

ARTICLES

FANS, FREE EXPRESSION, AND THE WIDE WORLD OF SPORTS

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*This field, this game, is a part of our past, Ray. It reminds us of all that once was good,
and that could be again. Oh people will come, Ray. People will most definitely come.
Field of Dreams¹*

People will come to ballparks, stadiums, and arenas (usually paid for by the community for the exclusive benefit of a professional team²) to watch the games being played. The controversy is over what people will say when they get there.

Sport and free expression are American icons.³ We talk about sport⁴ and

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1. FIELD OF DREAMS (Tri-Star 1989) (soliloquy by James Earl Jones).

2. See Steven A. Riess, *Historical Perspectives on Sports and Public Policy*, in THE ECONOMICS AND POLITICS OF SPORTS FACILITIES 13, 14 (Wilbur C. Rich ed., 2000) [hereinafter SPORTS FACILITIES]; *infra* Part II.B.

3. See LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA 7 (1986) (“[T]he free speech idea nonetheless remains one of our foremost cultural symbols. It is suffused with symbolic significance.”); HARRY EDWARDS, SOCIOLOGY OF SPORT 90 (1973) (“[S]port is essentially a secular quasi-religious institution.”); A. BARTLETT GIAMATTI, TAKE TIME FOR PARADISE: AMERICANS AND THEIR GAMES 14 (1989) (“Sports represent a shared vision of how we continue, as individual, team, or community, to experience a happiness or absence of care so intense, so rare, and so fleeting”); Howard M. Wasserman, *Symbolic Counter-Speech*, 12 WM. & MARY BILL RTS. J. 367, 392 (2004) [hereinafter Wasserman, *Symbolic Counter-Speech*] (describing sport and speech as intersecting American icons).

4. DANIEL L. WANN ET AL., SPORTS FANS: THE PSYCHOLOGY AND SOCIAL IMPACT OF SPECTATORS

we talk through sport.⁵ Fan expression is a long-standing and expected part of these games, encouraged by the teams, the players, the cheerleaders, the band, the scoreboard, and the music blaring over the sound system.⁶ Fans become participants, seeking to help their teams win through their cheering.⁷ Fans develop elaborate pregame and cheering rituals and their own songs and cheers.⁸

But how far does the right to engage in this expression go? Everyone is encouraged to “root, root, root for the home team.”⁹ But will fans be allowed to root, root, root for the visiting team or (in a distinct message) against the home team? Will fans be allowed to display banners and pennants criticizing

183 (2001) (“Because sport talk functions so well as small talk, it has become a very important vehicle for communication in modern society.”); Edward R. Hirt et al., *Costs and Benefits of Allegiance: Changes in Fans’ Self-Ascribed Competencies after Team Victory Versus Defeat*, J. PERSONALITY & SOC. PSYCHOL. 724, 724 (1992) (“Rarely do we go through a day without overhearing or participating in a discussion of a recent or upcoming sporting event.”); Mark S. Kende, *Foul Language*, in *COURTING THE YANKEES: LEGAL ESSAYS ON THE BRONX BOMBERS* 233, 233 (Ettie Ward ed., 2003) (“People say provocative things about professional sports.”); Jed Rubenfeld, *The First Amendment’s Purpose*, 53 STAN. L. REV. 767, 800-01 (2001) (describing the prevalence of and protection for discussions of the Babe Ruth trade by a New Yorker in Boston).

5. See GIAMATTI, *supra* note 3, at 95 (“Where does America sing this poem, say this story? Wherever baseball gathers.”).

6. See DANIEL ROSENSWEIG, *RETRO BALL PARKS: INSTANT HISTORY, BASEBALL, AND THE NEW AMERICAN CITY* 55 (2005) (“Yelling and screaming, rooting at the right time . . . have long been essential parts of the stadium experience.”); *id.* (describing scoreboard encouragement of fans to “Make Some Noise”); WANN ET AL., *supra* note 4, at 112 (“An integral part of the spectator experience at many sporting events is extreme noise levels.”); Clay Calvert & Robert D. Richards, *Fans and the First Amendment: Cheering and Jeering in College Sports*, 4 VA. SPORTS & ENT. L.J. 1, 16 (2004) (“[S]peech activities are a central part of attending collegiate athletic events.”); Howard M. Wasserman, *Cheers, Profanity, and Free Speech*, 31 J.C. & U.L. 377, 386 (2005) [hereinafter Wasserman, *Cheers*] (arguing that fans “are encouraged to attend games and make noise, . . . to cheer for their team and players (and against the opposing team and players)”).

7. See ROSENSWEIG, *supra* note 6, at 55 (“Fans who attend sporting events in part do so in order to help their teams win games and thus feel themselves part of the action.”); WANN ET AL., *supra* note 4, at 182 (“The habits, traditions, and superstitions of sport spectators suggest that . . . they become active participants, altering and constructing their own sports experiences.”); George Vecsey, *Fans*, in *SPORT INSIDE OUT* 122, 123 (David L. Vanderwerken & Spencer K. Wertz eds., 1985) (“[F]ans like to get involved in the game, from shouting ‘DEEEE-fense’ to heckling the opposition.”).

8. See WARREN ST. JOHN, *RAMMER JAMMER YELLOW HAMMER: A JOURNEY INTO THE HEART OF FAN MANIA* 90 (2004) (describing a “long, swelling chant of ‘Roll Tide, Roll’” prior to kick-off at University of Alabama football game); *id.* at 56 (quoting University of Alabama post-game chant: “Hey ‘Dores! We just beat the hell out of you! Rammer Jammer Yellow Hammer! Give ‘em hell Alabama!”); see also Michigan Songs, <http://www.umich.edu/~bhl/bhl/exhibits/umosu/umsongs.htm> (containing lyrics to University of Michigan fight songs); The University of Chicago Fight Song, <http://home.uchicago.edu/~ahkissel/cheers.html> (containing words to University of Chicago cheers, including various “Scholarly Yells,” for example “Themistocles, Thucydides, The Peloponnesian War, X squared, Y squared, H₂SO₄”).

9. JACK NORWORTH, *TAKE ME OUT TO THE BALL GAME* (York Music Co. 1908).

the owner, general manager, or coach?¹⁰ Will fans be permitted to wave Confederate flags and other symbols?¹¹ Will one notable fan be able to walk around the park in a rainbow wig carrying a poster reading “John 3:16”?¹² How about the fan in red face paint and a cape making noises like a wolf or like an industrial vacuum cleaner?¹³ Will fans be able to participate in or protest against sport’s pervasive pregame and in-game patriotic expression, symbolism, and ritual?¹⁴ Will fans be able to cheer and jeer using profanity, as with T-shirts or chants declaring “Yankees suck” or “Fuck Duke”?¹⁵ Can cheering rely on sexual innuendo and double entendre?¹⁶ Can fans heckle particular players about any and all issues and characteristics, relevant and irrelevant to on-field performance?¹⁷

These all are forms of what I call “cheering speech,” the expression that occurs at, and surrounds, sport. It “is a time-honored tradition that fans at sporting events engage in speech ranging from throaty booing to ‘symbolic expression.’”¹⁸ Cheering speech is about teams, players, coaches, officials, team executives, or other fans. It supports, opposes, cheers, jeers, praises, criticizes, heckles, and even taunts. It can be in support of one’s own players and team, against the opposing players and team, or even critical of one’s own

10. See Calvert & Richards, *supra* note 6, at 40 (describing efforts by university officials to prevent students from waving posters calling for the basketball coach to be fired); Kende, *supra* note 4, at 240 (describing a Major League Baseball team’s efforts to remove banners criticizing the team owner); Robert J. Misesy, Jr., *Free Speech at the Ball Park? Major League Baseball Violates the First Amendment*, 3 GEO. MASON U. CIV. RTS. L.J. 227, 228-29 (1993) (describing the same efforts); L. Jon Wertheim, *Losing Their Grip*, SPORTS ILLUSTRATED, Dec. 24, 2001, available at http://sportsillustrated.cnn.com/si_online/news/2002/01/18/flash122401/ (describing incident in which a female fan and her boyfriend’s son were removed from the arena when the woman displayed a sign calling for the team president to be fired).

11. See *Giles v. Univ. of Miss.*, No. CIV.A.3:99CV125-P-A, 2000 WL 33907681, at *4 (N.D. Miss. Aug. 29, 2000) (rejecting a First Amendment challenge to a university policy prohibiting fans from bringing flags to football games); *Barrett v. Khayat*, No. CIV.A.397CV211BA, 1999 WL 33537194, at *3 (N.D. Miss. Nov. 12, 1999) (describing the same event).

12. *Aubrey v. City of Cincinnati*, 815 F. Supp. 1100, 1103 (S.D. Ohio 1993) (involving the confiscation of a fan’s “John 3:16” poster at a World Series game); see also *John 3:16* (“For God so loved the world that he gave his one and only Son, that whoever believes in him shall not perish but have eternal life.”).

13. See ST. JOHN, *supra* note 8, at 228.

14. Wasserman, *Symbolic Counter-Speech*, *supra* note 3, at 392-93 (describing patriotic rituals surrounding sporting events).

15. See Calvert & Richards, *supra* note 6, at 2-3; Kende, *supra* note 4, at 240; Wasserman, *Cheers*, *supra* note 6, at 377; *id.* at 383-84.

16. See Calvert & Richards, *supra* note 6, at 2-3; Wasserman, *Cheers*, *supra* note 6, at 383-84.

17. See Calvert & Richards, *supra* note 6, at 42; Wasserman, *Cheers*, *supra* note 6, at 381.

18. Calvert & Richards, *supra* note 6, at 4; see also ST. JOHN, *supra* note 8, at 227 (“[F]ans feel freer to go nuts over the game itself.”).

players and team. It can be about events on the field or about sport in a broader context. Cheering speech can be oral, symbolic, or written on signs, banners, clothing, and body parts. It can be in good taste or bad, clean or profane, provocative, clever, or otherwise. And it will be loud and obvious.

Cheering speech should not be derogated as an insignificant category. For one thing, we do not want anyone deciding that some expression lacks import.¹⁹ For another, sport does not lack such import, possessing and reflecting meaning in American society.²⁰ Sport is American culture;²¹ it is low culture, perhaps, but we are not in the habit of leaving that characterization to others.²² Fanship—affiliation with a sports team from which individuals derive psychological and emotional significance and value—is essential to that culture.²³ And fans will express that fanship.²⁴ Speaking about sports, particularly in the confines of a stadium or arena during games, must be protected as cultural speech, as expression that builds a culture on “all areas of human learning and knowledge.”²⁵ Like art or literature, sport simply is one more such area of knowledge.²⁶

Cheering speech also is part of the public discourse “about the common stimuli that in fact establish the existence of a public,” even if the matters

19. See Rubinfeld, *supra* note 4, at 801.

20. See ROGER I. ABRAMS, *LEGAL BASES: BASEBALL AND THE LAW* 1-5 (1998) (calling baseball the “heart of America” that, like America, “continues to rebound along with the American spirit”); KATHRYN JAY, *MORE THAN JUST A GAME: SPORTS IN AMERICAN LIFE SINCE 1945*, at 1 (2004) (“In modern American society, sports are far more than just a game.”); JOHN WILSON, *PLAYING BY THE RULES: SPORT, SOCIETY, AND THE STATE* 331 (1994) (discussing the grand jury that investigated the fixing of the 1919 World Series by the Chicago White Sox that described baseball as “an American institution, having its place prominently and significantly in the life of the people”).

21. JAY, *supra* note 20, at 1 (“Sports saturate our culture as well as our language.”).

22. See WANN ET AL., *supra* note 4, at 205 (“[S]port spectating is not the trivial, infantile, and superficial activity its critics claim.”); ANDREW ZIMBALIST, *MAY THE BEST TEAM WIN: BASEBALL ECONOMICS AND PUBLIC POLICY* 131 (2003) (“[P]leasure is pleasure and is in the eye of the beholder, not some cultural critic.”); Rubinfeld, *supra* note 4, at 824 (“If high-value/low-value thinking were taken seriously, a person could in principle be jailed for calling Roger Clemens a bum.”); see also *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1098 (7th Cir. 1990) (Posner, J., concurring) (arguing against judges playing culture critic), *rev’d sub nom. Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

23. See JAMES L. SHULMAN & WILLIAM G. BOWEN, *THE GAME OF LIFE: COLLEGE SPORTS AND EDUCATIONAL VALUES* 4 (2001); Hirt et al., *supra* note 4, at 724-25.

24. See WANN ET AL., *supra* note 4, at 198.

25. THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 7 (1970); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 257 (arguing that literature and the arts “lead the way toward sensitive and informed appreciation and response to the values out of which the riches of the general welfare are created”).

26. See WANN ET AL., *supra* note 4, at 198 (comparing the drama, ritual, and excitement of sport to Ancient Greek theatre); Rubinfeld, *supra* note 4, at 779-80 (describing the need to recognize protection for high and low cultural forms).

seem trivial or irrelevant.²⁷ Social and political issues—race, sex, crime, community, education, patriotism—arise and play out in the context of sports.²⁸ Presidents since William Howard Taft have connected themselves to America’s games, whether by throwing out the ceremonial first pitch or by calling a play for a favorite team during the NFL playoffs.²⁹ Sports, politics, and the official’s own electoral ambitions merge.³⁰ That being the case, political expression and its mirror, political protest—the speech that all recognize as occupying a core of First Amendment protection³¹—becomes part of the cheering-speech milieu. Sport allows for the simple and unique protest of heckling the President—especially if he does not throw a strike.

This Article explores in depth three distinct elements of cheering speech, all of which must be present for it to enjoy full constitutional protection. The analysis considers the effect on free-speech principles from the economic, psychological, cultural, and sociological import of sports, sports stadiums, and sports fandom.

Part I examines the public-forum nature of the grandstand or bleachers at the ballpark or arena, the place where cheering speech occurs. The proper characterization of the forum dictates the First Amendment rules that apply there and the expression that can and cannot be regulated there.

Part II examines the nature of the entity that controls the relevant forum, the stadium or arena. At one end is a state university controlling student-fan speech in its arena, a state actor plainly bound by the limitations of the First

27. See Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 672-73 (1990).

28. See EDWARDS, *supra* note 3, at 3 (“[T]here is literally no institution or stratum in modern American society which is not touched in some manner by sport.”); *infra* notes 202-18 and accompanying text.

