that one dollar is not just compensation, and therefore deprived the plaintiff of the plaintiff’s property without due process of law.<sup>119</sup> The Court applied the Fifth Amendment just compensation requirement through the due process clause of the Fourteenth Amendment and ruled that the city had in fact paid just compensation because the plaintiff was still able to use the land for its intended purpose.<sup>120</sup> The critical precedent of *Chicago, B & Q.R. Co.* is not the outcome, but the fact that the United States Supreme Court created a mechanism, the Incorporation Doctrine, through which courts can apply the Bill of Rights restrictions to the states.

#### IV. APPLYING A CONSTITUTIONAL ANALYSIS TO PROFESSIONAL SPORTS TEAMS

Shortly after the Court decided *Chicago, B & Q.R. Co.*, the Court continued to apply additional amendments from the Bill of Rights through Incorporation Doctrine to the states.<sup>121</sup> However, for the protections of the First and Fourteenth Amendment to apply, either the state or federal government must cause the harm.<sup>122</sup> Accordingly, for the Federal Constitution to limit professional sports, it is necessary to prove both the team or league is a state actor and that the sport facility is a public forum.

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<sup>115</sup> *Id.* at 228.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 230.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 232.

<sup>120</sup> *Id.* at 257–58.

<sup>121</sup> Hudson, *supra* note 112.

<sup>122</sup> *Id.*

## A. STATE ACTOR REQUIREMENT

Congress passed the Fourteenth Amendment to impose the First Amendment's same constitutional limits on the state governments or "state actors."<sup>123</sup> A state actor is a person who is acting on behalf of the state government.<sup>124</sup> Therefore, constitutional protection is only triggered when alleged offenders "carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it."<sup>125</sup> Thus, the First and Fourteenth Amendments' protections typically do not extend to citizens acting in a private capacity.<sup>126</sup>

For several years, the Court refused to extend Fourteenth Amendment protections into the private sector. It was not until the Civil Rights Cases<sup>127</sup> that the Court began to broaden the boundaries of the "state actor" requirement. Cases such as *Marsh v. Alabama*,<sup>128</sup> *Shelley v. Kraemer*,<sup>129</sup> and *Burton v. Wilmington Parking Authority*<sup>130</sup> extended the reach of Fourteenth Amendment into the private sector. These cases set forth three theories through which state action can occur in the private sector: public function, judicial enforcement theory, and symbiotic relationship or nexus theory.<sup>131</sup>

The public function theory emerged in *Marsh v. Alabama*, a case involving a privately-owned town.<sup>132</sup> Gulf Shipbuilding Corporation owned a small town, Chickasaw.<sup>133</sup> The town had all of the same characteristics as any other town, including a sheriff, stores, a post office, and residential buildings.<sup>134</sup> A Jehovah's Witness was distributing religious literature on the sidewalks of Chickasaw when a town official told the Jehovah's Witness that

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<sup>123</sup> U.S. CONST. amend. XIV, § 1.

<sup>124</sup> *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 923 (1982).

<sup>125</sup> Christopher J. McKinny, *Professional Sports Leagues and the First Amendment: A Closed Marketplace*, 13 MARQ. SPORTS L. REV. 223, 229 (2003).

<sup>126</sup> *Id.*

<sup>127</sup> *The Civil Rights Cases*, 109 U.S. 3, 24–25 (1883).

<sup>128</sup> *Marsh v. Ala.*, 326 U.S. 501 (1946).

<sup>129</sup> *Shelley v. Kraemer*, 334 U.S. 1 (1948).

<sup>130</sup> *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

<sup>131</sup> *See McKinny, supra* note 125, at 230.

<sup>132</sup> *See Marsh*, 326 U.S. at 502–03.

<sup>133</sup> *Id.* at 502.

<sup>134</sup> *Id.* at 502–503.



she was on private property and such action was not permitted.<sup>135</sup> When the Witness refused to leave, town officials arrested her.<sup>136</sup> The Court found the company could not hide behind private property rights and abridge free speech rights.<sup>137</sup> The Court reasoned that the company was performing municipal functions and therefore should be bound to restrictions imposed on municipalities.<sup>138</sup>

The Court stated the judicial enforcement theory in *Shelley v. Kraemer*, where a group of landowners recorded a restrictive covenant stating that the properties within the specified district may only be occupied by a person of the Caucasian race.<sup>139</sup> Petitioners, a black family, purchased a parcel of land covered by the restrictive covenant.<sup>140</sup> When Petitioners purchased the parcel of land, they had no knowledge of such covenant.<sup>141</sup> In response, other landowners brought suit against Petitioners to enforce the restrictive covenant.<sup>142</sup> The state courts upheld the covenant.<sup>143</sup> The United States Supreme Court reviewed the state courts' decisions and held that if the restrictive covenant (a private agreement) was enforced without the assistance of the state court, there would be no Fourteenth Amendment violation.<sup>144</sup> However, action of the state courts to uphold the restrictive covenant triggered Fourteenth Amendment protections and prohibits the state from depriving individuals of substantive rights without notice and due process.<sup>145</sup> The United States Supreme Court thereby reversed the judgment of the Supreme Court of Missouri.<sup>146</sup>

Last, the nexus theory (or the symbiotic relationship test), is where state action and action of private parties are so entwined that the action may be attributed to the state.<sup>147</sup> This theory evolved out of *Burton v. Wilmington Parking Authority*, where a

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<sup>135</sup> *Id.* at 503.

<sup>136</sup> *Id.* at 503–504.

<sup>137</sup> *Id.* at 508–509.

<sup>138</sup> *See id.* at 509.

<sup>139</sup> *See Shelley*, 334 U.S. at 4–5.

<sup>140</sup> *Id.* at 5.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 6.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 13.

<sup>145</sup> *Id.* at 15–16.

<sup>146</sup> *Id.* at 22–23.

<sup>147</sup> McKinny, *supra* note 125, at 231.

local coffee shop refused to serve an African American customer.<sup>148</sup> The court found the requisite state action because the local coffee shop leased the property from the city of Wilmington.<sup>149</sup> The court reasoned both the privately owned coffee shop and city of Wilmington mutually benefitted from the arrangement, and therefore Fourteenth Amendment protections applied.<sup>150</sup>

Despite the United States Supreme Court's broadened interpretation of state action, lower courts have not applied the Federal Constitution's limits on professional sports, which are private associations.<sup>151</sup> Courts have consistently followed the concept of non-interference with the matters of private associations, arguing private associations are better suited to govern their internal operations.<sup>152</sup> Courts only get involved in the outcomes of private association processes if: "(1) the association's action adversely affects 'substantial property, contract or other economic rights' and the associations own internal procedures were inadequate or unfair, or if (2) the association acted maliciously or in bad faith."<sup>153</sup>

Collective bargaining agreements (CBA) govern professional sports leagues, and define and establish the relationship between players, the teams, and the league.<sup>154</sup> At the head of every league is a commissioner who is responsible for acting in the best interests of the league.<sup>155</sup> Courts engage in limited judicial review of a commissioner's decisions regarding the league or player discipline.<sup>156</sup> Whether the commissioner's decision is right or wrong often is beyond the courts'

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<sup>148</sup> See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 716–21 (1961).

<sup>149</sup> *Id.* at 861.

<sup>150</sup> *Id.*

<sup>151</sup> McKinny, *supra* note 125, at 232–33.

