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Will the Players Union Take an L or Take a Knee?: The First Amendment Legal Issues Surrounding the NFL National Anthem Controversy

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WILL THE PLAYERS UNION TAKE AN L OR TAKE A KNEE?: THE FIRST AMENDMENT LEGAL ISSUES SURROUNDING THE NFL NATIONAL ANTHEM CONTROVERSY

Audriana Rodriguez *

ABSTRACT

This Article analyzes the First Amendment issues present in the NFL National Anthem controversy. Part I introduces the state action doctrine and analyzes the various tests courts use to make a finding of state action within private organizations. Then, these tests are applied to the NFL through observing the roles of the United States military and the President and how their direct involvement may have created the appearance of state action within a private organization. Part II further builds on the state action claim, examining the role of employee compelled speech in a private organization following state action. Finally, Part III concludes with how these legal issues will affect the next round of collective bargaining in 2021.

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I. INTRODUCTION

During the San Francisco 49er's final pre-season game in 2016, quarterback Colin Kaepernick decided to kneel during the NFL's National Anthem ceremony.¹ While the rest of his teammates remained standing during the ceremony, Kaepernick and one other player, Eric Reid, kneeled to protest the police brutality against ethnic minorities within the United States.² Kaepernick's decision to kneel during the National Anthem soon caught attention by other players in the NFL, and they too began to kneel. This phenomenon sparked an enormous controversy over the players' right to protest and respect towards the flag and the United States. While the NFL's Collective Bargaining Agreement makes no mention of the National Anthem, the NFL's Operations Manual *encourages* players to stand during the National Anthem ceremony.³ This made it questionable as to whether the NFL could legally restrict the players' right to protest. Given the NFL's status as a private organization, it seems as though the NFL was legally permitted to require that all its players refrain from kneeling and to require them to stand. However, in this paper, I will argue that due to the NFL's ongoing relationship with the government and other public institutions, the NFL might be hovering over the edge of state actor status, therefore placing it within the sphere of public functions subject to the First and Fourteenth Amendments. These legal issues will certainly be at the very forefront of discussions as we approach negotiations for the new 2021 Collective Bargaining Agreement.

A. *The State Action Doctrine and Why It Matters*

Under Section 1983 of the US Code, any person who acts on behalf of the government or "under color of any statute, ordinance, regulation, custom or usage," and deprives a citizen of the US of their rights or privileges protected by the US Constitution is liable to the injured party in the form of a civil action.⁴ According to Section 1983, in order for the players' union to

¹ ESPN News Servs., *Colin Kaepernick Protests Anthem over Treatment of Minorities*, THE UNDEFEATED (Aug. 27, 2016), <http://theundefeated.com/features/colin-kaepernick-protests-anthem-over-treatment-of-minorities/>.

² *Id.*

³ Alex Fitzpatrick, *Does the NFL Require Players to Stand for the National Anthem?*, TIME (Sept. 25, 2017), <http://time.com/4955704/nfl-league-rulebook-a62-63-national-anthem-rume/>.

⁴ 42 U.S.C. § 1983 (2018).

resort to any legal remedy against the NFL for infringement of their freedom of speech, the players must first assert that the NFL is a state actor or that it is acting “under the color of state law”⁵ in depriving the players of their First Amendment rights protected by the US Constitution. This is essential to the players’ claim, because only public institutions are subject to the regulations of the Constitution, as the Fourteenth Amendment has been held to apply to state action only. As a result, private actors do not face the same scrutiny in regard to a constitutional violation. While they may still face repercussions for their actions, they cannot be held liable for violating the US Constitution.

B. Private Actors and the State Action Doctrine

This situation prompts a very interesting question: Are private actors permitted to freely violate the US Constitution? The answer to this question is: not necessarily, depending on the circumstances. The Supreme Court has been extremely hesitant to impose the US Constitution upon private actors; however, in situations where the private actor acts “under the color of state law,” it would most certainly be subject to Section 1983 and the US Constitution.⁶ In one of the most articulate court opinions ever written, Justice Jackson in *West Virginia State Board of Education v. Barnette* stated, “none who acts under color of law is beyond reach of the Constitution.”⁷ The Supreme Court, almost forty years later, seemed to build upon this statement in *Rendell-Baker v. Kohn* when it stated, “the acts of a private party are fairly attributable to the state on certain occasions when the private party acted in concert with state actors.”⁸ This seems to suggest that there are certain situations where a private actor may be subject to the restraints of the Constitution.

Barnette highlighted the significance of protecting the rights and privileges guaranteed to US citizens by the US Constitution, and it involved the Board of Education in West Virginia, which adopted a resolution requiring students in public school to stand during the Pledge of Allegiance.⁹ When Jehovah’s Witness students chose not to stand during the Pledge due to their religious beliefs, the Board expelled these students, and the parents of the students sued the Board for violating the students’ First Amendment rights.¹⁰ The Supreme Court held that it was unconstitutional for the Board

⁵ *Id.*

⁶ *Id.*

⁷ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

⁸ *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 n.6 (1982).

⁹ *Barnette*, 319 U.S. at 625–27.

¹⁰ *Id.* at 629.

to violate the students' rights guaranteed to them by the US Constitution.¹¹ In the most famous line of the opinion, Justice Jackson eloquently wrote, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."¹² With this statement, the Court hoped to drive home the importance of protecting the very rights and privileges this nation was built to protect.

The Supreme Court must meet a very high threshold to find that a private entity is acting under the color of law and subject it to constitutional liability.¹³ Nevertheless, the Court has considered several, yet rare, occurrences where a private actor is held to be acting under the color of state law and therefore liable under the US Constitution. The case of *Lugar v. Edmondson Oil Co.* lays out a two-step test for when a defendant is subject to Section 1983 liability.¹⁴ "First, the deprivation [of a federal right] must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible," and "[s]econd, the party charged with the deprivation must be a person who may fairly be said to be a state actor."¹⁵ The second part of the test has given courts a difficult time, because there is no clear line as to when a private actor becomes a state actor. The following factors have been adopted to attempt to answer this question and give the courts some guidance in determining whether a private actor should be held to the status of a state actor. Specifically, these factors are aimed towards preventing private organizations that maintain a "joint participation" with the government from depriving an individual of his rights and privileges secured by the US Constitution.¹⁶

1. Traditional and Exclusive Public Functions

A private entity may be held to be acting under the color of law when it undertakes a function that is "traditionally the exclusive prerogative of the state."¹⁷ This test is extremely narrow, as the private organization must be performing a function that only the government traditionally performs, such

¹¹ *Id.* at 645.

¹² *Id.* at 642.

¹³ HOWARD M. WASSERMAN, UNDERSTANDING CIVIL RIGHTS LITIGATION 26–27 (2d ed. 2018).

¹⁴ *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

¹⁵ *Id.*

¹⁶ *See* WASSERMAN, *supra* note 13, at 26.

¹⁷ *Rendell-Baker v. Kohn*, 457 U.S. 830, 849 (1982).

as running general and primary elections,¹⁸ or providing services for a private, company town.¹⁹ The Court in *Marsh v. Alabama* held that even though the town was funded and operated through a private company, the company did not have the authority to impose criminal punishment on a resident for distributing religious literature throughout the town.²⁰ The Court did not hesitate to find that the company had violated the resident's First and Fourteenth Amendment rights despite its status as a private entity.²¹

In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a state statute.²²

This case presents a clear example of when the Court must attempt to balance the rights and liberties of citizens with the rights of a private entity. The Fourth Circuit has also held a private actor to be acting "under the color of state law" when it has assumed the traditional and exclusive public function of operating a fire department.²³ The Fourth Circuit, relying on previous case law and the plaintiff's expert testimony, ruled that firefighting services had been the traditional and exclusive function of the state of Maryland.²⁴ The court made clear that this finding was a fact-specific inquiry regarding only Maryland's state functions, and it did not rule on whether firefighting services in the abstract were considered traditional and exclusive functions of the state.²⁵ Finally, the state can delegate its exclusive and traditional functions to private entities, which then places the private entity "under the color of state law."²⁶ This was the case in *Fabrikant v. French*, where the Second Circuit held that the private Society for Prevention of Cruelty to Animals (SPCA) was acting under the delegated authority of New York to seize and sterilize dogs.²⁷ Thus, the SPCA was acting as a state actor

¹⁸ *Terry v. Adams*, 345 U.S. 461, 462–63 (1953).