29. See Jennifer Allen, *Nixon’s Tricks Not in Redskins’ Playbook*, ESPN.com (Mar. 7, 2002), <http://espn.go.com/page2/wash/s/allen/020308.html> (describing the story of President Richard Nixon calling a play for the Washington Redskins during a playoff game); Christine L. Putnam, *A President Inaugurates a Remarkable Tradition*, BASEBALL ALMANAC (2003), http://www.baseball-almanac.com/articles/president_taft_opening_day.shtml (describing President William Howard Taft instituting the ceremonial first pitch in 1911).

30. See EDWARDS, *supra* note 3, at 96 (describing the popular belief “that sport is and should be supportive of ‘the American way of life,’” reflected in the connection between sports and political leaders and issues); JAY, *supra* note 20, at 141 (describing how President Nixon, a rabid sports fan, used sports to associate with traditional, conservative American heroes and to appeal to the conservative values of sports fans); see *infra* Part III.B.

31. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (describing “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials”).

Amendment.³² At the other end is a private university controlling fan speech in its arena; this is a private actor controlling private property and ordinarily not bound by those limitations (although certainly permitted to make the private decision to govern its conduct according to free-speech principles).³³ Somewhere in the middle is the prevailing situation in professional sports: an ostensibly private entity (the franchise) regulating cheering speech in a ballpark built largely with public funds, owned by the government, and leased—long-term, exclusively, and on favorable terms—to the franchise.³⁴ Only if that entity can be deemed a state actor will it be subject to First Amendment restrictions in regulating cheering speech there.

Finally, Part III reaches the crux of the controversy over expression by sports fans, examining the specific content of different examples of cheering speech and the protection to which it is entitled.

I. FORUMS: SPACE, PLACE, AND SPEECH

Lillian BeVier argues that there are two competing models of the First Amendment. Under the “Enhancement Model,” the First Amendment “sometimes imposes affirmative duties on government to maximize the opportunities for expression.”³⁵ On the other hand, under the “Distortion Model,” “the essential task of First Amendment rules is to restrain government from deliberately manipulating the content or outcome of public debate and to prohibit it from censoring, punishing, or selectively denying speech opportunities to disfavored views.”³⁶

These models compete to define the scope of the duty of government to create, and the right of the public to access, public forums for expression.³⁷ Implicit in, and essential to, the freedom of speech is the need for adequate physical space in which speech can occur.³⁸ As Timothy Zick argues, “debate

32. See *Barrett v. Khayat*, No. CIV.A.397CV211BA, 1999 WL 33537194, at *1 (N.D. Miss. Nov. 12, 1999); Calvert & Richards, *supra* note 6, at 3-4; Wasserman, *Cheers*, *supra* note 6, at 377.

33. See *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001); Wasserman, *Symbolic Counter-Speech*, *supra* note 3, at 414-15; *infra* Part II.A.

34. See Kende, *supra* note 4, at 241; *infra* Part II.B.

35. Lillian R. BeVier, *Rehabilitating the Public Forum Doctrine: In Defense of Categories*, 1992 SUP. CT. REV. 79, 101.

36. *Id.* at 102-03.

37. See Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1538 (1998) [hereinafter Gey, *Reopening*] (describing the “noble heritage” of the public forum doctrine as a public space in which a single speaker can rail against government injustice and government is powerless to stop her).

38. See Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581, 581 (2006) [hereinafter

can hardly be ‘wide open’ without adequate physical space for the airing of positions and arguments [S]peech can thrive only when given *adequate* room or space.”³⁹ The public forum is a place for unfettered speech with a built-in tolerance for boisterous and even offensive expression.⁴⁰

Zick takes us one step further, suggesting that “speech and spatiality are closely related,” thus regulations on space may disparately impact certain speakers and messages.⁴¹ It follows that some spaces are uniquely opened for particular expression and some expression by some speakers is uniquely appropriate in particular spaces.⁴² Such a place-content link exists between the grandstand at a sports stadium and fans’ cheering related to the game on the field; the ability to engage in cheering speech in this place is critical to the speaker’s message.⁴³

The distortion model controls public forum analysis, following Chief Justice Rehnquist’s opinion in *International Society for Krishna Consciousness, Inc. v. Lee*.⁴⁴ A space does not become a designated public forum by inaction, but only by government “intentionally opening a nontraditional forum for public discourse.”⁴⁵ Government makes a designated public forum out of a space under its ownership and control when it deliberately and intentionally opens that space for expression, while also retaining broad control over whether that property is opened and on what

Zick, *Spatial Tactics*]; *id.* at 620 (emphasizing ways in which “speech and spatiality are intimately related”); *see also* Curtis J. Berger, *Pruneyard Revisited: Political Activity on Private Lands*, 66 N.Y.U. L. REV. 633, 647 (1991) (“Societally, we should seek to expand that space and the opportunities for discourse within it.”); Gey, *Reopening*, *supra* note 37, at 1575 (arguing that the public forum doctrine is a mechanism to effectuate the broad command of the First Amendment).

39. Zick, *Spatial Tactics*, *supra* note 38, at 620.

40. *See* Gey, *Reopening*, *supra* note 37, at 1536.

41. Zick, *Spatial Tactics*, *supra* note 38, at 638; *id.* at 651 (“To decide *where* expression takes place is to . . . make normative judgments about what speech should be seen and heard and what speech should be segregated and avoided.”).

42. *See* Timothy Zick, *Space, Place, and Speech: The Expressive Topography*, 74 GEO. WASH. L. REV. (forthcoming 2006) (manuscript at 30) [hereinafter Zick, *Space*], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=854264 (describing as “contested places” those areas that are part of a specific ongoing controversy).

43. *See id.* (manuscript at 30) (arguing that the ability to protest in a given space may be critical to the intended message); *id.* (manuscript at 30) (emphasizing the “contest, symbolism, and expression bound up with these places”).

44. 505 U.S. 672 (1992); BeVier, *supra* note 35, at 104 (describing public-forum rules as “well-designed embodiments of the Distortion Model” that make considerable sense); Zick, *Space*, *supra* note 42 (manuscript at 15) (“[V]ery little of the Enhancement model has survived with regard to considerations of place.”).

45. *Int’l Soc’y for Krishna Consciousness*, 505 U.S. at 680.

terms.⁴⁶ This includes the discretion to open a place only for speech on certain subjects or by certain speakers, while keeping the space closed to speakers not within the designated class.⁴⁷ Courts further distinguish between general access and selective access to a forum; government designates a forum when it makes its property generally available to a class of speakers, but not when it merely reserves space for a discrete class of speakers within the broader community, then requires members of that class to obtain special permission to gain access.⁴⁸

Even under this constricted doctrine, the bleachers form a designated public forum for fans and for cheering speech. Speech about sport is uniquely fit for this place. The stadium or arena has been built, opened, and operated specifically, intentionally, and explicitly with bleacher space set-off as a place to which the public has been invited to engage in expression. The public as a whole has been indiscriminately invited into the stands, making it a place of general access. Fans must purchase a ticket to gain access, although there is nothing inherently problematic with that, so long as the cost of the ticket is not tied to their speech.⁴⁹ Ticket prices are pre-determined neutrally by location within the stadium—the closer to the field, the more it costs to gain access.⁵⁰ A member of the public does not need special permission to purchase a ticket and no inquiry is made into a fan's identity, intended rooting interests, or what she wants to say as a condition of purchasing that ticket.

The Enhancement Model would create a much broader public forum right by imposing on government an affirmative obligation to provide public forums in order to enhance and increase opportunities for private expression.⁵¹

46. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677-78 (1998); Gey, *Reopening*, *supra* note 37, at 1566-67.

47. See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 n.7 (1983); Gey, *Reopening*, *supra* note 37, at 1548, 1570 (criticizing such limitations as allowing government to open the forum only for government-preferred speech); see also *Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 695 (1992) (Kennedy, J., concurring in the judgments) ("It leaves the government with almost unlimited authority to restrict speech on its property by doing nothing more than articulating a non-speech-related purpose . . .").

48. See *Forbes*, 523 U.S. at 679.

49. See *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133-34 (1992).

50. See ROSENSWEIG, *supra* note 6, at 93 (comparing the "no-frills bleacher section" with luxury skyboxes and enclosed restaurants overlooking the field); *id.* at 95-97 (tracing the history of bleachers as a product of class and cost inequalities at ballparks).

51. See C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 170-71 (1989) (arguing that government must provide opportunities for expressive activities); EMERSON, *supra* note 25, at 645 ("One important way in which the government can affirmatively promote a system of freedom of expression is by making available to individuals and groups the facilities for engaging in expression."); RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 208-09 (1992) (arguing that government has an obligation to provide

Concurring in *Krishna Consciousness*, Justice Kennedy suggested that all “open, public spaces and thoroughfares that are suitable for discourse may be public forums, whatever their historical pedigree and without concern for a precise classification of the property.”⁵² The question is whether “the objective, physical characteristics of the property at issue and the actual public access and uses that have been permitted by the government indicate that expressive activity would be appropriate and compatible with those uses.”⁵³ Steven Gey refines (and in some ways corrects) Kennedy’s approach. Gey defines as a public forum any “instrumentality of communication” (in this case, a physical space) whose typical uses are compatible with and suitable for speech.⁵⁴ A government-owned space is a public forum unless speech would be incompatible—i.e., would interfere in a significant way—with other, basic uses of the space.⁵⁵

Gey’s modification of Kennedy’s approach captures the nature of the sports stadium forum. The basic use of the grandstand is expression; it is a place for all fans to watch and cheer (whatever form that cheering takes) as the players perform on the field below. By definition, no cheering speech can interfere or be incompatible with the game and the bleachers. This is an open, spacious, noisy, and active area.⁵⁶ Cheering speech of some form and substance is an expected, encouraged part of the game.⁵⁷ “Once we determine

“green spaces” for expression); Gey, *Reopening*, *supra* note 37, at 1538-39 (arguing that “every culture must have venues in which citizens can confront each other’s ideas and ways of thinking about the world”).

52. *Int’l Soc’y for Krishna Consciousness*, 505 U.S. at 697 (Kennedy, J., concurring in the judgments).

53. *Id.* at 698 (Kennedy, J., concurring in the judgments); compare Gey, *Reopening*, *supra* note 37, at 1558 (arguing that Justice Kennedy’s approach “provides a hint of the protections that would become available to speakers in government venues” under a different public forum analysis) with BeVier, *supra* note 35, at 115 (emphasizing possible negative side effects of intensive judicial scrutiny in public forum cases).

54. See Gey, *Reopening*, *supra* note 37, at 1570; see also *Int’l Soc’y for Krishna Consciousness*, 505 U.S. at 697 (Kennedy, J., concurring in the judgments).

55. See Gey, *Reopening*, *supra* note 37, at 1570, 1576; Zick, *Space*, *supra* note 42 (manuscript at 47) (arguing that compatibility “jibes well with the notion that governments have an affirmative obligation to facilitate speech by making space for it”); see also *Int’l Soc’y for Krishna Consciousness*, 505 U.S. at 698 (Kennedy, J., concurring in the judgments) (looking to whether “expressive activit[ies] would be appropriate and compatible with” government’s intended uses).

56. Berger, *supra* note 38, at 687.

57. See ROSENWEIG, *supra* note 6, at 56 (“Without cheering, without release, attending a game loses one of its most profound appeals.”); *id.* at 55 (“Yelling and screaming, rooting at the right time . . . have long been essential parts of the stadium experience.”); Calvert & Richards, *supra* note 6, at 16 (“[S]peech activities are a central part of attending collegiate athletic events.”); Wasserman, *Cheers*, *supra* note 6, at 386 (arguing that fans “are encouraged to attend games and make noise, . . . to cheer for their team and players (and against the opposing team and players)”; *supra* notes 18-31 and accompanying text.

that property is a suitable public forum, *all* speech is entitled to an airing, even when the public might vote otherwise.”⁵⁸ So long as some cheering speech is compatible with the forum, all cheering speech is compatible with the forum, regardless of the specific nature.⁵⁹ Reliance on a compatibility analysis is particularly appropriate given the unique “intersection of speech and spatiality” between cheering and a sports arena.⁶⁰

Compatibility analysis must consider the essence of the particular activity and the working relationship between noise and that activity. A ball game is different from other public entertainment spaces, such as the theatre, symphony, or opera, where audience speech of any kind during the performance would significantly interfere and be incompatible with the performance. We also can distinguish a basketball game from, for example, a golf or tennis match, where the game’s essential emphasis on player concentration limits fan cheering, at least during play.⁶¹ As such, the cheering speech permitted at a basketball game may be incompatible with a tennis match, even if played in the same arena and watched from the same seat in the grandstand. Much of the time the determination will be easy enough: In one sport officials insist on “quiet please,” while in the other the scoreboard implores fans to “make some noise.”

Interference exists only when speech creates an actual problem in the forum.⁶² For our purposes, this arises only when cheering prevents players on the field from playing or other fans in the stands from watching and cheering. One fan cannot physically interfere with another, as by waving a large flag or banner in her face.⁶³ But interference necessarily means more than fans, players, or other participants “not liking” or “objecting to” or even being

58. Berger, *supra* note 38, at 686.

59. See Calvert & Richards, *supra* note 6, at 15 (“[I]t would be difficult to argue that speech activities are incompatible with the ordinary functioning of the space.”); see also *Int’l Soc’y for Krishna Consciousness*, 505 U.S. at 699 (Kennedy, J., concurring in the judgments) (“[C]ourts must consider the consistency of those uses with expressive activities in general, rather than the specific sort of speech at issue in the case before it . . .”).

60. See Zick, *Spatial Tactics*, *supra* note 38, at 617.

61. *Cf. PGA Tour, Inc. v. Martin*, 532 U.S. 661, 683-84 & nn.39-40 (2001) (defining the “essence” of golf).

62. See Gey, *Reopening*, *supra* note 37, at 1574.

63. See NCAA, REPORT ON THE SPORTSMANSHIP AND FAN BEHAVIOR SUMMIT 7 (Feb. 20, 2003) [hereinafter REPORT ON SPORTSMANSHIP] (noting that one school does not permit any spectator-made signs into the basketball arena), available at <http://www.ncaa.org/sportsmanship/sportsmanshipFanBehavior/report.pdf>; see also *Barrett v. Khayat*, No. CIV.A.397CV211BA, 1999 WL 33537194, at *1 (N.D. Miss. Nov. 12, 1999) (describing a football stadium policy that prohibits fans from bringing in large banners or flags).

