Professional Sports Leagues and the First Amendment: A Closed Marketplace

Christopher J. McKinny

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COMMENTS

PROFESSIONAL SPORTS LEAGUES AND THE FIRST AMENDMENT: A CLOSED MARKETPLACE

I. INTRODUCTION: THE CONTROVERSY

Get murdered in a second in the first degree
Come to me with faggot tendencies
You’ll be sleeping where the maggots be . . .

Die reaching for heat, leave you leaking in the street
Niggers screaming he was a good boy ever since he was born
But fuck it he gone
Life must go on
Niggers don’t live that long

Allen Iverson, a.k.a. “Jewelz,” from the song “40 Bars.”

These abrasive lyrics, quoted from Allen Iverson’s rap composition “40 Bars,” sent a shock-wave of controversy throughout the National Basketball


2. Allen Iverson, a 6-foot, 165-pound shooting guard, currently of the Philadelphia 76ers, was born June 7, 1975 in Hampton, Virginia. Players: Allen Iverson, ESPN.COM, http://sports.espn.go.com/nba/players/profile?statsid=3094 (last visited Jan. 17, 2003). After attending Georgetown University, Iverson was the first player selected in the 1996 NBA draft. Id. Iverson was both the NBA All-Star Game and regular season MVP during the 2000-2001 season, and led his team to the NBA Finals. Id. His career scoring average is 26.9 points per game. Id.

Association (NBA) in the year 2000.4 Earlier that year, Iverson, a superstar guard and reigning league MVP for the Philadelphia 76ers, had signed a record contract with Universal Records to fulfill a childhood dream of recording a rap album.5 After months of painstaking work in the studio, Iverson released the first single, “40 Bars,” to radio in October 2000, with the full album, Non-Fiction, soon to follow.6 Upon its release, the song’s lyrics immediately garnered widespread criticism from the media, gay and lesbian groups, civil rights activists and, perhaps most importantly, NBA Commissioner David Stern.7 Stern wasted little time in chastising Iverson for using lyrics that he characterized as “coarse, offensive, and antisocial,” and further stated that Iverson had “done a disservice to himself, the Philadelphia 76ers, his teammates, and perhaps all NBA players.”8 Stern thus encouraged Iverson to return to the studio to re-record the song with what he characterized as “less offensive” lyrics.9 After initially refusing, Iverson reluctantly agreed.10 For the next several months, Iverson and Stern would engage in a very public battle over the album’s contents, culminating in Iverson’s decision to cancel the album’s release.11

While Stern neither fined nor suspended Iverson for the controversial lyrics, the inescapable question remains: should he have been able to? While surprising to many, as the state of professional sports leagues currently stands, Stern does have that ability in his arsenal. According to one commentator:

Stern, a lawyer, knew and said that, as was the case with [John] Rocker, the league could do whatever it felt to be best in this situation, without any violation of the athlete’s free speech rights. According to Stern, “The NBA is a private organization. Whatever constitutional right of free speech an individual may have, there is no constitutional

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6. Id. Following the controversy with Stern, Iverson decided to change the title of his CD to Misunderstood. McKenna, supra note 1.
7. McKenna, supra note 1.
8. Id.
11. Maaddi, supra note 5. Prior to training camp in 2001, Iverson made the following statement: “I’m through with it... [i]t’s something I always wanted to do. It was a childhood dream of mine, just like basketball. But I feel like people took it the wrong way. It kind of took all the excitement out of it.” Id.
A CLOSED MARKETPLACE

right to participate in the NBA and I have the power... to disqualify players who engage in offensive conduct—including inappropriate speech.”

The controversy generated by Iverson's "40 Bars" is not an isolated incident. Over the years, there have been a number of well-publicized examples of professional athletes being fined, suspended, or both for exercising First Amendment rights many of us believe to be absolute. These examples have arisen in a number of contexts, including, among other things, speech relating to religion, speech involving criticism of league officiating, and racially insensitive speech. Because professional athletes face media scrutiny unimaginable to the average person, particularly peculiar concerns are created.

The aim of this comment is to discuss and analyze several recent examples of professional sports leagues disciplining athletes for speech and religious expression against the backdrop of traditional First Amendment principles.

12. Shropshire, supra note 3.
13. See generally Ali v. State Athletic Comm'r of NY., 308 F. Supp. 11 (S.D.N.Y. 1969) (noting the court's denial of Ali's motion for preliminary injunction on the grounds that the New York State Boxing Commission's decision to suspend Ali's boxing license following his conviction for draft evasion was irrational and unsupported by evidence); Major League Baseball Players Ass'n v. Comm'r of Major League Baseball, 638 PLI/P at 765 (2001) (Das, Arb.) (detailing an arbitrator's reduction in Commissioner Selig's discipline of Rocker) [hereinafter Rocker Arbitration]; Kelly B. Koenig, Mahmoud Abdul-Rauf's Suspension for Refusing to Stand for the National Anthem: A "Free Throw" for the NBA and Denver Nuggets, or a "Slam Dunk" Violation of Abdul-Rauf's Title VII Rights?, 76 WASH. U. L.Q. 377 (1998) (discussing the Mahmoud Abdul-Rauf suspension); Ross Newhan, Now, Baseball Has Spoken. L.A. TIMES, Feb. 1, 2000, at D1 (describing Major League Baseball Commissioner Bud Selig's fine and suspension of Rocker); Jeff Pearlman, At Full Blast, SPORTS ILLUSTRATED, Dec. 27, 1999, at 60 (detailing a series of inflammatory comments concerning among other things, New York City, welfare recipients, homosexuals, and foreigners made by then-Atlanta Braves pitcher John Rocker); Carol Slezak, Comments Cost Worm $50,000, CHI. SUN-TIMES, June 13, 1997, at 136 (detailing the NBA's discipline of then-Chicago Bulls forward Dennis Rodman for comments he made about Mormons).
14. For an example, see PAUL C. WEILER & GARY R. ROBERTS, SPORTS AND THE LAW: TEXT, CASES, PROBLEMS 883-84 (2nd ed., West 1998) (discussing the New York State Athletic Commission's revocation of Muhammad Ali's boxing license following Ali's refusal to be inducted into the military). This incident will be given a more in-depth treatment in the pages that follow.
15. Over the years, there have been a plethora of incidents in this area. A discussion of all of them is beyond the scope of this comment. However, for a recent and notable example, see Marc Stein, Whistle Blower: Mark Cuban, Dallas Maverick Owner, Gaining Support for his Crusade Against League Referees, SAN DIEGO UNION-TRIB., Feb. 11, 2002, at C2 (discussing several recent fines levied against Dallas Mavericks' owner Mark Cuban by NBA Commissioner David Stern for his continual criticism of the quality of NBA officiating).
16. For a recent example of such an incident in professional sports, see WEILER & ROBERTS, supra note 14, at 75 (discussing Major League Baseball's imposition of a one-year suspension and $25,000 fine against Cincinnati Reds owner Marge Schott following her use of a number of racial slurs, such as "dumb niggers" and "money-grubbing Jews").
This will be done to help the reader conclude that professional sports leagues are not currently providing their athletes with sufficient free speech and expression protection. League unions, as agents of their members, must exert more pressure on league management to agree to changes in league constitutions, bylaws, and collective bargaining agreements that will afford professional athletes with a greater degree of First Amendment protection.

The first portion of this comment will provide a brief constitutional background discussing the origin and evolution of First Amendment principles in the United States of America. The comment will then proceed to explain the principal concepts of the state action requirement. After doing so, this general legal framework will be applied to the world of professional sports leagues by discussing the current state of commissioner disciplinary authority, private association law, and the interaction between league constitutions and collective bargaining agreements. Next, several recent examples of commissioner disciplinary determinations that have raised First Amendment concerns will be discussed. Lastly, a brief proposal for reforming professional sports league constitutions and collective bargaining agreements will be advanced.

II. CONSTITUTIONAL BACKGROUND: WHY DO WE VALUE FREE SPEECH AND EXPRESSION?

Countries and governments are often defined by the ideals they seek to foster and protect. There is perhaps no greater modern day example of this idea than the United States of America. Dating back to the earliest days of its existence, the United States has been admired and emulated as the ideal model of the democratic way of life. While there may be no single characteristic that truly defines a democracy, many commentators have pointed to the concepts of freedom of speech and expression embodied in the First Amendment of the United States Constitution as a logical starting point. For example, in the 1937 Supreme Court case Palko v. Connecticut, Justice Cardozo characterized the First Amendment as "the matrix, the indispensable

17. See generally Alexis de Tocqueville, DEMOCRACY IN AMERICA (George Lawrence trans., J.P. Mayer ed., Harper Perennial 1966) (discussing democracy as it existed in the United States as the model form of government for other countries to emulate).
18. According to de Tocqueville, "I admit that I saw in America more than America; it was the shape of democracy itself which I sought." Id. at 19.
19. KATHLEEN M. SULLIVAN & GERALD GUNThER, CONSTITUTIONAL LAW 962 (14th ed. 2001) (quoting Justice Brandeis' concurrence in the case Whitney v. California, 274 U.S. 357, 375 (1927), in which he made the comment, "[t]hose who won our independence believed that the final end of the State was to make men free to develop their faculties . . . [t]hey valued liberty both as an end and as a means").
condition, of nearly every other form of freedom."\textsuperscript{20}