¹⁹ *Marsh v. Alabama*, 326 U.S. 501, 502 (1946).

²⁰ *Id.* at 509.

²¹ *Id.* at 508–09.

²² *Id.* at 509.

²³ *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 345 (4th Cir. 2000).

²⁴ *Id.* at 344–45.

²⁵ *Id.* at 344.

²⁶ *Fabrikant v. French*, 691 F.3d 193, 210 (2d Cir. 2012).

²⁷ *Id.* at 210–11.

because it was “clothed with the authority of state law.”²⁸ Instances where courts have not found a private organization to be performing exclusive and traditional government functions include managing hospitals and healthcare facilities,²⁹ operating educational facilities,³⁰ and regulating interscholastic athletics.³¹ As a result, only very few functions have been held to be exclusive and traditional government functions.

2. Symbiotic Relationship

The symbiotic relationship test has been the broadest and most controversial application in which the Supreme Court has found a private entity to be acting under the color of law.³² This test derives from the case of *Burton v. Wilmington Parking Authority*.³³ In *Burton*, a private restaurant had leased space in a public parking garage where it operated on a twenty-year lease.³⁴ The restaurant refused to serve an African American customer, violating equal protection.³⁵ The restaurant argued that because it was a private entity, it was not subject to the United States Constitution; however, the Court did not accept this argument as a compelling one.³⁶ The Court instead noted the “peculiar relationship” between the restaurant and the parking garage in the variety of mutual benefits both retained.³⁷ The restaurant had easily available access for its customers to park, and the parking garage benefited from the lease payments made by the restaurant.³⁸ Further, the restaurant did not want to serve African Americans because it made more money catering to whites only, and because the public parking garage received the restaurant’s money, it was indirectly benefiting from the private discrimination against African Americans.³⁹ This joint relationship was enough, in the Court’s perspective, to place the private restaurant under the color of law, and therefore subject to the US Constitution.⁴⁰ It is unclear

²⁸ *Id.*

²⁹ *McGugan v. Aldana-Bernier*, 752 F.3d 224, 230–31 (2d Cir. 2014).

³⁰ *Rendell-Baker v. Kohn*, 457 U.S. 830, 842–43 (1982).

³¹ *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 309 (2001).

³² See WASSERMAN, *supra* note 13, at 29.

³³ *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 726 (1961).

³⁴ *Id.* at 719.

³⁵ *Id.* at 720.

³⁶ *Id.* at 723–25.

³⁷ *Id.* at 724.

³⁸ *Id.*

³⁹ See WASSERMAN, *supra* note 13, at 29.

⁴⁰ *Burton*, 365 U.S. at 726.

how persuasive the symbiotic relationship test is, as the Court has only relied on it in *Burton* and not in any later cases dealing with private entities and state action.⁴¹

However, the Third Circuit has found a symbiotic relationship between the state and two private universities when the state legislature specifically referred to the universities as “an instrumentality of the Commonwealth to serve as a State-related institution in the Commonwealth System of higher education” in a state statute.⁴² While the court discussed the financial relationship between the universities and the state, it held that this alone was not enough to find a symbiotic relationship present.⁴³ There must be more than just a financial relationship in existence. The Third Circuit also focused on the statute’s further specifications that the State was to make annual appropriations to the universities, to be used according to the state’s determination and that the funds must be kept in a certain account.⁴⁴ The statute creates a tax exemption for the universities, allows for the State to choose one-third of the universities’ trustees, and requires the universities to file annual reports of university activities.⁴⁵ As a result, the private universities had an interdependent, symbiotic relationship with the state.⁴⁶ In addition, the New York Southern District applied the symbiotic relationship test to find state action present between the MLB and the state of New York for purposes of striking down an MLB rule prohibiting female reporters from entering the Stadium clubhouses.⁴⁷ The court focused on the similarities between this case and *Burton*, highlighting the fact that the city of New York and the Yankees shared a mutually beneficial relationship.⁴⁸ The court relied on a five prong test to make its finding of state action. The test examines:

- (1) the private entity’s degree of dependence on governmental aid; (2) the extent and intrusiveness of governmental regulation involved; (3) whether or not aid is given to all similar institutions or is suggestive of government’s approval of the activity challenged in the particular case; (4) whether or not the institution under attack performs a public function; and (5) the legitimacy of the

⁴¹ See WASSERMAN, *supra* note 13, at 30.

⁴² *Krynicky v. Univ. of Pittsburgh*, 742 F.2d 94, 102 (3d Cir. 1984).

⁴³ *Id.* at 101.

⁴⁴ *Id.* at 102.

⁴⁵ *Id.*

⁴⁶ *Id.* at 103.

⁴⁷ *Ludtke v. Kuhn*, 461 F.Supp. 86, 96 (S.D.N.Y. 1978).

⁴⁸ *Id.* at 93.

organization's claim to be regarded as private in character, in associational or constitutional terms.⁴⁹

The court noted that this was a guiding principle, and the absence of one prong did not automatically render state action inapplicable.⁵⁰ The Yankees are financially dependent on the City and its publicly funded stadium, while the City benefits economically from the sale of tickets and fans attending games.⁵¹ Moreover, the City retains power to regulate the team's operations, including ticket prices and stadium rules.⁵² For the fifth prong, the appellate court balanced the interests of the private entity remaining private against the harm to the public from the alleged offensive conduct.⁵³ Because the claim here was sex discrimination, the fifth prong was clearly met, and the court made a finding of state action.⁵⁴

3. Close Nexus

Another test courts can apply to find a private actor acting under the color of law is to look for a close nexus between the private entity's actions and the government.⁵⁵ The finding of a close nexus is also very limited, as the government must be the driving force behind the private entity's actions.⁵⁶ The Ninth Circuit held that a close nexus was present in *Chudacoff v. University Medical Center*, when private physicians were performing their duties as part of a state-mandated medical program.⁵⁷ There is "such a close nexus between the State and the challenged action that the individual's conduct may be fairly treated as that of the State itself."⁵⁸ Despite the fact that the doctors were privately employed, the University Medical Center received its authority to regulate the physicians through state law, and therefore, the physicians' actions constituted state action.⁵⁹ Further, a close nexus exists where the state "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must

⁴⁹ *Id.* at 95.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 96.

⁵⁵ See WASSERMAN, *supra* note 13, at 30.

⁵⁶ *Id.*

⁵⁷ *Chudacoff v. Univ. Med. Ctr.*, 649 F.3d 1143, 1152 (9th Cir. 2011).

⁵⁸ *Id.* at 1150 (quoting *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295–96 (2001)).