<sup>152</sup> See generally *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Rendell-Baler v. Kohn*, 457 U.S. 830 (1982); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Clonlara, Inc. v. Runkel*, 722 F.Supp. 1442 (E.D. Mich. 1989); *Gemini Enterprises, Inc. v. WFMY Television Corp.*, 470 F.Supp. 559 (M.D.N.C. 1979); *Ingram v. Steven Robert Corp.*, 419 F.Supp. 461 (S.D. Ala. 1976).

<sup>153</sup> McKinny, *supra* note 125, at 236.

<sup>154</sup> See *id.* at 233.

<sup>155</sup> See *id.* at 234.

<sup>156</sup> *Id.* at 236.

jurisdiction,<sup>157</sup> ultimately leaving the professional sports leagues to their own self-governance.

Some have argued professional sports leagues are not solely private organizations but a public-private hybrid system.<sup>158</sup> This is because the majority of professional stadiums are publicly funded,<sup>159</sup> and often a team staying in a certain city is contingent upon receipt of funding for a new stadium.<sup>160</sup> *Ludtke v. Kuhn* shows that courts are willing to extend constitutional protections in the professional sport setting. In *Ludtke v. Kuhn*, the Yankees banned female reporters from the players' locker room.<sup>161</sup> The court held a symbiotic relationship existed and therefore the stadium was a state actor because the stadium was publicly funded, the city was responsible for the upkeep of the stadium, and the city profited from the Yankees lease and attendance.<sup>162</sup>

The majority of professional sport stadiums are leased or subsidized by the city in which they reside.<sup>163</sup> Cities agree to subsidize these expensive stadium projects in hopes of benefitting from the team being present. For example, fans who travel to a game have to pay for parking, may stay at a nearby hotel, or enjoy dinner at a local restaurant.<sup>164</sup> Since there is shared benefit between most professional sports teams and their local cities, it is possible the professional sport team will be considered a state actor in accordance with the symbiotic relationship or nexus theory—but there is no additional precedent. In a free speech issue, once a court has found state action, the court then examines the type of forum where the speech occurred. This analysis will determine whether the restrictions on the speech violated the individual's constitutional rights.

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<sup>157</sup> *See Id.*

<sup>158</sup> Nick DeSiato, *Silencing the Crowd: Regulating Free Speech in Professional Sports Facilities*, 20 MARQ. SPORTS L. REV. 411, 413 (2010).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 415.

<sup>161</sup> *Ludtke v. Kuhn*, 461 F. Supp. 86, 88 (S.D.N.Y. 1978).

<sup>162</sup> *Id.* at 93–94.

<sup>163</sup> *See* Scott Wolla, *The Economics of Subsidizing Sport Stadiums*, FED. RES. BANK OF ST. LOUIS (May 2017), <https://research.stlouisfed.org/publications/page1-econ/2017-05-01/the-economics-of-subsidizing-sports-stadiums/>.

<sup>164</sup> *Id.*

## B. PUBLIC FORUM REQUIREMENT

The concept of public forum grew out of *Hague v. CIO*.<sup>165</sup> In *Hague*, Justice Roberts wrote:

Wherever the title of 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.<sup>166</sup>

The public forum doctrine distinguishes three types of places for protest with varying levels of free speech restrictions: (1) the traditional public forum; (2) the designed public forum; and (3) the nonpublic forum.<sup>167</sup> First Amendment activity in a public forum may be limited only by reasonable time, place, and manner restrictions.<sup>168</sup> Content-neutral restrictions are only permissible if they serve a compelling state interest and the restriction is narrowly tailored to meet that interest.<sup>169</sup> However, not all public properties are considered public forums.<sup>170</sup> The critical issue is whether the manner of expression is compatible with the normal activity of place and time.<sup>171</sup> Some sites are not open for expression like streets and parks.<sup>172</sup> A designated public forum includes places that are specifically created for expressive activities.<sup>173</sup> This includes university meeting spaces, airports, and municipal theaters.<sup>174</sup> The government may implement restrictions similar to those in the traditional public forum, but cannot exercise viewpoint discrimination.<sup>175</sup> Last, nonpublic

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<sup>165</sup> *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939).

<sup>166</sup> *Id.* at 515.

<sup>167</sup> DeSiato, *supra* note 158, at 422.

<sup>168</sup> *Id.*

<sup>169</sup> Cornell Law School, *Forums*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/forums> (last visited Apr. 17, 2018).

<sup>170</sup> *See* DeSiato, *supra* note 158, at 422–23.

<sup>171</sup> *See id.* at 423.

<sup>172</sup> *See id.* at 423–424.

<sup>173</sup> *See id.*

<sup>174</sup> *See id.* at 429.

<sup>175</sup> Cornell Law School, *supra* note 169.

forums are public places that are neither traditional or designated public forums.<sup>176</sup> Reasonable restrictions can be imposed on speech in a nonpublic forum so long as restrictions are not viewpoint discrimination.<sup>177</sup>

To determine if a sporting facility is a public forum, courts will consider the primary purpose of the facility's construction, the commercial nature of the facility's operation, and whether there is regular enforcement of regulations limiting expression.<sup>178</sup> Courts will not only examine the location of the speaker, but also examine the context of the property as a whole.<sup>179</sup> *Stewart v. D.C. Armory Board Decision* shows at least one court has applied the public forum analysis to a sport facility context.<sup>180</sup> In *Stewart*, plaintiffs hung a banner with a scripture written on it on the railings of the stadium during a Washington Redskins football game.<sup>181</sup> At halftime, the plaintiffs noticed someone had taken down the banner.<sup>182</sup> The plaintiffs hung another banner, but found that someone had removed the new banner as well.<sup>183</sup> Another plaintiff in the case, who was watching the game on television, observed various signs throughout the stadium, including "Capitol Punishment," "National Defense," and "Hi Kathy and Don" remained untouched for the duration of the game.<sup>184</sup> The plaintiff also noted that he had previously hung banners that no one had ever removed.<sup>185</sup> The defendant claimed stadium officials removed the signs pursuant to an NFL-created content restriction.<sup>186</sup>

Since Robert F. Kennedy (RFK) Memorial Stadium is government-owned property, the *Stewart* court analyzed the case under public forum doctrine.<sup>187</sup> First, the court considered whether the First Amendment protected the banner.<sup>188</sup> Given the religious nature of the expression, there is little doubt the First Amendment

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<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> DeSiato, *supra* note 158, at 423.

<sup>179</sup> *Id.*

<sup>180</sup> *Stewart v. D.C. Armory Bd.*, 789 F. Supp. 402 (D.D.C 1992).

<sup>181</sup> *Id.* at 403–04.