Commentators have identified three principal societal functions First Amendment rights are designed to enhance: (1) "advancing knowledge and 'truth' in the 'marketplace of ideas,'" (2) "facilitating representative democracy and self-government," and (3) "promoting individual autonomy, self-expression and self-fulfillment."\textsuperscript{21} Over the years, these ideals have become firmly imbedded in our constitutional jurisprudence, and attempts to scale them back have been met with rabid hostility.\textsuperscript{22}

Contrary to popular belief, while perhaps fundamental to our American ideal of democracy, First Amendment rights are not absolute.\textsuperscript{23} Even the most cursory examination of First Amendment caselaw makes this concept abundantly clear. Courts have long recognized that some forms of speech and expression are entitled to more protection than others,\textsuperscript{24} and some groups of persons have been provided more First Amendment protection than others.\textsuperscript{25} For example, over the years, courts have concluded that speech relating to incitement, fighting words, libel, and obscenity lies completely outside the shadow of protection cast by the First Amendment,\textsuperscript{26} and courts have afforded the First Amendment rights of minors less protection than the First Amendment rights of adults.\textsuperscript{27} While many commentators have questioned

\begin{itemize}
\item \textsuperscript{20} 302 U.S. 319, 327 (1937).
\item \textsuperscript{21} SULLIVAN & GUNThER, supra note 19, at 959.
\item \textsuperscript{22} \textit{Id}.
\item \textsuperscript{23} "As written, the First Amendment is simple and unqualified. But, there has been a broad consensus that not all expression or communication is included within the 'freedom of speech.'" \textit{Id}.
\item \textsuperscript{24} \textit{Id}.
\item \textsuperscript{25} \textit{See generally} Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (discussing the limits on First Amendment rights).
\item \textsuperscript{26} \textit{See generally} Feiner v. New York, 340 U.S. 315 (1951) (rejecting petitioner's First Amendment defense to an arrest for disorderly conduct resulting from a speech to a "hostile audience").
\item \textsuperscript{27} \textit{See generally} Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (holding that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns"). \textit{But see} Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (stating that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate").
\end{itemize}

\begin{itemize}
\item \textsuperscript{28} SULLIVAN & GUNThER, supra note 19, at 956.
\item \textsuperscript{29} \textit{See generally} Hazelwood Sch. Dist., 484 U.S. 260. In that decision, the Court noted the following:
\begin{quote}
[T]he First Amendment rights of students in the public schools "are not automatically coextensive with the rights of adults in other settings," and must be "applied in light of the special characteristics of the school environment." A school need not tolerate student speech that is inconsistent with its "basic educational mission," even though the government could not censor similar speech outside the school.
\end{quote}
\textit{Id} at 266 (citations omitted).
the validity of these distinctions, the more pressing constitutional issue may be the extent to which First Amendment rights can be protected in what has traditionally been labeled the "private sector."

III. THE PROBLEM: THE PRIVATE ACTOR/STATE ACTOR DICHOTOMY

According to the text of the First Amendment of the United States Constitution, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." As originally interpreted, these words were thought to apply exclusively to the federal government. However, as the years passed, "governmental involvement in the private sector became more pervasive, [and] traditional notions as to what activity constitutes 'state action'...[became] blurred." In recognition of this fact, Congress subsequently passed the Fourteenth Amendment to incorporate the same constitutional limitations imposed on the federal government onto entities that can be fairly characterized as "state actors." While the idea appears noble, its interpretation and application has proved problematic.

While facially the First and Fourteenth Amendments may appear relatively unambiguous, judicial interpretation of their language has led to a great deal of constitutional debate. The main source of this debate lies in the seemingly straightforward language, "[n]o State shall... deprive any person of life, liberty, or property, without due process of law." The Supreme Court of the United States has come to an extremely strict understanding of what it believes the Founding Fathers intended this language to mean. In the Court's opinion, the word "State" as expressed in the Fourteenth Amendment should be interpreted to mean just that, "[n]o State shall... deprive any person of life, liberty, property, without due process of law." In other

28. U.S. Const. amend. I.
29. See generally SULLIVAN & GUNThER, supra note 19, at 433-50 (discussing the historical developments in the incorporation controversy).
30. Id. at 958-59 (discussing the impact the Sedition Acts had on the United States presidential election of 1800).
33. U.S. Const. amend. XIV, § 1 (emphasis added).
34. Davis, supra note 32, at 1395.
35. Id. (quoting U.S. Const. amend. XIV, § 1 (emphasis added)).
words, the First and Fourteenth Amendments do not protect United States citizens from constitutional violations by individuals acting in a private capacity. In order for constitutional protection to be triggered, alleged wrongdoers must “carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it.”

This concept has become known as the “state actor” requirement. The underlying theory behind the state actor principle was to strike a delicate balance between “preserv[ing] an area of individual freedom by limiting the reach of federal law and avoiding the imposition of responsibility on a State for conduct it could not control... [and] assur[ing] that constitutional standards are invoked ‘when it can be said that the State is responsible for the specific conduct of which the plaintiff complains.”

Until the early twentieth century, the Court was extremely strict in its application of the state actor requirement. Beginning with the Civil Rights Cases in 1883, courts vehemently adhered to the traditional fine line drawn by the state actor/private actor dichotomy. In the absence of congressional legislation, courts were unwilling to find conduct that was exclusively private to be violative of Fourteenth Amendment guarantees. The Court’s rationale behind this strict adherence seems to have been based on the belief that governmental intervention in matters of private discrimination lies outside of the firm judicial boundaries established by the Fourteenth Amendment, and should instead be dealt with by the legislative and executive branches of state and federal governments. Judicial intervention could potentially thrust the Court into an area in which it had little to no expertise. That was a risk the Court was unwilling to take.

Following the Civil Rights Cases, however, the Supreme Court began to vastly expand the traditional boundaries of the state actor requirement. For example, against vigorous dissent, Supreme Court rulings in mid-twentieth

36. Id.
39. Davis, supra note 32, at 1397.
40. Civil Rights Cases, 109 U.S. 3, 17 (1883) (holding that “[c]ivil rights... cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong; or a crime of that individual...”).
41. Davis, supra note 32, at 1397-98.
43. Davis, supra note 32, at 1397-98.
century cases such as *Marsh v. Alabama*, 44 *Shelley v. Kraemer*, 45 *Burton v. Wilmington Parking Authority*, 46 and *Reitman v. Mulkey* 47 extended the state actor concept to new extremes. This expansion was due in large part to the Court’s development of three theories, known as the “public function” theory, the “state encouragement” theory, and the “nexus” theory, by which, if satisfied, state action could be found.48 While a complete explanation of these three theories is beyond the scope of this comment, some time must be devoted to discussing them.

Under the public function theory, courts ask whether “the private entity exercise[s] powers which are traditionally exclusively reserved to the state.”49 In other words, the public function theory operates under the assumption that certain conduct of private parties should be subject to constitutional restraints because it closely resembles activities traditionally engaged in by the government. Thus, the focus of the public function theory is the particular activity being engaged in by the party in question. The Supreme Court’s decision in *Marsh*, which declared that a “company town’s” attempts to eliminate the dissemination of religious materials satisfied the state actor requirement, represented the public function theory’s high water point.50 Today, further extension of the “public function” strand appears unlikely due to the Court’s extremely stringent “traditionally exclusively” standard in *Jackson v. Metropolitan Edison Co.*51

When dealing with the state encouragement theory, courts examine “the

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44. 326 U.S. 501, 506 (1946) (holding that a “company town” in Alabama was subject to Constitutional protections and state regulation “[s]ince [its] facilities are built and operated primarily to benefit the public and since their operation is essentially a public function . . . .”) (emphasis added).

45. 334 U.S. 1, 20 (1948) (holding that “[b]y granting judicial enforcement of . . . restrictive agreements . . . the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand”).

46. 365 U.S. 715, 726 (1961) (holding that “when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself”).

47. 387 U.S. 369, 381 (1967) (affirming the state court determination that an amendment to a state constitution upholding the right of property owners to discriminate in land sales unconstitutionally involves the state in private racial discrimination).

48. These theories became instrumental in determining state actor questions due to the fact that the Court has never developed a bright-line state actor “test.” Instead, the Court has insisted on making case-by-case determinations of state action. The three theories mentioned above have aided in these determinations. *Brentwood*, 531 U.S. at 295-98.