“offended by” the content of particular cheering speech. There is no “heckler’s veto” or “listener’s veto” built into the forum, through which one fan’s dislike for, and unwillingness to tolerate, another’s cheering renders the latter incompatible.⁶⁴ Speech is not incompatible merely because it “drowns out” others by being louder, more boisterous, more numerous, or more obvious.

Finally, cheering speech is about “sport,” in all its effects and extensions, on the field and off the field. There is no distinction for purposes of forum analysis between speakers and speech immediately focused on the team’s performance on the field and speakers and speech focused on other interests more tangentially related to the game.⁶⁵ The question is one of compatibility and interference; as long as particular content does not interfere with other uses, it is compatible with, and thus within the constitutional scope of, the forum.

The narrowness of the interference analysis is reinforced by the relevant forum being not the ballpark as a whole, but only the grandstand within the broader government-owned space. The grandstand is the “perimeter to which speakers seek” access for expression.⁶⁶ The fence or wall separating fans in the grandstand from the players outside reinforces the bleachers as a distinct public forum; it sits adjacent to the non-forum of the playing field and is housed within a larger space.⁶⁷ But so long as speakers stay on the forum side of the fence, they remain unrestrained in their expression.

The wall separating the grandstand from the field provides a clear line between forum space, subject only to limited team or school control, and the rest of the ballpark, subject to total team control. The team or school dictates everything, expressive or otherwise, occurring on the field or coming from

64. Heidi Kitrosser, *From Marshall McLuhan to Anthropomorphic Cows: Communicative Manner and the First Amendment*, 96 NW. U. L. REV. 1339, 1369-70 & n.170 (2002) [hereinafter Kitrosser, *Communicative Manner*]; Wasserman, *Symbolic Counter-Speech*, *supra* note 3, at 416-17.

65. *But see* United Church of Christ v. Gateway Econ. Dev. Corp., 383 F.3d 449, 453 (6th Cir. 2004) (distinguishing, for purposes of defining the forum, between according access to fans having an interest in the game and to fans seeking to protest the team’s racist nickname).

66. *See* Air Line Pilots Ass’n v. Dept. of Aviation, 45 F.3d 1144, 1151 (7th Cir. 1995) (defining the relevant public forum as the display cases within the airport, not the airport as a whole, which had been held to be a non-public forum).

67. *See* Gey, *Reopening*, *supra* note 37, at 1575 (arguing that much modern communication takes place inside larger buildings and alongside buildings that are not expressive forums); *see also* United States v. Kokinda, 497 U.S. 720, 727-28 (1990) (considering the physical location of a particular space relative to an established public forum); *United Church of Christ*, 383 F.3d at 452-53 (emphasizing the physical proximity and similarity between a privately owned sidewalk and a publicly owned sidewalk in characterizing the former as a public forum).

cheerleaders, bands, mascots, the public-address system, organ, and scoreboard.⁶⁸ In fact, they engage in their own cheering speech via these resources, both supporting the team⁶⁹ and heckling the opposition.⁷⁰

The fence defines incompatibility: a fan's expressive conduct actually interferes when it leaves the grandstand and spills onto the field. At a game at Dodger Stadium in 1976, two fans ran onto the field and tried to burn the American flag.⁷¹ They properly were arrested, not because of what they tried to say or how they tried to say it (unquestionably an act of protected political expression⁷²), but because they had no right to say it in that place. That expression interfered with the game, eliminating the protection of the public forum. The same is true of the fan at a women's college basketball game who walked onto the court carrying an American flag, during the game, to confront a player who had turned her back to the flag during the national anthem.⁷³ His right to counter-speak to her protest ended where the bleachers ended.

One perhaps could argue that the government's power to establish a "limited public forum" only for speech on particular subjects allows it to define the forum to exclude the most objectionable or offensive cheering, notably profanity.⁷⁴ Government might designate the grandstand as a forum

68. See ROSENSWEIG, *supra* note 6, at 55 (describing the way in which a Major League Baseball team uses the scoreboard to encourage fans to "Make Some Noise"); WANN ET AL., *supra* note 4, at 182 (describing ways in which teams pull fans into participating in organized cheering rituals); Calvert & Richards, *supra* note 6, at 44 (describing schools' uses of bands and cheerleaders to create and encourage cheering speech); Robert M. Jarvis & Phyllis Coleman, *Hi-Jinks at the Ballpark: Costumed Mascots in the Major Leagues*, 23 CARDOZO L. REV. 1635 (2002).

69. The former music director for the Chicago White Sox played the song "Hurts So Good" whenever the Sox' Frank Thomas was at bat, in honor of Thomas' nickname of "The Big Hurt." Jim Caple, *Who Let the Prudes out?*, ESPN.com, Apr. 24, 2003, <http://espn.go.com/page2/s/caple/020424.html>.

70. For example, the music director at Minnesota's baseball stadium once played "I Want to Be Rich" prior to a game started by a pitcher who had left the Twins to play for more money for another team. *See id.* Unlike with the speech of fans in the grandstand, the team controls the individuals who perform these jobs and can prohibit objectionable cheering speech on the team's behalf. For example, the same former music director for the White Sox played the song "Here I Go Again" while the visiting pitcher was warming up prior to the game. This was an obvious reference to that pitcher's ongoing, public divorce from an actress who had appeared in a video for that song, writhing on the hood of a car. *See id.* The director was fired, a move that is, descriptively, within the power of the team in controlling its own in-park expression. Cf. Eugene Volokh, *Deterring Speech: When is it "McCarthyism"? When is it Proper?*, 93 CAL. L. REV. 1413, 1427 (2005) [hereinafter Volokh, *Deterring Speech*] (arguing that private employers are not required to provide a platform for disagreeable messages by employees).

71. See Wasserman, *Symbolic Counter-Speech*, *supra* note 3, at 395-96.

72. See *Texas v. Johnson*, 491 U.S. 397, 399 (1989) (holding that flag burning is protected expression); Wasserman, *Symbolic Counter-Speech*, *supra* note 3, at 395 (describing one form of "symbolic counter-speech" as attacking a symbol by destroying it).

73. See Wasserman, *Symbolic Counter-Speech*, *supra* note 3, at 433.

74. See *infra* Part III.D.

only for “decent, non-profane, fan-friendly, cheering speech.” Profanity and other offensive speech (and those who utter it) may be excluded from the forum because they are not within the class of speakers for whose special benefit the forum is reserved.

But the free speech values served by the public forum doctrine suggest that the presumption as to the scope of the forum always should run in favor of unfettered speech.⁷⁵ This constrains government’s ability to define speech or speakers out of the forum. One limitation is that government cannot limit the forum only to particular viewpoints on a particular subject or issue.⁷⁶ In simplest terms, the forum cannot be defined as a space only for pro-University of Maryland or pro-Philadelphia Eagles cheering, meaning pro-Duke University or pro-Dallas Cowboys cheering falls outside the defined forum.

A definitional limitation to decent, non-profane, family-friendly speech fails for similar reasons. Although not resolved as a public forum case, *National Endowment for the Arts v. Finley*⁷⁷ is instructive. That case involved a challenge to a federal statute requiring the NEA to consider “general standards of decency” in awarding grants to artists.⁷⁸ Three justices argued separately that the decency rule was viewpoint discriminatory because it limited NEA funding only to “decent art” within the broader category of “art.”⁷⁹ Limiting a designated public forum only to “non-profane” cheering speech from within the broader category of cheering speech similarly defines the forum by viewpoint.⁸⁰ It excludes from the scope of the forum speech on the subject matter covered by the forum—cheering about this game and its surrounding circumstances—that comes from a particular (indecent or profane) point of view.

75. See Gey, *Reopening*, *supra* note 37, at 1574.

76. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001) (stating that the power to reserve a forum for certain groups or subjects does not allow the reservation of the forum based on viewpoint); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (holding that the state may not discriminate on viewpoint in defining scope of forum); Calvin Massey, *Public Fora, Neutral Governments, and the Prism of Property*, 50 HASTINGS L.J. 309, 322 (1999) (arguing that “a limited public forum can be created by content-based but not viewpoint-based means”); *infra* Part III.A.

77. 524 U.S. 569 (1998).

78. The majority upheld the provision, concluding that the rule only required the NEA to “consider” those standards, but did not prohibit funding projects that did not conform to those standards. *Id.* at 572-73; *id.* at 583-84 (describing the requirement as a “vague exhortation” to “take them into consideration”).

79. See *id.* at 593 (Scalia, J., joined by Thomas, J., concurring in the judgments); *id.* at 606 (Souter, J., dissenting).

80. Cf. Gey, *Reopening*, *supra* note 37, at 1608 (arguing that government could establish a forum for “art,” but not only for “decent art”).

II. THE STATE ACTION PROBLEM

As a general rule, of course, the First Amendment binds only government actors, not private entities.⁸¹ Once we characterize the stadium grandstand as a forum for cheering speech, First Amendment protection for fan speech depends on the nature of the entity controlling the stadium forum. Commentators long have criticized the state action requirement, arguing that it insulates wrongful private conduct from legal sanction and denies broader protection to individual rights.⁸²

During the Civil Rights Era of the 1960s, the Supreme Court expanded the concept of state action, holding that, under certain circumstances, a sufficient connection between government and an ostensibly private entity converted the latter into a state actor, subjecting its conduct to constitutional limitations.⁸³ This expansion of state action enabled the Supreme Court to expand the reach of the Fourteenth Amendment to halt racial discrimination by ostensibly private actors in the Jim Crow South.⁸⁴ These cases arguably

81. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001); Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. REV. 1537, 1544 (1998); Kende, *supra* note 4, at 241; Ronald J. Krotoszynski, Jr., *Back to the Briar-Patch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 MICH. L. REV. 302, 305-06 (1995) [hereinafter Krotoszynski, *Back to the BriarPatch*].

82. Charles L. Black, Jr., *Forward: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 70 (1967) ("The amenability of racial injustice to national legal correction is inversely proportional to the durability and scope of the state action 'doctrine,' and of the ways of thinking to which it is linked."); Erwin Chemerinsky, *More Speech is Better*, 45 UCLA L. REV. 1635, 1639 (1998) [hereinafter Chemerinsky, *More Speech*] ("Traditional law, as embodied in the state action doctrine, creates a bright-line rule that the private institution always wins . . ."); Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 505 (1985) [hereinafter Chemerinsky, *Rethinking*] ("It is time to again ask why infringement of the most basic values—speech, privacy, and equality—should be tolerated just because the violator is a private entity rather than the government."); David A. Strauss, *State Action After the Civil Rights Era*, 10 CONST. COMMENT. 409, 409 (1993) ("During the civil rights revolution, the state action doctrine became, in a word, the enemy.").

83. See *Brentwood Acad.*, 531 U.S. at 295 ("[S]tate action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'"); Ronald J. Krotoszynski, Jr., *A Remembrance of Things Past?: Reflections on the Warren Court and the Struggle for Civil Rights*, 59 WASH. & LEE L. REV. 1055, 1064 (2002) [hereinafter Krotoszynski, *Remembrance*] ("[T]he Warren Court's efforts made it very difficult for government to avoid responsibility for racial discrimination . . . [T]he expanded scope of state action doctrine greatly facilitated the Warren Court's equality project."); Strauss, *supra* note 82, at 410 ("Private action may or may not be 'state action,' depending on a variety of functional concerns.").

84. See, e.g., *Reitman v. Mulkey*, 387 U.S. 369, 380-81 (1967) (holding that a state constitutional provision authorizing racial discrimination in housing made discrimination a state-sanctioned policy);

were mooted by the Civil Rights Act of 1964, which expressly prohibited racial discrimination by non-state actors in public accommodations.⁸⁵

But similar statutory protections do not exist for individual speech rights, which remain subject to private abridgement.⁸⁶ This means that sports fans may enjoy and enforce their cheering-speech rights only if the entity (the professional franchise or university) controlling the stadium or arena qualifies as a state actor that can be bound by the First Amendment.

A. *College Sports*

For college athletics, there are two polar options. The forum could be controlled by a public university, an arm of the state, such as the University of Maryland. There is no question that a state university is bound by the First Amendment in attempting to regulate fan expression.⁸⁷ And state universities recognize and proceed from that understanding in analyzing their constrained power to regulate cheering speech.⁸⁸ The other option is that the controller is a private university, not bound by the First Amendment and free to regulate speech in its on-campus spaces (perhaps even to the point of eliminating all crowd noise).⁸⁹

Additional regulations on cheering speech may come from the National Collegiate Athletic Association (“NCAA”) and individual collegiate athletic conferences. In 2003, the NCAA held a conference on fan behavior and

Evans v. Newton, 382 U.S. 296, 301-02 (1966) (holding that a municipal park transferred to control by a private trustee retained its public character and continued to be bound by Fourteenth Amendment prohibitions on race discrimination); Burton v. Wilmington Parking Auth., 365 U.S. 715, 717 (1961) (holding that the discriminatory exclusion of African American patrons by a private restaurant leasing public space was discriminatory state action); *see also* Krotoszynski, *Remembrance*, *supra* note 83, at 1063; Strauss, *supra* note 82, at 413.

85. *See* Strauss, *supra* note 82, at 413; *see also* Civil Rights Act of 1964, 42 U.S.C. § 2000a (2000).

86. *See* Chemerinsky, *More Speech*, *supra* note 82, at 1636-37 (“Speech—and all of its benefits to the individual in expressing a message and to society in receiving it—can be lost just as much when private entities prohibit and punish it as when the government does so.”).

87. *See* Crue v. Aiken, 370 F.3d 668, 670 (7th Cir. 2004) (stating that the lawsuit involving the protest of a public university’s Native American mascot raised First Amendment issues); Barrett v. Khayat, No. CIV.A.397CV211BA, 1999 WL 33537194, at *2 (N.D. Miss. Nov. 12, 1999) (applying a First Amendment analysis to a state university restriction on flags inside an on-campus football stadium).

88. *See* Calvert & Richards, *supra* note 6, at 2-3 (describing steps taken by the University of Maryland and the Maryland government in analyzing potential restrictions on cheering speech at basketball games); Wasserman, *Cheers*, *supra* note 6, at 377-78 (same).