<sup>182</sup> *Id.* at 404.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

protected the banner.<sup>189</sup> Second, the court analyzed the nature of the forum.<sup>190</sup> A stadium does not need to be a place traditionally devoted to expressive activities, it could be considered a public forum based on government designation.<sup>191</sup> The crux for determining whether a property is a designated public forum is to look at the “government’s intent in establishing and maintaining the property.”<sup>192</sup> The court found sufficient evidence to conclude that RFK Stadium was a public forum because the government’s intent of operating the stadium was “to build civic pride, identity and cohesion through sponsorship of public events which brings citizens together for a common purpose.”<sup>193</sup> To conclude, the court evaluated the justification for the restriction on speech.<sup>194</sup> The defense claimed that the sign was removed because they were concerned it might offend fans, football team owners, tenants, and the NFL.<sup>195</sup> This was not a compelling enough reason to justify the suppression of speech;<sup>196</sup> so, the court ruled in favor of the plaintiffs.<sup>197</sup>

Subsequent to the *Stewart* decision, the courts in *Krishna Consciousness, Inc. v. New Jersey Sports and Exposition Authority*<sup>198</sup> and *Hubbard Broadcasting Inc. v. Metropolitan Sports Facilities Commission*<sup>199</sup> have held sport facilities are not public forums.<sup>200</sup> In *Krishna Consciousness, Inc.*, the plaintiffs, a religious organization, challenged a policy prohibiting outside organizations from soliciting money at the race track and stadium in the Meadowlands Sports Complex in New Jersey.<sup>201</sup> The court upheld the policy finding that it was uniform and non-discriminatory.<sup>202</sup> Further, the court noted “neither the race track

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<sup>189</sup> *Id.* at 405.

<sup>190</sup> *Id.* at 404.

<sup>191</sup> *Id.* at 405.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 404.

<sup>195</sup> *Id.* at 405.

<sup>196</sup> *Id.* at 406.

<sup>197</sup> *Id.* at 407.

<sup>198</sup> *Int’l Soc’y for Krishna Consciousness, Inc. v. N.J. Sports and Exposition Auth.*, 691 F.2d 155 (3rd Cir. 1982).

<sup>199</sup> *Hubbard Broad., Inc. v. Metro. Sports Facilities Comm’n*, 797 F.2d 552 (8th Cir. 1986).

<sup>200</sup> DeSiato, *supra* note 158, at 425.

<sup>201</sup> *Int’l Soc’y for Krishna Consciousness*, 691 F.2d at 158.

<sup>202</sup> *Id.*

nor the stadium [was] designed, built, intended or used as a public forum.”<sup>203</sup>

In *Hubbard Broadcasting Inc.*, Hubbard, a radio and television broadcaster, claimed the Metropolitan Sports Facilities Commission violated its free speech rights by selling its competitor, Midwest Radio Television (Midwest), exclusive rights to advertise on the score board at the Metrodome in Minneapolis.<sup>204</sup> Hubbard claimed the advertising space on the scoreboard was a public forum.<sup>205</sup> The court disagreed with Hubbard, stating that in situations where the city is acting in a proprietary capacity to allow a small number of advertising spaces on government property to generate revenue, a public forum is not created.<sup>206</sup> Last, the court explored whether the restriction on commercial speech was reasonable and content-neutral.<sup>207</sup> The court agreed that exclusive ten-year contracts would elicit the most value and therefore is a reasonable objective.<sup>208</sup> Further, the court concluded that the policy was content-neutral, because no effort was made to suppress a specific point of view.<sup>209</sup>

There is no strong precedent in favor of constitutional protections being applied to the sports arena. *Ludtke v. Kuhn* is the lone case that found a sports team violated the Constitution by depriving a reporter of equal access. Furthermore, this case is distinguishable from potential constitutional protections for players because in *Ludtke*, the plaintiff was a reporter. A court would likely treat an athlete plaintiff differently because the athlete agreed to be part of a private association and abide by its rules and regulations, whereas a reporter has not made such concessions.

## V. CONTRACTUAL CONSIDERATIONS UNDER THE CBA AND THE STANDARD PLAYER CONTRACT

Even if a constitutional analysis concludes professional teams are state actors and stadiums are public forums, professional athletes may have contractual obligations under the CBA and their

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<sup>203</sup> *Id.*

<sup>204</sup> *Hubbard Broad., Inc.*, 797 F.2d at 553.

<sup>205</sup> *Id.* at 555.

<sup>206</sup> *Id.* at 556.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

Standard Player Contracts (SPC) that restrict free speech rights.<sup>210</sup> Collective bargaining agreements govern the employee-employer relationship between the owners of professional sports teams and players' associations.<sup>211</sup> Specifically, CBAs explicitly outline treatment of players (employees) and limit employers' power by adding restraints to punishments, such as requiring "just" or reasonable" cause to punish employees.<sup>212</sup> CBAs do not give players blanket rights to behave however they want, but past arbitrations have shown deference to free speech rights.<sup>213</sup> For example, in 2000, former Atlanta Braves Pitcher John Rocker was suspended by then-Commissioner Bud Selig for seventy-three games<sup>214</sup> for making derogatory comments in an interview, including "Asians and Koreans and Vietnamese and Indians and Russians and Spanish people and everything up there [New York City]. How the hell did they get in this country?"<sup>215</sup> An arbitrator reduced the suspension to fourteen days and a \$500 fine.<sup>216</sup> Each league has its own policies. As result, the league's and athletes' responsibilities under the CBAs and the SPCs for the NFL, MLB, and the NBA are subsequently discussed.

#### A. NATIONAL FOOTBALL LEAGUE

Every NFL player signs a standard contract with their team. There are two clauses in the NFL's SPC that may restrict athlete's free speech: Paragraph 2 (Employment and Services) and Paragraph 11 (Skill, Performance and Conduct).<sup>217</sup> Paragraph 2

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<sup>210</sup> McKinny, *supra* note 125, at 249.

<sup>211</sup> Ryan T. Dryer, *Beyond the Box Score: A Look at Collective Bargaining Agreements in Professional Sports and Their Effect on Competition*, 2008 J. DISP. RESOL., 267, 267 (2008).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> Jeff Pearlman, *A Reporter's Tale: The John Rocker Story 15 Years Later*, BLEACHER REP. (Apr. 4, 2014), <http://bleacherreport.com/articles/2009128-a-reporters-tale-the-john-rocker-story-15-years-later>.

<sup>215</sup> Maki Becker, Michael Finnegan & Bill Hutchinson, *ROCKER: I'M SORRY Pitcher Says He's No Racist, Amid Firestorm over Slurs*, DAILY NEWS (Dec. 23, 1999, 12:00 AM), <http://www.nydailynews.com/archives/news/rocker-pitcher-no-racist-firestorm-slurs-article-1.850825>.

<sup>216</sup> Pearlman, *supra* note 214.

<sup>217</sup> Michael McCann, *Can an NFL Owner Legally 'Fire' a Player for Protesting?*, SPORTS ILLUSTRATED (Sept. 23, 2017),



states that a player pledges to “conduct himself on and off the field with appropriate recognition of the fact that the success of professional football depends largely on public respect for and approval of those associated with the game.”<sup>218</sup> This general language may allow for teams to broadly define “public respect” to capture athlete protests as a negative effect on “public respect.”<sup>219</sup> Teams may support this claim by pointing to the 5% ratings drop for NFL games this season.<sup>220</sup> Paragraph 11 of the SPC states that the team may terminate a player’s contract if the player “has engaged in personal conduct reasonably judged by the Club to adversely affect or reflect on the Club.”<sup>221</sup> Similar to Paragraph 2, this clause may allow wide-ranging deference for the team to “reasonably judge” the impact of a player’s “personal conduct” on the team.<sup>222</sup>

Additionally, teams may look to Article 46 (Commissioner Discipline) of the CBA to terminate players for protesting. Article 46 grants the Commissioner with a broad power to discipline players whose “conduct [is] detrimental to the integrity of, or public confidence in, the game of professional football.”<sup>223</sup> With the recent backlash the NFL has suffered from its players kneeling for the national anthem, it may not be farfetched to conclude that this behavior is detrimental to the integrity of professional football. However, the Commissioner’s criticism of President Trump’s tweet saying teams should fire players who kneel for the national anthem seems to indicate that the Commissioner will likely not be electing to use his authority to fire players for their political protests.<sup>224</sup> Further, neither the NFL nor a team has punished a current player for opting to kneel for the national anthem, and even if a player was punished, the

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<https://www.si.com/nfl/2017/09/23/donald-trump-fired-roger-goodell-player-protest>.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> Jimmy Traina, *Traina Thoughts: NFL Ratings Decline Seems like Nothing Compared to the Rest of Television*, SPORTS ILLUSTRATED (Oct. 27, 2017), <https://www.si.com/extra-mustard/2017/10/27/nfl-2017-ratings-national-anthem-protests>.

