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STANDING TO KNEEL: ANALYZING NFL PLAYERS' FREEDOM TO PROTEST DURING THE PLAYING OF THE U.S. NATIONAL ANTHEM

*Marc Edelman**

On September 22, 2017, U.S. President Donald Trump held a campaign rally in Huntsville, Alabama, where he suggested that the National Football League (NFL) should “fire” all players who politically protest during the playing of the U.S. national anthem (“the national anthem”).¹ President Trump then followed his statements with a series of tweets in which he declared that, if the NFL continued to allow its players to protest during the national anthem, the U.S. government should take away the league’s “massive tax breaks.”²

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1. Julie Hirschfeld Davis & Jonathan Martin, *At Alabama Rally, Trump Toggles Between Republican Loyalists*, N.Y. TIMES (Sept. 22, 2017), <https://www.nytimes.com/2017/09/22/us/politics/trump-luther-strange-alabama.html> [<https://perma.cc/9Y43-Q8M3>]; see also Mark Maske, *NFL Owners Could Change Anthem Policy Next Season If Protests Continue*, WASH. POST (Nov. 21, 2017), <https://www.washingtonpost.com/news/sports/wp/2017/11/21/nfl-owners-weighing-change-to-anthem-policy-for-next-season-if-protests-continue> [<https://perma.cc/AJ56-HSRY>] (noting that President Trump specifically stated during his speech that NFL owners “should fire any player who protested during the anthem,” and referred to a protesting player as a being a “son of a bitch”). See generally Jenna Johnson, *‘I Love Alabama—It’s Special’: At Rally for Sen. Luther Strange, Trump Vents Frustrations in Rambling Speech*, WASH. POST (Sept. 23, 2017), <https://www.washingtonpost.com/news/post-politics/wp/2017/09/23/i-love-alabama-its-special-at-rally-for-sen-luther-strange-trump-vents-frustrations-in-rambling-speech> [<http://perma.cc/C23E-D3ZM>] (noting the city of President Trump’s speech as Huntsville, Alabama).

2. Ylan Mui, *Trump Threatens to End NFL’s ‘Massive Tax Breaks’ but His Tax Plan Would Be Great for Sports Teams*, CNBC (Oct. 10, 2017, 2:56 PM), <https://www.cnbc.com/2017/10/10/trump-threatens-to-end-nfls-massive-tax-cuts-but-theres-a-huge-one-in-his-tax-plan.html> [<https://perma.cc/92M9-BE9M>]; see also Maske, *supra* note 1. Subsequent to these tweets, the White House clarified that when President Trump referenced “massive tax breaks,” he was actually “referring to public subsidies for sports stadiums.” Tracy Jan, *Did Trump’s Tweet Make It Safer for NFL Players to Kneel for the Anthem?*, WASH. 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 [<https://perma.cc/PWM4-2FJN>]; cf. Marc Edelman, *Sports and the City: How to Curb Professional Sports Teams’ Demands for Free Public Stadiums*, 6

Since President Trump threatened financial harm to NFL owners, the NFL teams have cut at least two protesting players—former Green Bay Packers tight end Marcellus Bennett and former Dallas Cowboys defensive end Damontre Moore.³ In addition, none of the thirty-two NFL team owners have signed free agent quarterback Colin Kaepernick—the player who spearheaded the NFL players’ recent political protests.⁴

This Article analyzes whether an NFL player who protests during the national anthem has any legal recourse if he is fired—or not hired—as a result of his political protests. Part I of this Article describes the history of NFL players engaging in political protests during the national anthem. Part II explores whether the firing of an NFL player for his political protests would violate the player’s constitutional right to free speech. Finally, Part III discusses whether the firing—or not hiring—of an NFL player for his political protests would violate the player’s rights under the terms of the league’s collective bargaining agreement.

I. NFL PLAYER PROTESTS DURING THE NATIONAL ANTHEM

Although commercial sporting events in the United States operate primarily within the private sector, most contest organizers incorporate certain patriotic traditions, such as the playing of the national anthem, into their events.⁵ These patriotic traditions allow for professional athletes to

RUTGERS J.L. & PUB. POL’Y 35 (2008) (discussing sports teams’ demands for free public stadiums and measures that Congress could implement to curb such public funding).

3. See *Packers Cut TE Martellus Bennett*, FOX SPORTS (Nov. 9, 2017, 10:18 AM), <https://www.foxsports.com/wisconsin/story/green-bay-packers-cut-martellus-bennett-110817> [https://perma.cc/2NHD-4SS2] (explaining that Packers management cited a failure to disclose a physical injury as their reason for releasing Martellus Bennett); Ari Gilberg, *Cowboys Cut Damontre Moore, Who Raised Fist at End of Anthem*, N.Y. DAILY NEWS (Oct. 25, 2017, 7:27 PM), <http://www.nydailynews.com/sports/football/giants/cowboys-cut-damontre-moore-raised-fist-anthem-article-1.3588976> [https://perma.cc/V4PL-CZFZ] (discussing the Dallas Cowboys’ decision to cut defensive end Damontre Moore).