89. *See* Eule & Varat, *supra* note 81, at 1540-41. *But see* Larry Alexander, *The Public/Private Distinction and Constitutional Limits on Private Power*, 10 CONST. COMMENT. 361, 374 (1993) (arguing that a private university with a speech code causes effects on constitutional values comparable to those caused by a public university).

sportsmanship.⁹⁰ Out of that meeting came a definition of sportsmanship and an insistence that schools establish policies and procedures relating to sporting and ethical conduct.⁹¹ Most conferences have established fan-behavior policies to be followed by member schools.⁹²

The Supreme Court has held that the NCAA does not act under the color of law of any one state, because it is composed of both private and public entities located in all fifty states and any one state plays only a minor role in formulating and enforcing the association's rules.⁹³ The same reasoning presumably would apply to individual conferences, similarly composed of public and private universities from several states.⁹⁴ Although NCAA or conference rules themselves are not subject to First Amendment scrutiny, they become so when a public university adopts and enforces those rules as their own.⁹⁵ The rules remain private if the enforcing school is private.

This creates a seemingly odd dichotomy even among schools within the same athletic conference. Officials at a private member of the Atlantic Coast Conference, such as Duke University, can more strictly control student cheering than can officials at a public university in the same conference, such as the University of Maryland or the University of North Carolina. Duke could enforce some conference regulations that Maryland or North Carolina may not. But that dichotomy is a product of long-existing constitutional norms.⁹⁶ We (and fans engaged in cheering speech at private-university arenas) are stuck, at least in the absence of a dramatic expansion of the state action doctrine in the university context.⁹⁷

90. See Calvert & Richards, *supra* note 6, at 2-3.

91. *Id.* at 3 & n.7; see also REPORT ON SPORTSMANSHIP, *supra* note 63, at 2, 15.

92. See Calvert & Richards, *supra* note 6, at 32-45; REPORT ON SPORTSMANSHIP, *supra* note 63, at 15.

93. See NCAA v. Tarkanian, 488 U.S. 179, 193-94 (1988).

94. See Calvert & Richards, *supra* note 6, at 33-34 & nn.196-202 (identifying members of several collegiate conferences). The line between *Brentwood Academy* and *Tarkanian* was the line between an association with members located within the same state and one with member schools spread across several states. See *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 298 (2001) ("The situation would, of course, be different if the [Association's] membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign.") (quoting *Tarkanian*, 488 U.S. at 193 n.13)).

95. See *Tarkanian*, 488 U.S. at 193 (emphasizing that, although the public university was influenced by the organization's rules, the public university imposed the punishment); *id.* at 194 ("UNLV engaged in state action when it adopted the NCAA's rules to govern its own behavior . . .").

96. See Eule & Varat, *supra* note 81, at 1541 (describing this dichotomy and the resistance to it as "part of a rich tradition").

97. See, e.g., Alexander, *supra* note 89, at 374 (arguing that a private university with a speech code "will cause effects on constitutional values comparable to those a public university would cause");

B. Professional Sports

Professional sports present a more complicated situation. Professional sports leagues and their individual franchises are private entities.⁹⁸ But public financial support for sports franchises, in a variety of forms, dates to the earliest days of professional sports.⁹⁹

Most importantly, many teams play in arenas and stadiums that are publicly financed and publicly owned, leased to the team on a long-term and exclusive basis on highly favorable terms.¹⁰⁰ Beginning in the late 1950s and 1960s, stadium construction became the primary means of public subsidization.¹⁰¹ That process reached new levels starting in the late 1980s and early 1990s;¹⁰² since that time, more than sixty stadiums and arenas either were built or renovated for professional sports teams at massive, largely public, expense.¹⁰³ And teams continue to seek public funding.¹⁰⁴

Chemerinsky, *More Speech*, *supra* note 82, at 1643 (arguing in favor of statutes that provide individuals in private schools the same speech rights as individuals in public schools); *infra* Part II.C.

98. See ABRAMS, *supra* note 20, at 161 (“Despite its self-proclaimed status as our ‘national’ pastime, baseball is not a governmental entity.”).

99. See Riess, *supra* note 2, at 18-19 (describing efforts in the 1910s to construct public sports stadiums).

100. See Bruce W. Hamilton & Peter Kahn, *Baltimore’s Camden Yards Ballpark*, in SPORTS, JOBS, AND TAXES: THE ECONOMIC IMPACT OF SPORTS TEAMS AND STADIUMS 245, 252 (Roger G. Noll & Andrew Zimbalist eds., 1997) [hereinafter SPORTS, JOBS, AND TAXES]; Misesy, *supra* note 10, at 244; Robyne S. Turner, *The Politics of Design and Development in the Postmodern Downtown*, 24 J. URB. AFF. 533, 533 (2002) [hereinafter Turner, *Politics of Design*].

101. See Riess, *supra* note 2, at 14 (“Since the 1950s, and especially the mid-1960s, cities have gone into the business of subsidizing professional sports, especially major league baseball and professional football, by building stadiums to house local franchises.”).

102. See *id.* at 35.

103. See ZIMBALIST, *supra* note 22, at 123 (stating that sixteen new baseball parks were built in that time at a cost of \$4.9 billion dollars, two-thirds of which came from public coffers); Kevin Clark Forsythe, *The Stadium Game Pittsburgh Style: Observations on the Latest Round of Publicly Funded Sports Stadia in Steel Town, U.S.A.; and Comparisons with 28 Other Major League Teams*, 10 MARQ. SPORTS L.J. 237 app. at 267-302 (2000) (breaking down costs for thirty baseball and football stadiums); Judith Grant Long, *Full Count: The Real Cost of Public Funding for Major League Sports Facilities*, 6 J. SPORTS ECON. 119, 121-25 (2005) (charting the cost of projects in all four major professional sports through 2001 and showing that the actual public subsidies are underreported); Allen R. Sanderson, *In Defense of New Sports Stadiums, Ballparks, and Arenas*, 10 MARQ. SPORTS L.J. 173, 173 (2000) (arguing that eighty percent of teams soon would be playing in facilities built since 1990 at a combined cost of more than \$20 billion); Edward I. Sidlow & Beth M. Henschen, *Building Ballparks: The Public-Policy Dimensions of Keeping the Game in Town*, in SPORTS FACILITIES, *supra* note 2, at 153, 153 (quoting estimates of forty-five stadiums at a cost of \$9 billion); Daniel McGraw, *Demolishing Sports Welfare*, REASONONLINE, May 2005, <http://www.reason.com/0505/fe.dm.demolishing.shtml> (quoting an advocacy organization placing the figure at a cost of \$17.3 billion, of which sixty percent came from public funding, for sixty-six stadium projects

Stadiums are built either to keep an existing team from skipping town or to lure a new team into town.¹⁰⁵ Teams insist they need these new, publicly funded stadiums to be competitive on the field and off.¹⁰⁶ And the situation is so dire, they claim, that the franchise may be forced to relocate.¹⁰⁷ Whether teams actually follow through on that threat, the pain felt by cities burned by the notorious relocations (Brooklyn and the baseball Dodgers, Baltimore and the NFL Colts, and Cleveland and the NFL Browns) makes the threat real enough.¹⁰⁸ Given the scarcity of professional sports franchises, there always is another community willing to make a play to bring a team into town by building its own modern stadium.¹⁰⁹

State action analysis should take these circumstances into account in characterizing professional teams. Government expends public funds on a

between 1990 and 2003).

104. See McGraw, *supra* note 103 (describing efforts by the owner of the Dallas Cowboys to secure public funding); Katharine Q. Seelye, *Baseball Deal Back as Washington Council Blinks*, N.Y. TIMES, Dec. 22, 2004, at A20 (describing the controversy over public funding for a ballpark in Washington, D.C.); Fred Grimm, *New Pitch Thrown in Ball Park Quest*, MIAMI HERALD, Sept. 25, 2005, at 3B (describing efforts to obtain public funding for a baseball park in Miami-Dade County).

105. See Rebecca M. Bratspies, *Greener Pastures*, in *COURTING THE YANKEES*, *supra* note 4, at 291, 294 (“[T]eam after team has used the threat of a move to extract concessions from its home city.”); Sidlow & Henschen, *supra* note 103, at 155 (“[T]he real story in baseball may be one of cities actively working to keep the teams they have.”); Robyne S. Turner & Jose F. Marichal, *Exploring Politics on the Sports Page*, in *SPORTS FACILITIES*, *supra* note 2, at 189, 190 (“Because of the highly coveted nature of sports franchises, cities compete with each other to put together the most attractive package to either lure or maintain sports teams in given localities.”); Andrew Zimbalist, *The Economics of Stadiums, Teams, and Cities*, in *SPORTS FACILITIES*, *supra* note 2, at 57, 58 (stating that cities “imprudently offer the kitchen sink in their efforts to retain existing teams or attract new ones”).

106. See ROSENSWEIG, *supra* note 6, at 27 (describing the increased spending and success of the Cleveland Indians baseball team after the opening of a new ballpark); ZIMBALIST, *supra* note 22, at 132 (discussing the link between new ballparks and team success).

107. ZIMBALIST, *supra* note 22, at 124; see JAY, *supra* note 20, at 211-13 (describing a spate of NFL moves in the 1980s and 90s); ROSENSWEIG, *supra* note 6, at 91 (“[I]t was only after taxpayers paid to replace Cleveland Stadium with Jacobs Field that the Indians stopped threatening to move.”); Lynn W. Bachelor, *Stadiums as Solution Sets: Baseball, Football, and Downtown Development*, in *SPORTS FACILITIES*, *supra* note 2, at 125, 126 (“[M]ajor league sports teams, like large corporations, have made effective use of relocation threats . . .”).

108. See JAY, *supra* note 20, at 84-86 (discussing the relocation of the Dodgers in 1957); *id.* at 211-12; Riess, *supra* note 2, at 27-28, 37-38; Sidlow & Henschen, *supra* note 103, at 155.

109. See ZIMBALIST, *supra* note 22, at 124.

With excess demand for teams, cities are thrust into competition with each other to obtain or retain a team. This competition leads cities to offer public funds for facility construction and more favorable lease terms. The greater the competition, the more financing and the more concessionary the lease terms the city must offer.

Id.; Zimbalist, *supra* note 105, at 57 (“U.S. team-sports leagues . . . maximize their profits by reducing the supply of franchises below the demand for franchises from economically viable cities. The result is that cities are thrust into competition with each other to procure or retain teams.”).

stadium or arena expressly for this team's exclusive, long-term use. The terms and conditions on which the community funds and builds stadiums in order to keep "their" teams in town changes the nature of the sports franchise, at least for purposes of operating the stadium and deciding what fans can say there.

1. *Symbiotic Relationship*

The zenith of the expansion of state action in situations of joint public/private participation¹¹⁰ was the "symbiotic relationship" test attributed to *Burton v. Wilmington Parking Authority*.¹¹¹ The Court found that a private restaurant leasing space in a publicly owned garage was a state actor and could not, under the Fourteenth Amendment, discriminate against customers based on race.¹¹² The Court emphasized the exchange of "benefits mutually conferred" between the government and the restaurant; the restaurant benefited from government-provided upkeep, maintenance, repairs on the building, convenient parking for patrons, and the prestige of location in that building, while the government gained the parking revenue from restaurant patrons and increased rent from greater restaurant profits.¹¹³ These facts placed the state and the restaurant "into a position of interdependence" such that they became joint participants in the challenged activity of operating the restaurant in a way that discriminated against customers on the basis of race.¹¹⁴

Ronald Krotoszynski called this test an "open-ended inquiry into the relationship between the state and the private entity in order to ascertain whether it would be fundamentally fair to hold the private entity accountable for constitutional violations."¹¹⁵ Application of the test is fact-intensive and varies with circumstances.¹¹⁶ A similar inquiry into the relations among the government, community, and team reveals a symbiotic relationship,

110. See Krotoszynski, *Remembrance*, *supra* note 83, at 1063.

111. 365 U.S. 715 (1961).

112. *Id.* at 726.

113. *Id.* at 724-25.

114. *Id.* at 725.

115. Krotoszynski, *Remembrance*, *supra* note 83, at 1063; *see also* Alexander, *supra* note 89, at 372 (arguing for consideration of whether the negative effects on constitutional values from private actions are comparable to the negative effects on constitutional values from the analogous governmental action).

116. See *Burton*, 365 U.S. at 722 ("Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."); Strauss, *supra* note 82, at 410 ("Private actions may or may not be 'state action,' depending on a variety of functional concerns.").

considering why teams demand stadiums, why communities are willing to fund them, and the specific terms on which they are built and operated.

Teams insist that the new ballpark will bring with it increased revenues, allowing the team to be financially successful off the field and giving it the money to attract and retain high-priced superstar players who can make the team successful on the field.¹¹⁷ Teams expect a sharp rise in attendance in the early years of a new ballpark, especially one that combines the intimate, romantic style of old urban neighborhood ballparks with the amenities and secondary diversions of modern stadiums.¹¹⁸ Average attendance at Oriole Park at Camden Yards in Baltimore—the first of baseball’s throwback parks beginning in the early 1990s and widely regarded as the most, if not only, successful public financing project¹¹⁹—spiked in the first five years the Orioles played there.¹²⁰ Of course, attendance and public support for the deal wither, often after only one year, if competitive success on the field does not follow.¹²¹

The critical piece of the financial circle from the team’s perspective is a favorable lease under which the team keeps a substantial (if not complete) share of the nontraditional revenues associated with the special features of modern ballparks.¹²² These include revenues from luxury skyboxes and premium seating sold to corporations and businesses; corporate advertising within the stadium (including on outfield fences); exclusive concession rights; ballpark naming rights from corporate interests having no connection to the team, ownership, or history; and “personal seat licenses” (PSLs), a fixed fee

117. See ROSENSWEIG, *supra* note 6, at 27; ZIMBALIST, *supra* note 22, at 132.

118. See ROSENSWEIG, *supra* note 6, at 38-40 (describing the rise of “new old stadiums” that sought to replicate ballparks of the past); *id.* at 146; WANN ET AL., *supra* note 4, at 65-66; Robert A. Baade, *Home Field Advantage? Does the Metropolis or Neighborhood Derive Benefit from a Professional Sports Stadium?*, in SPORTS FACILITIES, *supra* note 2, at 71, 72-73; Sanderson, *supra* note 103, at 175, 181.

119. See Hamilton & Kahn, *supra* note 100, at 245.

120. See ROSENSWEIG, *supra* note 6, at 10 (noting that the Orioles sold out every game in the early years of the park); Hamilton & Kahn, *supra* note 100, at 245-46, 252-55; see also ZIMBALIST, *supra* note 22, at 132-33 (describing attendance benefits resulting from Camden Yards being the first throwback park).