<sup>221</sup> McCann, *supra* note 217.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

player has the right to appeal the punishment through arbitration proceedings.<sup>225</sup>

Currently, the NFL rulebook does not dictate player behavior for the national anthem, but the game operations manual provides some context.<sup>226</sup> The game operations manual says the national anthem must be played prior to every NFL game, and all players must be on the sideline for the national anthem.<sup>227</sup> During the national anthem, players on the field and bench area *should* stand at attention, face the flag, and hold helmets in their left hand, and refrain from talking.<sup>228</sup> The home team has a duty to ensure that the American flag is in good condition.<sup>229</sup> Failure to be on the field by the start of the national anthem *may* result in discipline, such as fines, suspensions, or the forfeiture of draft choice(s) for violations of the above, including first offenses.<sup>230</sup> It should be pointed out to players and coaches that they continue to be judged by the public in how they handle the singing of the national anthem prior to games.

Unquestionably, the key word above is *may*, which gives the NFL discretion to punish both teams or players who kneel for the national anthem. Clearly, the NFL is not yet willing to punish teams or players who choose to kneel or stay in the locker room for the national anthem. Further, the NFL does not appear to be making any plans to mandate players to stand for the national anthem.<sup>231</sup> The NFL and National Football League Players Association (NFLPA) released a joint statement:

Commissioner Roger Goodell reached out to the NFLPA Executive Director DeMaurice Smith today and both he and player leadership will attend the League meetings next week. There has been no change in the current policy regarding the

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<sup>225</sup> *Id.*

<sup>226</sup> Alex Fitzpatrick, *Here's What NFL Rules Say About Standing for the National Anthem*, SPORTS ILLUSTRATED (Sept. 25, 2017), <https://www.si.com/nfl/2017/09/25/does-nfl-require-players-stand-national-anthem>.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *NFL: No Mandate for Players to Stand During the National Anthem*, NFL.COM (Oct. 11, 2017), <http://www.nfl.com/news/story/0ap3000000860129/article/nfl-no-mandate-for-players-to-stand-during-national-anthem>.

anthem. The agenda will be a continuation of how to make progress on the important social issues that players have vocalized.<sup>232</sup>

Although it appears Kaepernick's efforts were successful in getting the NFL and the NFLPA to take a stance on social issues, Kaepernick now finds himself unemployed following his year-long protest.<sup>233</sup> Speculation regarding the rationale for his unemployment ranged from his struggling performance as quarterback (which led him to losing his starting position) to Kaepernick's views on politics and the mixed responses from fans, team owners, and the league.<sup>234</sup> After being passed over numerous times in the 2017 off-season, Kaepernick filed a complaint against the NFL alleging that the owners colluded to deprive him of an employment opportunity.<sup>235</sup> The complaint also references President Trump's comments, arguing that the Federal government further coerced the league into blacklisting Kaepernick.<sup>236</sup> Kaepernick filed the complaint under Section 17 of the CBA (Anti-Collusion) using his own attorney, Mark Geragos, rather than filing through the NFLPA.<sup>237</sup>

Kaepernick claims the NFL engaged in calculated and coordinated activity to keep him out of the league because of his protest during the national anthem.<sup>238</sup> As a result, multiple NFL owners will be deposed and asked to turn over cellphone records

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<sup>232</sup> *Id.*

<sup>233</sup> Claire McNear, *If the Seahawks Won't Give Colin Kaepernick a Shot, Then Who Will?*, THE RINGER (Apr. 12, 2018), <https://www.theringer.com/nfl/2018/4/12/17231582/colin-kaepernick-seattle-seahawks-quarterback-national-anthem-protest-free-agency>.

<sup>234</sup> Jack Dickey, *There's No Credible Reason Why Colin Kaepernick Isn't on a Week 1 NFL Roster*, SPORTS ILLUSTRATED (Sept. 8, 2017), <https://www.si.com/nfl/2017/09/08/colin-kaepernick-week-1-nfl-roster-not-signed>.

<sup>235</sup> Mark W. Sanchez, *Colin Kaepernick Calls Out NFL Owners, Trump in Collusion Fight*, N.Y. POST (Oct. 15, 2017), <https://nypost.com/2017/10/15/colin-kaepernick-is-taking-on-nfl-owners-with-collusion-fight/>.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> Justin Terranova, *Kaepernick's Collusion Case Targets NFL Owners, Including Giants*, N.Y. POST (Nov. 3, 2017), <https://nypost.com/2017/11/03/nfls-most-powerful-owners-targeted-in-kaepernicks-collusion-case/>.

and emails that relate to Kaepernick's accusations.<sup>239</sup> Among those to be deposed are Cowboys owner Jerry Jones, Patriots owner Robert Kraft, Texans owner Bob McNair, Seahawks coach Pete Carroll, 49ers owner Jed York, and Giants owners John Mara and Steve Tisch.<sup>240</sup>

To win a collusion argument, Kaepernick will have to meet the burden of preponderance of the evidence and demonstrate that two or more teams cooperated together to deprive him of his collectively bargained right of employment with a team.<sup>241</sup> Despite numerous teams passing on Kaepernick, likely the more talented option for backup quarterback, this does not prove a collusion case. Kaepernick's legal team will have to uncover hard evidence during discovery that there was collusion between owners or the league and owners. A date has not been set for this case, but if Kaepernick's collusion case does not pan out, he can still bring suit for violation of Section 7 of the NLRA (Interfering with Employee Rights), arguing that he was denied the opportunity to engage in a concerted activity—anthem protest.<sup>242</sup> A more detailed discussion of the National Labor Relations Act is addressed in Part VII.

## B. MAJOR LEAGUE BASEBALL

Under the MLB CBA, Article XII—Discipline, Subsection B (Conduct Detrimental or Prejudicial to Baseball), details: “Players may be disciplined for just cause for conduct that is materially prejudicial to the best interests of Baseball, including, but not limited to, engaging in conduct in violation of federal, state or local law.”<sup>243</sup> This language provides the Commissioner or the Club with the autonomy to discipline players for a wide range of behavior. Kneeling during the national anthem could be deemed “just cause” for disciplining a player. Yet, the Club can only

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<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> Michael McCann, *Colin Kaepernick's Collusion Claim: Does He Have a Case?*, SPORTS ILLUSTRATED (Oct. 15, 2017), <https://www.si.com/nfl/2017/10/15/colin-kaepernick-collusion-lawsuit-against-nfl>.