4. See Valerie Richardson, *NFL Take-a-Knee Protests Make Comeback as 19 Players Refuse to Stand for Anthem*, WASH. TIMES (Nov. 26, 2017), <https://www.washingtontimes.com/news/2017/nov/26/nfl-take-knee-protests-make-comeback/> [https://perma.cc/P778-BK4Q]; see also Christopher L. Gasper, *No Reason to Pass on Kaepernick*, BOS. GLOBE, Nov. 19, 2017, at C1 (explaining that Kaepernick has not been able to find a new NFL team since he “knelt during the national anthem last season to protest police brutality and social injustice”). In response to the sudden lack of interest in his service, Kaepernick has filed a labor grievance against the NFL, alleging that the league’s thirty-two teams colluded not to sign him this past season. See Evan Grossman & Leonard Greene, *Colin Kaepernick Files Grievance Alleging Collusion by NFL Owners*, N.Y. DAILY NEWS (Oct. 15, 2017, 11:07 PM), <http://www.nydailynews.com/sports/football/colin-kaepernick-files-grievance-alleging-collusion-nfl-owners-article-1.3565129> [https://perma.cc/8QTL-8SWN] (discussing the specifics of the collusion complaint that Kaepernick filed against the thirty-two NFL teams); see also Mark Maske, *Colin Kaepernick’s Attorneys Seek Deposition of Roger Goodell in Collusion Grievance*, WASH. POST (Nov. 5, 2017), <https://www.washingtonpost.com/news/sports/wp/2017/11/05/colin-kaepernick-attorneys-seek-deposition-of-roger-goodell-in-collusion-grievance> [https://perma.cc/2BLN-US9X] (noting that attorneys for Kaepernick seek to depose NFL Commissioner Roger Goodell and various NFL team owners as part of their collusion grievance); Gasper, *supra* (arguing that the NFL is “collectively boycotting Kaepernick”).

5. See *infra* notes 6–10 and accompanying text.

showcase their national pride. However, these traditions also unintentionally invite athletes to engage in political protests. Part I.A provides a brief history of playing the Star-Spangled Banner at U.S. sporting events, as well as the way in which U.S. professional athletes have responded to the anthem's playing. Part I.B looks at the NFL's practice of playing the national anthem before games, and NFL players' responses to that practice.

A. *Brief Historic Overview*

Most U.S. sporting events today begin with the playing of our national anthem, the Star-Spangled Banner.⁶ Historians trace this tradition back to Major League Baseball's 1918 World Series, when the Boston Red Sox played the Chicago Cubs.⁷ During the seventh inning of "a particularly depressing Cubs game," a military band appeared on the Cubs' home field and offered its rendition of the Star-Spangled Banner.⁸ The band's performance energized both fans and players alike, with players on both teams turning toward the flag and offering military salutes.⁹

Other professional sports teams took notice and, by the end of World War II, most U.S. sports teams had adopted the practice of playing the Star-Spangled Banner before the start of each game.¹⁰ For some athletes, such as former Red Sox third baseman Fred Thomas, the pregame rendition of the national anthem invoked a feeling of camaraderie and patriotism.¹¹ For others, the feelings were more equivocal.¹² Meanwhile, for a very small

6. See Becky Little, *Why the Star-Spangled Banner Is Played at Sporting Events*, HISTORY (Sept. 25, 2017), <http://www.history.com/news/why-the-star-spangled-banner-is-played-at-sporting-events> [<https://perma.cc/V8LM-CN2P>] (discussing the history of playing the Star-Spangled Banner at professional sports games).

7. See Avi Selk, *How the National Anthem—and Subverting It—Became a Pregame Tradition in America*, WASH. POST (Sept. 24, 2017), https://www.washingtonpost.com/news/retropolis/wp/2017/09/24/how-the-national-anthem-and-subverting-it-became-a-pregame-tradition-in-america/?utm_term=.7f3300d80774 [<https://perma.cc/76AM-JDCF>]; see also Little, *supra* note 6 (explaining that, at the time, the Star-Spangled Banner had not yet even officially become the national anthem). But see Olivia B. Waxman, *Here's How Standing for the National Anthem Became Part of U.S. Sports Tradition*, TIME (Sept. 25, 2017), <http://time.com/4955623/history-national-anthem-sports-nfl> [<https://perma.cc/5J5L-B6ND>] (linking the earliest example of the playing of the Star-Spangled Banner at a baseball game back to a game played in Brooklyn on May 15, 1862).

8. Selk, *supra* note 7.

9. *Id.* (describing how the band's performance of the Star-Spangled Banner led Fred Thomas, the Boston Red Sox third baseman and a Navy veteran, to launch into a military salute that was followed by other players and fans who sang along and burst into applause).

10. See Little, *supra* note 6 (explaining that, "by the end of World War II, NFL Commissioner Elmer Layden ordered [the Star-Spangled Banner] be played at every football game").

11. See Selk, *supra* note 7 (describing how Fred Thomas launched into a military salute during the Star-Spangled Banner at Game Three of the 1918 World Series).

12. See Stephen Hewitt, *Indifferent Reaction to NFL's Anthem Memo in Patriots Locker Room*, BOS. HERALD (Oct. 10, 2017), http://www.bostonherald.com/sports/patriots/the_bltz/2017/10/indifferent_reaction_to_nfls_anthem_memo_in_patriots_locker_room [<https://perma.cc/2R2P-MTK6>] (describing one New England Patriots player as "sound[ing] indifferent" about being required to stand for the national anthem).

minority of athletes, the playing of the national anthem invoked a feeling of anger and the desire to protest.¹³

Perhaps the most prominent case of athletes protesting during the national anthem occurred during the 1968 Summer Olympics in Mexico City, Mexico.¹⁴ There, Black-American sprinters Tommie Smith and John Carlos turned their backs to the American flag and raised their fists to protest racial injustice as the national anthem played.¹⁵ In the immediate aftermath of their protest, both athletes were ostracized by the U.S. sporting community and received death threats.¹⁶ However, over time, much of this anger faded. Tommie Smith thereafter played a season as a wide receiver on the NFL's Cincinnati Bengals, and later he became an assistant coach for basketball and track at Oberlin College and an esteemed member of his local community.¹⁷ Meanwhile, John Carlos went on to become a high school track coach, in-school suspension supervisor, and school counselor.¹⁸