49. Wolotsky v. Huhn, 960 F.2d 1331, 1335 (6th Cir. 1992) (internal citations omitted).


51. 419 U.S. 345 (1974); see also SULLIVAN & GUNTHER, *supra* note 19, at 871, 877.
quantity and quality of encouragement, coercion and direction on behalf of the governmental entity toward the private entity."52 Under this test, a state will be held responsible for the actions of a private party only when the state can be said to have coerced or encouraged the private party to the extent that the decision may be fairly attributed to the state itself.53 Mere designation or delegation of duties traditionally associated with the state will not suffice.54 Thus, this theory focuses not upon the type of activity being engaged in, but upon governmental encouragement or authorization of private conduct. An example of the Court's use of this theory can be seen in the 1967 case Reitman v. Mulkey, in which the Court held that a state constitutional amendment, repealing laws that had prohibited discrimination in the sale or rental of land, constituted state authorization of discrimination in the housing market.55

Lastly, under what is referred to as the nexus theory, courts look for such a significantly "'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'"56 In other words, when using the nexus theory, courts look for "sufficient points of contact between the private actor and the state to justify imposing constitutional restraints on the private actor or commanding state disentanglement."57 The nexus theory centers on the relationship between the private party and the government. An example of the Court's use of the nexus theory can be illustrated by the case Shelley v. Kraemer, in which the Court found that a state's judicial enforcement of racially restrictive covenants constituted sufficient state involvement to find the state actor requirement satisfied.58

As time passed, more and more Supreme Court justices were becoming concerned that the state action doctrine, as expressed in the previously mentioned cases, was coming dangerously close to entirely subsuming the private sector,59 and as a result, subsequent Court opinions, such as

53. Id. at 764 (citing Jackson, 419 U.S. 345).
54. Reitman, 387 U.S. at 381.
55. Brentwood, 531 U.S. at 295 (quoting Jackson, 419 U.S. at 351).
56. SULLIVAN & GUNTHER, supra note 19, at 871.
57. Shelley, 334 U.S. at 20.
58. Reitman, 387 U.S. at 395 ("I believe the state action required to bring the Fourteenth Amendment into operation must be affirmative and purposeful, actively fostering discrimination.") (Harlan, J., dissenting).
Jackson,\textsuperscript{60} sharply curtailed findings of state action. Contemporary decisions of the Supreme Court seem to favor the Jackson approach.\textsuperscript{61} As we shall soon see, this modern trend of Supreme Court reluctance to find state action in the private sector has transcended the world of professional sports.

IV. THE APPLICATION OF FREEDOM OF SPEECH RIGHTS TO THE WORLD OF SPORTS

A. The Status Quo: The Current State of League Constitutions and Collective Bargaining Agreements

While recent Supreme Court decisions indicate that in certain circumstances high school athletic associations can qualify as state actors,\textsuperscript{62} traditionally private entities such as the National Collegiate Athletic Association (NCAA),\textsuperscript{63} the United States Olympic Committee (USOC),\textsuperscript{64} and professional sports leagues have maintained their private actor status.\textsuperscript{65} As a result, the NCAA, the USOC, and professional sports leagues\textsuperscript{66} have been left

\textsuperscript{60} Jackson, 419 U.S. at 350 (holding that "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment").

\textsuperscript{61} See Blum v. Yaretsky, 457 U.S. 991, 1005-12 (1982) (holding that state action was not present where privately owned nursing homes were receiving reimbursements from the state for caring for Medicaid patients); Rendell-Baker v. Kohn, 457 U.S. 830, 839-43 (1982) (finding that a private school regulated by public authorities and primarily deriving its income from public sources was not engaged in state action when firing employees). But see Lugar, 457 U.S. at 941 (finding state action in a "private party's joint participation with state officials in the seizure of disputed property").

\textsuperscript{62} Brentwood, 531 U.S. at 303-05 (holding that a wholly intrastate high-school athletic association comprised mainly of public schools (84%) constituted a state actor under the "public entwinement" theory).

\textsuperscript{63} Tarkanian, 488 U.S. at 199 (holding that NCAA member schools conduct their "athletic program[s] under color of the policies adopted by the NCAA, rather than . . . those policies [that] were developed and enforced under color of [state] law").

\textsuperscript{64} DeFranz v. United States Olympic Comm., 492 F. Supp. 1181, 1194 (D.D.C. 1980) (holding that the USOC is not a state actor).


\textsuperscript{66} In the 1978 district court case Ludtke v. Kuhn, the court relied heavily on Burton to conclude that because Yankee Stadium received public funding, it could be considered a state actor for constitutional purposes. See generally Ludtke, 461 F. Supp. 86. In Ludtke, a female sports reporter for SPORTS ILLUSTRATED challenged former Major League Baseball Commissioner Bowie Kuhn's league-wide ban on the admission of female sportswriters to team clubhouses. Id. at 87-88. Ludtke was sent to Yankee Stadium to cover the 1977 World Series between the New York Yankees and the Los Angeles Dodgers. Id. at 90. After being denied access to the Yankee clubhouse following a game,
free to establish and enforce their own governing rules, subject only to the
tremendously deferential restraints of private association law.\textsuperscript{67}

In professional sports leagues, which are the principle focus of this
comment, league rules are embodied in league constitutions and are binding
upon players by way of standard player contracts and documents known as
collective bargaining agreements (CBA).\textsuperscript{68} As one may expect, league
constitutions are responsible for defining and outlining league rules, policies,
and procedures. CBAs are essentially agreements made between employer (in
this case, either Major League Baseball (MLB), the NBA, the National
Football League (NFL), or the National Hockey League (NHL)) and union
that define labor conditions and create a contractual relationship between
player, team, and league.\textsuperscript{69} These agreements vary by league, but at a
minimum will cover the following areas: "club discipline, non-injury
grievances, commissioner discipline, injury grievances, the [standard player
contract], college draft, option clauses, waivers, base salaries, access to
personnel files, medical rights, retirement, insurance and the duration of the

\textsuperscript{67} Ludtke filed suit against Kuhn for sexual discrimination on equal protection and due process grounds. The court concluded that because the City of New York owns the land upon which the stadium was built, used public funds to build and maintain the stadium, and received financial benefit from the stadium's continued operation, Kuhn's policy could be deemed state action. \textit{Id.} at 96. While this may indeed be the case, more recent Supreme Court jurisprudence seems to indicate that if this case were filed today, a different outcome would be likely. In the 2001 Supreme Court case \textit{Brentwood}, the Court synthesized nearly 130 years of state action law and declared four theories upon which state action may be found: (1) the public function theory; (2) the nexus theory; (3) the state encouragement theory; and lastly, and most recently, (4) the entwinement theory. 531 U.S. 288. When examined under this contemporary legal framework, it appears unlikely that New York's actions would be enough to warrant a finding of state action, as courts have now explicitly stated that the mere receipt of federal funds in and of itself is not enough to trigger state action. See generally \textit{Blum}, 457 U.S. 991. Absent the receipt of state funds, it appears unlikely that the totality of the circumstances presented in \textit{Ludtke} would compel a finding of state action.


\textsuperscript{69} For example, in Major League Baseball, the requirements of the Major League Agreement, including commissioner "best interests" authority, are bound upon all players by way of Schedule A, § 9(a) of the league collective bargaining agreement. BASIC AGREEMENT BETWEEN THE AMERICAN LEAGUE OF PROFESSIONAL BASEBALL CLUBS AND THE NATIONAL LEAGUE OF PROFESSIONAL BASEBALL CLUBS AND MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, EFFECTIVE JAN. 1, 1997, Schedule A, § 9(a) (1997) [hereinafter \textit{MAJOR LEAGUE AGREEMENT}].

\textsuperscript{69} BLACK'S LAW DICTIONARY 257 (7th ed. 1999).
As one can see, CBAs in professional sports leagues cover a wide variety of working conditions. However, for purposes of this comment, none are more important than those pertaining to league disciplinary determinations and individual rights.

B. "Best Interests" Authority of Professional Sports League Commissioners

All organizations need chief executive officers in order to ensure that operations run smoothly. In traditional professional sports leagues such as MLB, the NBA, the NFL, and the NHL, league authority to discipline players is vested in commissioners by way of league constitutions. "What makes sports unique (by comparison with the movie world, for example) is that the office of the commissioner has historically been viewed as the supreme voice about what truly is in the best interests (not just the business interests) of the game."  

In order to play in a professional sports league, as is essentially the case with any private association, athletes, in signing standard player contracts, must agree to comply with league constitutions and CBAs. Among other things, these documents require players to abide by disciplinary determinations made by league commissioners. Thus, as a result of standard player contracts, professional sports league commissioners are empowered with the authority to exert a great deal of control over the actions and activities of professional athletes through what is known as their "best interests" authority.

MLB was the first professional sports league to recognize the need for a commissioner, hoping that such an authority figure could help to restore public

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70. WALTER T. CHAMPION, JR., SPORTS LAW 45 (2nd ed. 2000).
72. While the authority of commissioners in professional sports leagues is not limited to "best interests" authority, best interests authority will be the focus of this comment due to the fact that it is the broadest authority possessed by commissioners.
74. WEILER & ROBERTS, supra note 14, at 2.
75. Jeffrey A. Dumey, Comment, Fair or Foul? The Commissioner and Major League Baseball's Disciplinary Process, 41 EMORY L.J. 581, 597 (1992) ("Thus, a person entering Major League Baseball as an owner, player, or employee must accept the jurisdiction of the Commissioner and disciplinary process under the 'best interests of baseball' clause."). Id.
confidence and integrity to a game in desperate need of that following the "Black Sox Scandal" in 1919. Prior to 1919, the game of baseball had achieved immense honor and popularity in the United States. "While other commercial sports of the era, most notably racing and boxing, were notoriously suspected of improprieties, professional baseball remained the lone sport on the ‘top shelf of honor.’" The Black Sox scandal, however, would quickly change all of that, and MLB viewed the establishment of the Office of the Commissioner as the vital component to the solution of that problem. Thus, on January 12, 1921, Kennesaw Mountain Landis became the first commissioner of MLB, vested with “control over ‘whatever and whoever’ had to do with baseball.” After Landis and MLB defined the standard for commissioner authority, other professional leagues quickly followed suit.