⁵⁹ *Id.*

in law be deemed to be that of the State.”⁶⁰ The Second Circuit applied this principle in *United States v. Stein*, where it held that an accounting firm’s enforcement of a policy that stopped advancing legal fees to defendants was the result of the state’s significant encouragement, and therefore amounted to state action.⁶¹ The court reasoned that because the state gave off the impression that the accounting firm’s survival depended on its compliance with the government, the accounting firm was forced to adopt the state’s fees policy.⁶² The accounting firm had no choice except to comply with the government’s memorandum to cooperate with the fee policy, and the government further reinforced compliance through its emphasis that misconduct could not be rewarded under the federal guidelines.⁶³ Because the fee policy was the subject of the complaint, the state must be liable for its effects.⁶⁴

The Supreme Court has only applied the close nexus test in one case—*Moose Lodge No. 107 v. Irvis*.⁶⁵ The plaintiff in *Moose Lodge* sued a private club under Section 1983 for denying him service based on racial discrimination.⁶⁶ The club claimed that it was a private entity and not subject to Section 1983; however, the Court held that because the state liquor board issued the club a license that permitted it to sell alcohol, the club was a state actor for purposes of Section 1983.⁶⁷ The Court noted, “the impetus for the forbidden discrimination need not originate with the State if it is state action that enforces privately originated discrimination.”⁶⁸ The ideology behind the close nexus theory is that if the government delegates authority to a private entity and the private entity practices unconstitutional regulations, the government then becomes a supporter of the harmful, private conduct.⁶⁹ As a result, the close nexus theory claims that the private organization’s acts become public functions, which subjects the private organization to constitutional regulation.⁷⁰

⁶⁰ *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

⁶¹ *United States v. Stein*, 541 F.3d 130, 136 (2d Cir. 2008).

⁶² *Id.* at 148.

⁶³ *Id.*

⁶⁴ *Id.* at 147.

⁶⁵ *See* WASSERMAN, *supra* note 13, at 31.

⁶⁶ *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 165 (1972).

⁶⁷ *Id.*

⁶⁸ *Id.* at 172.

⁶⁹ *See* WASSERMAN, *supra* note 13, at 31.

⁷⁰ *Id.*

4. Entwinement

The Supreme Court's last and most recent finding of a private entity acting under the color of state law was in 2001 in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*.⁷¹ In this case, the Tennessee Secondary School Athletic Association (TSSAA), a not-for-profit corporation, regulated sports programs between private and public high schools within the state of Tennessee.⁷² When the TSSAA concluded that Brentwood Academy had violated a recruiting rule through undue influence in recruiting athletes, the TSSAA responded by putting Brentwood's athletic program on probation for four years, prohibiting the football and basketball teams from competing for two years, and imposing a \$3,000 fine.⁷³ Brentwood filed suit against the TSSAA under Section 1983, claiming that the TSSAA was a state actor and subject to the First and Fourteenth Amendments.⁷⁴ While the TSSAA's initial structure declared it as the official regulator of interscholastic athletics, along with the Board of Education who reviewed and approved the TSSAA's actions, this title was removed in 1996, but the TSSAA still played a regulatory function.⁷⁵ However, because of this rule change in 1996, it made the Court's decision of finding a close nexus between the TSSAA and the state too difficult to draw.⁷⁶ Because the TSSAA had only changed its title but continued to do the same work, the Court found that there was still active state involvement.⁷⁷ Instead, the Court stated that the "nominally private character of the Association is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings" and therefore, the TSSAA was subject to Section 1983.⁷⁸ The Court in essence established an entwinement test for determining when private entities are acting under the color of law. Entwinement is a very similar concept to close nexus, but the crux of entwinement lies in the government's relationship with the private organization, whereas close nexus analyzes the government's relationship to the private organization's *conduct* rather than the organization itself.⁷⁹

⁷¹ *Id.* at 32.

⁷² *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 291 (2001).

⁷³ *Id.* at 293.

⁷⁴ *Id.*

⁷⁵ *Id.* at 301.

⁷⁶ See WASSERMAN, *supra* note 13, at 32.

⁷⁷ *Brentwood Acad.*, 531 U.S. at 301.

⁷⁸ *Id.* at 298.

⁷⁹ See WASSERMAN, *supra* note 13, at 33.

Because entwinement is a relatively recent test, not many cases have relied on it. However, the Middle District of Tennessee relied on this doctrine to find that a private bus company (DTO) that supplied drivers to a public transport service (MTA) had created an appearance of entwinement.⁸⁰ In the past, MTA had selected the employees for its own system.⁸¹ However, once MTA delegated the power to appoint employees to DTO, DTO was “endowed by the State with powers . . . governmental in nature.”⁸² Moreover, the plaintiff also alleged that certain individuals who managed and controlled DTO were public officials who also served on MTA’s board of directors.⁸³ As a result, the plaintiff alleged enough evidence to dispute issues of fact as to whether DTO and MTA are sufficiently entwined for purposes of liability.⁸⁴

Overall, the Supreme Court has been very cautious in applying any of these tests to a case dealing with private organizations and constitutional restraints. Because of the complexity in balancing an individual’s constitutional rights with the reach of federal laws, these tests are not likely to be the Court’s first line of defense when it comes to finding the NFL liable under Section 1983 and the First Amendment. Nevertheless, there is an argument to be made that the NFL is acting under the color of state law, placing it within the sphere of constitutional limitations.

C. *Is the NFL Acting Under the Color of State Law?*

The National Football League (NFL) is a private, professional football organization founded in the United States and is made up of thirty-two teams.⁸⁵ The NFL is divided into two divisions—the National Football Conference (NFC) and the American Football Conference (AFC).⁸⁶ Because the organization is private in nature, it is not subject to many of the constitutional limitations that are placed on public institutions. However, the NFL does engage in business with several public entities. The question now becomes: Exactly how much of the NFL’s business is conducted with the federal or state governments? Is this enough to hold the NFL as acting under

⁸⁰ Thompson v. Davidson Transit Org., 563 F. Supp. 2d 820, 828 (M.D. Tenn. 2008).

⁸¹ *Id.* at 827.

⁸² *Id.*

⁸³ *Id.* at 827–28.

⁸⁴ *Id.* at 828.

⁸⁵ *National Football League*, ENCYCLOPÆDIA BRITANNICA (2020), <https://www.britannica.com/topic/National-Football-League>.

⁸⁶ *Id.*

the color of law? To answer these questions, we first look to the NFL's relationships with the federal government and state governments.

1. The NFL's Relationship with the U.S. Military

The most important and relevant relationship that the NFL currently has with a government entity is its contract with the United States military. The main argument here is that the NFL could be acting under the color of state law from its long historical relationship with the United States military, culminating into a contract of millions of dollars a year to conduct pre-game ceremonies including flyovers, military returns, and the National Anthem.⁸⁷ This relationship stems back to the 1960s, when the NFL's commissioner, Pete Rozelle, a World War II Navy veteran, paved the way for the support of NFL patriotism.⁸⁸ Rozelle essentially took the NFL's platform and combined it with the military's sense of nationalism.⁸⁹ The 1968 Super Bowl featured the first military flyover, and this sparked the NFL's relationship with the Department of Defense.⁹⁰ The NFL pounced on this newly formed relationship and began sending players on United Service Organization tours abroad as a sign of appreciation to the military men and women.⁹¹ The 1980s and 1990s brought closer ties between the NFL and United States military; so much so, that commissioner Paul Tagliabue in 1991 said, "We've become the winter version of the Fourth of July celebration."⁹² If this was not enough to show the close bond between the two entities, the tragic events on September 11, 2001, further strengthened this inseparable bond between the NFL and United States military.⁹³ The NFL began engaging in more charity work for the United States military through raising money for veteran programs, conducting military tributes, and displaying camouflage uniforms during games.⁹⁴ However, throughout the years, the players were never required to participate in any of these ceremonies or even stand on the field

⁸⁷ Melanie Schmitz, *How the NFL Sold Patriotism to the US Military for Millions*, THINKPROGRESS (Sept. 25, 2017, 2:19 PM), <https://thinkprogress.org/nfl-dod-national-anthem-6f682cebc7cd/>.