Another, somewhat less publicized, athlete protest to the national anthem took place in March 1996 when Denver Nuggets basketball player Mahmoud Abdul-Rauf refused to stand for the anthem because he claimed the tenets of his Islamic religion disallowed "nationalistic ritualism."¹⁹ At around the same time, Abdul-Rauf also described the American flag as "a symbol of oppression that went against his Muslim beliefs."²⁰ At first, the National Basketball Association suspended Abdul-Rauf indefinitely from

13. See Selk, *supra* note 7; see also Patrick Strickland, 'Take a Knee' Anti-Racist Protests Move Beyond the NFL, AL JAZEERA (Oct. 20, 2017), <http://www.aljazeera.com/news/2017/10/knee-anti-racist-protests-move-nfl-171019153538456.html> [<https://perma.cc/MT46-SAQJ>] (discussing the long history of protests in sports, especially among Black Americans, as "a platform for social justice activism"); Zach Johnk, *National Anthem Protests by Black Athletes Have a Long History*, N.Y. TIMES (Sept. 25, 2017), <https://www.nytimes.com/2017/09/25/sports/national-anthem-protests-black-athletes.html> [<https://perma.cc/R9FR-YSWZ>] (discussing the history of Black athletes protesting during the national anthem).

14. See Selk, *supra* note 7.

15. See *id.*

16. See David Davis, *Olympic Athletes Who Took a Stand*, SMITHSONIAN, <https://www.smithsonianmag.com/articles/olympic-athletes-who-took-a-stand-593920/> [<https://perma.cc/ZKR4-W6K2>].

17. See Alicia Smith-Tran, *After Tommie Smith Took a Stand at the 1968 Olympics, He Took His Place as a Coach at Oberlin*, OBERLIN ALUMNI MAG., Spring 2016, at 16 <http://www2.oberlin.edu/alummag/spring2016/issue/html5forwebkit.html?page=16> [<https://perma.cc/6NBY-XSQR>]; see also John Fay, *Anthem Protest at '68 Olympics Rocked the Nation: A Year Later, the Bengals Signed Tommie Smith*, WCPO (Sept. 25, 2017, 12:47 PM), <https://www.wcpo.com/news/insider/fay-anthem-protest-at-68-olympics-rocked-the-nation-a-year-later-the-bengals-signed-tommie-smith> [<https://perma.cc/AUZ5-APF8>].

18. *Biography*, JOHN CARLOS, <http://www.johncarlos68.com/wp-content/uploads/2015/10/john-carlos-biography.pdf> [<https://perma.cc/6BUS-7KNX>] (last visited Jan. 6, 2018).

19. Assoc. Press, *Unmoved by Suspension, Abdul-Rauf Still Won't Stand*, ATLANTA J. & CONST., Mar. 14, 1996, at E5; see also Cindy Boren, *Mahmoud Abdul-Rauf on Colin Kaepernick: 'The Same Thing Happened to Me,'* WASH. POST (Jun. 26, 2017), <https://www.washingtonpost.com/news/early-lead/wp/2017/06/26/as-his-own-national-anthem-protest-continues-mahmoud-abdul-rauf-says-the-nfl-is-blackballing-colin-kaepernick> [<https://perma.cc/M5CL-3TP9>].

20. See Boren, *supra* note 19.

the league.²¹ However, after Abdul-Rauf missed one game under this suspension, a compromise solution was reached: Abdul-Rauf agreed to stand while praying with his head down during the playing of the anthem.²²

B. NFL Anthem Policies and Political Protests

Whereas professional baseball and basketball players have historically stood at attention during the national anthem, until 2009 NFL players remained in the locker room.²³ Then, nine years ago, NFL team owners changed their policy.²⁴ The new NFL policy states that the national anthem “must be played prior to every NFL game.”²⁵ The new policy, which appears in the NFL’s operating manual, also states that players “should stand at attention” during the anthem and “face the flag, hold helmets in their left hand and refrain from talking.”²⁶

Although the NFL’s new national anthem policy does not appear anywhere in the league’s Collective Bargaining Agreement (CBA),²⁷ there also is no public evidence of any players objecting to the policy change in 2009. However, during the 2016 NFL preseason, former San Francisco 49ers (“49ers”) quarterback Kaepernick captured media attention—both positive and negative—when he decided to kneel during the national anthem to protest police brutality against Black Americans.²⁸ Kaepernick, who served as the starting quarterback for the 49ers during their 2012 to 2013 National Football Conference Championship season, hoped that his protests would bring attention to police officers’ disproportionate shooting of Black people in the United States.²⁹ While it is uncertain whether Kaepernick’s protests ever fully accomplished their desired result, it is

21. See Jesse Washington, *Still No Anthem, Still No Regrets for Mahmoud Abdul-Rauf*, UNDEFEATED (Sept. 1, 2016), <https://theundefeated.com/features/abdul-rauf-doesnt-regret-sitting-out-national-anthem> [<https://perma.cc/5X2D-A9VZ>].

22. See *id.*

23. See Maske, *supra* note 1.

24. Yaron Steinbuch, *NFL May Tweak Rules to Make Players Stand for Anthem*, N.Y. POST (Oct. 10, 2017), <https://nypost.com/2017/10/10/nfl-may-tweak-rules-to-make-players-stand-for-anthem/> [<https://perma.cc/9NKY-4PWA>].

25. *Id.*

26. *Id.*

27. See *infra* Part III.

28. See Gasper, *supra* note 4; Richardson, *supra* note 4; see also Sonja Bochow, *Black Army Ranger Won’t Accept Colin Kaepernick’s Actions Against U.S. Anthem—Gives This Advice . . .*, RIGHT WING NEWS (Aug. 27, 2016), <http://rightwingnews.com/military/black-army-ranger-wont-accept-colin-kaepernicks-actions-u-s-anthem-gives-advice/> [<https://perma.cc/PSQ2-VWU4>] (quoting Kaepernick as stating that “I am not going to stand up to show pride in a flag for a country that oppresses black people and people of color”).