Today, in adherence to the legacy of Landis, the four traditional professional sports leagues in the United States vest their commissioners with what is known as “best interests of the sport” authority. Under this authority, league commissioners have broad discretion to discipline professional athletes for a wide variety of activities, both on and off the field of play. Essentially, any behavior deemed by the commissioner to be

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76. Id. at 585.
78. Dumey, supra note 75, at 583-84. “[B]eing a true American and being a fan are synonymous.” Id. at 583 (quoting HAROLD SEYMOUR, 2 BASEBALL: THE GOLDEN AGE 5 (1971)).
79. Id. at 583 (quoting SEYMOUR, supra note 78, at 275).
80. Id. at 585.
81. Id. (citing SEYMOUR, supra note 78, at 322).
82. Pollack, supra note 67, at 1645-47. It is important to note that while “best interests authority” in other sports leagues is similar to that of Baseball’s, differences do exist. WEILER & ROBERTS, supra note 14, at 27.
83. See generally WEILER & ROBERTS, supra note 14, at 1-86 (discussing commissioner “best interests” authority in professional sports leagues).
84. For example, in the 1931 case Milwaukee Am. Ass’n v. Landis, 49 F.2d 298 (N.D. Ill. 1931), the court stated that “[t]he various agreements and rules . . . disclose a clear intent upon the part of the parties to endow the commissioner with all the attributes of a benevolent but absolute despot and all the disciplinary powers of the proverbial pater familias.” Id. at 299. “Broad discretion” to discipline may in fact be an understatement. For example, see SEYMOUR, supra note 78, at 375, which discusses MLB Commissioner Landis’ lifetime ban of New York Giants outfielder Benny Kauf. Kauf was banned from the game for life following an indictment on charges of auto theft. Even following Kauf’s subsequent acquittal, Landis refused to reinstate him, stating that allowing him to return would “burden patrons of the game with grave apprehension as to its integrity.” Id.
85. WEILER & ROBERTS, supra note 14, at 1-2.
detrimental to the image and integrity of the league is subject to discipline.\textsuperscript{86} In fact, some commentators have described this authority as "plenary" in nature.\textsuperscript{87} An illustration of this belief can be seen in the case \textit{Atlanta National League Baseball Club v. Kuhn, Inc.},\textsuperscript{88} in which the court declared:

The Commissioner has general authority, without rules or directives, to punish both clubs and/or personnel for any act or conduct which, in his judgment, is "not in the best interests of baseball" within the meaning of the Major League Agreement. What conduct is "not in the best interests of baseball" is, of course, a question which addresses itself to the Commissioner, not this court.\textsuperscript{89}

This judicial interpretation of "best interests" authority suggests the extremely wide degree of latitude commissioners are granted in making disciplinary determinations. This remarkable deference reflects the judicial inclination to allow private associations—which traditional professional sports leagues have been characterized as—to establish and enforce their own rules.\textsuperscript{90}

\textbf{C. Private Association Law in Professional Sports}

As private associations, the limited judicial review afforded to professional sports league commissioners' "best interests" authority operates under a "clearly erroneous" standard of review, and courts will not involve themselves in determining whether a commissioner's decision was "right or wrong."\textsuperscript{91} In fact, courts have long declared that "the results of internal association processes are subject to judicial reversal only if (1) the association's action adversely affects 'substantial property, contract or other economic rights' and the association's own internal procedures were inadequate or unfair, or if (2) the association acted maliciously or in bad faith."\textsuperscript{92} The reason for this deference is relatively simple: courts operate

\textsuperscript{86} Id. at 1.

\textsuperscript{87} RAY YASSER ET AL., SPORTS LAW: CASES AND MATERIALS 439 (3rd ed. 1997).


\textsuperscript{89} Id. at 1222.

\textsuperscript{90} See generally Pachman, supra note 67, at 1419-30 (discussing judicial reluctance to intervene in determinations made by private associations).

\textsuperscript{91} For example, note the following statement:

We conclude that the evidence fully supports, and we agree with, the district court's finding and conclusion that the Commissioner "acted in good faith, after investigation, consultation and deliberation, in a manner which he determined to be in the best interests of baseball" and that "whether he was right or wrong is beyond the competence and the jurisdiction of this court to decide."

Finley & Co. v. Kuhn, 569 F.2d 527, 539 (7th Cir. 1978) (emphasis added).

\textsuperscript{92} Nat'l Collegiate Athletic Ass'n v. Brinkworth, 680 So.2d 1081, 1084 (Fla. Dist. Ct. App.}
under the assumption that private associations are more fit to govern their internal operations than courts. According to one commentator,

[i]f a court undertakes to examine the group’s rules or past usages, its inquiry may lead it into... the “dismal swamp,” the area of its activity concerning which only the group can speak with competence. Rules and usages which have taken on a peculiar meaning over a period of time, when interpreted by a court which is unfamiliar with the group or unsympathetic to its practices, may be construed in a way which does not reflect the understanding of the members prior to the dispute.

While the courts have traditionally been extremely deferential to commissioner disciplinary determinations, it is important to note that they will not hesitate to intervene when there is any indication that a party’s due process rights have been violated. Thus, it appears that judicial review of private association affairs is primarily concerned with process, not merits.

While theoretically possible, it is important to note that very few challenges to commissioner authority actually make it to the judicial level. Instead, as one would expect, most are resolved internally. This internal resolution has had a tremendous impact on a number of professional athletes over the years. The following section discusses several of the more notable examples.

V. RECENT EXAMPLES OF COMMISSIONER DISCIPLINE FOR FIRST AMENDMENT RELATED ISSUES

Over the years, commissioner “best interests of the game” authority has generated considerable controversy and media attention in all of the major professional sports leagues in the United States. While general

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93. Finley, 569 F.2d at 539. “Any other conclusion would involve the courts in not only interpreting often complex rules of baseball to determine if they were violated but also, as noted in the Landis case, the ‘intent of the [baseball] code,’ an even more complicated and subjective task.” Id.

94. Dumey, supra note 75, at 598 (quoting Note, Developments in the Law: Judicial Control of Actions of Private Associations, 76 HARV. L. REV. 983, 991 (1963)).

95. Pachman, supra note 67, at 1430 n.132 (discussing several examples of caselaw in the world of sports in which courts insisted that sports organizations provide members with due process of law).

96. A discussion of every instance in which a professional athlete has been disciplined for behavior thought to be protected by the First Amendment is beyond the scope of this comment. Thus, this comment will focus on several of the most highly publicized incidents in recent years in the areas of freedom of speech and freedom of expression.

97. For example, in MLB, recent controversial commissioner disciplinary determinations include both the Pete Rose and John Rocker incidents. See generally Pachman, supra note 67; Rocker
commissioner discipline of athletes has become a widespread practice in modern professional sports, commissioner discipline for athlete speech and religious expression has been far less commonplace. Although there has been a great deal of variety in the First Amendment claims brought by professional athletes over the years, many of the most highly publicized claims have involved either freedom of religious expression or freedom of speech. Thus, the following examples illustrate several of the more notable, recent developments in the First Amendment rights of professional athletes in these two contexts.

A. First Amendment Freedom of Religious Expression

"To some extent, claims based on the free exercise of religion overlap with free speech claims." However, freedom of expression and freedom of speech claims involve distinct issues. For example, the term "exercise," as used in this context, encompasses more than simple belief or expression. Instead, the term "exercise," as used in relation to the first amendment, "often implies conduct or action." Additionally, "the establishment clause has no parallel in the speech clause. In the religion context . . . it places limits on how far either legislatures or courts can go in exempting religious believers from general regulations, or otherwise accommodating free exercise values." "Free exercise challenges arise [most] commonly when laws regulate religious practice or conduct." Over the years, freedom of expression claims have been far less prevalent than freedom of speech claims in professional sports; however, the most famous freedom of religious expression action initiated by an athlete is likely legendary boxer Muhammad Ali’s battle with the New York State Athletic Commission.


98. SULLIVAN & GUNTHER, supra note 19, at 1444.
99. Id.
100. Id.
101. Id. at 1445.
1. The Muhammad Ali Incident

Few, if any, professional athletes have been as controversial, transcending, and outright important as Muhammad Ali. The controversy surrounding Ali and Vietnam essentially began on January 24, 1964, the date on which Ali was ordered to report for a military qualifying examination at the Armed Forces Induction Center in Florida. The military qualifying examination consisted of two parts: a physical examination and a mental aptitude test. While having no trouble with the physical examination, Ali scored in the sixteenth percentile on the mental aptitude test, fourteen percentage points short of the passing grade of thirty.

Two years later, as the war effort in Vietnam continued to escalate, the military lowered the minimal percentile score on the mental aptitude test from thirty to fifteen, effectively making Ali eligible for service. Ali, a follower of the Nation of Islam since 1964, immediately requested that he be exempted from induction into the military as a conscientious objector to war.