⁸⁸ Adam Kilgore, *For Decades, the NFL Wrapped Itself in the Flag. Now, That's Made Business Uneasy*, WASH. POST (Sept. 6, 2018, 11:23 AM), https://www.washingtonpost.com/sports/for-decades-the-nfl-wrapped-itself-in-the-flag-now-thats-made-business-uneasy/2018/09/06/bc9aab64-b05d-11e8-9a6a-565d92a3585d_story.html?utm_term=.d07e6dd217bb.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

during the National Anthem; they sat in the locker rooms instead.⁹⁵ The players began to take the field in 2009 when the NFL signed a formal contract with the United States Department of Defense in which the NFL would exhibit signs of patriotism in exchange for millions of dollars from the Department of Defense.⁹⁶ This tactic was seen as a marketing strategy for the United States military, whose goal was to appeal to a wider audience in order to recruit more enlistees.⁹⁷ From 2011 to 2014, the Department of Defense paid the NFL \$5.4 million to conduct patriotic ceremonies for recruiting measures.⁹⁸ In addition, from 2013 to 2015 the National Guard also paid the NFL \$6.7 million for similar ceremonies.⁹⁹ Is this long-standing relationship enough to show the federal government's active involvement with the NFL, a private organization, for purposes of establishing state action?

2. President Trump and Vice President Pence's Active Involvement with the NFL

In addition to the NFL's open relationship with the United States military, President Trump has become actively involved in the NFL's National Anthem issue and has spoken out about his disagreement with the players' protest.¹⁰⁰ Some of his comments, many of which are found on Twitter, include actions that the NFL should take in punishing the players for kneeling during the National Anthem. One of President Trump's tweets went as far as to say, "If NFL fans refuse to go to games until players stop disrespecting our Flag & Country, you will see change take place fast. Fire or suspend!"¹⁰¹ President Trump has openly sided with those who believe the players should stand during the National Anthem as a sign of respect for the flag. His comments and posts have suggested that NFL owners should fire or suspend players if they kneel during the anthem.¹⁰² President Trump also

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ See Brooke Singman, *How Trump Pushed NFL into New Anthem Rule: 'This One Lifts me'*, N.Y. POST (May 30, 2018, 5:20 PM), <https://nypost.com/2018/05/30/how-trump-pushed-nfl-into-new-anthem-rule-this-one-lifts-me/>.

¹⁰¹ Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 24, 2017, 3:44 AM), <https://twitter.com/realdonaldtrump/status/911904261553950720?lang=en>.

¹⁰² *Id.*; see also Donald J. Trump (@realDonaldTrump), TWITTER (SEPT. 23, 2017, 11:11 AM), <https://twitter.com/realdonaldtrump/status/911654184918880260?lang=en> ("If a player wants the privilege of making millions of dollars in the NFL, or other leagues, he or she should not be allowed to

expressed his views over this issue at a rally held in Alabama.¹⁰³ He posed this jarring question to the audience: “Wouldn’t you love to see one of these NFL owners when somebody disrespects our flag to say get that son of a bitch off the field right now, out, he’s fired, he’s fired.”¹⁰⁴ These comments present an interesting situation amongst all the controversy because, on the one hand, the President may be giving his own opinion on the issue, which he is permitted to do. However, on the other hand, he is speaking to the entire nation when he addresses this issue in his presidential capacity. Another example takes a step further beyond his mere opinion on the issue and instead calls for specific action. President Trump tweeted, “I asked @VP Pence to leave stadium if any players kneeled, disrespecting our country. I am proud of him and @SecondLady Karen.”¹⁰⁵ This tweet came after many people criticized and praised Vice President Pence after he and his wife left an Indianapolis Colts game where several players decided to kneel during the National Anthem.¹⁰⁶ While the previous examples seemed to express an opinion, this was more. President Trump explicitly asked that Vice President Pence leave if the players kneeled; this was a direct request made in his capacity as President. Actions and words made by the President of the United States certainly constitute that of a state actor, and because they are made in an official capacity, President Trump is slowly injecting his power and authority of a public office into a private organization. If requesting Vice President Pence might not be enough to implicate state action, maybe the President’s threats to use federal tax law against the NFL if the players kneel meets this threshold.¹⁰⁷ President Trump’s statements and comments about the NFL National Anthem issue have added to the chaotic mess of public versus private for purposes of First Amendment violations. If the President and Vice President’s involvement in the NFL National Anthem issue are enough to make a finding of state action, what would the claim of state action

disrespect . . . our Great American Flag (or Country) and should stand for the National Anthem. If not, YOU’RE FIRED. Find something else to do!”).

¹⁰³ Ian Schwartz, *Trump: NFL Owners Should Fire the “Son Of A Bitch” Player Who “Disrespects Our Flag” by Kneeling*, REALCLEARPOLITICS (Sept. 23, 2017), https://www.realclearpolitics.com/video/2017/09/23/trump_nfl_owners_should_fire_the_son_of_a_bitch_player_who_disrespects_our_flag_by_kneeling.html.

¹⁰⁴ *Id.*

¹⁰⁵ Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 8, 2017, 11:16 AM), <https://twitter.com/realdonaldtrump/status/917091286607433728?lang=en>.

¹⁰⁶ Kevin Seifert, *Mike Pence Leaves 49ers-Colts Game over Protesting During National Anthem*, ESPN (Oct. 9, 2017), http://www.espn.com/nfl/story/_/id/20955550/mike-pence-leaves-san-francisco-49ers-indianapolis-colts-game-protesting-national-anthem.

¹⁰⁷ Peter Baker & Ken Belson, *Trump Threatens N.F.L. and Attacks Jemele Hill of ESPN*, N.Y. TIMES (Oct. 10, 2017), <https://www.nytimes.com/2017/10/10/us/politics/trump-nfl-jemele-hill.html>.

look like? Would all of the tests lead to a conclusion of state action for the NFL?

D. The NFL and Joint-Participation

Of the four tests previously discussed and used by courts to find a private actor liable under the United States Constitution, the most compelling one to apply to the NFL is the symbiotic relationship test. Because the symbiotic relationship has been the Court's broadest application of holding a private actor as engaging in state action, this likely would be the best opportunity to subject the NFL to the restrictions of the First Amendment and the Constitution.¹⁰⁸ Similar to the public parking garage and private restaurant in *Burton*, the NFL maintains a "peculiar relationship" with the United States military where both entities benefit.¹⁰⁹ The NFL helps advertise the United States military by conducting all of its pre-game ceremonies including flyovers, tributes, and the National Anthem. The United States military in turn pays the NFL millions of dollars for these signs of patriotism. In addition, just as the public garage in *Burton* indirectly benefited from the restaurant's refusal to serve African-Americans, the United States military also benefits from the NFL in its refusal to permit its players to protest during the National Anthem.¹¹⁰

A more compelling argument for a symbiotic relationship between the NFL and United States government lies in the Southern District of New York's analysis in *Ludtke*.¹¹¹ Using the court's five-prong test to determine state action, the NFL meets several of the five factors. First, the NFL depends on the government for financial support, through its contracts with the United States military and through public funding for numerous stadiums. The NFL's contract with the military brings it millions of dollars a year. Second, the government is involved with the NFL's functions, dictating how patriotic advertising must be carried out (flyovers, National Anthem ceremony, etc.), when it is to be conducted, and what to cover in the advertising. Third, financial aid appears to be provided to similar institutions, like the NBA and MLB;¹¹² however, this does not prevent a showing of state action. Fourth, the

¹⁰⁸ See WASSERMAN, *supra* note 13, at 29.

¹⁰⁹ *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 724 (1961).

¹¹⁰ See WASSERMAN, *supra* note 13, at 29.