121. See ROSENSWEIG, *supra* note 6, at 169 (describing decreased revenues in Cleveland’s new baseball park when the team’s successful run and consecutive-sellout streak ended six years after the new park opened); ZIMBALIST, *supra* note 22, at 132 (arguing that the novelty of new stadiums attracts curious fans in the first year, but is not enough by year two); Steven Fainaru, *Selig Plays Hardball on Stadium Deals*, WASH. POST, June 27, 2004, at A1 (describing community dissatisfaction with a ballpark deal in Milwaukee, which produced a structurally problematic park and did not produce a winning team).

122. See Roger G. Noll & Andrew Zimbalist, *Build the Stadium—Create the Jobs!*, in SPORTS, JOBS, AND TAXES, *supra* note 100, at 1, 8.

giving a customer the right to purchase expensive season tickets.¹²³ The team also counts on the public picking up much or all of the construction cost.¹²⁴

From the other side, the public and public officials support these projects in anticipation of numerous community benefits expected to flow from the stadium.¹²⁵ One is the boost to the local economy, especially in the neighborhood surrounding the ballpark. The theory is that “‘if you build it, they will come’—and in large numbers bringing obscene sums of money and other commercial activity with them. . . .”¹²⁶ Stadiums are a prominent feature of large-scale urban redevelopment plans, expected to attract restaurants, bars, stores, and residential life, and to bring tourism and recreation dollars to the area.¹²⁷ Some supporters argue that professional sports franchises are necessary for a community to attract the young, educated, affluent demographic essential to a thriving metropolitan area.¹²⁸ Perhaps more important is an intangible benefit—the psychic, symbolic, and cultural benefit to the community of being a “major league city” and the civic pride and unity created by luring or keeping a successful team.¹²⁹

123. *See id.* at 8-9, 12, 18, 20-21; *see also* Forsythe, *supra* note 103, app. at 267-302 (detailing terms of lease agreements for thirty Major League Baseball and professional football facilities, showing teams keep most or all of these various revenue sources); *see also* Ziona Austrian & Mark S. Rosentraub, *Cleveland's Gateway to the Future*, in *SPORTS, JOBS, AND TAXES*, *supra* note 100, at 355, 364; Misy, *supra* note 10, at 235-36.

124. *See* ZIMBALIST, *supra* note 22, at 129 (stating that public costs hover around seventy percent of the construction cost); Long, *supra* note 103, at 139 (finding that the average public share, after adjustment for omitted subsidies, is seventy-nine percent).

125. *See* ZIMBALIST, *supra* note 22, at 125 (summarizing the process of building community, business, political, and electoral support); Turner & Marichal, *supra* note 105, at 197-98 (describing the range of public support for stadium projects from “oblique support” to “boosterism”); Robyne Turner, *Civic Pride and Professional Sports*, 18 *PUB. ADMIN. TIMES* 8, 8 (1995) [hereinafter Turner, *Civic Pride*] (“When citizens and fans begin to see multiple returns on their investment, they will value their teams and recognize their funding as an investment.”).

126. Robert A. Baade & Allen R. Sanderson, *Bearing Down in Chicago: Location, Location, Location*, in *SPORTS, JOBS, AND TAXES*, *supra* note 100, at 324, 328.

127. *See* ROSENSWEIG, *supra* note 6, at 4 (describing Camden Yards in Baltimore as a “dramatic symbol of the new urbanism” and an “anchor of downtown redevelopment”); *id.* at 4-5 (“It was to afford patrons the ability to combine a ball game with shopping, dining, and, above all, a simple city stroll.”); WANN ET AL., *supra* note 4, at 66 (“[Y]ou will park your car downtown, walk past a restaurant or bar and maybe stop. . . . Inside, the buzz will be even louder. You will see downtown. People are having fun just because they are there.”); ZIMBALIST, *supra* note 22, at 130 (“[S]uch construction could facilitate efforts to redevelop an urban core.”); Baade, *supra* note 118, at 74-80 (analyzing types of economic impacts that stadiums are thought to have); Turner & Marichal, *supra* note 105, at 189 (“[S]tadiums are widely perceived as economic magnets that create jobs by attracting capital from outside the central city.”).

128. ROSENSWEIG, *supra* note 6, at 10.

129. *See id.* (describing “side benefits, including the generation of civic pride”); *id.* at 27-28 (describing a “sense of solidarity among citizens,” creating random conversations, smoothing over race and

Economists reject the idea that stadiums can or do produce tangible financial benefits for the community.¹³⁰ It is particularly questionable given that the actual public subsidy (and the percentage of the stadium development and operation subsidized by the community) usually far exceeds reported public contributions.¹³¹ But even critics of the economic arguments agree that the civic-pride benefits, if explicitly made part of the public debate, justify the expenditure.¹³² For many in the community, “a subsidized team is better than no team at all.”¹³³ Whether the sense of pride from the team’s success is worth a \$1 billion investment becomes a question of public policy.¹³⁴

Whether any, all, or none of the benefits are realized is beside the point for purposes of joint participation. It is enough that teams demand stadiums and the community brings them into existence—all in joint pursuit of those mutual benefits. It is enough that the community engages in public policy

class differences, and creating connection within the community); ZIMBALIST, *supra* note 22, at 132 (“In the case of a stadium these benefits may include self-image enhancement for a city or greater community cohesion.”); Riess, *supra* note 2, at 24 (describing the belief that teams enhance prestige, demonstrate community spirit, and help build feelings of community); Sanderson, *supra* note 103, at 176 (describing intangible benefits of “city unity, ‘civic pride,’ and some notion of the team conferring ‘big league status’ on the community”); Sidlow & Henschen, *supra* note 103, at 155 (describing “‘team-less’ cities that would love to become ‘big league’”); Turner, *Civic Pride*, *supra* note 125, at 8 (“If a spirit of community can be found in the arts, culture, and beauty, why not in sports?”).

130. ZIMBALIST, *supra* note 22, at 125 (“[E]very independent economic analysis on the impact of stadiums has found no positive effect on output or employment.”); Baade, *supra* note 118, at 87-88; Long, *supra* note 103, at 139 (arguing that better public and government understanding of the real costs of stadium projects is necessary to ensure better decision making about undertaking such projects); Noll & Zimbalist, *supra* note 122, at 28; Turner & Marichal, *supra* note 105, at 189 (“[T]he effectiveness of a stadium strategy as an economic-development policy approach has been successfully challenged in many cities.”).

131. See Long, *supra* note 103, at 140 (arguing that the real public cost of projects often is kept out of the public debate by government and subsidy advocates); *id.* at 121-25 (displaying a chart showing reported public subsidies, actual public subsidies after adjustment, and actual percentage of projects paid for by the public); Noll & Zimbalist, *supra* note 122, at 25 (“[T]he actual magnitude of the subsidy is typically greater than the estimate in the plan owing to numerous systematic errors in estimating the costs and revenues of a stadium.”); see also, e.g., ROSENWEIG, *supra* note 6, at 13 (suggesting public costs for a project in Cleveland were more than \$1 billion); Austrian & Rosentraub, *supra* note 123, at 361 (arguing that a baseball stadium in Cleveland cost not the promised \$128 million, but between \$176 million and \$180 million).

132. See Turner, *Civic Pride*, *supra* note 125, at 8 (arguing that the symbolic value of teams is worth the money if “articulated to be a part of what government should be doing”); Turner & Marichal, *supra* note 105, at 170 (“[I]t may be some intangible value associated with having a common identification symbol which brings major league status to a city that is the driving force behind public investment in sports.”).

133. Noll & Zimbalist, *supra* note 122, at 30.

134. ROSENWEIG, *supra* note 6, at 27; Sidlow & Henschen, *supra* note 103, at 168 (arguing that, like other public-policy decisions, the choice to build a stadium is the culmination of a “primeval soup” of ideas, parties, events, and circumstances).

debates centered on how to lure or retain a sports franchise and make it successful. The public gains a vested interest in the presence and athletic and fiscal success of the team (beyond what sports fans normally hold in their teams); public dollars are expended for the explicit purpose of ensuring a successful private business entity and a championship sports franchise, with the expectation or hope that the team will give something, symbolic or tangible, back.¹³⁵

The revenue that the community receives, usually through rents paid on the stadium, is inextricably linked to attendance and to the money taken in by the stadium.¹³⁶ The more people come, the more revenue the team earns, and the better the team will be (assuming money is spent wisely on the team). The better the team and the ballpark experience, the more people will come, the more money the community collects in rent and other ballpark revenues, and the more money spent in the neighborhood surrounding the facility.

Regulations on fans and cheering speech are intended to further these economic goals. Teams act (and government likely supports those actions) on the laudable desire to make the experience of attending the game as pleasant as possible for the greatest number of fans, especially young fans and families, ensuring large numbers will pay to return. But to the extent regulations on cheering speech run afoul of the First Amendment, the situation begins to look like *Burton* itself. The restaurant there argued that serving black patrons would injure its business, reducing its profits, and, in turn, the amount it would pay to the government in rent; the Court rejected the argument that a government agency could make private discrimination an “indispensable element[.]” in its financial success.¹³⁷ In the same way, the prevalence of loud and objectionable (but constitutionally protected) speech in the stands may hurt fan satisfaction, reducing attendance and the amount paid to the community in rent. But the community cannot benefit from stadium rules that enhance stadium profits by violating free speech principles.

135. See EDWARDS, *supra* note 3, at 245 (“A winning team reinforces the societal values upon hard work, discipline, good character, . . . the ‘American way of life’”); see also Turner, *Civic Pride*, *supra* note 125, at 8 (“We should make teams an integral contributor to the civic fabric . . .”).

136. See Forsythe, *supra* note 103, app. at 267-302 (showing financing details of baseball and football stadium deals, many of which tie rent to a percentage of gate receipts); Misesy, *supra* note 10, at 235 (stating that the Baltimore Orioles pay rent based on a percentage of receipts); Noll & Zimbalist, *supra* note 122, at 28.

137. See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 724 (1961) (“Neither can it be ignored, especially in view of Eagle’s affirmative allegation that for it to serve Negroes would injure its business, that profits earned by discrimination not only contribute to, but also are indispensable elements in, the financial success of a governmental agency.”).

One federal court accepted this very argument as to the renovation and operation of Yankee Stadium, finding that the exchange of mutual benefits made the New York Yankees state actors in enforcing Major League Baseball's rule prohibiting female sportswriters from entering the Stadium clubhouses.¹³⁸ The court emphasized that annual rent paid to New York City depended on the team's drawing power and on attendance at games, sufficient to create a symbiotic relationship between the team and the city.¹³⁹

2. *Entwinement*

The Supreme Court recently introduced a new, independent test for state action, one forged in the relevant context of a First Amendment claim.¹⁴⁰ This test looks to whether a private entity is so "entwined" with government that the ostensibly private organization takes on a public character as to particular conduct.¹⁴¹ Krotoszynski described entwinement as "an amalgam of bits and pieces of evidence relevant to pre-existing state-action tests but perhaps insufficient to satisfy any one of the tests standing alone."¹⁴²

Entwinement depends on the details, terms, and conditions under which a stadium is built and operated and the respective roles of the team and the government in those operations. A range of facts may suggest entwinement, including the details of the policy choices and goals underlying the team's demand, and the community's willingness to pay, for the stadium.¹⁴³

138. See *Ludtke v. Kuhn*, 461 F. Supp. 86, 93-94 (S.D.N.Y. 1978); Kende, *supra* note 4, at 241; Jan Stiglitz, *An Inquiring Woman*, in *COURTING THE YANKEES*, *supra* note 4, at 101, 105-06.

139. See *Ludtke*, 461 F. Supp. at 93-94; Stiglitz, *supra* note 138, at 106.

140. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 298 (2001). *Brentwood Academy* addressed a First Amendment challenge by a private school to a state high school athletic association's anti-recruiting rule. *Id.* at 293.

141. *Id.* at 302. Entwinement was present in *Brentwood Academy* because the state high school athletic association was comprised of all schools in the state, eighty-four percent of which were public, and representatives of each of those schools selected the legislative and executive bodies that made and enforced association policies. *Id.* at 298-300. From the other direction, members of the state board of education served as *ex officio* members of the association's governing bodies. *Id.* at 300.

142. Krotoszynski, *Remembrance*, *supra* note 83, at 1066; see *Brentwood Acad.*, 531 U.S. at 295 ("What is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity.")

Entwinement reflects the flexible "meta analysis" that Krotoszynski himself called for in 1995, arguing that even when a "defendant does not satisfy any one of the three state action tests, a reviewing court should step back and consider whether the defendant satisfies a sufficient portion of each of the three tests to support a state action finding, even if no single test is satisfied completely." Krotoszynski, *Back to the Briar-Patch*, *supra* note 81, at 337.

143. See *supra* Part II.B.1.

One factor is the divide of title to and control over the stadium or arena. Perhaps government retains title but expressly delegates to the team exclusive power to establish rules of operation.¹⁴⁴ Alternatively, perhaps government reserves for itself the power to establish speech rules in its facility, which the team simply is required to follow.¹⁴⁵ Another possibility is that title and operational control rest with a third entity jointly established by the team and the government; pervasive entwinement exists due to the “largely overlapping identity” between government and that entity.¹⁴⁶ This may be the case with Cleveland’s baseball park, Jacobs Field. “The Jake,” opened in 1994 specifically to keep the Indians from skipping town,¹⁴⁷ is owned by the Gateway Economic Development Corp., a 50/50 public/private partnership between the city of Cleveland and private investors.¹⁴⁸

Another relevant fact may be whether government provides police and other security officials to enforce team-created speech policies by removing fans who violate those rules.¹⁴⁹ For example, the City of Cleveland provides fifty extra police officers outside the stadium area beginning ninety minutes prior to the game.¹⁵⁰ Police officers inside the park work alongside private

144. See Alexander, *supra* note 89, at 376 (arguing that cases suggest that government cannot cede control over speech on property to a private entity); Richard S. Kay, *The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law*, 10 CONST. COMMENT. 329, 349 (1993) (arguing that state action is present where a government function is delegated to a private actor); see also Hamilton & Kahn, *supra* note 100, at 252; David Nakamura, *Head of Stadium Project Has His Eye on the Clock*, WASH. POST, Jan. 10, 2005, at B1.