29. See Strickland, *supra* note 13 (explaining that American police officers killed at least 1093 people in 2016, with almost 25 percent of those individuals being Black even though Black people make up roughly 12 percent of the U.S. population); see also Earl Ufari Hutchinson, *Commentary: Kaepernick’s Sit-Down Aside, the Case of Whether to Stand for the National Anthem*, CHI. TRIB. (Aug. 30, 2016, 8:25 AM), <http://www.chicagotribune.com/news/opinion/commentary/ct-colin-kaepernick-anthem-sit-down-blacks-stand-perspec-0830-jm-20160829-story.html> [<https://perma.cc/WVP3-5R2L>] (opining that “Kaepernick showed guts in telling the world that he would not stand because of the continued abuse and killing of blacks by law enforcement officials”).

undeniable that, by protesting, he angered certain segments of the U.S. military and police communities.³⁰

Although Kaepernick was initially the only NFL player to kneel during the national anthem, a few other players soon began to join him.³¹ By the start of the 2016 NFL regular season, 49ers safety Eric Reid, Seattle Seahawks cornerback Jeremy Lane, and Denver Broncos linebacker Brandon Marshall had emulated Kaepernick's kneeling posture during the national anthem.³² Then, on September 19, 2016, others, including Philadelphia Eagles safety Malcolm Jenkins, joined the protest movement.³³ Yet, rather than kneel during the national anthem, Jenkins and others raised their fists in the air much like Tommie Smith and John Carlos had done during the 1968 Olympics.³⁴

Several other Black football players also began to protest following the November 8, 2016 election of President Donald Trump—a law-and-order candidate who has a poor relationship with the Black community.³⁵ Meanwhile, before the 2017 NFL regular season, other players began to protest based on numerous grounds including: Black NFL player Michael Bennett's accusations that he had been a victim of police brutality,³⁶ the death of a human rights protester during an August 2017 White supremacist rally in Charlottesville, Virginia,³⁷ and President Trump's overzealous attempts to use social media to insult many of the earliest NFL protesters.³⁸

30. See generally Bochow, *supra* note 28 (explaining one Black army ranger's disagreement with Kaepernick's position on standing for the national anthem).

31. See Mark Sandritter, *A Timeline of Colin Kaepernick's National Anthem Protest and the Athletes Who Joined Him*, SB NATION (Sept. 25, 2017, 10:28 AM), <https://www.sbnation.com/2016/9/11/12869726/colin-kaepernick-national-anthem-protest-seahawks-brandon-marshall-nfl> [<https://perma.cc/95AU-S9CQ>].

32. *Id.*; see also Nicki Jhabvala, *Broncos' Brandon Marshall Kneels During National Anthem in Tampa Bay*, DENV. POST (Oct. 3, 2016, 2:06 PM), <https://www.denverpost.com/2016/10/02/broncos-brandon-marshall-national-anthem-buccaneers/> [<https://perma.cc/3FRQ-ZG6R>].

33. T.J. Neer, *Philadelphia Eagles Safety and Former OSU Football Player Malcolm Jenkins Joins Anthem Protests*, LANTERN (Oct. 6, 2016), <https://www.thelantern.com/2016/10/philadelphia-eagles-safety-and-former-osu-football-player-malcolm-jenkins-joins-anthem-protests-colin-kaepernick-nfl-national-anthem-pittsburgh-steelers-chicago-bears/> [<https://perma.cc/RD9M-935V>].

34. See *id.*

35. See, e.g., Des Bieler, *Bucs' Mike Evans Kneels During Anthem to Protest Donald Trump's Election Victory*, WASH. POST (Nov. 13, 2016), <https://www.washingtonpost.com/news/early-lead/wp/2016/11/13/bucs-mike-evans-kneels-during-anthem-to-protest-donald-trumps-election-victory> [<https://perma.cc/T95J-ZNYV>] (explaining that Tampa Bay Buccaneers wide receiver Mike Evans was the first NFL player to explicitly link his protests to Donald Trump's election).

36. See Jarrett Bell, *Michael Bennett's Police Incident Illustrates Reason for Protests*, USA TODAY (Sept. 6, 2017, 8:15 PM), <https://www.usatoday.com/story/sports/nfl/columnist/bell/2017/09/06/michael-bennett-police-incident-protest-seattle-seahawks/640041001/> [<https://perma.cc/RST5-HTXB>] (describing how the alleged police brutality against Michael Bennett reinforced the true reasoning for the NFL player protests).

37. See Ryan Wilson, *First White NFL Player to Kneel During National Anthem Explains His Decision*, CBS SPORTS (Aug. 22, 2017), <https://www.cbssports.com/nfl/news/first-white-nfl-player-to-kneel-during-national-anthem-explains-his-decision> [<https://perma.cc/EQB3-5VVB>] (explaining that Seth DeValve, a 2016 fourth-round draft

As recently as November 28, 2017, twenty-four NFL players continue to either kneel or lift their fists to protest police brutality and racial injustice during the national anthem.³⁹ One such protestor is Tennessee Titans wide receiver Rishard Matthews—a player whose father and brother were both U.S. Marines, and whose brother tragically died while fighting for his country in Afghanistan.⁴⁰ Although these protests remain highly controversial in their substance, the protests have always been nonviolent in nature, and they have never implied any hatred or disrespect for the United States.