¹¹¹ *Ludtke v. Kuhn*, 461 F.Supp. 86, 95 (S.D.N.Y. 1978).

¹¹² See Dave Hogg, *The Military Paid Pro Sports Teams \$10.4 Million for Patriotic Displays, Troop Tributes*, SBNATION (Nov. 4, 2015, 4:11 PM), <https://www.sbnation.com/2015/11/4/9670302/nfl-paid-patriotism-troops-mcain-flake-report-million> (noting that the NBA's Atlanta Hawks team received

NFL performs public functions in hosting football games, which are open to the public to attend. Lastly, the legitimacy of the NFL's claim to being private must be weighed against the potential harm to the public in offensive conduct.¹¹³ In this case, the courts should certainly focus on this last prong. The potential harm to the public in not permitting the players to advocate social justice matters is very high. The players occupy special positions in society due to their status that allows them to use their platform for change. In suppressing their voices on matters that are currently affecting our communities, the NFL is essentially depriving the players of using their fame for good. While the protesting may be controversial to some, it is nevertheless an expression of speech that should be permissible in any setting. The gravity of these issues far outweighs the financial concerns that the NFL may have in not allowing this behavior.

Moreover, the Third Circuit's application of a symbiotic relationship in *Krynicky* may lend some guidance for a claim of state action regarding the NFL. While the financial relationship between the government and NFL is present as evidenced through the NFL's contract with the military, this alone would not be sufficient to make a finding of a symbiotic relationship.¹¹⁴ The players' union must go beyond this and prove that the NFL shares an interdependent relationship with the state, a relationship where the state is said to be acting as a joint participant in the NFL's endeavors.¹¹⁵ In order to do this, we would need to know the contents of the contract between the military and the NFL. Does the contract specify that the NFL must allocate the funds in a certain way, like the government required the private universities to do in *Krynicky*?¹¹⁶ Does the military require that the NFL place the funds in a certain account, like the state specified in *Krynicky*?¹¹⁷ Does the military's contract with the NFL stipulate that the NFL shall file annual reports of its military activities, similar to the state's annual reporting requirement in *Krynicky*?¹¹⁸ One important criterion is that the NFL does enjoy certain tax exemptions from the government, similar to the private universities in *Krynicky*.¹¹⁹ Answers to all these questions are important because they have the potential to elevate the NFL's casual relationship with

\$230,000 from the U.S. military, while the MLB's Los Angeles Angels received \$450,000 from the military to sponsor patriotic tributes during games).

¹¹³ See *Ludtke*, 461 F. Supp. at 96.

¹¹⁴ See *Krynicky v. Univ. of Pittsburgh*, 742 F.2d 94, 101 (3d Cir. 1984).

¹¹⁵ See *Burton*, 365 U.S. at 725.

¹¹⁶ See *Krynicky*, 742 F.2d at 102.

¹¹⁷ See *id.*

¹¹⁸ See *id.*

¹¹⁹ See *id.*

the military to a heightened relationship, which could place the NFL in a position of constitutional liability.

The other methods for finding state action within a private organization do not seem applicable to the unique scenario confronting the NFL. Under the narrowly-applied traditional and exclusive public functions test, the players' union would have to prove two things: (1) that promoting the military is a traditional and exclusive function of the state, and (2) that the state delegated this exclusive function to a private entity, the NFL.¹²⁰ The first element would be very difficult to prove because the military is promoted through many different media outlets, including television, radio, movies, and music; for example, there are online military newspapers that advertise the military,¹²¹ and there are even online military memberships that help promote the military and advertise on their behalf in order to find jobs for veterans.¹²² The online military newspaper also states at the bottom of the home page that it is not a United States government publication.¹²³ Further, to make the argument that the government delegated this traditional and exclusive function to the NFL is also a difficult scenario to present because the government only has a financial relationship with the NFL. And as has been stated, a financial relationship alone is not enough to prove state action.¹²⁴ The NFL would have to be performing specific functions that the government traditionally performs, such as running elections or operating a company town.¹²⁵ In advertising the United States military, the NFL is not performing a traditional and exclusive state function. This also presents a distinguishable case from *Fabrikant* because in that case, the SPCA was acting under the delegated authority of New York when it took on the task of sterilizing dogs.¹²⁶ Here, it cannot be said that the government effectively "clothed the NFL with the authority of state law,"¹²⁷ when all the government did was provide compensation in exchange for patriotism; the government makes these deals with numerous other organizations.

In regard to close nexus theory, this, too, likely would fail because the government is not affirmatively delegating any authority to the NFL through

¹²⁰ See *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 345 (4th Cir. 2000).

¹²¹ MILITARYTIMES, <https://www.militarytimes.com/> (last visited Feb. 21, 2020).

¹²² See *Reach the Large but Elusive Military Market—Efficiently*, MILITARY.COM, <https://www.military.com/about-us/advertising-and-sales> (last visited Apr. 4, 2019).

¹²³ MILITARYTIMES, <https://www.militarytimes.com/> (last visited Feb. 21, 2020) ("Not A U.S. Government Publication").

¹²⁴ *Krynicky v. Univ. of Pittsburgh*, 742 F.2d 94, 101 (3d Cir. 1984).

¹²⁵ See *Rendell-Baker v. Kohn*, 457 U.S. 830, 849 (1982).

¹²⁶ *Fabrikant v. French*, 691 F.3d 193, 210 (2d Cir. 2012).

¹²⁷ See *id.*

their relationship. This is crucial because for a close nexus to exist, the government must be the driving force behind the private organization's acts.¹²⁸ The NFL's case is vastly different from the one presented in *Chucadoff*, where private doctors were performing medical care according to a state-mandated program.¹²⁹ Since the government is not authorizing the NFL to engage in any official capacity, the government is not supporting the NFL's prohibition against players protesting. Nevertheless, a stronger argument for close nexus theory exists when discussing the coercive power and significant encouragement of President Trump. Similar to the Second Circuit's analysis in *Stein*, President Trump has relied on his coercive power to pressure the NFL into punishing the players for protesting on the field. Trump has taken to social media and press events to compel the NFL into taking action against the players if the players choose to kneel during the National Anthem. His comments have included firing or suspending players for kneeling,¹³⁰ threatening to end tax exemptions for the NFL if they take no action on the issue,¹³¹ and requesting Vice President Pence to leave an NFL game where players kneeled during the National Anthem.¹³² These coercive comments might be enough to force the NFL to adopt certain policies against the players. Like the accounting firm in *Stein*, which felt like it had no choice but to adopt the faulty fee policy or go out of business,¹³³ if the NFL believes it has no choice but to cooperate with the government or lose its tax benefits and reputation, this may be enough to make a claim of state action under the close nexus theory.

Lastly, the argument for entwinement remains a rather weak one as well. While the theory of entwinement has been the most recent test developed by the Court, the criteria for it is not particularly prominent in the relationship between the NFL and the United States military and President Trump. Entwinement places the focus on the government's relationship with the private entity itself, not its conduct.¹³⁴ In *Brentwood Academy*, the TSSAA operated and functioned as a public entity in its regulation of interscholastic sports between private and public schools.¹³⁵ While it changed its identity

¹²⁸ See WASSERMAN, *supra* note 13, at 30.

¹²⁹ See *Chudacoff v. Univ. Med. Ctr.*, 649 F.3d 1143, 1152 (9th Cir. 2011).

¹³⁰ Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 24, 2017, 3:44 AM), <https://twitter.com/realdonaldtrump/status/911904261553950720?lang=en>.

¹³¹ Baker & Belson, *supra* note 107.

¹³² Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 8, 2017, 11:16 AM), <https://twitter.com/realdonaldtrump/status/917091286607433728?lang=en>.

¹³³ *United States v. Stein*, 541 F.3d 130, 148 (2d Cir. 2008).