<sup>242</sup> *Id.*

<sup>243</sup> MAJOR LEAGUE BASEBALL COLLECTIVE BARGAINING AGREEMENT, Art. XII (2017) archived at <http://www.mlbplayers.com/pdf9/5450407.pdf> [hereinafter MLB CBA].

discipline the player if the Commissioner concedes the disciplinary authority to the Club.<sup>244</sup>

Currently, the MLB does not have a rule about national anthem etiquette, but the league treats the national anthem as an important tradition.<sup>245</sup> “The National Anthem has been performed before all Major League games since 1942, during World War II.”<sup>246</sup> Because only one MLB player, Oakland A’s Bruce Maxwell, has knelt during the national anthem, there is not much discussion around steps to thwart protest efforts.<sup>247</sup> However, after Bruce Maxwell took a knee, the Oakland A’s issued a statement saying “[t]he Oakland A’s pride ourselves on being inclusive. We respect and support all of our players’ constitutional rights and freedom of expression.”<sup>248</sup>

Although one baseball player engaged in pre-game activism activities last season, the Seattle Mariners also displayed a position on the issue when the team suspended catcher Steve Clevenger for posting several tweets to his private Twitter account that were disseminated by his followers.<sup>249</sup> “Black people beating whites when a thug got shot holding a gun by a black officer haha [expletive] cracks me up! Keep kneeling for the anthem! BLM [Black Lives Matter] is pathetic again! Obama you are pathetic once again! Everyone should be locked behind bars like animals!”<sup>250</sup>

Mariners’ general manager Jerry Dipito commented, “[a]s soon we became aware of the tweets posted by Steve, we began to examine all of our options in regard to his standing on the

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<sup>244</sup> *Id.*

<sup>245</sup> Maury Brown, *If MLB Players Protest National Anthem, Here’s How League Would Respond*, FORBES (Sept. 15, 2016), <https://www.forbes.com/sites/maurybrown/2016/09/15/if-mlb-players-protest-national-anthem-heres-how-league-would-respond/#450c29c92113>.

<sup>246</sup> *Id.*

<sup>247</sup> Marissa Payne, *‘To Single Out NFL Players for Doing This Isn’t Something We Should Be Doing’: A’s Player Takes Up Anthem Protest*, WASHINGTON POST (Sept. 24, 2017), [https://www.washingtonpost.com/news/early-lead/wp/2017/09/23/as-catcher-bruce-maxwell-first-mlb-player-to-kneel-for-the-national-anthem/?utm\\_term=.8f60e80960dc](https://www.washingtonpost.com/news/early-lead/wp/2017/09/23/as-catcher-bruce-maxwell-first-mlb-player-to-kneel-for-the-national-anthem/?utm_term=.8f60e80960dc).

<sup>248</sup> *Id.*

<sup>249</sup> Bob Nightengale, *Steve Clevenger: How a Catcher Tweeted His Way Out of a Major League Career*, USA TODAY (Sept. 23, 2016, 9:37 PM), <https://www.usatoday.com/story/sports/mlb/columnist/bob-nightengale/2016/09/23/steve-clevenger-tweets-suspended/90912142/>.

<sup>250</sup> *Id.*

team.”<sup>251</sup> The team suspended Clevenger through MLB’s Social Media policy in accordance with Article XII of the CBA.<sup>252</sup> The reaction by the Seattle Mariners to Clevenger’s post reiterated that any behavior contrary to the best interests of Baseball would not be tolerated (including negative comments about players who are choosing to protest by kneeling).

Without a doubt, the more interesting aspect of the MLB is not how the league will handle protests, but rather why are MLB players not joining the protest?<sup>253</sup> Baseball is America’s past time, “it is a hyper-patriotic place.”<sup>254</sup> Baltimore Orioles outfielder, Adam Jones, said “[b]aseball is white man’s sport. We already have two strikes against us, so you might as well not kick yourself out of the game. In football, you can’t kick them out. You need those players. In baseball, they don’t need us.”<sup>255</sup>

Adam Jones was one of sixty-two African Americans out of 750 players on opening day rosters in the 2017 season.<sup>256</sup> This is a powerful statement from Adam Jones, who also said that he will not join the protest and kneel for the national anthem because both his brother and father served in the military.<sup>257</sup> Additionally, in response to Bruce Maxwell’s protest, Tampa Bay Rays pitcher, Chris Archer, said:

From the feedback I’ve gotten from my teammates, I don’t think it would be the best thing to do for me at this time. I agree with [Maxwell’s] message. I believe in equality. [But] I don’t want to offend anybody. No matter how you explain it or justify it, some people just can’t get past the military element of it, and it’s not

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<sup>251</sup> *Id.*

<sup>252</sup> MLB CBA, *supra* note 243, art. 12.

<sup>253</sup> David Lengel, *Why Protesting During the Anthem is the Ultimate Sin in Major League Baseball*, THE GUARDIAN (Sept. 14, 2016), <https://www.theguardian.com/sport/blog/2016/sep/14/mlb-protest-national-anthem-ultimate-sin-adam-jones>.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> Dave Sheinin & Jorge Castillo, *Amid NFL Protests and NBA Uproar, MLB still taking Cautious First Steps into Anthem Controversy*, THE WASHINGTON POST (Sept. 25, 2017), [https://www.washingtonpost.com/news/sports/wp/2017/09/25/amid-nfl-protests-and-nba-uproar-mlb-still-taking-cautious-first-steps-into-anthem-controversy/?utm\\_term=.f8fe6f219b21](https://www.washingtonpost.com/news/sports/wp/2017/09/25/amid-nfl-protests-and-nba-uproar-mlb-still-taking-cautious-first-steps-into-anthem-controversy/?utm_term=.f8fe6f219b21).

<sup>257</sup> Lengel, *supra* note 253.

something I want to do, is ruffle my teammates' feathers on my personal views that have nothing to do with baseball.<sup>258</sup>

While the league has not actively discussed the national anthem protest, it did release a statement that said "each of our players is an individual with his own background, perspectives and opinions," hinting that the league may not respond as harsh as its players think.<sup>259</sup>

### C. NATIONAL BASKETBALL ASSOCIATION

Unlike the NFL and MLB, the NBA has a rule requiring players, coaches, and trainers to stand along the sidelines for the national anthem.<sup>260</sup> Under Paragraph 5 of the NBA Uniform Player Contract, the NBA can "enforce reasonable rules governing the conduct of players on the playing court (defined in Article XXXI, Section 9(c)) that do not violate the provisions of the [CBA]." <sup>261</sup> Paragraph 5 states that players must always conduct themselves "on and off the court according to the highest standards of honesty, morality, fair play and sportsmanship; and [cannot] do anything which is detrimental to the best interests of the Club or the Association."<sup>262</sup> The NBA reinforced this rule by sending out a memo prior to the start of the 2017 season.<sup>263</sup> The memo suggested teams address the current issues by having players and coaches give a joint message prior to their first home

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<sup>258</sup> Sheinin, *supra* note 256.

<sup>259</sup> *Id.*

<sup>260</sup> John Reid, *Unlike NFL, the NBA has a Rule that Players Must Stand During Playing of National Anthem*, NOLA (Sept. 15, 2016), [http://www.nola.com/pelicans/index.ssf/2016/09/victor\\_oladipo\\_predicts\\_nba\\_pl.html](http://www.nola.com/pelicans/index.ssf/2016/09/victor_oladipo_predicts_nba_pl.html).