II. NFL PLAYER PROTESTS AND THE U.S. CONSTITUTION

As President Trump has attempted to use strong-arm tactics to quell NFL players' protests during the national anthem, many have wondered if NFL players have a legal cause of action if they are fired—or not hired—based on their political protests.⁴¹

Greatly oversimplified, there are at least two types of legal protections that may attach to NFL players who engage in political protests during the national anthem: those that arise under constitutional law and those that arise under the terms of the NFL CBA.⁴² This Part analyzes whether constitutional law protects an NFL player from being fired—or not hired—based on his expression of political protests during playing of the national anthem. Part II.A provides an overview of the First Amendment's Free Speech Clause, including the notion that only "state actors" must not

pick from Princeton University, became the first White player to kneel during the national anthem in response to the race-based attacks on protesters in Charlottesville, Virginia).

38. See Benjamin Hoffman, Victor Mather & Jacey Fortin, *After Trump Blasts N.F.L., Players Kneel and Lock Arms in Solidarity*, N.Y. TIMES (Sept. 24, 2017), <https://www.nytimes.com/2017/09/24/sports/nfl-trump-anthem-protests.html> [<http://perma.cc/9D3P-GB24>] (explaining that on Sunday, September 22, 2017, "N.F.L. players across the country demonstrated during the national anthem . . . in a show of solidarity against President Trump, who scolded the league and players on Twitter [for earlier protests]").

39. See Cindy Boren, *Trump Tweets that NFL Is 'Weak and out of Control' Because of Players' National Anthem Demonstrations*, WASH. POST (Nov. 28, 2017), <https://www.washingtonpost.com/news/early-lead/wp/2017/11/28/trump-tweets-that-nfl-is-weak-and-out-of-control-because-of-players-national-anthem-demonstrations> [<https://perma.cc/4LHT-AE7Y>]; Jan, *supra* note 2.

40. See Jan, *supra* note 2 (noting that, despite the claims by President Donald Trump that kneeling during the national anthem is disrespectful to the U.S. military, among the players who continue to kneel in protest to racial injustice include Rishard Matthews, a player whose father is a Marine and whose brother died in Afghanistan in 2015).

41. See *id.* (addressing whether any freedom of speech grounds exist that would protect NFL players' protest rights); see Des Bieler, *Michael Bennett Says He'll Continue to Sit During Anthem Despite NFL's Preference*, WASH. POST (Oct. 18, 2017), <https://www.washingtonpost.com/news/early-lead/wp/2017/10/18/michael-bennett-says-hell-continue-to-sit-during-anthem-despite-nfls-preference> [<https://perma.cc/7B86-4JUC>] (quoting NFL owner and Fordham University School of Law graduate John Mara as conceding that "one of the things our forefathers fought and died for, and that continues to be a principle that's very important to most of us" is the right to protest).

42. See *infra* Part III.

infringe free speech rights. Part II.B then discusses whether terminating an NFL player for protesting would constitute “state action.”

A. *An Overview of the First Amendment
Right to Free Speech*

Under constitutional law, the strongest argument that certain NFL players enjoy a protectable right to protest comes from the Free Speech Clause of the First Amendment to the U.S. Constitution.⁴³ In pertinent part, the First Amendment states that the government cannot engage in “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.”⁴⁴

As explained by the U.S. Supreme Court in *Texas v. Johnson*,⁴⁵ the term “speech,” as referenced in the U.S. Constitution, includes not only the spoken or written word, but also conduct with sufficient communicative elements to constitute expression.⁴⁶ For example, the U.S. Supreme Court has held that both wearing black armbands to protest American military involvement in the Vietnam War⁴⁷ and burning the American flag constitute forms of “speech.”⁴⁸ Thus, kneeling or lifting a fist during the national anthem would likewise meet today’s Constitutional definition of “speech.”⁴⁹

Nevertheless, the First Amendment does not protect all employees who are terminated based upon their speech.⁵⁰ The First Amendment simply prohibits a *state actor* from limiting an employee’s right to speak on matters of public concern, so long as the employee’s interest in speaking is not outweighed by a substantial interference to the workplace.⁵¹ A private employer is typically not a state actor. Thus, a private employer typically would not have any constitutional obligation to afford its employees free speech rights unless there is a nexus between the private employer’s actions and the government.⁵²

43. See U.S. CONST. amend. I.

44. *Id.*

45. 491 U.S. 397 (1989).

46. *Id.* at 404.

47. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

48. *Johnson*, 491 U.S. at 420.

49. See *supra* notes 45–48 and accompanying text.

50. See *infra* notes 51–52 and accompanying text.

51. See *Waters v. Churchill*, 511 U.S. 661, 673 (1994) (noting, for example, that “a public employer may, consistently with the First Amendment, prohibit its employees from being ‘rude to customers,’ a standard almost certainly too vague when applied to the public at large”).

52. See Mary Becker, *How Free Is Speech at Work?*, 29 U.C. DAVIS L. REV. 815, 842 (1996) (stating that “[t]he Free Speech Clause of the First Amendment protects only against state action and thus affords no protection when private employers retaliate against private employees for speech”); see also *Wickersham v. City of Columbia*, 481 F.3d 591, 598 (8th Cir. 2007) (finding that a “close nexus” with state action—a private actor that acts under the color of state law—renders a private employer into a state actor).

*B. Is Terminating NFL Players for Protesting
a Form of “State Action?”*

To determine whether firing a protesting NFL player constitutes a form of state action, one must look at whether there exists a sufficient nexus between the player’s NFL employer and government activity.⁵³ The simple, gut reaction to that question is there probably is not such a nexus. However, upon more careful analysis, one could construe two potential arguments for why an NFL team’s firing—or not hiring—of a political protester may constitute state action.