¹³⁴ See WASSERMAN, *supra* note 13, at 33.

¹³⁵ *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 291 (2001).

from a public to private organization, it still maintained the same operations as it previously had engaged in.¹³⁶ The Court applied entwinement to overcome this barrier. However, in the NFL's case, there does not seem to be any similar entity to the TSSAA, which blurs the distinction between private and public and would allow the Court to make a finding of entwinement. Nor does there seem to be a situation such as the one presented in *Thompson*, where a public bus company delegated its power to appoint bus drivers to a private bus company.¹³⁷ Had the United States government been the main entity in charge of promoting the military and then delegated this function to the NFL and other sports organizations, then an argument regarding entwinement might be more plausible. However, once again, the relationship between the NFL and United States government appears to be more of a financial one, and this by itself cannot sustain a finding of state action.

II. EMPLOYEE COMPELLED SPEECH

The First Amendment protects the notion of a “marketplace of ideas,”¹³⁸ where any idea, good or bad, can flow freely without any government infringement. The doctrine of compelled speech “sets out the principle that the government cannot force an individual or group to support certain expression.”¹³⁹ The compelled speech doctrine expands the limitations placed on government because it goes further than restraining the government from prohibiting certain speech; the doctrine additionally states that the government cannot reprimand anyone for choosing *not* to support a particular view.¹⁴⁰

But how does this doctrine play out in an employment context? Do employees receive these same protections? Generally, private employers are free to create restrictions they wish to impose on their employees. Because the First Amendment is a safeguard against government intrusion, private employers are typically shielded from its reach. However, employees of the public sector have more narrowed rights when it comes to free speech because their employer is the government.¹⁴¹ While they do have protected rights, these rights are more conscripted. The landmark Supreme Court case

¹³⁶ *Id.* at 301.

¹³⁷ *See Thompson v. Davidson Transit Org.*, 563 F. Supp. 2d 820, 827 (M.D. Tenn. 2008).

¹³⁸ SAMUEL ESTREICHER, MICHAEL C. HARPER & ELIZABETH C. TIPPETT, *CASES AND MATERIALS ON EMPLOYMENT LAW: THE FIELD AS PRACTICED* 267 (5th ed. 2016).

¹³⁹ David L. Hudson, *Compelled Speech*, THE FIRST AMENDMENT ENCYCLOPEDIA, <https://mtsu.edu/first-amendment/article/933/compelled-speech> (last visited Feb. 20, 2020).

¹⁴⁰ *Id.*

¹⁴¹ *See ESTREICHER, HARPER & TIPPETT, supra* note 138, at 268.

outlining compelled speech is *Barnette*, where the Court held that the School Board could not compel Jehovah's Witness students to stand and salute the flag during the Pledge of Allegiance.¹⁴² The Court stated that the children chose not to salute the flag for religious reasons, which is undeniably protected under the First Amendment.¹⁴³ For the School Board to expel these children for exercising their First Amendment rights was a clear violation of Section 1983 and the First and Fourteenth Amendments.¹⁴⁴ In the most quoted phrase of the *Barnette* opinion, Justice Jackson eloquently wrote, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."¹⁴⁵ While *Barnette* established the dangers of compelled speech, it seems heavily applicable to speech in an employment setting. Several cases later have seemed to uphold this belief in the employment context, holding that the government cannot force a public employee to take a loyalty oath as part of the employee's job requirements.¹⁴⁶

A. *Compelled Speech Cases in the Employment Context*

Barnette seemed to lay the groundwork for compelled speech, but the Court did not really apply this doctrine to the employment setting until the 1950s and 1960s.¹⁴⁷ The world encompassing employee speech changed in 1968 with the Supreme Court's opinion in *Pickering v. Board of Education*.¹⁴⁸ This case involved a public-school teacher who was dismissed from his job for criticizing the Board of Education in how it handled proposals for raising revenue within the school district.¹⁴⁹ The teacher sent a letter to a newspaper condemning the way the Board allocated funds among the educational and athletic programs. Once the Board saw the article, it fired the teacher.¹⁵⁰ The teacher sued the Board, claiming a violation of his First Amendment right to free speech, but this was rejected by the lower courts.¹⁵¹

¹⁴² W. Va. State Bd. of Educ. v. *Barnette*, 319 U.S. 624, 642 (1943).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ See *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278 (1961); *Wieman v. Updegraff*, 344 U.S. 183 (1952).

¹⁴⁷ See ESTREICHER, HARPER & TIPPETT, *supra* note 138, at 268.

¹⁴⁸ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 564 (1968).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 565.

On appeal, the Supreme Court focused primarily “on whether a school system requires additional funds is a matter of legitimate public concern,” and it ultimately held that it was.¹⁵² Because the teacher was speaking out about an issue that affected members of the community, it was essential to afford his speech protection.¹⁵³ Further, in recognizing the Board’s interest, the teacher’s letter was written after the proposal had been rejected, so there was no fear that the teacher’s acts would interfere with the Board’s functions.¹⁵⁴ *Pickering* established the groundwork for protecting employee speech by providing a balancing test. The solution is to balance the interests of the teacher, as a citizen, speaking out on matters of public concern, with the State’s interest, as an employer, in promoting the efficiency of its services.¹⁵⁵

The Court further elaborated on the employee speech balancing test in *Connick v. Meyers* in 1983.¹⁵⁶ The plaintiff in *Connick* was an Assistant District Attorney who was terminated for distributing a questionnaire around the office, which caused chaos among the staff.¹⁵⁷ She claimed that her termination violated the First Amendment, so the Court applied the *Pickering* balancing test to determine if so.¹⁵⁸ In analyzing whether the plaintiff’s speech was on a matter of public concern, the Court stated that this must be determined by “the content, form, and context of a given statement.”¹⁵⁹ Based on these criteria, the Court noted that the “manner, time, and place in which the questionnaire was distributed” was also relevant.¹⁶⁰

The last important case to build on the *Pickering* balancing test was *Garcetti v. Ceballos* in 2006.¹⁶¹ In *Garcetti*, the plaintiff was a deputy district attorney who found serious misrepresentations in an affidavit being used to obtain a search warrant.¹⁶² He told his supervisor about the inaccuracies, but the supervisor decided to proceed with the prosecution.¹⁶³ At trial, the plaintiff was called by the defense to testify about the affidavit, and then he was later subject to retaliatory employment actions for which he sued.¹⁶⁴ The

¹⁵² *Id.* at 572.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 571.

¹⁵⁵ *Id.*

¹⁵⁶ *Connick v. Myers*, 461 U.S. 138, 140 (1983).

¹⁵⁷ *Id.* at 141.

¹⁵⁸ *Id.* at 143.

¹⁵⁹ *Id.* at 147–48.

¹⁶⁰ *Id.* at 152.

¹⁶¹ *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

¹⁶² *Id.* at 413.

¹⁶³ *Id.* at 414.

¹⁶⁴ *Id.* at 414–15.