As a Muslim, Ali contended that any involvement in Vietnam would violate the...
rules of his faith.¹¹⁰ This decision alienated Ali from a number of Americans and caused him to become “one of the most despised public figures in America.”¹¹¹

While a Kentucky Appeal Board granted Ali’s conscientious objector request, “the National Selective Service Presidential Appeal Board voted unanimously to maintain Ali’s 1-A classification”¹¹² following FBI and Department of Justice intervention into the matter.¹¹³ Following the decision of the National Selective Service Presidential Appeal Board, Ali was to be inducted into the United States Military on April 28, 1967.¹¹⁴ However, on that date, the name “Cassius Marcellus Clay”¹¹⁵ was called four times, and four times Ali refused to step forward.¹¹⁶ Thus, later that same day, the World

¹¹⁰ Id. at 166.

¹¹¹ Oates, supra note 103, at 209; Schwartz, supra note 103 (noting that following Ali’s decision to join the Nation of Islam, his “popularity nose-dived”). “‘If you had told somebody in 1968 that in 1996 Muhammad Ali would be the most beloved individual on earth, and the mere sight of him holding an Olympic torch would bring him to tears, you’d have won a lot of bets.’” Schwartz, supra note 103 (quoting Bryant Gumbel).

¹¹² HAUSER, supra note 104, at 166.

¹¹³ Id. Throughout the course of his refusal to enlist, Ali made a number of memorable comments. Perhaps most famously, Ali was quoted as saying, “Man, I ain’t got no quarrel with them Vietcong.” Id. “No Vietcong ever called me nigger.” Oates, supra note 103, at 210. A short time later, Ali elaborated on these profound and controversial statements by saying:

Why should they ask me ... to put on a uniform and go ten thousand miles from home and drop bombs and bullets on brown people in Vietnam while so-called Negro people in Louisville are treated like dogs? If I thought going to war would bring freedom and equality to twenty-two million of my people, they wouldn’t have to draft me; I’d join tomorrow. But I either have to obey the laws of the land or the laws of Allah. I have nothing to lose by standing up and following my beliefs. So I’ll go to jail. We’ve been in jail for four hundred years.

HAUSER, supra note 104, at 167.

¹¹⁴ HAUSER, supra note 104, at 166. In opposing the determination of the Appeal Board, the Department of Justice wrote a letter to the Appeal Board, stating that based upon its examination of the FBI’s investigation of Ali, it appeared “that Ali’s objection to war rested on political and racial rather than religious grounds, that he was opposed only to certain types of war, and that his beliefs were a matter of convenience rather than sincerely held.” Id. at 155.

¹¹⁵ Much to Ali’s dismay, even after he had legally changed his name from Cassius Marcellus Clay—a name he characterized as his “slave name”—to Muhammad Ali in 1964, “the majority of white publications, including even The New York Times, as well as television commentators, refused ... to acknowledge Ali’s new, legal name.” Oates, supra note 103, at 212.

¹¹⁶ HAUSER, supra note 104, at 169. Following the induction ceremony, Ali issued the following statement:

I am proud of the title “World Heavyweight Champion,” which I won in the ring in Miami on February 25, 1964. The holder of it should at all times have the courage of his convictions and carry out those convictions, not only in the ring but throughout all phases of his life. It is in light of my own personal convictions that I take my stand in rejecting the call to be inducted into the armed services. I do so with full realization of its implications and possible consequences. I have searched my conscience, and find I cannot be true to my belief in my religion by accepting such a call. My decision is a private and
Boxing Association and the "New York State Athletic Commission [a governing body analogous to the commissioner's office] suspended [Ali's] boxing license and stripped him of his title,"\(^{117}\) stating that Ali's "refusal to enter the service and [his] felony conviction in violation of federal law is regarded by this Commission to be detrimental to the best interests of boxing, or to the public interest, convenience or necessity."\(^{118}\) Shortly after the New York State Athletic Commission announced its decision to strip Ali of his state boxing license, all other United States jurisdictions followed suit.\(^{119}\) Following the revocation of his boxing license and World Heavyweight Title, Ali filed lawsuit after lawsuit against the myriad of state boxing commissions\(^{120}\) that had denied him the right to participate in the sport he loved.

In his lawsuit against the New York State Athletic Commission, which was decided under the Fourteenth Amendment, Ali claimed that the Commission had acted arbitrarily and capriciously in revoking his boxing license due to the fact that other boxers who had been convicted of similar and, in many cases, much more heinous crimes were allowed to continue to box.\(^{121}\)

In essence, Ali's claim was a private association law challenge to the New York State Athletic Commission's "best interests" authority.\(^{122}\) After initially rejecting Ali's claim, the court subsequently reversed, and forced the Athletic

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individual one. In taking it I am dependent solely upon Allah as the final judge of these actions brought about by my own conscience. I strongly object to the fact that so many newspapers have given the American public and the world the impression that I have only two alternatives in taking this stand—either I go to jail or go to the Army. There is another alternative, and that alternative is justice. If justice prevails, if my constitutional rights are upheld, I will be forced to go neither to the Army nor jail. In the end, I am confident that justice will come my way, for the truth must eventually prevail.

*Id.* at 170.


119. *Houser, supra* note 104, at 172. Additionally, the United States government revoked Ali's passport to prevent him from boxing overseas. *Id.* at 181. This decision precluded Ali from boxing anywhere for a period of three years. *Id.* at 202.  
120. See generally *Ali*, 308 F. Supp. at 19 (noting the court's denial of Ali's motion for preliminary injunction on the grounds that the New York State Boxing Commission's decision to suspend Ali's boxing license following his conviction for draft evasion was irrational and unsupported by evidence); *Ali*, 316 F. Supp. at 1252-53 (noting the court's reversal of its earlier decision upholding the New York State Boxing Commission's decision to revoke Ali's license on the grounds that the Commission had acted arbitrarily and capriciously).  
122. *Id.* at 1247-48.
Commission to reinstate Ali's license. According to the United States District Court for the Southern District of New York:

Although the state possesses broad powers to regulate boxing, however, it may not exercise those powers in such a way as to deny to an applicant the equal protection of the state's laws, which is guaranteed to him by the Fourteenth Amendment. A deliberate and arbitrary discrimination or inequality in the exercise of regulatory power, not based upon differences that are reasonably related to the lawful purposes of such regulation, violates the Fourteenth Amendment.

The district court concluded that while Ali may not have had constitutional protection for his actions due to the New York State Athletic Commission's private actor status, he should at the least have legal protection from arbitrary and capricious behavior under private association law. Subsequently, this decision was affirmed by the United States Supreme Court, which concluded that "it is indisputably clear... that the Department was simply wrong as a matter of law...." Thus, nearly three and one-half years after he was denied the right to earn his living in the ring, Ali was finally allowed to fight to regain the title that had been so ruthlessly stripped from him.

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123. Id. at 1253.
124. Id. at 1250 (citations omitted).
125. According to the district court:

In short, the exercise of state power by a state agency in the issuance or refusal of licenses to engage in a regulated activity should not represent the exercise of mere personal whim, caprice or prejudice on the part of such agency.... If the Commission in the present case had denied licenses to all applicants convicted of crimes or military offenses, plaintiff would have no valid basis for demanding that a license be issued to him. But the action of the Commission in denying him a license because of his refusal to serve in the Armed Forces while granting licenses to hundreds of other applicants convicted of other crimes and military offenses involving moral turpitude appears on its face to be an intentional, arbitrary and unreasonable discrimination against plaintiff.... It is not suggested that any rational basis exists for singling out the offense of draft evasion for labeling as "conduct detrimental to the interests of boxing" while holding that all other criminal activities such as murder, rape, arson, burglary, robbery and possession of narcotics are not so classified. All other things being equal, the convicted murderer, burglar, rapist, or robber would seem to present a greater risk of corruptibility as a licensed boxer, and a greater likelihood of bringing boxing into disrepute, than would the person who openly refused to serve in the Armed Forces.

Id. at 1250-51 (citations omitted).
127. HAUSER, supra note 104, at 202.
2. The Mahmoud Abdul-Rauf Incident

In 1996, Mahmoud Abdul-Rauf was arguably having the best year of his career as a shooting guard for the NBA’s Denver Nuggets, averaging 19.2 points per game. Five years earlier, Abdul-Rauf, then known as Chris Jackson, had become a follower of the Muslim religion. In the years between 1991 and 1996, Abdul-Rauf became increasingly devoted to his faith, while at the same time becoming more and more dissatisfied with United States foreign policy, most notably its involvement in the Gulf War. According to Abdul-Rauf, who had described himself as “[f]irst, foremost and last . . . a Muslim,” the American flag had become “a symbol of oppression . . . [and] tyranny.” Thus, after coming to the conclusion that he “[could not] be for God and for oppression,” Abdul-Rauf vowed that he would never again stand for the playing of the national anthem that precedes every NBA game.

This controversial decision put Abdul-Rauf in violation of an NBA rule dating back to World War II that required players to stand “respectfully” during the playing of the national anthem. Initially, the Nuggets, with the consent of the NBA, allowed Abdul-Rauf to return to the locker room during the playing of the national anthem so as to be out of the view of the fans in

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130. Koenig, supra note 13, at 377-78 (citing Mossman, supra note 128).