The first potential argument is that some NFL teams play their games in publicly-owned stadiums or, at least, in stadiums that are greatly subsidized by municipal governments.⁵⁴ In the 1978 decision of *Ludtke v. Kuhn*,⁵⁵ the Southern District of New York held that New York City’s ownership rights over the lease to Yankee Stadium transformed the Yankees’ ban against female reporters in the Yankees Clubhouse from a private employer action into state action under the Equal Protection Clause of the Fifth and Fourteenth Amendments.⁵⁶ Based on this conclusion, there is at least some precedent, albeit under different clauses of the Constitution, to tie stadium ownership and funding to state action.⁵⁷

Alternatively, and perhaps far more compellingly, President Trump’s repeated statements that threaten to remove “massive tax breaks” from NFL teams unless they “fire” protesting players also may amount to state action by the executive branch to curb political speech, applied through the instrumentality of the NFL team owners.⁵⁸ Indeed, in the 1963 Supreme Court decision *Bantam Books, Inc. v. Sullivan*,⁵⁹ the Court found state action where a government entity used the “threat of invoking legal

53. *See supra* notes 51–52 and accompanying text.

54. *See Ludtke v. Kuhn*, 461 F. Supp. 86, 93–96 (S.D.N.Y. 1978) (holding that a professional sports team that receives municipal aid toward the costs of use of a publicly-owned stadium engages in “public action” when it denies female reporters access to the team’s clubhouse facilities located within the stadium); *see also* *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961) (explaining that there is no rigid yardstick to determine whether state action in a given case exists, and that “[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance”).

55. 461 F. Supp. 86 (S.D.N.Y. 1978).

56. *Id.* at 95.

57. Nevertheless, the situation here is not fully analogous to the situation in *Ludtke*. There, a public entity technically owned the facility in which the female reporter wished to gain access but, here, there is no bona fide argument that a public entity actually owns or controls any NFL team. *See id.* While the analogy with *Ludtke* might be very compelling if an NFL team sought to ban a player from a sports facility based on his political speech, the analogy is perhaps useful, but somewhat imperfect, where the underlying conduct in question entails the firing of a worker rather than denying facility access.

58. *See* Jan, *supra* note 2 (quoting legal scholars—including myself, American University law professor N. Jeremi Duru, and American Civil Liberties Union’s national legal director David Cole—for the position that President Trump’s efforts to financially bully the NFL teams into punishing players for protesting could constitute state action, giving rise to the claim of protection under the First Amendment).

59. 372 U.S. 58 (1963).

sanctions and other means of coercion, persuasion, and intimidation” to induce private entities to act in a way that chills free speech rights.⁶⁰ Subsequently, in *Playboy Enterprises v. Meese III*,⁶¹ the District Court for the District of Columbia similarly recognized that the federal government engages in state action that may violate the First Amendment where the government takes actions to facilitate private actors’ ability to blacklist private third parties.⁶² Based on these two decisions, one can make a reasonable argument that President Trump’s threat to strip “massive tax breaks” from team owners who allow players to protest the anthem serves as a form of “threat of invoking legal sanctions” that violates protesting NFL players’ First Amendment rights.

III. NFL PLAYER PROTESTS AND THE NFL COLLECTIVE BARGAINING AGREEMENT

In addition to the constitutional arguments in defense of the protesting NFL players, there is an entirely separate argument that the “firing” or “concerted not hiring” of an NFL player who protests during the national anthem gives rise to a cause of action. Namely, such firing or concerted not hiring may violate a player’s labor rights under the NFL’s CBA.⁶³ In certain respects, the NFL players’ rights under the NFL CBA are more limited than similar rights under the U.S. Constitution.⁶⁴ For example, the CBA does not necessarily protect all forms of speech that would be protected for public employees under constitutional free speech principles.⁶⁵ Yet, in other respects, a claim of wrongful “firing” or “concerted not hiring” under the CBA is broader in scope because it would not require a player bringing a labor grievance under the CBA to prove state action.⁶⁶

Part III.A provides an overview of federal labor law and the NFL CBA. Part III.B addresses protections in the NFL CBA that are relevant to protesting NFL players. Part III.C addresses whether firing an NFL player for protesting during the national anthem would violate the NFL CBA. Finally, Part III.D addresses whether not hiring an NFL player who

60. *Id.* at 67.

61. 746 F. Supp. 154 (D.D.C. 1990).

62. *See id.* at 156 (recognizing that the federal government’s creating of a list of stores that distribute what it considers pornographic material could violate the First Amendment if the list is intended to serve an “unconstitutional motive” such as the facilitation of a private boycott of these stores).

63. *See infra* Part III.A–D. For a full and current version of the NFL CBA, see NAT’L FOOTBALL LEAGUE, COLLECTIVE BARGAINING AGREEMENT (Aug. 4, 2011), <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf> [<https://perma.cc/T7GL-D7E4>].

64. *See* NAT’L FOOTBALL LEAGUE, *supra* note 63, at 5 (explaining that the only parties bound by the NFL CBA are the “players, Clubs, the [NFL Players Association], the NFL, and the Management Council,” and thus the NFL CBA does not provide any rights or remedies with respect to non-parties to the agreement).

65. *See infra* Part III.C–D.

66. *See infra* Part III.A.

previously protested during the national anthem would violate the NFL CBA.

*A. An Overview of Labor Law and
the NFL Collective Bargaining Agreement*

In the United States, most workers are “at-will” employees.⁶⁷ “At-will” employees may be fired by their employer at any time for any reason or no reason at all.⁶⁸ Under the National Labor Relations Act, however, employees in a unionized workplace enjoy the right to bargain collectively with their employees over “mandatory terms and conditions of bargaining”—hours, wages, and working conditions.⁶⁹ Employers also must bargain over disciplinary procedures, including terms for terminating workers based on cause.⁷⁰

Although it is often presumed that employees in the United States unionize primarily for purposes of obtaining higher salaries, in reality, unionized workers may benefit most from the opportunity to garner both substantive and procedural protections against being terminated.⁷¹ Indeed, unionized employees often represent some of the most difficult employees in the private workforce to legally terminate.⁷²

67. See Kathleen C. McGowan, Note, *Unequal Opportunity in At-Will Employment: The Search for a Remedy*, 72 ST. JOHN’S L. REV. 141, 142 (1998).