Court held that when “public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes.”¹⁶⁵ Because the plaintiff spoke on matters pursuant to his duty of being a deputy, he was not afforded First Amendment protection.¹⁶⁶

Building on employee speech are the cases that address the unconstitutional nature of loyalty oaths. *Wieman v. Updegraff* involved state employees who declined to take an oath required by the state of Oregon that said the employee was not and had not been a member of any communist organization.¹⁶⁷ The employer brought suit, attempting to withhold the state employees’ salaries for not complying with the oath.¹⁶⁸ The state employees argued primarily that this oath violated their Due Process rights in attempting to bar them from employment on the basis of mere membership in an organization.¹⁶⁹ There was testimony that the state employees were unaware of the intentions of the party they had affiliated with.¹⁷⁰ The Court highlighted this distinction between *innocent* and *knowing* association and declared the loyalty oath unconstitutional on Due Process grounds.¹⁷¹ The Court recognized that to “inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources.”¹⁷² Constitutional protection extends to public employees who have been excluded due to facially discriminatory or arbitrary laws.¹⁷³ More than a decade later, the Court decided *Elfbrandt v. Russell*, where it struck down an Arizona act as unconstitutional for requiring state employees to take an oath.¹⁷⁴ The oath read that state employees would not be members of organizations having a purpose of overthrowing the government.¹⁷⁵ The Court found this oath troublesome due to its vagueness because it restricted membership in parties that followed both legal and illegal means and created a presumption that members of such organizations shared the organization’s unlawful beliefs.¹⁷⁶ Without a “specific intent” to further illegal action,

¹⁶⁵ *Id.* at 421.

¹⁶⁶ *Id.*

¹⁶⁷ *Wieman v. Updegraff*, 344 U.S. 183, 184–85 (1952).

¹⁶⁸ *Id.* at 185.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 185–86.

¹⁷¹ *Id.* at 190–91.

¹⁷² *Id.* at 191.

¹⁷³ *Id.* at 192.

¹⁷⁴ *Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966).

¹⁷⁵ *Id.* at 13.

¹⁷⁶ *Id.* at 14.

members would be penalized just for being a member of the organization.¹⁷⁷ The Court ultimately found that the oath unnecessarily infringed on protected freedoms by fostering the idea of “guilty by association,” which is not a doctrine this nation supports.¹⁷⁸

Following the Court’s run on deciding loyalty oath cases, the Court later recognized and began to apply the doctrine of compelled speech to situations affecting everyday life. The Supreme Court took an interesting turn in 1995 when it placed the rights of a private parade organizer over the rights of LGBTQ parade marchers in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*.¹⁷⁹ This case prompted a rather interesting question dealing with private entities: Can the government compel private organizations to promote the government’s ideas?¹⁸⁰ If so, the government might be able to require the NFL players to stand during the National Anthem as a sign of respect. This seems to be a rather novel concept, as all the cases focusing on this very question have been decided within the past fifteen years.

The first case to touch on this issue was *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* in 2006.¹⁸¹ In *Rumsfeld*, an amendment stated that if an institution for higher education denied access to military recruiters, the institution would lose federal funding.¹⁸² Certain law schools wanted to prohibit military recruiters because many of them did not support a congressional policy related to homosexuals in the military.¹⁸³ The law schools filed suit against the Department of Defense arguing that the amendment violated the law schools’ First Amendment right to speech and association.¹⁸⁴ In arriving at a decision, the Court once again relied on *Barnette* and its establishment of the compelled speech doctrine, as the Court reiterated that the First Amendment also prohibits the government from telling people what they have to say.¹⁸⁵ The Court ultimately held that no compelled speech issue persisted in this case dealing with a federal law requiring law schools to give military recruiters the same access as other

¹⁷⁷ *Id.* at 17.

¹⁷⁸ *Id.* at 19.

¹⁷⁹ *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 564, 581 (1995) (holding that to require parade sponsors to allow gay and lesbian members to march in the parade would violate the sponsor’s freedom of speech and right to advocate its own ideas).

¹⁸⁰ *Id.* at 575–76; Hudson, *supra* note 139.

¹⁸¹ *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 51 (2006).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 61.

recruiters.¹⁸⁶ The Court came to this conclusion because it argued that the amendment did not force the law schools to say anything or say something specific.¹⁸⁷

In 2018, the Supreme Court came out with two more decisions related to compelled speech. The second case the Court decided in 2018 was *Janus v. American Federation of State, County, & Municipal Employees, Council 31*. This case involved an Illinois law that ultimately forced employees to unionize.¹⁸⁸ The law specifically held that if the majority of employees voted to be unionized, the union was the sole representative of all the employees, even those that did not vote for a union.¹⁸⁹ In addition, the nonmembers also had to pay part of the union dues, which were set by the union itself.¹⁹⁰ Janus, a state employee, decided not to join his union; however, because the majority of employees chose to unionize, Janus was required to pay dues.¹⁹¹ He filed suit claiming that the process was unconstitutional for compelling individuals to support ideas that they did not agree with, therefore violating the First Amendment.¹⁹² The Court agreed with Janus and found that this was a form of compelled speech since Janus did not consent to paying the dues.¹⁹³ The Court stated, “employees must choose to support the union before anything is taken from them.”¹⁹⁴ Because Janus opposed the union’s position, he was not required to pay any fees to the union in order to “subsidize private speech on matters of substantial public concern.”¹⁹⁵

An interesting idea to note is how some courts have reacted to speech made by fans in a public sports stadium. This is more of a recent development, but it may provide some insight as to how courts will view the players’ speech within the stadiums. As far as the professional sports setting, fan speech contains similar complexities to employee speech, but overall fans are typically permitted to engage in free speech in publicly owned stadiums.¹⁹⁶ The Supreme Court in *Cohen v. California* held that the defendant’s jacket, which read “Fuck the Draft,” was protected speech after

¹⁸⁶ *Id.* at 70.

¹⁸⁷ *Id.*

¹⁸⁸ *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2459 (2018).

¹⁸⁹ *Id.* at 2460.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 2461.

¹⁹² *Id.* at 2462.

¹⁹³ *Id.* at 2486.

¹⁹⁴ *Id.* at 2459.

¹⁹⁵ *Id.* at 2460.

¹⁹⁶ Howard M. Wasserman, *Fans, Free Expression, and the Wide World of Sports*, 67 U. PITT. L. REV. 525, 560 (2006).

he was charged with disturbing the peace.¹⁹⁷ This holding in *Cohen* extends to fans with similar displays of profane messages regarding opposing sports teams and players.

B. Compelled Speech in the NFL

The NFL brings a rather interesting conversation to the application of compelled speech. While the NFL is a private organization, it is not directly subject to the First and Fourteenth Amendments. However, as we have previously seen, there are a few circumstances when a private actor may still be held accountable as a state actor under the First and Fourteenth Amendments. Assuming the symbiotic test or another test is applicable to the NFL and the National Anthem controversy, the gates would be open to subjecting the NFL to violations of the First Amendment through compelled speech.

In analyzing the relationship between the NFL and its players, we begin with the application of the *Pickering* balance test. The key is to balance the interests of the NFL as the employer in promoting an efficient organization against the interests of the players, the employees, on speaking about matters of public concern.¹⁹⁸ In this case, the NFL's interests in maintaining efficient control over the organization are compelling because of the controversial nature surrounding the National Anthem issue. The tension surrounding the issue creates even more pressure for the NFL to take control and preserve order. However, the players' interests as employees are even more compelling, as they are ultimately addressing matters of public concern—police brutality amongst ethnic minorities. Just as the school teacher in *Pickering* was speaking out about school funding, an issue important to the community,¹⁹⁹ so too are the players speaking out about issues affecting their communities. On issues like these, “[f]ree and open debate is vital.”²⁰⁰ In addition, the “content, form, and context” criteria of *Connick* also support the players in their interests.²⁰¹ The content of the players' speech concerns issues that affect them and others in the community. The form of their speech is done through kneeling during the National Anthem. This is not disruptive to any of the NFL's operations, and the players remain silent during the entire ceremony. Finally, the context of the players' speech is extremely important. This protesting is not attempting to draw attention to a minor issue in which

¹⁹⁷ *Cohen v. California*, 403 U.S. 15, 26 (1971).

¹⁹⁸ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 571 (1968).

¹⁹⁹ *Id.* at 572.

²⁰⁰ *See id.* at 571–72.