145. See *Kuba v. 1-A Agric. Ass’n*, 387 F.3d 850, 852-53 (9th Cir. 2004); *Aubrey v. City of Cincinnati*, 815 F. Supp. 1100, 1105 (S.D. Ohio 1993) (emphasizing the city’s reserved power to establish rules and regulations for a stadium); *Ludtke v. Kuhn*, 461 F. Supp. 86, 95 (S.D.N.Y. 1978) (emphasizing the city’s power to regulate some aspects of team affairs, such as ticket prices); see also Louis Michael Seidman, *The State Action Paradox*, 10 CONST. COMMENT. 379, 391 (1993) (discussing a case in which “government affirmatively commands or encourages private individuals to engage in the constitutionally questionable conduct”).

146. See *Brentwood Acad.*, 531 U.S. at 303.

147. See ROSENWEIG, *supra* note 6, at 91; Austrian & Rosentraub, *supra* note 123, at 358-59.

148. See Austrian & Rosentraub, *supra* note 123, at 360; see also *United Church of Christ v. Gateway Econ. Dev. Corp.*, 383 F.3d 449, 451 (6th Cir. 2004).

149. See *Aubrey*, 815 F. Supp. at 1106 (emphasizing the fact that the city enforced team rules and regulations through its police force); ROSENWEIG, *supra* note 6, at 27, 52-53 (describing city-financed security team of police officers working overtime to provide security inside and outside a ballpark in Cleveland); see also Black, *supra* note 82, at 86 (“If a private amusement park uses a badged policeman to enforce its no-Negro policy, state and private power are so mixed as to bring constitutional guarantees into play.”).

150. See ROSENWEIG, *supra* note 6, at 50-51. Police presence is similar at other publicly owned stadiums. See, e.g., *Aubrey*, 815 F. Supp. at 1106 (refusing to dismiss a city from a fan’s lawsuit where the city made an affirmative decision to support team regulations by having on-duty and off-duty officers patrolling the stadium during World Series games); Misesy, *supra* note 10, at 235-36 (emphasizing that the

ushers and security guards to perform a “well-choreographed bunker maneuver” to watch the crowd and dissuade any misconduct during stoppages in play.¹⁵¹ The private entity links to public power in the operation of the arena. That degree of entwinement increases if local police go beyond merely enforcing to actually helping develop fan-conduct policies.¹⁵²

Note that finding entwinement because of police enforcement of team policies goes beyond ordinary police acquiescence in and enforcement of neutral private-property rules.¹⁵³ State action is not present merely because government enforces private legal choices.¹⁵⁴ Nor is this a situation in which one speaker has been granted short-term access to a public forum, during which time the speaker remains a private actor and retains control over the expression that occurs in the forum.¹⁵⁵

Rather, stadiums present the different case of government lending its enforcement muscle to assist the private entity in its long-term and exclusive management and control of government property. Pervasive entwinement is present because government has turned long-term control over its space to the private entity, then agreed to wield public power to enforce those private choices. The exercise of private power (managing the grandstand public forum) is a product of public laws and force.¹⁵⁶

3. *Public Function*

The Sixth Circuit employed a different approach in finding Cleveland’s Gateway Corporation to be a state actor in a free-speech case involving a

Baltimore Orioles baseball team and the local government share responsibility for hiring police to provide security at games).

151. See ROSENSWEIG, *supra* note 6, at 52-53.

152. Cf. *Aubrey*, 815 F. Supp. at 1105 (describing the city’s retained, although unexercised, power to establish rules and regulations for occupancy of the stadium by a baseball team).

153. See Alexander, *supra* note 89, at 365-66 (“[S]tate action permitting and enforcing private choices of a type the state would be constitutionally forbidden to make is not necessarily or even usually unconstitutional. . . .”); Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 GEO. L.J. 779, 790 (2004).

154. *But see* Black, *supra* note 82, at 92 (arguing that the enforcement of private contract and property rights brings constitutional restrictions into play); Peller & Tushnet, *supra* note 153, at 790 (“If the state recognizes the host’s power to exclude, it has created a property entitlement backed up by the coercive power of the state . . .”).

155. See *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 566-67 (1995) (accepting the lower-court determination that parade organizers were not state entities when using public streets for a parade).

156. See Alexander, *supra* note 89, at 377.

prohibition on protests.¹⁵⁷ The protest took place on the sidewalk outside Jacobs Field, but within the multi-stadium downtown complex that includes a basketball arena, parking garage, and common area.¹⁵⁸ That court relied on the long-established “public function test,” under which a private entity is a state actor if it performs a traditionally exclusive government function.¹⁵⁹ According to the court, the sidewalk looked and felt like a typical public sidewalk, was integrated into the downtown grid, and indistinguishable from an adjoining public sidewalk, making it a traditional public forum.¹⁶⁰ In managing this traditional public forum, Gateway performed a public function and became a state actor in doing so.¹⁶¹

This approach is problematic in its circularity. A speaker’s First Amendment rights in a forum demand both that the place be an appropriate forum for her speech and that the entity controlling the forum be a state actor. The Sixth Circuit approach uses the former to establish the latter.¹⁶² Moreover, the test seems boundless. The upshot may be that operating any property that can be characterized as a public forum, without more, makes the operator a state actor. Given that the grandstand at any sports stadium, ballpark, or arena properly should be characterized as a designated public forum,¹⁶³ this test subjects any entity that runs a stadium or arena, including a private university, to the First Amendment. This perhaps is a positive development from the standpoint of maximizing cheering speech.¹⁶⁴ But it is inconsistent with the long-standing refusal to characterize as a public function

157. See *United Church of Christ v. Gateway Econ. Dev. Corp.*, 383 F.3d 449, 454-55 (6th Cir. 2004).

158. See *id.* at 451; Austrian & Rosentraub, *supra* note 123, at 358 (describing the stadium complex in downtown Cleveland, including a baseball park, basketball arena, and other entertainment venues).

159. See *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 296 (2001); *Marsh v. Alabama*, 326 U.S. 501, 508-09 (1946) (holding that a private company that owned and controlled a town, a space indistinguishable from an ordinary municipality, was a state actor); Eule & Varat, *supra* note 81, at 1555-56; Krotoszynski, *Remembrance*, *supra* note 83, at 1065.

160. *United Church of Christ*, 383 F.3d at 452.

161. See *id.* at 454-55.

162. That circularity is illustrated by the court’s treatment of the Gateway Commons, another area within the ballpark complex to which the protesters sought access. The court held that this area was not a designated public forum; therefore, the court said, “even if Gateway were treated as a state actor for purposes of the Commons, the restrictions on their usage would satisfy the First Amendment.” *Id.* at 453.

163. See *supra* Part I.

164. See Chemerinsky, *More Speech*, *supra* note 82, at 1641 (“[W]hen private institutions prohibit and punish expression there is a loss of speech, just as when the government prohibits and punishes expression.”).

the mere operation, without more, of otherwise private space with which speech may be compatible.¹⁶⁵

A brake on the test could come by distinguishing stadiums based on design. Gateway Development owns a multi-feature complex whose grounds are adjacent to and indistinguishable from a public sidewalk, blended into the urban grid.¹⁶⁶ In fact, the commons and sidewalk were public spaces until they were turned over to Gateway as part of the development project for the ballpark.¹⁶⁷ Although no longer public, the sidewalk continues to perform the same function as before. By contrast, the grandstand within a stadium or arena does not share that similarity in appearance, function, or history.¹⁶⁸ Neither does an arena located in the middle of private university campus. Thus, even if the grandstand could be analyzed as a designated public forum, controlling such a forum would not be a public function comparable to controlling a sidewalk.

One final note on treating franchises as state actors. The conversion is limited to the team's functions in operating the publicly owned ballpark, including regulating fan expression. State action tests all focus on the connection between government and the private entity with regard to a particular activity, with state action established only as to that particular activity.¹⁶⁹ None of these arguments requires the conclusion that the baseball or football franchise is a state actor for any and all purposes, such as employee relations, hiring and firing concessionaires and vendors, or making player-personnel decisions.¹⁷⁰ The entwinement between franchise and government touches only the grandstand within that publicly owned stadium. The team's "public function" is managing that stadium, not all its activities not immediately tied to the stadium.

165. See *Hudgens v. NLRB*, 424 U.S. 507, 520 (1976); Eule & Varat, *supra* note 81, at 1559.

166. See *United Church of Christ*, 383 F.3d at 452.

167. See Austrian & Rosentraub, *supra* note 123, at 358-59; see also Turner, *Politics of Design*, *supra* note 100, at 533 (arguing that urban downtown public space is increasingly privatized).

168. See *Int'l Soc'y of Krishna Consciousness v. Lee*, 505 U.S. 672, 698 (1992) (Kennedy, J., concurring in the judgments); *supra* notes 44-50 and accompanying text.

169. See *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (stating that "state action may be found if, though only if, there is such a 'close nexus between the State and the challenged action'" (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974))) (emphasis added).

170. See *United Church of Christ*, 383 F.3d at 455 ("[O]ur decision in today's case has no bearing, for instance, on whether Gateway's employees would receive First Amendment protection for their workplace speech or whether Gateway would have to comply with the Due Process Clause when firing a subcontractor.").

C. *Protecting Free Speech*

There is an important distinction between the First Amendment and free speech. The former is the Constitution's textual commitment to free speech applicable against government; the latter is the popular tradition and understanding of people's rights to express themselves and to participate in public discussion.¹⁷¹ Recognizing that "more speech is better,"¹⁷² powerful private institutions (private universities or professional sports leagues and franchises) may voluntarily act in ways that will expand opportunities for individual expression by conforming to First Amendment principles, furthering the free-speech tradition, even if not constitutionally compelled to do so.¹⁷³ We might particularly hope universities would do so, given their unique purpose as a place for expression and exchange of ideas, a purpose that should carry into the bleachers at the basketball arena.¹⁷⁴

Alternatively, perhaps communities could impose the obligation on professional franchises not by constitutional law, but by private contractual obligation. Cities could negotiate in the stadium deal and lease a requirement that the team recognize the grandstand as a public forum for cheering speech and abide by First Amendment limitations in setting stadium policy. A community's decision to build a stadium for the team reflects a policy choice, but it is a choice at least influenced (if not necessarily coerced) by the team's insistence that it needs the facility and a veiled threat to leave town if it does not get it.¹⁷⁵ It is appropriate that consideration for that benefit includes the team respecting the free speech interests of the community members who want to make themselves heard on the game and other issues at the stadium. Of course, to the extent a team finds this condition unacceptable, it could avoid the condition by foregoing the government benefit and finding other ways to pay for its arena or stadium.

171. Wasserman, *Symbolic Counter-Speech*, *supra* note 3, at 414-15; *see also* Chemerinsky, *Rethinking*, *supra* note 82, at 510 ("Speech can be chilled and lost just as much through private actions as through public ones."); Michael Kent Curtis, *Judicial Review and Populism*, 38 WAKE FOREST L. REV. 313, 360-61 (2003) ("The majority had no right to silence the minority. All had the right to discuss political, moral, and social questions and to espouse any theory they chose.").

172. *See* Chemerinsky, *More Speech*, *supra* note 82, at 1641.

173. *See* Wasserman, *Symbolic Counter-Speech*, *supra* note 3, at 418. *But see* Eule & Varat, *supra* note 81, at 1564-65 (describing a "radical departure from constitutional tradition" regarding state constitutional provisions protecting free speech rights against private incursion).

174. *Cf.* Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 231 (2000) (describing the university as a place which "undertakes to stimulate the whole universe of speech and ideas").

175. *See* Sidlow & Henschen, *supra* note 103, at 168; *supra* notes 105-09 and accompanying text.

Curtis Berger suggested something similar as to privately owned shopping malls; he argued that government should condition approval of a development project (especially a project in which the developer acquires government land through lease or purchase) on the developer agreeing to provide and maintain an expressive forum within the mall.¹⁷⁶ The ballpark and the shopping mall both exemplify the politics of modern downtown development. Both grant private control over public space, thereby decreasing the amount of public space, all while providing a private financial benefit.¹⁷⁷ Civil society depends on reasonable public access to and use of such public space.¹⁷⁸ That is why the First Amendment commands that government create public forums.¹⁷⁹ If government is turning large amounts of public space over to private control, one way to satisfy that obligation is to insist that private entities receiving this benefit leave room for expression within the public space that the community has placed under the entity's exclusive control.¹⁸⁰

Of course, government and the popular majority dislike outrageous, offensive, and profane cheering speech as much as the team does. The public actually may prefer not to impose this obligation on the team, leaving the team freer to regulate fan expression, in order to maximize revenue and other benefits. This is especially true if those speech restrictions succeed in enhancing public revenues by ensuring a positive experience for fans.¹⁸¹

For our purposes, the question is whether the state, limited as it is in how it could regulate cheering speech if it controlled the stadium, has sufficient justification for allowing a private franchise controlling the public stadium to do what the state itself could not. But any justification must itself be of constitutional provenance, grounded in countervailing constitutional concerns (such as equality).¹⁸² A motive of securing the full economic benefits of the stadium, without more, would not be sufficient.

176. Berger, *supra* note 38, at 675-76.

177. See Turner, *Politics of Design*, *supra* note 100, at 533 ("Increasingly, downtown space is privatized and reflects a power over space that is generated through public authority but often wielded by private interests.").

178. See *id.* at 542-43.

179. See BAKER, *supra* note 51, at 170-71; SMOLLA, *supra* note 51, at 208-09; Gey, *Reopening*, *supra* note 37, at 1538-39; *supra* notes 51-64 and accompanying text.

180. Cf. Turner, *Politics of Design*, *supra* note 100, at 542 (discussing ways in which public access can be integrated into private development).

181. See Berger, *supra* note 38, at 686; *supra* notes 136-39 and accompanying text.

182. See *id.* at 378; see also, e.g., *id.* at 377 (arguing that the state's interest in protecting academic freedom may justify permitting a private university to impose a speech code).

III. TALKING SPORTS

Sports fandom is an American cultural phenomenon.¹⁸³ Fans talk about sport and through sport.¹⁸⁴ Fans form an association with a particular team, experiencing that team's success as personal success and that team's failure as personal failure.¹⁸⁵ It should not be surprising that fans want to express themselves about that fandom and their feelings of success or failure.¹⁸⁶ As Daniel Wann explains: "The ebb and flow of game action, the point/counterpoint of team success and failure, the spectators' empathic identification with heroes and vilification of villains, the thin line spectators walk between tragedy and ecstasy, all combine to engage them in a type of emotional aerobics."¹⁸⁷

The grandstand is the essential and appropriate space for this cheering speech.¹⁸⁸ And we will assume that the entity controlling that forum either is a state entity, a private entity morphed into a state actor through joint public participation, or a private entity that otherwise has agreed to be bound by First Amendment principles.¹⁸⁹ We look now at the forms this expressive outlet may take and what efforts stadium operators can undertake to regulate that expression.