68. See *id.* at 142 (stating that “most employees are at-will, which means they can be terminated by their employer any time, for any reason or for no reason”); see also Wendy L. Stasell, *How Far Is the Boss’s Reach*, ABA J., Dec. 2000, at 32 (explaining that “[a]n at-will employee can be fired for any reason, so long as the termination does not violate some other law, such as nondiscrimination or whistleblower statutes”).

69. See Marc Edelman, *The Future of College Athletes Players Unions: Lessons Learned from Northwestern University and Potential Next Steps in the College Athletes’ Rights Movement*, 38 CARDOZO L. REV. 1627, 1630 & n.7 (2017) (“Although parties are free to bargain about any legal subject, Congress has limited the mandate or duty to bargain to matters of ‘wages, hours, and other terms and conditions of employment.’” (first quoting *First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666, 674 (1981); then quoting 29 U.S.C. § 158(d) (2012))).

70. HARRY C. KATZ ET AL., AN INTRODUCTION TO COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS 261 (4th ed. 2008) (explaining that when employers implement discipline only for just cause, employees gain freedom from “arbitrary discipline, discharge, or denial of benefits”); see also Wendi J. Delmendo, *Determining Just Cause: An Equitable Solution for the Workplace*, 66 WASH. L. REV. 831, 831 (1991) (explaining that a majority of courts recognize that an employer’s promise to discharge an employee only for just cause represents an exception to the typical employment-at-will doctrine that allows the firing of an employee at any time, for any reason, except for an illegal reason).

71. See *I’m a Professional. What Can a Union Do for Me?*, DEP’T PROF. EMPS., AFL-CIO, <http://dpeaflcio.org/survey/what-can-a-union-do-for-me> [https://perma.cc/U3PR-EU3L] (last visited Jan. 6, 2018) (explaining that “[u]nions protect workers from arbitrary employer actions relating to discipline and dismissals,” and “[t]hat protection makes jobs better and often leads union members to stay at their jobs longer than non-union workers. Better training, lower turnover and a clear role for workers’ voices in making decisions about how work gets done also mean that unions increase productivity”).

72. See, e.g., *The Benefits of Collective Bargaining for Professionals*, DEP’T PROF. EMPS., AFL-CIO, <http://dpeaflcio.org/programs-publications/issue-fact-sheets/the-benefits-of-collective-bargaining-for-professional-and-technical-workers/> [https://perma.cc/2VBA-6AB8] (last visited Jan. 6, 2018) (explaining that a “union job is not a ‘job for life’” but “a union job does afford employees greater protection against unfair unilateral actions by

*B. Protections in the NFL Collective Bargaining Agreement
Relevant to Protesting Players*

For most of the past fifty years, the NFL players have participated in a collective bargaining relationship with the league's thirty-two teams, in which they bargain over their mandatory terms and conditions of employment.⁷³ As part of the CBA, NFL players sign a Standard Player Contract for a term of one or more years.⁷⁴ During the life of this contract, a team may only remove a player from its roster if his "skill or performance has been unsatisfactory as compared with that of other players competing for positions" or, arguably, if the player has "engaged in personal conduct reasonably judged by [a team] to adversely affect or reflect on [the team]."⁷⁵ However, language in the CBA, which takes precedence over the NFL Standard Player Contract,⁷⁶ limits the maximum penalty an NFL team may impose for "conduct detrimental to [an NFL club]" to a four-game suspension and a fine equivalent to one week's salary.⁷⁷

In addition, the CBA also includes an "Anti-Collusion" clause, which stipulates that no NFL club shall enter into any agreement with the league or any club as to whether to offer a contract to a particular player.⁷⁸ Pursuant to the CBA's "Anti-Collusion" clause, NFL teams are prohibited from jointly imposing discipline on a player and from creating a blacklist of players with whom the teams collectively choose not to negotiate.⁷⁹

*C. Does Firing an NFL Player for Protesting
Violate the NFL Collective Bargaining Agreement?*

When analyzing the language of the NFL CBA, it is doubtful whether an NFL team may simply "fire" a player who is under contract simply for failing to stand during the national anthem. First, there is not a single reference to the league's national anthem policy anywhere in the league's

employers—after all, a workplace dispute has the potential to cost a person their job and, as a result, their livelihood").

73. See Marc Edelman & Joseph A. Wacker, *Collectively Bargained Age/Education Requirements: A Source of Antitrust Risk for Sports Club-Owners or Labor Risk for Players Unions?*, 115 PENN ST. L. REV. 341, 341 (2010); see also *History*, NAT'L FOOTBALL LEAGUE PLAYERS ASS'N, <https://www.nflpa.com/about/history> [<https://perma.cc/APV8-BSC5>] (last visited Jan. 6, 2018).

74. See NAT'L FOOTBALL LEAGUE, *supra* note 63, at 256–64.

75. *Id.* at 260 (further noting that a "Club may terminate this contract. In addition, during the period any salary cap is legally in effect, this contract may be terminated if, in Club's opinion, Player is anticipated to make less of a contribution to Club's ability to compete on the playing field than another player or players whom Club intends to sign or attempts to sign, or another player or players who is or are already on Club's roster, and for whom Club needs room").

76. See *id.* at 5 (stating that "[t]he provisions of [the NFL CBA] supersede any conflicting provisions in the Settlement Agreement, NFL Player Contract, the NFL Constitution and Bylaws, the NFL Rules, or any other document affecting terms and conditions of employment of NFL players").

77. *Id.* at 180–86.

78. *Id.* at 119.