²⁰¹ *Connick v. Myers*, 461 U.S. 138, 147 (1983).

many people are not familiar with. The players are addressing concerns within their own communities, affecting their own friends, families, and co-workers. The concern of police brutality against minorities has become such a heated political debate, so much so that people cannot even seem to discuss the matter peacefully. As a result, the players have relied on their status to raise awareness.

Because the players are employees of the NFL, we must also apply *Garcetti* to this case. The key inquiry is whether the players' speech is made pursuant to their official duties of being professional athletes.²⁰² If this is so, the players are not afforded First Amendment protection because the NFL maintains its power to control the duties of its employees. However, the players do not seem to be protesting anything remotely tied to their official duties as football players. As a professional athlete, they are likely expected to show up to practices, follow a rigid diet, attend press events, and perform well during games amongst other duties. Protesting social injustices do not appear to be a duty expected of the players in being professional athletes. Thus, the players' speech should fall under the protection of the First Amendment. Moreover, in preventing the players from protesting and forcing them to stand during the National Anthem, the NFL is "stifl[ing] the flow of democratic expression and controversy" by effectively enforcing a loyalty oath upon the players.²⁰³ As *Wieman* and *Elfbrandt* held, loyalty oaths are disfavored in public employment and cannot be used to penalize employees for merely exercising their freedom of speech.²⁰⁴ However, the loyalty oath cases only apply to public employees.

Recently, the courts have attempted to address whether the government can compel private organizations to promote the government's ideas.²⁰⁵ The courts tend to look for a clear sign that the government is forcing an organization to support its ideas. Because of this narrow finding, the National Anthem controversy presents a similar outcome to the one reached in *Rumsfeld*. The government is not particularly forcing the players to say anything or say something specific.²⁰⁶ President Trump criticized the players for kneeling, but he never stated that the players had to say certain comments about the flag or the United States. As a result, there does not seem to be a compelled speech issue with the players in the NFL. Under the *Janus* framework, the results might vary. Similar to the state employee forced to pay union dues in *Janus*, the NFL (if found as acting under the color of law)

²⁰² *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

²⁰³ *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952).

²⁰⁴ *See id.* at 185; *Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966).

²⁰⁵ *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 568 (1995).

²⁰⁶ *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 70 (2006).

cannot compel its players to stand during the National Anthem if the players decide not to support those views. “Forcing free and independent individuals to endorse ideas they find objectionable raises serious First Amendment concerns.”²⁰⁷

To close off the employee compelled speech section, it will be interesting to see how the courts will decide issues dealing with sports organizations in the future. Will they apply a similar analysis to the one used when fans express themselves in stadiums? Or will they take a different route and apply a more restricted test? The inquiry becomes more complex when looking at private organizations, such as the NFL, especially when collective bargaining agreements are at play. These agreements govern the players’ actions and finding exceptions to the agreement are very difficult to do.

III. THE NEXT ROUND OF COLLECTIVE BARGAINING: WHAT TO EXPECT

As we have seen, the NFL National Anthem controversy contains several legal issues in need of resolution before the next round of collective bargaining approaches in 2021. If the players’ attitudes and comments in the media have not been enough to hint at what could be expected, one can assume that discussions will most definitely intensify the closer we get to 2021. Several players have also spoken out about a potential lockout once the current 10-year collective bargaining agreement expires in 2021.²⁰⁸ The players’ union is ready to continue this labor battle against the NFL and given all the drama and chaos surrounding the National Anthem issue, it comes as no surprise that the players will be looking for more protected rights under the next CBA. This lockout could last as long as, if not longer than, the previous lockout in 2011. The 2011 lockout occurred over the course of four months but did not interfere with any pre-season or regular season games.²⁰⁹ Some believe this lockout could have lasted longer if the players had prepared better for it.²¹⁰ As a result, the players seem ready to negotiate during this next round, meaning a long and arduous battle looms ahead. As tensions continue to run high, the players will likely fight harder and longer to secure more rights and protections under the CBA.

²⁰⁷ Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2456 (2018).

²⁰⁸ Chris Chavez, *NFL Players Union President Eric Winston: NFL Lockout ‘Inevitable’ for 2021*, SPORTS ILLUSTRATED (Aug. 22, 2017), <https://www.si.com/nfl/2017/08/22/nfl-lockout-inevitable-eric-winston-players-union>.

²⁰⁹ *Id.*

²¹⁰ *Id.*

Another probable change that is expected to come out of the 2021 collective bargaining process is a new rule regarding the National Anthem. As of now, the policy states that the anthem “must be played prior to every NFL game, and all players must be on the sideline for the National Anthem.”²¹¹ Further, the policy mentions that players *should* stand, but there is no explicit requirement that players *must* stand.²¹² In negotiations preceding the new 2021 CBA, the NFL likely will seek to include a modified provision about the anthem stating that it “must be played prior to every NFL game, and all players who are on the field must stand for the National Anthem.”²¹³ The players will likely be upset with this proposition and they will struggle to negotiate this rule. While the players strongly oppose this rule, the team owners will want a strict policy regarding these protests.²¹⁴ The players’ possible arguments include that this change could impact their wages, hours, and other conditions of employment. Players would argue that although the policy change might not directly punish players, it nevertheless adversely affects the employment of players who protest in violation of the new policy.²¹⁵ In addition, if the players make this argument, then the NFL’s proposed rule could be challenged under federal antitrust laws.²¹⁶ Because it would be a rule affecting the players’ wages and employment that was not collectively bargained for, the players would have standing to challenge it.²¹⁷ This is in direct opposition to Kaepernick’s collusion grievances filed against the NFL after he alleged that the teams in the league conspired to prohibit him from playing on any team due to his initiation of the protests during the National Anthem. While these are just some of the plausible arguments that both sides might make, we will have to wait and see exactly what arguments each side brings to the table in 2021.

²¹¹ Michael McCann, *The NFL vs. the NFLPA: New National Anthem Policy Deepens Divide, Prolongs Controversy*, SPORTS ILLUSTRATED (May 23, 2018), <https://www.si.com/nfl/2018/05/23/nfl-new-national-anthem-protest>.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ See Jarrett Bell, *Opinion: Labor Day Should Be Reminder to NFL Players, Fans of Possible Work Stoppage*, USA TODAY (Sept. 2, 2019, 11:14 AM), <https://www.usatoday.com/story/sports/nfl/columnist/bell/2019/09/02/nfl-work-stoppage-strike-lockout-2021-collective-bargaining/2190653001/>.

²¹⁵ See McCann, *supra* note 211.

²¹⁶ *Id.*

²¹⁷ *Id.*

IV. CONCLUSION

In 2016, quarterback Colin Kaepernick caused a national uproar when he decided to kneel during the National Anthem of an NFL pre-season game. On one hand, people praised him for bringing attention to a controversial issue—police brutality against minorities. On the other hand, people criticized him for disrespecting the flag, the country, and all the men and women in the military who fight every day for our freedom. The NFL sought a way to stop Kaepernick from engaging in this contentious behavior, but legal issues began to surround the league and the players. Some have attempted to argue that the First Amendment is applicable to the NFL, a private organization. The arguments related to this theory are discussed in this paper. To hold the NFL liable for violating the First Amendment in suppressing players' speech, there must first be a showing of state action. State action can be found in private organizations as well, through several tests such as traditional and exclusive public functions, symbiotic relationship, close nexus, or entwinement. In addition, the role of the United States military and the President and Vice President might help create state action within the NFL. After state action is proven, employee compelled speech and how it applies to the private setting of the NFL must also be addressed. Lastly, there are some key arguments likely to be negotiated by both sides during the next round of collective bargaining in 2021. The next couple of years in the NFL will certainly be exciting and challenging, as both the players' union and the NFL organization attempt to strike a balance between the players' freedom of speech and the private organization's power to control its operations.