183. See Hirt et al., *supra* note 4, at 724; see also GIAMATTI, *supra* note 3, at 14 ("Sports represent a shared vision of how we continue, as individual, team, or community, to experience a happiness or absence of case so intense, so rare, and so fleeting . . .").

184. See *supra* notes 3-8 and accompanying text.

185. See EDWARDS, *supra* note 3, at 244 ("[W]hen an athlete, a coach, or an athletic unit as a whole fails to achieve, they are perceived by the fan as having failed him personally."); WANN ET AL., *supra* note 4, at 19 ("Fans experience the 'thrill of victory' . . . and the 'agony of defeat' when their team loses."); Hirt et al., *supra* note 4, at 724 ("Students were also found to use the pronoun *we* more frequently when describing the outcome of a game in which their school's had been victorious ('We won!') than when their school's team had lost ('They lost')."); Vecsey, *supra* note 7, at 126 ("Those good old boys on the field are brave Texas Longhorns. But so are the fans who braved monstrous traffic jams, monstrous hangovers, monstrous weekend rates at the motel.")

186. See WANN ET AL., *supra* note 4, at 198; *id.* at 62 (describing sports fans experiencing the thrill of victory and the agony of defeat); Hirt et al., *supra* note 4, at 724 ("[U]niversity students were more likely to wear school-identifying apparel on the Monday after a winning performance by their school's football team than after a losing performance.")

187. WANN ET AL., *supra* note 4, at 198.

188. See Zick, *Space*, *supra* note 42 (manuscript at 49) ("Speakers' messages depend to some degree on proximity to *these* places, not the ability to speak elsewhere."); *supra* Part I.

189. See *supra* Part II.

A. *Viewpoint Discrimination*

Begin with the easiest case. There can be no viewpoint-discriminatory restrictions on speech in the public forum.¹⁹⁰ Fans are permitted to support and root for the home team or to support and root for the visiting team.¹⁹¹

More fundamentally, fans are free to root against teams and players or to make negative or critical statements or comments; fans cannot be limited only to positive or supportive comments.¹⁹² Penn State University unquestionably ran afoul of this principle when officials ordered that signs calling for the firing of the men's basketball coach be confiscated; the objection to the signs apparently was nothing beyond the fact that they expressed a point of view (criticism of the coach) with which public university officials disagreed.¹⁹³ Professional teams similarly ran afoul of this principle in ordering the removal of fans from publicly funded venues for displaying signs and banners criticizing and calling for the "firing" of the team owner or general manager.¹⁹⁴ If fans cheer and support their team and its members when the team succeeds, fans must be permitted to criticize or boo when it fails. That is inherent in speech about sport (indeed, speech about anything) where there are winners and losers and the conversation is going to be about winners and losers.

One could argue that a command that fans keep things "positive" or "non-critical" is not viewpoint discriminatory, because a fan still can cheer in favor of either team. In other words, Maryland fans support Maryland by saying positive things and Duke fans support Duke by saying positive things, but saying negative things about Duke adds nothing to the expressive mix. The argument misses the mark because rooting against one team does not express the same message as rooting for another. One could root against Duke (many, many people do) without rooting for Maryland or necessarily wanting

190. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 824, 830 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination.") (citation omitted).

191. *Cf. Schoolhouse Rock: Interjections* (ABC Television) ("Hooray, I'm for the other team!").

192. *See Calvert & Richards, supra* note 6, at 40 (arguing that a rule allowing the display of only positive signs supporting a team likely would be unconstitutional).

193. *See id.*

194. *See Kende, supra* note 4, at 240 (describing the controversy over the removal at Yankee Stadium of banners reading "George Must Go" and "Fire George," in reference to Yankee owner George Steinbrenner); Wertheim, *supra* note 10 (describing an incident in which a female fan and her boyfriend's son were removed from the NBA arena in Portland for waving a poster reading "TRADE WHITSITT," in reference to the Portland Trailblazers team president).

Maryland to win. The obvious comparison is to voters who support the challenger for public office not because they particularly like the challenger or particularly want her to win, but because they dislike the incumbent and want her to lose.¹⁹⁵

The zero-sum nature of sports (someone has to win and someone has to lose, except perhaps in hockey) means fans all are pulling for the outcome of a Maryland victory. But the individual, internalized points of view expressed are distinct. The idea is captured in a popular sports T-shirt: “I root for two teams: [My team] and whoever is playing [My team’s arch-rival].”¹⁹⁶ As the *Rosenberger* Court emphasized, public discourse is not bipolar, but complex and multifaceted, allowing for many distinct viewpoints on a single subject.¹⁹⁷ The principle of viewpoint neutrality means fans must be permitted to root for Maryland, against Duke, for Duke, or somewhere in between those; each represents a distinct, and protected, viewpoint on the single subject of the game being played and everything extending outward from that game.

Of course, some viewpoint slant is uniquely inevitable in a sports venue. As a practical matter, there will be more Maryland fans than Duke fans in the state of Maryland (the place from which most tickets to the arena will be sold), thus more Maryland fans than Duke fans will purchase tickets to a game at Maryland’s on-campus arena. Ditto for the relative numbers of Eagles and Cowboys fans living in Philadelphia. The point is that any fans of a visiting team who want to purchase available tickets to a game at the other team’s facility (something that has become easier in professional sports, where tickets are available over the non-geographically limited internet) must be permitted to do so.

Indeed, many teams have national fan bases that “travel well,” meaning they often outnumber fans of the home team.¹⁹⁸ If geographic distance is

195. See, e.g., MORRIS P. FIORINA, RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS 5-6 (1981) (describing the process of “retrospective voting,” in which a voter bases her choice on an evaluation of her personal circumstances to determine whether the incumbent has performed poorly, rather than on future-policy proposals from either candidate); John T. Wold & John H. Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, in JUDICIAL POLITICS: READINGS FROM *JUDICATURE* 71, 71-73 (Elliot E. Slotnick ed., 1992) (describing a campaign to unseat three sitting state supreme court justices based on their performance on the bench, without regard to their replacements).

196. Cf. *ST. JOHN*, *supra* note 8, at 19 (quoting an unnamed University of Alabama football fan as saying he would root for “Florida, Auburn, Notre Dame, Russia, and the University of Hell” before rooting for the University of Tennessee).

197. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 831 (1995).

198. See *ST. JOHN*, *supra* note 8, at 54 (describing a football game in which fans of visiting Alabama more than doubled the number of fans of home Vanderbilt); WILLIAM J. WAGNER, *WRIGLEY BLUES: THE*

removed, the balance between home and visiting fans shifts dramatically—imagine the Cubs playing the White Sox at either team’s ballpark in Chicago¹⁹⁹ or the eleven miles that separate Duke University and its students from the University of North Carolina and its students.²⁰⁰ To refuse to sell tickets (i.e., to grant access to the forum) to these fans based on their anticipated desire to root for the visiting team would be viewpoint discrimination, prohibited in a public forum. The same is true for their removal from the game once they have begun to cheer.

B. Political Content of Cheering Speech

Sociologist Harry Edwards argues that “there is literally no institution or stratum in modern American society which is not touched in some manner by sport.”²⁰¹ Through sport, we examine, discuss, and address issues of community,²⁰² race,²⁰³ gender,²⁰⁴ ethnicity,²⁰⁵ socioeconomic class,²⁰⁶

YEAR THE CUBS PLAYED HARDBALL WITH THE CURSE (BUT LOST ANYWAY) 72 (2005) (describing fans in Chicago and St. Louis, separated by five hours, using games in the other city as an excuse to take a road trip).

199. See WAGNER, *supra* note 198, at 135 (describing a game in the White Sox ballpark in which the crowd seemed evenly split between people wearing CUBS SUCK and SOX SUCK T-shirts).

200. See JOHN FEINSTEIN, A MARCH TO MADNESS: THE VIEW FROM THE FLOOR IN THE ATLANTIC COAST CONFERENCE 300 (1999).

201. EDWARDS, *supra* note 3, at 3.

202. See JAY, *supra* note 20, at 2 (calling sports “a central lens through which we view the world, helping many Americans to create a sense of personal identity and community and allowing us the space to discuss often contentious issues”); WANN ET AL., *supra* note 4, at 1 (describing strong social bonds that form among sports spectators).

203. See EDWARDS, *supra* note 3, at 190 (“For Afro-Americans, it might be thought, the vehicle for advancement is sport rather than one of the avenues used historically by the European immigrants, such as crime, political power, or the ‘cornering’ of certain occupational fields.”); GIAMATTI, *supra* note 3, at 64 (arguing that baseball “made a tremendous promise—to play the game of America by the rules of the Constitution and the American Dream”); JAY, *supra* note 20, at 30 (“True democracy, whether on the field or in general society, demanded equal opportunity. For sports, and for the United States, to live up to the stated creed, African Americans would have to be included.”); JULES TYGIEL, BASEBALL’S GREAT EXPERIMENT: JACKIE ROBINSON AND HIS LEGACY 9 (1983) (“The integration of baseball represented both a symbol of imminent racial challenge and a direct agent of social change. . . . For civil rights advocates, the baseball experience offered a model of peaceful transition through militant confrontation, economic pressure, and moral suasion.”); Timothy Davis, *Breaking the Color Barrier*, in *COURTING THE YANKEES*, *supra* note 4, at 335, 340 (“Given that sport was viewed as embodying the ‘American Creed,’ it was not surprising when increasingly aggressive campaigns to achieve access to opportunities for blacks in a wide range of institutions spilled over into baseball.”).

204. See JAY, *supra* note 20, at 165-66 (describing arguments that opposition to gender-equity “masked a more deep-seated rejection of the very concept of the female athlete”); Kimberly A. Yuracko, *One for You and One for Me: Is Title IX’s Sex-Based Proportionality Requirement for College Varsity Athletic Positions Defensible?*, 97 NW. U. L. REV. 731, 791 (2003) (arguing that gender equity in athletics

assimilation,²⁰⁷ higher education,²⁰⁸ crime and punishment,²⁰⁹ and patriotism.²¹⁰ Cheering speech thus cannot be derogated as unimportant.²¹¹

Sport is awash in political symbolism. The “Star Spangled Banner” signals the start of organized sporting events at all levels, a tradition dating back to the 1918 World Series, played in the closing months of World War I.²¹² Indeed, sport marks the only occasion in which adult Americans regularly gather and collectively participate in these symbolic and ceremonial tributes to flag and nation. Public officials place their imprimatur on games and use

“encourages girls to develop a sense of their own bodily agency and to develop a conception of themselves as agents in their social and physical world”).

205. See *Crue v. Aiken*, 370 F.3d 668, 672-73 (7th Cir. 2004) (affirming summary judgment in favor of plaintiffs challenging a state university’s prohibition on protests against the university’s Indian mascot); *United Church of Christ v. Gateway Econ. Dev. Corp.*, 383 F.3d 449, 451 (6th Cir. 2004) (describing fans’ planned protest against the Cleveland Indians’ nickname and mascot). In 2005, the NCAA banned teams from participating in championship events that display hostile and abusive racial/ethnic/national origin mascots, nicknames or imagery; teams, bands, and cheerleaders cannot wear or use such references, nicknames, or images on their uniforms, clothing, and other materials. Press Release, National Collegiate Athletics Association, NCAA Executive Committee Issues Guidelines for Use of Native American Mascots at Championship Events (Aug. 5, 2005), available at http://www2.ncaa.org/media_and_events/press_room/2005/august/20050805_exec_comm_rls.html.

206. See ROSENSWEIG, *supra* note 6, at 27-28 (discussing the way in which the presence of professional teams helps create community and smooth over class differences); *id.* at 96 (arguing that the bleachers historically allowed people from various neighborhoods, occupations, and classes to temporarily join together, rooting for the same team or jeering the same umpire).

207. See JAY, *supra* note 6, at 24 (“[S]ports remained an important cultural venue for many immigrants, serving as a public ritual of inclusion . . .”); PETER LEVINE, *ELLIS ISLAND TO EBBETS FIELD: SPORT AND THE AMERICAN JEWISH EXPERIENCE* 3 (1992) (“Sport in general, an activity lauded as open to all based solely on talent, still garners attention as a metaphor of American democratic ideals and a pathway to assimilation.”).

208. See JAY, *supra* note 20, at 190-91 (describing efforts by the NCAA to require colleges to impose academic standards and create academic support programs for college athletes); SHULMAN & BOWEN, *supra* note 23, at 5 (arguing that college athletics can be assessed “in terms of its direct effects on the core educational mission of a college or university” and “in terms of its impact on campus ethos, alumni/ae loyalty, and institutional reputation”); ANDREW ZIMBALIST, *UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS* 12 (1999) (describing the “cultural dominance” of intercollegiate sports over college life).

209. See Wasserman, *Cheers*, *supra* note 6, at 383 n.36 (arguing that heckling a player accused of sexual assault may function as a protest against unpunished athlete misbehavior); *infra* notes 267-73 and accompanying text.

210. See JAY, *supra* note 20, at 52 (“For the United States and the Soviet Union, the Olympics provided a rare stage upon which they could compete publicly and directly.”); Wasserman, *Symbolic Counter-Speech*, *supra* note 3, at 392 (“Patriotic symbolism is an integral part of sport.”).

211. See Rubinfeld, *supra* note 4, at 824 (rejecting the idea of a First Amendment in which judges can “portion out constitutional protection depending on their assessment of the ‘social value’ of the speech act”).