79. See *id.*

301-page CBA.⁸⁰ At best, a team might argue that a player who protests during the national anthem violates a general prohibition against engaging in “conduct detrimental to an NFL club” under the CBA or has engaged in conduct that could be reasonably judged as reflecting negatively on a club under the Standard Player Contract.⁸¹ However, even there, such a conclusion is far from certain.

In addition, even if one were to presume that protesting during the national anthem could constitute “conduct detrimental to an NFL club,” there is still a very strong argument that a team could not impose more than a “fine of an amount equal to one week’s salary and/or suspension without pay for a period not to exceed four (4) weeks.”⁸² The CBA explicitly notes that, in the context of a conflict between language in the CBA and that in the Standard Player Agreement, it is the CBA language that holds superseding weight.⁸³

Furthermore, even if an NFL team were to argue that the NFL’s national anthem policy, which appears in the league operating manual, is referenced by implication in the league’s CBA, the express language included in the NFL’s national anthem policy still does not necessarily impose any mandatory duty on NFL players.⁸⁴ This is because the language in the NFL’s national anthem policy merely states that players “*should* stand at attention.”⁸⁵ It does not state that players *must* stand.⁸⁶

*D. Does Not Hiring an NFL Player for Protesting
Violate the NFL Collective Bargaining Agreement?*

Finally, if an unsigned NFL player believes that his lack of employment is due to an agreement among teams not to sign him,⁸⁷ the player may attempt to allege a violation of the “Anti-Collusion” clause in the CBA.⁸⁸ At the time of publishing this Article, former NFL quarterback Kaepernick had just filed a labor grievance against the thirty-two NFL teams, alleging that his unemployment resulted from collusion among the thirty-two NFL

80. *See generally id.*

81. *Id.* at 180–86, 260.

82. *Id.* at 181.

83. *See id.* at 5.

84. *See id.* (stating that the NFL CBA “represents the complete understanding of the parties on all subjects covered herein” and that “the [NFL Players Association] and the NFL waive all rights to bargain with one another concerning any subject covered or not covered in this Agreement for the duration of this Agreement, including the provisions of the NFL Constitution and Bylaws; provided, however, that if any proposed change in the NFL Constitution and Bylaws could significantly affect the terms and conditions of employment of NFL players, then the NFL will give the [NFL Players Association] notice of and negotiate the proposed change in good faith”).

85. Steinbuch, *supra* note 24 (noting that language says that teams “*must*” play the anthem before every game, but only that players “*should*” stand) (emphasis added).

86. *Id.* (emphasis added).

87. *See* NAT’L FOOTBALL LEAGUE, *supra* note 63, at 119.

88. *See id.*

teams, with U.S. President Donald Trump serving as an “organizing force” behind the collusion.⁸⁹

For Kaepernick or a similarly-situated player to prevail on a labor grievance of this nature, there would be a need for the grievant to produce actual evidence of an agreement among the NFL teams and not simply evidence of consciously-parallel behavior.⁹⁰ Gaining such evidence would require the grievant to engage in extensive discovery under the CBA’s internal discovery process.⁹¹

CONCLUSION

It is difficult to predict whether a former NFL player who is fired—or not hired—based on his political protests would prevail in a resulting legal challenge. If a former NFL player were to file a lawsuit challenging his termination under the First Amendment, the player’s primary legal obstacle would entail proving that his termination represents “state action,” based on either public ownership of an NFL sports facility or President Trump’s attempt to coerce, persuade, and intimidate the NFL into quashing the player’s political speech. Among these two arguments, the second one—coercion from the U.S. executive branch—seems to provide significantly stronger grounds for finding state action.

In addition, if an NFL player—who is fired for protesting during the national anthem—wanted to bring a labor grievance against his team under the terms of the CBA, that player would need to successfully argue either: (1) his failure to stand at attention during the national anthem was not reasonably detrimental to his NFL club; or (2) his firing for such conduct lies outside of the permissible range of sanctions allowed under the CBA.⁹²

Finally, if a protesting NFL player—who cannot thereafter find new employment—brings a collusion-related grievance against the thirty-two NFL teams under the NFL CBA, he would need to prove his lack of employment was based on an actual collusive agreement among the teams.⁹³ Under this scenario, the burden of proof would lie with the former NFL player to show the existence of such an agreement. Consequently, it

89. Michael Hiltzik, *Kaepernick Blames Trump for NFL Collusion Against Him—And He Could Be Right*, L.A. TIMES (Oct. 18, 2017, 9:35 AM), <http://www.latimes.com/business/hiltzik/la-fi-hiltzik-kaepernick-trump-20171018-story.html> [<https://perma.cc/7Q6Y-JE7S>].

90. See NAT’L FOOTBALL LEAGUE, *supra* note 63, at 120 (stating that “[t]he failure by a Club or Clubs to negotiate, to submit Offer Sheets, or to sign contracts with Restricted Free Agents or Transition Players, or to negotiate, make offers, or sign contracts for the playing services of such players or Unrestricted Free Agents, shall not, by itself or in combination only with evidence about the playing skills of the player(s) not receiving any such offer or contract, satisfy the burden of proof set forth [to prove collusion under the CBA]”).

91. See generally Marc Edelman, *Explaining Colin Kaepernick’s Collusion Grievance Against the NFL*, FORBES (Oct. 15, 2017, 8:29 PM), <https://www.forbes.com/sites/marcedelman/2017/10/15/explaining-colin-kaepernicks-collusion-grievance-against-the-nfl> [<https://perma.cc/PV6L-4ZT9>] (discussing the need for Kaepernick, through his lawyers, to gather evidence of collusion in the discovery process); see also NAT’L FOOTBALL LEAGUE, *supra* note 63, at 113–14 (describing NFL discovery process).

92. See *supra* Part III.A–C.

93. See *supra* Part III.D.

would be an uphill battle for any player to prove collusion and doing so would require the player's attorneys to engage in a long and time-consuming internal discovery process.