<sup>261</sup> NAT'L BASKETBALL ASSOC. COLLECTIVE BARGAINING AGREEMENT, Art. 31 (Jan. 19, 2017) archived at, <http://3c90sm37lsaecdwtr32v9qof.wpengine.netdna-cdn.com/wp-content/uploads/2016/02/2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf>.

<sup>262</sup> *Id.*

<sup>263</sup> Zach Lowe, *Memo Reinforces Rule that NBA Players, Coaches Stand for Anthem*, ESPN (Sept. 30, 2017), [http://www.espn.com/nba/story/\\_/id/20864858/nba-memo-reinforces-rule-players-coaches-stand-national-anthem](http://www.espn.com/nba/story/_/id/20864858/nba-memo-reinforces-rule-players-coaches-stand-national-anthem).

game.<sup>264</sup> The NBA was making an effort to establish an environment where its players were able to use their platform to discuss issues that matter to them, but it seems the NBA would not tolerate kneeling for the national anthem.<sup>265</sup>

The NBA has a history of zero tolerance for national anthem protests.<sup>266</sup> During the 1995-1996 season, Denver Nuggets guard Mahmoud Abdul-Rauf sat during the national anthem.<sup>267</sup> Then-Commissioner David Stern suspended Abdul-Rauf for one game.<sup>268</sup> Thereafter, Abdul-Rauf stood for national anthem, but had his head bowed in prayer.<sup>269</sup> Despite this compromise, the Nuggets traded Abdul-Rauf to the Kings at the end of the season and Abdul-Rauf lost sponsorships.<sup>270</sup> The next season Abdul-Rauf's contract expired and he went unsigned, essentially being forced into early retirement.<sup>271</sup> Twenty years later, the league has changed and outwardly encouraged its players to speak about the issues, but no player has tested the waters and taken a knee.

While NBA players may not be protesting the national anthem, some players have taken a stand in other ways. For example, during the 2014 season, numerous players including LeBron James, Derrick Rose, and Kobe Bryant wore t-shirts in warm-ups with the phrase "I can't breathe."<sup>272</sup> "I can't breathe" were the last words of Eric Garner, a black man who died in a police chokehold.<sup>273</sup> NBA Commissioner Adam Silver seemed to be walking a slippery slope when he issued his statement, "I respect Derrick Rose and all of our players for voicing their personal views on important issues, but my preference would be for players to abide by our on-court attire rules."<sup>274</sup> The NBA rule

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<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> Tim Cato, *The NBA Actually has a Rule Against Kneeling for the National Anthem*, SBINATION (Sept. 29, 2017, 9:33 PM), <https://www.sbnation.com/2017/9/25/16358070/national-anthem-protest-kneel-rule>.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> William Rhoden, *Social Convictions Don't Tuck Neatly into NBA's Interests*, N.Y. TIMES (Dec. 9, 2014), <https://www.nytimes.com/2014/12/10/sports/basketball/adam-silver-likes-show-of-support-but-not-with-i-cant-breathe-pregame-shirts.html>.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*



book outlines specific requirements and regulations for on-court attire.<sup>275</sup> Even though Silver could have barred the players from wearing the shirts or penalized them, he opted not to.<sup>276</sup> More recently, players have been using social media to communicate and advocate for certain social causes.<sup>277</sup> Specifically, LeBron James has taken a strong stance by posting videos to Instagram and tweets to encourage and improve race relations in the U.S.<sup>278</sup>

If professional athletes find themselves without legal recourse under the Federal Constitution or their leagues' CBA, SPC or rulebook, they may find reprieve in the National Labor Relations Act (NLRA).

## VI. ATHLETE ACTIVISM UNDER THE NATIONAL LABOR RELATIONS ACT

If the constitutional argument fails, athletes may still be able to bring a claim under the NLRA. The NLRA gets its power from the Commerce Clause of the Federal Constitution and has jurisdiction over any labor industry that affects interstate commerce.<sup>279</sup> Given professional sports' interstate nature, the NLRA can apply to professional sports.<sup>280</sup> The National Labor Relations Board (NLRB) is "an independent federal agency vested with the power to safeguard employees' rights to organize and to determine whether to have unions as their bargaining representative."<sup>281</sup> The NLRB can decline jurisdiction when "in its opinion, the impact of a particular industry on interstate commerce is not so 'sufficiently substantial to warrant the exercise

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<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> Scott Kushner, *NBA Commissioner Adam Silver Opines on State of League, Technology, Social Media Before All-Star Game Tips*, THE ADVOCATE (Feb. 18, 2018, 6:55 PM), [http://www.theadvocate.com/new\\_orleans/sports/pelicans/article\\_948037dc-150f-11e8-a58a-bfe737aad7ff.html](http://www.theadvocate.com/new_orleans/sports/pelicans/article_948037dc-150f-11e8-a58a-bfe737aad7ff.html).

<sup>278</sup> *LeBron James Has No Plans to 'Shut up and Dribble,'* ESPN (Feb. 18, 2018), [http://www.espn.com/nba/story/\\_/id/22481008/lebron-james-cleveland-cavaliers-doubles-will-continue-discuss-social-issues](http://www.espn.com/nba/story/_/id/22481008/lebron-james-cleveland-cavaliers-doubles-will-continue-discuss-social-issues).

<sup>279</sup> Cym Lowell, *Collective Bargaining and the Professional Team Sport Industry*, 38 LAW & CONTEMP. PROBS. 3, 6 (1973).

<sup>280</sup> *Id.*

<sup>281</sup> *What We Do*, NLRB, <https://www.nlr.gov/what-we-do> (last visited Apr. 9, 2018).

of its jurisdiction . . . .”<sup>282</sup> However, the NLRB previously exercised jurisdiction over professional baseball in *American League of Professional Baseball Clubs*, where the NLRB determined that professional baseball does affect interstate commerce in a sufficiently substantial way.<sup>283</sup> Further, the NLRB has a history of being involved in the labor relations arena of professional sports. Some credit the NLRB with ending the 1995 baseball strike “by securing an injunction under section 10(j) of the Act requiring the baseball club owners to withdraw their unilaterally imposed changes to the negotiated system of setting wages in baseball”<sup>284</sup> and “the NLRB secured a \$30 million back pay settlement in 1994” for NFL players who went on strike in 1987.<sup>285</sup>

For an athlete’s action to be protected under the NLRB, the “action must be conducted in concert with co-workers, it must address an issue of relevance to their job, and it must be carried out using appropriate means”<sup>286</sup> Many labor experts believe that professional athlete protests meet all three conditions, and therefore teams cannot discipline athletes for participating in protests.<sup>287</sup> This argument hinges on a 1978 Supreme Court case where the Court ruled “that workers have a right to engage in political advocacy as long as the political theme relates to their job.”<sup>288</sup> However, each league’s CBA, as well as the SPC, could lawfully prohibit protests without violating the NLRA.<sup>289</sup>

Further, the NLRA can also be used by athletes to bring suit against their respective league or owner (e.g., the Local 100 and Dallas Cowboys owner, Jerry Jones).<sup>290</sup> For example, President Trump’s tweets calling for NFL owners to fire players

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<sup>282</sup> Lowell, *supra* note 279, at 6.

<sup>283</sup> *Id.* at 7.