131. WEILER & ROBERTS, supra note 14, at 76.

132. Donna Carter, Abdul-Rauf Has New Song: R-e-s-p-e-c-t, DENVER POST, Apr. 23, 1996, at D1. Abdul-Rauf also declared that “[m]y beliefs are more important than anything . . . If I have to give up basketball, I will.” Rosco Nance, Abdul-Rauf Suspended Over Anthem, USA TODAY, Mar. 13, 1996, at 1C.

133. WEILER & ROBERTS, supra note 14, at 76. Additionally, Abdul-Rauf stated “I just don’t look at Muslim issues, I look at Caucasian America and I look at the African-American being oppressed in this country . . . [a]nd I don’t stand for that. I’ll never stand for that.” Dave Krieger, Abdul Rauf Vows to Fight Suspension, ROCKY MNTN. NEWS, Mar. 13, 1996, at 4A.


135. WEILER & ROBERTS, supra note 14, at 76.
As time passed, however, Abdul-Rauf began to display his opposition publicly by remaining on the bench or stretching directly in front of it during the national anthem. In response, NBA Commissioner David Stern announced that Abdul-Rauf would be suspended without pay until he was willing to comply with the league rule. Stern based his decision to suspend Abdul-Rauf on a provision contained within the NBA's CBA that allowed the commissioner to "discipline players who are 'guilty of conduct prejudicial or detrimental' to the NBA."

Both Abdul-Rauf's action and Commissioner Stern's reaction generated a swarm of media attention. While many found Abdul-Rauf's refusal to stand for the national anthem offensive, others believed that Stern's decision had violated Abdul-Rauf's First Amendment and Title VII rights. In fact, the National Basketball Players Association went so far as to offer filing a grievance against the NBA on Abdul-Rauf's behalf, an offer that Abdul-Rauf ultimately rejected.

After the initial one-game suspension, Abdul-Rauf decided that he would be willing to stand for the playing of the national anthem, provided that he could "stand... with his eyes closed, his hands cupped close to his face, and praying to Allah." Stern found this proposal satisfactory, and agreed to lift Abdul-Rauf's suspension. Following Stern's reinstatement of Abdul-Rauf, the matter was settled without lawsuit or arbitration.

B. First Amendment Freedom of Speech

As was previously mentioned, freedom of speech claims differ somewhat
from freedom of expression claims. While freedom of expression claims involve conduct or action, freedom of speech claims refer to simply that: pure speech in and of itself. In the following examples, the athletes involved were punished by their respective leagues, not for anything relating to the exercise of their religion, but rather for statements made both on and off the field of play.

1. The John Rocker Incident

Few events in recent sports history have generated as much media attention as former Atlanta Braves pitcher John Rocker's infamous comments made in a 1999 interview with the sports magazine SPORTS ILLUSTRATED. In the months preceding the interview, the volatile Rocker had developed an intense relationship with fans of the Braves principal rival at the time, the New York Mets. This relationship stemmed largely from several exchanges of profanity and obscene gestures made between Rocker and Mets fans in a late-season series at Shea Stadium in New York, and reached its boiling point in a post-season match-up between the same two clubs shortly thereafter.

The situation that had erupted between Rocker and Mets fans generated a great deal of publicity for Rocker, and following the conclusion of the 1999 season, he agreed to be interviewed by SPORTS ILLUSTRATED writer Jeff Pearlman. Throughout the course of the interview, Rocker made a number of "profoundly insensitive and arguably racist statements." Among other things, Rocker referred to "an overweight black teammate [as] 'a fat
characterized Japanese women as bad drivers, expressed a dislike for what he referred to as "foreigners," and when asked about the possibility of ever playing for a New York team responded:

I would retire first. It's the most hectic, nerve-racking city. Imagine having to take the [Number] 7 train to the ballpark, looking like you're [riding through] Beirut next to some kid with purple hair next to some queer with AIDS right next to some dude who just got out of jail for the fourth time right next to some 20-year-old mom with four kids. It's depressing.

As one may expect, the nation exploded following the publication of Pearlman's article. Many people were upset about Rocker's comments, including MLB Commissioner Alan H. "Bud" Selig. In a news release announcing the discipline to be imposed on Rocker, Selig stated:

Major League Baseball takes seriously its role as an American institution and the important social responsibility that goes with it... We will not dodge our responsibility. Mr. Rocker should understand that his remarks offended practically every element of society and brought dishonor to himself, the Atlanta Braves and Major League Baseball.

The terrible example set by Mr. Rocker is not what our great game is about and, in fact, is a profound breach of the social compact we hold in such high regard.

Based upon these observations, Selig, who characterized Rocker's remarks as

153. Id. at 775.
155. Id.
156. Id. (quoting John Rocker).
158. For example, consider the following:

On January 5, 2000 the Atlanta City Council unanimously adopted a resolution condemning Rocker's remarks. A coalition of community organizations, many representing groups that were maligned by Rocker's remarks, as well as other individuals (including Jesse Jackson) and groups, demanded swift and decisive action by the Braves and the Commissioner. The Commissioner received literally thousands of communications condemning and, in some instances, defending Rocker's remarks. Many of these communications, while disapproving of Rocker's words, opposed disciplining him on free speech grounds.

Id. at 777-78.
159. Rocker Arbitration, supra note 13, at 769.
160. Id. at 777.
“hate speech”\textsuperscript{161} (the actual accuracy of this characterization is highly contestable), used his “best interests” authority to suspend Rocker for seventy-three days without pay,\textsuperscript{162} ordered him to make a $20,000 donation to “the NAACP or a similar organization dedicated to the goals of diversity,” and instructed him to enroll in a diversity training program prior to his return to MLB.\textsuperscript{163}

As was the case with Mahmoud Abdul-Rauf, even should he have desired to, Rocker would have been barred from filing constitutional claims against MLB due to its private actor status.\textsuperscript{164} However, Rocker and the Major League Baseball Player’s Association (MLBPA) wasted little time in filing a Notice of Grievance against MLB, contending that Selig’s punishment was without “just cause” in violation of Article XII(A) of the Major League Agreement.\textsuperscript{165} Specifically, the union presented the arbitrator with two main grievances directed at the punishment Selig had imposed upon Rocker: First, the union “argued that the penalty was too great when compared with past disciplines by the commissioner’s office;”\textsuperscript{166} and second, the union “maintained that speech—even if it’s offensive—shouldn’t be grounds for punishment.”\textsuperscript{167}

The arbitration proceeding that followed the filing of Rocker’s grievance proved to have mixed results for Selig. While the arbitrator ultimately vindicated Selig’s authority to discipline an athlete for speech-related, off-season conduct, he also significantly reduced the original punishment Selig had imposed upon Rocker.\textsuperscript{168} According to the arbitrator, Selig’s desired punishment of Rocker vastly exceeded past disciplinary actions taken by the

\textsuperscript{161} Id. at 778.
\textsuperscript{162} Shropshire, supra note 3.
\textsuperscript{163} Rocker Arbitration, supra note 13, at 770.
\textsuperscript{164} Mel Antonen, \textit{Law Doesn’t Bar Selig From Action}, USA TODAY, Feb. 1, 2000, at 3C (“For 200 years, courts have interpreted the First Amendment to say that the government can’t stop Rocker from shooting off his mouth, but Rocker can’t use it as a protection from punishment by the private sector.”).
\textsuperscript{165} Rocker Arbitration, supra note 13, at 769.
\textsuperscript{166} Larry Whiteside, \textit{Baseball’s Very Sorry Situation: Rocker’s Suspension Reduced}, BOSTON GLOBE, Mar. 2, 2000, at C1.
\textsuperscript{167} \textit{Arbitrator’s Decision Favors Controversial Baseball Player}, 55 DISP. RESOL. J. 6 (May 2000).
\textsuperscript{168} To the dismay of many, including Selig, Rocker’s fine of $20,000 was reduced to a paltry $500 and his original seventy-three game suspension was reduced to fourteen. Whiteside, supra note 166. In a prepared statement in response to the arbitrator’s decision, Selig was quoted as saying: “I disagree with the decision . . . . It does not reflect any understanding or sensitivity to the important social responsibility that baseball . . . has to be [sic] the public. It completely ignores the sensibilities of those groups of people maligned by Mr. Rocker and disregards the player’s position as a role model for children.” Id.
league, and thus could not stand. Following the decision of the arbitrator, both Rocker and Selig decided to drop the matter, but the American public and media have yet to do the same.

It appears that the Rocker arbitration illustrates two important points for purposes of this comment. First, and perhaps foremost, the arbitrator’s decision vindicated a commissioner’s authority to discipline an athlete for speech-related issues, even should they occur in the off-season. Second, the Rocker proceeding illustrates that while examples are few and far between, there are in fact limits on commissioner “best interests” authority.

2. The Dennis Rodman Incident

Former NBA superstar Dennis Rodman has had an illustrious history of controversial behavior. As a colorful forward for the Detroit Pistons, San Antonio Spurs, Chicago Bulls, Los Angeles Lakers, and Dallas Mavericks, Rodman has remained in the public spotlight for the better part of the past ten years. Throughout the course of his career, Rodman had a number of run-ins with NBA Commissioner David Stern. However, the most controversial of them all may have occurred during the 1997 NBA post-season.

Following Game Three of the 1997 NBA Finals against the Utah Jazz at the Delta Center in Salt Lake City, Utah, a game in which he had been incessantly heckled by the Jazz faithful, Rodman told a reporter that he thought Mormons were “assholes.” In response to this remark, NBA

169. Id.
171. The following is a brief summary of the career highlights and lowlights of Dennis Rodman: Dennis Rodman (b. May 13, 1961): Basketball F; superb rebounder and defender; also known for dyeing his hair various colors and for getting suspended regularly; in 1997, he was suspended for 11 games for kicking a courtside cameraman; led NBA in rebounding 7 years in a row (1992-1998); member of 5 NBA champion teams with Detroit (1989,90) and Chicago (1996-98); 2-time All Star (1990, 92), 2-time defensive player of the year (1990-91) and 6-time member of the NBA All-Defensive team (1989-93, 96).
172. For several recent descriptions of Rodman’s behavior, see generally Mark Bechtel, Year of the Worm: Has Any Other Player had an NBA Season as Bizarre as the One Dennis Rodman Just Went Through? Don’t Be Ridiculous, SPORTS ILLUSTRATED, June 25, 1997, at 36; E. Jean Carroll, The Bad Boy Diary, SPORTS ILLUSTRATED, Apr. 31, 1997; Richard Hoffer, A Funny Thing Happened on the Way to the Forum: With the Arrival of the Flamboyant Dennis Rodman, Lakers Fans Expecting a Sideshow Were Treated to Something Else: A Rousing Revival Of Showtime, SPORTS ILLUSTRATED, Mar. 8, 1999, at 38; Michael Silver, Rodman Unchained, The Spurs’ No-Holds-Barred Forward Gives New Meaning to the Running Game, SPORTS ILLUSTRATED, May 29, 1995, at 20.
173. Carl’s Jr. to Drop Rodman Ads Following Anti-Mormon Slams, SAN DIEGO UNION-TRIB.,
Commissioner David Stern imposed a $50,000 fine on Rodman, which at that point in time was the largest fine that had ever been imposed upon an NBA player.\textsuperscript{174} In a press release issued by the NBA following the announcement of the fine, Stern commented that "insensitive or derogatory comments involving race or other classifications are unacceptable in the NBA..."\textsuperscript{175}

Like Abdul-Rauf, Rodman ultimately decided not to challenge Stern's authority. Instead, he simply issued a tearful public apology and paid the fine.\textsuperscript{176} Thus, the incident faded into obscurity with little press or fanfare.

VI. PROPOSAL: RESHAPING LEAGUE CONSTITUTIONS AND CBAS

As was previously discussed, professional athletes are bound by the terms of league constitutions through standard player contracts and league CBAs.\textsuperscript{177} Because league constitutions and standard player contracts bind professional athletes to commissioners' "best interest authority," in order to effectuate any sort of change, league constitutions must be amended. The best avenue of bringing about this change is the collective bargaining process.

A. Differentiating Professional Athletes from the Average Private Sector Employee

As the aforementioned examples acutely illustrate, professional athletes face a very substantial risk of being punished for engaging in behavior largely protected in other fields of employment. While it may indeed be true that many employees in the private sector face similar First Amendment hardships, being employed by a professional sports team presents athletes with situations substantially dissimilar than those faced by the average private sector employee.

First and foremost, professional athletes are constantly subjected to immense media scrutiny, a situation unimaginable to the vast majority of traditional private sector employees. While many athletes do indeed make the conscious decision to thrust themselves into the media spotlight, others are pulled in unwillingly.\textsuperscript{178} Additionally, professional athletes are constantly

\textsuperscript{174} Terry Armour, \textit{Rodman Must Tithe $50,000 for Insult}, CHI. TRIB., June 13, 1997, at 1N.
\textsuperscript{175} Slezak, \textit{supra} note 13.
\textsuperscript{177} See \textit{supra} notes 62-95 and accompanying text.
\textsuperscript{178} For example, many fans of Major League Baseball will recall Mark McGwire's struggle with the media during his record-setting season in 1998. Barry Bonds faced similar media scrutiny during his record-breaking 2001 season.
asked for their opinions on various political and social issues, commissioner decisions, managerial decisions, coaching decisions, league officiating, and a number of other issues. It seems fairly safe to assume that these sorts of situations are not often faced by the average private sector employee. While private sector employees undoubtedly discuss office politics, the media is not there to record and rebroadcast every word said. Due to these sorts of intense media pressures, it should come as no surprise that a number of professional athletes have made controversial comments over the years.

Another important distinction between private sector employees and professional athletes is the fact that offensive speech or bigotry in a typical office setting creates the potential for vastly greater harms than can be experienced in the world of professional sports. For example, recently “[e]xecutives at the Texaco Corporation were heavily fined for making insensitive statements in the course of office banter,” and Marge Schott, former owner of the Cincinnati Reds, was suspended by MLB for racially insensitive speech in the early 1990s. The ramifications of offensive speech in managerial situations, such as the two just mentioned, are vastly more grave than comments made by a professional athlete such as John Rocker. The reason for this conclusion is simple:

Both Schott and the Texaco executives were in management positions, where their beliefs and thoughts were likely to have a direct impact on their actions, such as in hiring practices. Rocker is merely a relief pitcher; his decision to be a bigot, while violating nearly everyone’s sense of right and wrong, does not violate anyone’s rights.

As offensive as it may be, Rocker is allowed to hate whomever he wants, provided he does no more than hate. As one can see, the free speech harms caused by individual athletes such as Rocker are simply not tantamount to free speech harms caused by those in a traditional corporate setting.

As was previously seen, the government has no legitimate authority to

179. For example, during the course of the Vietnam War, Muhammad Ali was asked the following questions, among others: “How do you feel about the war in Vietnam?” “Do you know where Vietnam is?” “Is the war a just war?” “What do you think about the Gulf of Tonkin Resolution?” “What do you think about Lyndon Johnson?” “Could you kill a Vietcong?” “What if the Vietcong try to kill you?” HAUSER, supra note 104, at 144. For a more recent example, see Mark Kreidler, They’re Athletes Not Rocket Scientists, ESPN.COM, http://espn.go.com/columns/kreidler_mark/1426777.html (Sept. 3, 2002).


181. Id.

182. Id.
proscribe speech that is merely controversial in nature. Thus, under current Supreme Court jurisprudence, it does not appear that any of the examples discussed in Part V would fall into any of the current judicially-carved exceptions to First Amendment protection.\footnote{As the state of the law currently stands, the Supreme Court has announced the following categories of speech/expression as falling outside of the protection granted by the First Amendment: (1) incitement; (2) fighting words; (3) libel/libel; (4) obscenity; (5) child pornography; and, in certain circumstances, (6) commercial speech. For a thorough discussion on these exceptions, see Sullivan & Gunther, supra note 19, at 956-1153.} This inconsistency has created the interesting anomaly that while courts have refused to proscribe speech or expression solely on the basis of its offensiveness,\footnote{See generally Cohen v. California, 403 U.S. 15 (1971) (holding that government may not proscribe speech based solely on its content, regardless of the specific manner in which it is expressed).} professional sports leagues (and too a lesser degree traditional workplaces) seem to have no reservations about doing so. While the social utility of many of the comments previously mentioned is debatable, their contribution to the time-honored tradition of the "marketplace of ideas"\footnote{The "marketplace of ideas" concept was first proposed by philosopher John Stuart Mill. See Sullivan & Gunther, supra note 19, at 959-60. Mill's central argument was that the suppression of opinion is wrong, whether or not the opinion is true: if it is true, society is denied the truth; if it is false, society is denied the fuller understanding of truth which comes from its conflict with error, and when the received opinion is part truth and part error, society can know the whole truth only by allowing the airing of competing views. Id.} is no different than that of any other comment.

Unfortunately, as was previously discussed, potential avenues of redress for professional athletes seeking First Amendment vindication appear extremely limited. Recent Supreme Court decisions reflect the idea that the current makeup of the Court abhors any further extension of state actor status.\footnote{See generally Jackson, 419 U.S. 345.} Thus, as the law currently stands, it appears unlikely that athletes will be able to assert First Amendment claims against professional sports leagues due to their private actor status.\footnote{See Antonen, supra note 164 and accompanying text.} Additionally, as the aforementioned examples demonstrate, reliance on private association law has not proved to be an adequate remedy for professional athletes either.\footnote{While it is true that Muhammad Ali was eventually able to win a private association claim against a league governing body, that appears to be the exception rather than the rule. See supra notes 96-176 and accompanying text.}
than the rule.\textsuperscript{189}

However, while courts may continue to be reluctant to grant professional sports league employees constitutional protections, there does not appear to be any legal barriers to leagues taking the matter into their own hands. Other potential means of securing First Amendment protection may be available to professional athletes, namely through the restructuring of league constitutions and CBAs.\textsuperscript{190}

\textbf{B. Professional Sports League Labor Unions}

Professional sports league employees, much like other employees in the private sector, often rely on labor unions to protect and advance their rights and interests. Unfortunately, in order to gain union protection, employees must make certain sacrifices. For example, in order to join labor unions, employees are often required to forfeit many of their individual avenues of redress for grievances they may potentially have against an employer.\textsuperscript{191} In recognition of these sorts of sacrifices, the National Labor Relations Act imposes a duty of fair representation on labor unions.\textsuperscript{192} Under this duty, unions, acting as agents of their members, are required to collectively represent the interests of any and all members.\textsuperscript{193} Based upon this premise, if professional athletes are to acquire increased First Amendment protection from leagues, unions must be the catalyst in bringing about this change.\textsuperscript{194}

Past union efforts to secure increased rights for members have proved quite successful, especially when related to mandatory subjects of collective

\textsuperscript{189} See \textit{supra} notes 102-127 and accompanying text.