<sup>284</sup> *Impact of the NLRB on Professional Sports*, NLRB, <https://www.nlr.gov/who-we-are/our-history/impact-nlr-professional-sports> (last visited Apr. 9, 2018).

<sup>285</sup> *Id.*

<sup>286</sup> Noam Scheiber, *NFL Players May Have an Ally in Their Protests: Labor Law*, NY TIMES (Oct. 12, 2017), <https://www.nytimes.com/2017/10/12/business/economy/nfl-players-kneeling-national-anthem-labor-laws.html>.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> Todd Archer, *Local Labor Union Files Complaint over Jerry Jones’ Anthem Mandate*, ESPN (Oct. 11, 2017), [http://www.espn.com/nfl/story/\\_/id/20984095/labor-union-files-complaint-cowboys-jerry-jones-national-anthem-mandate-team](http://www.espn.com/nfl/story/_/id/20984095/labor-union-files-complaint-cowboys-jerry-jones-national-anthem-mandate-team).

who kneel for the national anthem and threats to change tax laws to negatively affect the NFL<sup>291</sup> led to Jerry Jones threatening to bench any player who does not stand for the national anthem.<sup>292</sup> In response to Jerry Jones's threat, the Local 100 of the United Labor Union filed a complaint against the Dallas Cowboys, alleging Jerry Jones violated the NLRA by threatening players if they did not stand for the national anthem.<sup>293</sup> The complaint to the NLRB alleged that "the employer evidenced by repeated public statements, is attempting to threaten, coerce, and intimidate all Dallas Cowboys players on the roster to prevent them from exercising a concerted activity protected under the [A]ct by saying that he will [not play] any players involved in such concerted activity."<sup>294</sup> The complaint is still being investigated and no outcome has been reached.

## VII. PROS AND CONS OF ATHLETE ACTIVISM—THE ATHLETE PERSPECTIVE

Athlete activism can be a critical force for positive social change. In fact, athlete activism has brought the fight for social justice back into the national conversation, and this time with league support. Both the NBA and the NFL are listening to their players' concerns and are searching for ways to effectuate change. For example, a distinguished panel was formed for the RISE Super Bowl Town Hall in Minneapolis on Super Bowl weekend.<sup>295</sup> The panel discussed best practices for utilizing sport as a way to improve race relations.<sup>296</sup> Conversations have started and plans have been put into action as a result of athletes voicing their

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<sup>291</sup> Tracy Jan, *Did Trump's Tweet Make it Safer for NFL Players to Kneel for the Anthem?*, WASHINGTON POST (Oct. 15, 2017), [https://www.washingtonpost.com/business/economy/did-trumps-tweet-make-it-safer-for-nfl-players-to-kneel-for-the-anthem/2017/10/15/d99f20ca-af44-11e7-a908-a3470754bbb9\\_story.html?utm\\_term=.a9b270988837](https://www.washingtonpost.com/business/economy/did-trumps-tweet-make-it-safer-for-nfl-players-to-kneel-for-the-anthem/2017/10/15/d99f20ca-af44-11e7-a908-a3470754bbb9_story.html?utm_term=.a9b270988837).

<sup>292</sup> Archer, *supra* note 290.

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> Alain Poupart, *RISE Super Bowl Town Hall*, MIAMI DOLPHINS (Feb. 3, 2018), <http://www.miamidolphins.com/news/article-1/RISE-Super-Bowl-Town-Hall/df315b19-92b4-4399-bd10-32578bb8a68f>.

<sup>296</sup> *Id.*

concern for certain social issues. However, speaking up does not always have positive consequences.

Hollywood contracts have incorporated morals clauses since the 1920s, but such clauses also have become common in player contracts and endorsement agreements.<sup>297</sup> All four major professional leagues in the United States include broad morals clauses in their SPCs and CBAs.<sup>298</sup> Morals clauses in endorsement contracts are often the product of negotiation and are narrower in scope compared to the morals clauses in SPCs and CBAs.<sup>299</sup> Morals clauses must be carefully drafted to ensure intended protection for a team, league, or corporation, who invest in both an athlete's performance and reputation.<sup>300</sup> An athlete's off-field, or even on-field, immoral or illegal behavior may also impact the athlete's endorsers.<sup>301</sup> For example, when Adrian Peterson was indicted on a felony charge of injury to a child, Wheaties pulled all content related to Adrian Peterson from its website.<sup>302</sup> Cam Newton found himself in hot water after he responded to a question from a female reporter saying, "It's funny to hear a female talk about routes."<sup>303</sup> Newton felt immediate backlash from the comment and even lost an endorsement deal with Dannon.<sup>304</sup>

Morals clauses may play a vital role in how corporate sponsors handle athlete activism. For example, in 2013, Rashard Mendenhall sued Hanesbrands for breach of contract when Hanesbrands terminated his endorsement deal after he tweeted about Bin Laden's death and a 9/11 conspiracy theory.<sup>305</sup> Hanesbrands attempted to terminate the endorsement deal

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<sup>297</sup> William H. Baaki, "Morals Clauses" in *Sports Contracts – More Important Now Than Ever Before?*, SPORTS AND ENTERTAINMENT LAW INSIDER (Sept. 16, 2014), <https://sportslawinsider.com/morals-clauses-in-sports-contracts-more-important-now-than-ever-before/>.

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> Sarah Barshop, *Wheaties Pulls All Content of Vikings Adrian Peterson Off Website*, SPORTS ILLUSTRATED (Sept. 15, 2014), <https://www.si.com/nfl/2014/09/15/wheaties-adrian-peterson-content-website>.

<sup>303</sup> Jen Wilson, *Panthers' Cam Newton Losing Endorsement Deal Amid Backlash Over 'Sexist' Remark?* CHARLOTTE BUSINESS JOURNAL (Oct. 5, 2017), <https://www.bizjournals.com/charlotte/news/2017/10/05/pantherscam-newton-loses-endorsement-deal-amid.html>.

<sup>304</sup> *Id.*

<sup>305</sup> *Rashard Mendenhall v. Hanesbrands, Inc.*, 856 F.Supp.2d 717, 720 (M.D.N.C. 2012).

pursuant to Paragraph 17(a) of their agreement.<sup>306</sup> The terms of 17(a) in the agreement state:

If Mendenhall commits or is arrested for any crime or becomes involved in any situation or occurrence (collectively, the “Act”) tending to bring Mendenhall into public disrepute, contempt, scandal, or ridicule, or tending to shock, insult or offend the majority of the consuming public or any protected class or group thereof, then we shall have the right to immediately terminate this Agreement. HBI’s decision on all matters arising under this Section 17(a) shall be conclusive.<sup>307</sup>

The court found that a dispute of fact exists between the parties and allowed the case to move forward.<sup>308</sup> The parties eventually settled.<sup>309</sup>

In light of both the positive and negative outcomes associated with choosing to engage in activism, athletes should be both “cautious and deliberate” in their efforts.<sup>310</sup> This includes being strategic about the best medium and method for taking a stance on social issues. Social media has provided athletes with a global platform to disseminate their social and political perspectives.<sup>311</sup> Athletes are able to openly converse about numerous topics with fans. However, if the fans disagree with the athlete’s viewpoint, these discussions can have negative consequences for the athlete, namely backlash and intolerance for the athlete’s point of view.<sup>312</sup> Therefore, be it a social media post, a comment at a news conference, or wearing a t-shirt, the athlete needs to understand fans will have mixed reactions to his choosing to use his status in support of a cause.