\textsuperscript{190} For example, Rule 27 of the Major League Agreement states that the Agreement may be amended provided that three-fourths of the members of the National Association approve the amendment. \textit{Major League Agreement, supra} note 68, at Rule 27. With the exception of the three-fourths requirement, the Major League Agreement does not set any limits on substantive changes may be made to the Agreement. Thus, it appears safe to say provided the votes, there are no barriers to the addition of increased First Amendment rights for professional athletes.

\textsuperscript{191} Peterson v. Kennedy, 771 F.2d 1244, 1253-54 (9th Cir. 1985) (describing the theory behind union representation). While professional sports league players have in fact been contractually required to forfeit their access to the judicial system, the success of these contractual requirements is debatable. For example, Latrell Sprewell was able to file a district court claim against the NBA and the Golden State Warriors for the punishment imposed on him following his 1997 run-in with coach P.J. Carlesimo. See generally \textit{Sprewell v. Golden State Warriors}, 266 F.3d 979 (9th Cir. 2000); \textit{Sprewell v. Golden State Warriors}, 231 F.3d 520 (9th Cir. 2000).

\textsuperscript{192} Peterson, 771 F.2d at 1253; see also Durney, \textit{supra} note 75, at 581.

\textsuperscript{193} \textit{Weiler & Roberts}, \textit{supra} note 14, at 311 (discussing a union's duty of fair representation).

\textsuperscript{194} \textit{Champion, Jr.}, \textit{supra} note 70, at 44-45. "The process of collective bargaining only works because of the threat of concerted action that each party can legally invoke if negotiation reaches an impasse." \textit{Id.} at 45.
bargaining. For example, in 1976, the MLBPA helped to topple the reserve clause system that had crippled player salary levels for nearly thirty years. While the initial jab to the reserve clause was dealt by an arbitration proceeding, the blow that finally produced significant change in the free-agent system was dealt by the collective bargaining sessions that followed the arbitrator's decision. Another example of the power of collective bargaining in MLB was the union's successful efforts at gaining "certain arbitration rights with regard to discipline imposed upon them by their club, the league, or the Commissioner." Unfortunately, "[t]he matters subject to arbitration ... do not include matters 'involving the preservation of the integrity of, or the maintenance of public confidence in' baseball." Nonetheless, this example illustrates that change is indeed possible, and there is no reason to believe that further collective bargaining could not further extend the reach of arbitration proceedings in MLB. Union grievances in other sports over the years have also proved successful.

In addition to collective bargaining, a wide variety of economic weapons, including strikes, pickets, and boycotts, are at the disposal of unions to aid in exerting pressure on leagues. The use of such economic weapons has proved quite advantageous to union positions in the past. For example, in

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195. As was briefly mentioned earlier in this comment, "terms and conditions of employment" are regarded as mandatory subjects of collective bargaining. *Id.* at 44. Under federal labor law, unions have the right to insist on negotiating mandatory subjects of collective bargaining. *Id.*


197. According to one commentator:

As the *Messersmith* decision was being rendered ... the baseball collective agreement was itself expiring and being renegotiated. Naturally enough, free agency became the central issue in these negotiations. After a 17-day owner lockout of the players during spring training ... the Players Association and the owners' Player Relations Committee reached a new collective agreement ... The new contract modified free agency considerably.

*WEILER & ROBERTS, supra* note 14, at 248.


199. *Id.* (quoting *BASIC AGREEMENT BETWEEN THE AMERICAN LEAGUE OF PROFESSIONAL BASEBALL CLUBS AND THE NATIONAL LEAGUE OF PROFESSIONAL BASEBALL CLUBS AND MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION* art. XI, pt. A, §1(b) (1990)).

200. For one such example, see generally Nordstrom v. Nat'l Football League Players Ass'n, 292 N.L.R.B. No. 110, 1988-89 NLRB Dec. (CCH) ¶28,841 (Feb. 8, 1989) (illustrating a professional sports union's ability to enforce the rights of its members in the face of alleged team disciplinary action).


202. The author of this comment is not necessarily agreeing or disagreeing with union tactics employed by either side in the 1994 Major League Baseball strike. The example is merely used as an illustration of the power unions can exert over leagues in professional sports. *See* *WEILER &*
1994, the MLBPA and team owners became embroiled in a bitter dispute over the possibility of team salary caps.\textsuperscript{203} Citing the fact that average baseball salaries had increased 600\% from 1981 to 1994, owners advocated the imposition of a hard salary cap to help alleviate their alleged economic hardships, an idea the Players Association was steadfastly against.\textsuperscript{204} After collective bargaining failed to provide a satisfactory remedy, the MLBPA decided to strike.\textsuperscript{205} While the strike had devastating effects on the popularity of the game of baseball, it proved successful from the union’s vantage point in the sense that MLB is still the only major professional sport in the United States without some form of salary cap.\textsuperscript{206} Thus, for many, the 1994 strike serves as an unfortunate reminder of the tremendous pressure unions can exert on leagues to force them to succumb to union demands.

As the previous examples illustrate, professional sports league unions do indeed have the power to secure increased rights for their members. Based upon the “give-and-take”\textsuperscript{207} nature of the collective bargaining process, it seems probable that given the right concessions (or pressures), leagues may agree to afford professional athletes with increased First Amendment protection. At the least, it would seem perfectly reasonable to amend league constitutions and CBAs to contain “First Amendment-like” rights. For example, league constitutions could contain provisions requiring commissioners to consider First Amendment jurisprudence when dealing with free speech and religious expression-related issues. A more workable solution may require league commissioners to be bound by private association law in the same manner that the United States District Court for the Southern District of New York held the New York State Athletic Commission to be in the \textit{Ali} case.\textsuperscript{208} The \textit{Ali} decision seemed to strike a balance between the governing body’s legitimate interests in protecting the “best interests” of its sport and the professional athlete’s interest in not being treated arbitrarily or capriciously.\textsuperscript{209}

Additionally, in evaluating the legality of commissioner disciplinary determinations, arbitrators could be required to apply the framework provided by current First Amendment precedent. In the past, arbitrators have applied a wide variety of legal principles to sports-related disputes, from traces of

\textsuperscript{203} ROBERTS, \textit{ supra} note 14, at 290-95 (discussing the effects of the 1987 NFL player strike).
\textsuperscript{204} \textit{Id.} at 280.
\textsuperscript{205} \textit{Id.}
\textsuperscript{206} \textit{Id.} at 317.
\textsuperscript{207} CHAMPION, JR., \textit{ supra} note 70, at 44.
\textsuperscript{208} \textit{Ali}, 316 F. Supp. at 1250.
\textsuperscript{209} \textit{See id.}
federal labor and antitrust law\textsuperscript{210} to the New York Code of Professional Responsibility.\textsuperscript{211} Thus, there is no reason to believe that the same could not be done with First Amendment law. Applying these sorts of procedural safeguards to professional sports league disciplinary determinations should help to strike a compromise between the competing interests of league commissioners in protecting the best interests of their sport and players in protecting their First Amendment rights.

VII. CONCLUSION

Due to their high-profile status, professional athletes are often times subject to media pressures unimaginable to the average private sector employee. These sorts of pressures, among other things, have caused a number of athletes to do and say things that have invited the wrath of league commissioners. While commissioners undoubtedly have a legitimate interest in safeguarding the integrity of their leagues, current league rules allow them too much freedom to impinge on the First Amendment rights of their employees. While some forms of speech and expression are in fact left unprotected under current First Amendment jurisprudence,\textsuperscript{212} the aforementioned statements and expressions of professional athletes likely would have gone unproscribed outside of the context of professional sports leagues.\textsuperscript{213} Just as "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"\textsuperscript{214} nor should professional athletes be expected to shed their First Amendment rights the second they walk onto the field of play. While legal jurisprudence may continue to prohibit the application of constitutional protections to professional sports leagues, analogous results can be achieved by making changes in league constitutions and CBAs. These changes could help protect professional athletes from the dangers their unique profession presents. Unfortunately, until professional sports league player associations are willing to accept their responsibility as catalysts of change, the "marketplace of ideas" open to citizens in other walks of life will continue

\textsuperscript{210} For an example, see \textit{Weiler \& Roberts, supra} note 14, at 228-37 (discussing the owner collusion that significantly reduced MLB player salaries throughout the 1980s and the arbitration proceedings that attempted to resolve the issue).

\textsuperscript{211} \textit{See generally id.} at 375-79 (quoting Barry Rona and Major League Baseball Players Association, Arbitration (1993)).

\textsuperscript{212} \textit{See supra} notes 23-27 and accompanying text.

\textsuperscript{213} \textit{See generally Sullivan \& Gunther, supra} note 19, at 956-1475 (providing helpful background information on the First Amendment and the current state of the law).

\textsuperscript{214} \textit{Tinker}, 393 U.S. at 506.
to slam its doors on professional athletes.

CHRISTOPHER J. MCKINNY