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<sup>306</sup> *Id.* at 721.

<sup>307</sup> *Id.* at 720.

<sup>308</sup> *Id.* at 727–728.

<sup>309</sup> Marc Edelman, *Rashard Mendenhall Settles Lawsuit with Hanesbrands over Morals Clause*, FORBES (Jan. 17, 2013), <https://www.forbes.com/sites/marcedelman/2013/01/17/rashard-mendenhall-settles-lawsuit-with-hanesbrands-over-morals-clause/#4bfa7da52483>.

<sup>310</sup> Coombs & Cassilo, *supra* note 1, at 432.

<sup>311</sup> See Jimmy Sanderson, Evan Frederick & Mike Stocz, *When Athlete Activism Clashes with Group Values: Social Identity Threat Management via Social Media*, 19 MASS COMM. & SOC’Y 301, 305 (2016).

<sup>312</sup> *Id.* at 310.

There are also various types of political or social issue “calls to action” that an athlete may engage in, such as encouraging others to join a particular movement or even a boycott. If an athlete uses his status to encourage others to join a particular movement, he simply may be voicing his concerns to those who are able to promulgate change. The athlete may solicit others to participate in marches, to write letters to government representatives, or to join organizations supporting the cause. The athlete also may choose to take a more financial approach through a boycott. The objective of a boycott is to draw attention to undesirable behavior, and to “punish the firm [or individual] for those misdeeds.”<sup>313</sup> In addition to convincing consumers not to buy certain products or services, the athlete can “induce consumers to buy products or services which [are] consistent with” his activism goals.<sup>314</sup>

Given the copious options of mediums and methods for athlete activism as well as the diverse reactions from fans, an athlete should first consider how important the issue is to him. If the issue is one where the athlete feels being silent is worse than speaking out, choosing to take a stand may be the only avenue to encourage debate and to elicit change. Second, the athlete must contemplate whether his involvement will violate their SPC or an endorsement agreement. Prior to participating in any type of activism, the athlete and the athlete’s representatives should carefully review these contractual agreements for clauses that may trigger a breach of the player’s contractual obligations, e.g, a morals clause. Next, the athlete must weigh both the positive and negative repercussions of his choice to lend their image and voice to a particular cause. If there is negative backlash, the athlete and his team should be prepared to appropriately handle the situation. Last, the athlete needs to determine the best call to action for the political or social issue. For example, wearing a t-shirt rather than a lengthy statement to the media may be the most effective method to bring attention to the issue.

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<sup>313</sup> Monroe Friedman, *A Positive Approach to Organized Consumer Action: The “Buycott” as an Alternative to the Boycott*, 19 J. OF CONSUMER POL’Y 439, 440 (1996).

<sup>314</sup> *Id.*

### VIII. MOVING FORWARD—THE TEAM/LEAGUE PERSPECTIVE

While all four major leagues have had social responsibility programs for several years, the leagues often fall short on providing solutions to the problem of inequality.<sup>315</sup> However, with this spark of athlete activism, both the NFL and NBA have taken stronger stances in the fight against inequality. Specifically, the NFL proposed a partnership with its players to help influence social change.<sup>316</sup> The proposal includes the NFL donating nearly \$100 million over a seven-year period to support causes important to the African-American communities.<sup>317</sup> The money comes directly from the owners and periodic fundraisers.<sup>318</sup> The donation is not tied to a quid pro quo for players to end their protest.<sup>319</sup> Although, that is the league's hope by entering into the agreement.<sup>320</sup>

Likewise, the NBA is not only supporting athlete activism, but encouraging its players to use their platform for social change. The 2018 NBA All-Star Weekend featured various charitable events, in addition, to the two teams playing on behalf of a community organization selected by the team captains, LeBron James and Stephen Curry.<sup>321</sup> The winning team's charity received a \$350,000 donation and the losing team's charity received a \$150,000 donation.<sup>322</sup> Further, Adam Silver and NBA Players Association Executive Director Michele Roberts co-signed a letter supporting athlete activism:

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<sup>315</sup> Jessica Ann Levy, *Good Corporate Citizenship Won't End Racism. The NFL Must do More*, WASHINGTON POST (Oct. 8, 2017), [https://www.washingtonpost.com/news/made-by-history/wp/2017/10/08/good-corporate-citizenship-wont-end-racism-the-nfl-must-do-more/?utm\\_term=.a167582888ce](https://www.washingtonpost.com/news/made-by-history/wp/2017/10/08/good-corporate-citizenship-wont-end-racism-the-nfl-must-do-more/?utm_term=.a167582888ce).

<sup>316</sup> Jim Trotter & Jason Reid, *Players Debating NFL's Proposed Donation to Social Justice Organizations*, ESPN (Nov. 29, 2017), [http://www.espn.com/nfl/story/\\_/id/21606390/nfl-offers-100-million-plan-social-justice-organizations-partnership-players](http://www.espn.com/nfl/story/_/id/21606390/nfl-offers-100-million-plan-social-justice-organizations-partnership-players).

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> 2018 NBA All-Star Game Teams will Donate Money to Two Community-based Organizations Selected by Team LeBron and Team Stephen, NBA.COM (Jan. 31, 2018), <http://www.nba.com/article/2018/01/31/all-star-game-teams-charitable-donation-official-release>.

<sup>322</sup> *Id.*

None of us operates in a vacuum. Critical issues that affect our society also impact you directly. Fortunately, you are not only the world's greatest basketball players—you have real power to make a difference in the world, and we want you [to] know that the Players Association and the League are always available to help you figure out the most meaningful way to make that difference.<sup>323</sup>

Executive Director of the NBPA Foundation, Sherrie Deans, has worked with several teams and individual players on how to contribute to social change.<sup>324</sup> The Memphis Grizzlies hosted an event to discuss the issues at intersection of race and sports and the Milwaukee Bucks are partnering with the Milwaukee Police Department to create a midnight basketball league for young adults ages 18-25.<sup>325</sup> The NBA is committed to supporting its players in their journey to fight social injustice.<sup>326</sup>

## CONCLUSION

Despite some fan backlash, athlete activism is steadily growing and gaining momentum as it secures the support of the professional leagues. While constitutional protections may not be applicable to athlete protest given the private nature of professional sports, it appears that does not matter. At least not yet. Both the NFL and NBA have shown support for their players' initiatives and are finding ways to improve race relations and fight social injustice. However, league CBAs and SPCs provide mechanisms through which athletes may be punished for their activism. Additionally, morals clauses in endorsement deals can restrain an athlete's ability to participate in protest. Athletes may lose such deals based on activist statements or actions that run afoul of the endorser. Nonetheless, today's athletes are not afraid

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<sup>323</sup> Kristian Winfield, *The NBA is Encouraging Player Activism While the NFL is Struggling with Protest*, SBINATION (Sept. 7, 2017), <https://www.sbnation.com/2017/9/7/16270418/adam-silver-michele-roberts-letter-players-social-activism-nfl-colin-kaepernick>.

<sup>324</sup> Mia Hall, *Bigger Than Basketball: How the NBA is Supporting Social Justice*, NBC (Feb. 16, 2017), <https://www.nbcnews.com/news/nbcblk/bigger-basketball-how-nba-supporting-social-justice-n717901>.

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*



to speak up; in the words of Martin Luther King, Jr. “there comes a time when silence is betrayal.”

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