212. See GEOFFREY C. WARD & KEN BURNS, *BASEBALL: AN ILLUSTRATED HISTORY* 132 (1994).

them to further their political goals.²¹³ Military flyovers are part of the pregame ritual at the Super Bowl.²¹⁴

This political meaning has become more pronounced since September 11. Baseball stopped for six days following the attacks, then returned to an American pageant. Fields were painted red, white, and blue; players wore American flags on their uniforms; fans waved American flags; and ballparks observed moments of silence and remembrance. “God Bless America” supplanted or supplemented “Take Me Out to the Ballgame” during the seventh-inning stretch (and continues as part of the game’s rituals).²¹⁵ The tattered American flag recovered from Ground Zero flew above Yankee Stadium during the 2001 World Series, six weeks and nine miles from Ground Zero.²¹⁶ Fans watched in awe as President George W. Bush stood on the pitcher’s mound to throw out the first pitch prior to the game.²¹⁷

Fans in a public forum cannot be compelled to participate in the rituals that attend these patriotic symbols. Rather, fans remain free to challenge the symbols by engaging in what I label “symbolic counter-speech,” counter-speech that responds to and dissents from the message expressed by a symbol or symbolic ritual using that symbol as the vehicle or medium for counter-speech and dissent.²¹⁸ Symbolic counter-speech may take many forms.²¹⁹

213. See EDWARDS, *supra* note 3, at 96-97 (describing ways in which political figures associate themselves with athletes and athletes seek to associate themselves with broader, society-wide occurrences); JAY, *supra* note 20, at 141 (describing President Nixon’s love of sports and the way he used that to connect with public); *supra* notes 27-31 and accompanying text.

214. See United States Army Public Affairs, *Army Flyover to Kickoff Super Bowl*, Jan. 30, 2004, http://www4.army.mil/ocpa/read.php?story_id_key=5627.

215. See Rebecca S. Kraus, *A Shelter in the Storm: Baseball Responds to September 11*, 12 NINE: J. BASEBALL & CULTURE 88, 91, 95 (2003); Wasserman, *Symbolic Counter-Speech*, *supra* note 3, at 393; see also Press Release, Major League Baseball, Major League Baseball Announces Patriotic Initiatives for 2002 Season (Mar. 28, 2002) (on file with author).

216. See Wasserman, *Symbolic Counter-Speech*, *supra* note 3, at 393.

217. See NINE INNINGS FROM GROUND ZERO (HBO Sports 2004).

218. Wasserman, *Symbolic Counter-Speech*, *supra* note 3, at 390-91; see also *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (arguing that “the remedy to be applied” to objectionable speech is “more speech, not enforced silence”); Vincent Blasi, *Free Speech and Good Character: From Milton to Brandeis to the Present*, in ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 60, 84 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) (“The most important environmental consequence of protecting free speech is the intellectual and moral pluralism, and thus disorder in a sense, thereby engendered.”); Michael Kent Curtis, “Free Speech” and its Discontents: *The Rebellion Against General Propositions and the Danger of Discretion*, 31 WAKE FOREST L. REV. 419, 433 (1996) (“Justice Brandeis thought of the First Amendment as empowering people ‘to think as you will and to speak as you think,’ and . . . the only appropriate remedy for much evil speech is counter-speech and reason.”).

219. See Wasserman, *Symbolic Counter-Speech*, *supra* note 3, at 394-98.

Fans may refuse to stand for “God Bless America” or may turn their backs to the flag during the anthem. Fans even may jeer one nation’s anthem as it is being played as protest against that nation or its policies.²²⁰

Cheering speech may entail an exchange of speech and counter-speech on these political symbols and ceremonies. For example, a professional and a collegiate athlete have protested the War in Iraq and other public policy concerns by refusing to participate in game-related patriotic rituals.²²¹ Fans responded to both players with jeers and other cheering speech challenging both players and their viewpoints, in turn reaffirming the patriotic symbols.²²² Carlos Delgado’s appearance at Yankee Stadium in July 2004 produced an elaborate exchange. While most fans booed his expressive stand, during the seventh-inning stretch at one game two fans unfurled a banner reading “Delgado for President,” to which other fans responded by booing the banner-holders themselves.²²³

The political content of cheering speech extends beyond the symbolic. Genuine public controversies play out in and through sport and may be considered, discussed, and debated in that context. A fan uses cheering speech to be heard on a range of public issues; the stadium provides her singular, best opportunity to get her message heard by a substantial crowd.²²⁴ There is no space more appropriate than the stadium grandstand for messages protesting the team’s Native American nickname and mascot as racist and offensive,²²⁵ or, in the name of viewpoint neutrality, to protest the NCAA

220. See *id.* at 396-97 (describing two related incidents: fans in Toronto booing *The Star Spangled Banner* and fans in Chicago responding by booing *Oh Canada* one week later).

221. See, e.g., Wasserman, *Symbolic Counter-Speech*, *supra* note 3, at 395 (discussing women’s college basketball player Toni Smith, who refused to face the American flag during the pregame national anthem); Chris Green, *Cheering Delgado’s Dissent*, ESPN.com (Sept. 22, 2004), <http://sports.espn.go.com/espn/page2/story?page=green/040922> (describing a protest by baseball player Carlos Delgado, who refused to stand when *God Bless America* was played during the seventh-inning stretch). I leave aside the question of whether either player’s respective teams could have forced them to halt their symbolic counter-speech and to participate in the ritual.

222. See Wasserman, *Symbolic Counter-Speech*, *supra* note 3, at 419 (describing visiting fans booing Smith whenever she touched the ball, waving American flags, and singing *God Bless America* at the end of the game); Green, *supra* note 221 (describing fans at Yankee Stadium booing Delgado).

223. See Green, *supra* note 221.

224. See Gey, *Reopening*, *supra* note 37, at 1538-39 (arguing that “the street corner has long since ceased to be a focal point of either truth-telling or instigating the dissatisfied masses,” but “every culture must have venues in which citizens can confront each other’s ideas and ways of thinking about the world”); Wasserman, *Symbolic Counter-Speech*, *supra* note 3, at 431 (arguing that speakers must be able to use expressive forums uniquely available to them).

225. See *United Church of Christ v. Gateway Econ. Dev. Corp.*, 383 F.3d 449, 451 (6th Cir. 2004); Steve Bauer, *Anti-Chief Protesters File \$2.5 Million Lawsuit*, NEWS-GAZETTE (Champaign, IL), Jan. 29, 2003, available at <http://www.newsgazette.com/localnews/story.cfm?Number=13151> (describing an

prohibition on the team's Native American nickname and mascot by continuing to display the name and logo;²²⁶ the university's over-emphasis and over-spending on athletics at the expense of academics;²²⁷ the comparative spending and support for men's and women's athletics and the relative merits of Title IX;²²⁸ or the public policy decision that led to the construction, at public expense, of the very stadium in which the fans protest.²²⁹ None of this is incompatible with other, expressive uses of the bleachers, as long as it all remains there and does not obstruct other fans from watching the game.

Consider one final exchange of speech and counter-speech at the ballgame. In 1997, Major League Baseball commemorated the fiftieth anniversary of the integration of baseball by ordering all teams to retire Jackie Robinson's number 42 uniform, marking the official retirement in a pregame ceremony at New York's publicly owned Shea Stadium.²³⁰ Suppose a group of Ku Klux Klan members attend that game en masse specifically to protest the ceremony and the honoring of Robinson. They wave Confederate flags and they jeer, chant, and display banners denouncing Robinson, non-white players, and the integration of baseball ("The game was better when it was all-white"). The on-field ceremony in which Major League Baseball, the New

incident in which fans were removed from the basketball arena at the University of Illinois for chanting against the school's "Chief Illiniwek" mascot).

226. See *supra* note 205 and accompanying text.

227. See JAY, *supra* note 20, at 193 ("[T]he growing revenue streams available in college basketball led schools to make decisions based more on finances than on what might be best for their student-athletes."); SHULMAN & BOWEN, *supra* note 23, at 3 ("As many faculty critics have pointed out, there is no direct connection between organized athletics and the pursuit of learning for its own sake."); *id.* at 27 ("As time passed, even the less intensive programs, which were once viewed as ancillary, consumed more and more institutional resources . . .").

228. See JAY, *supra* note 20, at 188 (describing arguments that notions of gender equality should not take precedence over the demands of the athletic marketplace and the creation of revenues); SHULMAN & BOWEN, *supra* note 23, at 124 ("[O]ne can empathize with the male athletes and coaches who feel that their sports programs now face new restrictions, and who in some cases see gender equity as the cause of those restrictions . . ."); Yuracko, *supra* note 204, at 732 (describing criticisms of Title IX for guaranteeing female students proportional athletic opportunities even if they have lower levels of athletic interest and ability than male students).

229. See Bratspies, *supra* note 105, at 294 (describing the "wide applause" that greeted the New York City mayor who insisted that the city "had bigger things to worry about" and "could ill-afford to build baseball stadiums"); Sidlow & Henschen, *supra* note 103, at 169 (arguing that the decision to build a stadium with public funds is a public-policy choice, but recognizing the argument that a city is held hostage by a team's threats to leave town); Turner & Marichal, *supra* note 105, at 190 (describing the interaction between professional teams threatening to leave town and local leaders who become willing to build new stadiums).

230. Press Release, Major League Baseball, Major League Baseball Retires Robinson's No. 42—Forever (Apr. 15, 1997) (on file with author).

York Mets, New York City, and the fans honor a great player and arguably the vital historic moment in sports (and American) history surely is appropriate cheering speech.²³¹

If Robinson's contributions can be honored in the forum, they also can be criticized and denounced in the forum. To deny these fans the use of the forum is to deny them the best, most appropriate place for their undeniably political, undeniably protected message.²³²

C. Heckling

Cheering speech extends well beyond huzzahs, whistles, and applause that express hope and satisfaction that one's team wins or the other team loses. Rather, the purpose of cheering speech is to make noise in such a way as to influence (or at least to feel that one is influencing) the outcome of the game in favor of one's team.²³³

One way of doing this is through cheering that targets a particular player whenever the nature of the game focuses attention on that individual: the basketball player stepping to the free-throw line,²³⁴ the batter and pitcher locked in a solo battle,²³⁵ or the player who just did something important on the field, good or bad, and on whom all eyes rest.²³⁶ And of course, fans will

231. See JAY, *supra* note 20, at 31 ("When a black man took the field with white teammates . . . the idea of integration suddenly seemed possible."); TYGIEL, *supra* note 203, at 9 ("Jackie Robinson's campaign against the color line in 1946-47 captured the imagination of millions of Americans who had previously ignored the nation's racial dilemma."); *infra* Part III.F.

232. See Zick, *Space*, *supra* note 42 (manuscript at 30) (arguing that the ability to protest in or near a particular space may be critical to the intended message).

233. See ROSENSWEIG, *supra* note 6, at 55 ("Fans who attend sporting events in part do so in order to help their teams win games and thus feel themselves as part of the action."); Wasserman, *Cheers*, *supra* note 6, at 386 ("Students are encouraged to attend games and make noise . . . and to create a playing environment that will be intimidating or distracting to the opponent and will give their team a home-court advantage."); Eric Hoover, *Crying Foul Over Fans' Boorish Behavior*, CHRON. HIGHER EDUC. (Wash., D.C.), Apr. 9, 2004, at A36 [hereinafter Hoover, *Crying Foul*] (describing students who view themselves as participants in the game and ways in which schools encourage that view).

234. See Calvert & Richards, *supra* note 6, at 42.

235. See Ernest L. Thayer, *Casey at the Bat*, S.F. EXAMINER, June 3, 1888, at 4:

Ten thousand eyes were on him as he rubbed his hands with dirt;

Five thousand tongues applauded when he wiped them on his shirt.

Cf. FERRIS BUELLER'S DAY OFF (Paramount 1986) ("Hey, batter, batter! Swing batter!").

236. See Vecsey, *supra* note 7, at 129 ("When the shortstop fumbles the grounder, he is naked to the world. He must stand there and scuff at the dirt while the fans give him advice.").

seek out the star player or high-profile coach for special heckling.²³⁷ In fact, star players often treasure the taunts that rain down from fans.²³⁸

It is incoherent to prohibit, as one collegiate conference has, cheers that “attack or single out” particular athletes.²³⁹ It is impossible to cheer at a game without targeting comments at the player at the center of the action. Rather, the policy, by using the word “attack,” obviously is not intended to reach positive comments or applause singling out that individual. The goal is not to prohibit fans from yelling “Nice shot, J.J.,” only to prohibit “You stink, J.J.” Anti-targeting rules thus break down as simple viewpoint-discrimination—permitting positive targeted comments, but not negative or attacking targeted comments. When Penn State officials objected to signs calling for the men’s basketball coach to be fired, there were no objections to student signs praising the coach or suggesting that he should keep his job, although such signs obviously would “single out” the coach.²⁴⁰

Heckling is unbounded in subject matter, limited only by the compatibility requirement that all cheering speech must satisfy in the forum.²⁴¹ Hecklers may question the target’s talent, ability, competence, intelligence, eyesight, judgment, honesty (booing the player who tests positive for performance-enhancing drugs), temper, consciousness, parentage, marital stability, sobriety, past or present legal troubles, or just about anything else. It can touch on many referents, more or less connected to sport and often going beyond someone’s skills on the court. The only limit appears to be good taste, class, civility, and some amorphous concept of sportsmanship and sporting conduct.²⁴² Of course, those are not constitutional concepts. Rather,

237. See JOHN FEINSTEIN, *A SEASON ON THE BRINK* 181 (1986) (describing chants targeting the opposing coach and his legendary temper); Calvert & Richards, *supra* note 6, at 2 (describing student fans targeting comments about the opposing team’s star player); Wasseman, *Cheers*, *supra* note 6, at 377 (same).

238. See ROBERT W. CREAMER, *BABE: THE LEGEND COMES TO LIFE* (1983) (quoting Babe Ruth as saying he “never had so much fun in all my life” when he exchanged taunts with both opposing players and fans during the 1932 World Series). In a 2005 press conference, Barry Bonds of the San Francisco Giants spoke of how much he enjoyed playing before the heckling crowds in the home park of the archrival Los Angeles Dodgers, explaining that Dodger fans “say ‘Barry sucks’ louder than anyone out there” and “you’ve got to have some serious talent to have 53,000 people saying you suck.” Henry Schulman, “*It’s Time to Move On*”: Bonds Brushes Off Steroid Questions, Praises Baseball’s New Drug Rules, *S.F. CHRON.*, Feb. 23, 2005, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/02/23/MNGQJBFKUS1.DTL>; see *infra* Part IIID.

239. See Calvert & Richards, *supra* note 6, at 41-42.

240. See *id.* at 40; *supra* notes 193-95 and accompanying text.

241. See *supra* notes 51-67 and accompanying text.

242. See REPORT ON SPORTSMANSHIP, *supra* note 63, at 15 (defining sportsmanship as including “behaviors based on values, including respect, civility, fairness, honesty, and responsibility”); *id.* (requiring

matters of taste and style (and, we might add, of class and sportsmanship) are left to the individual.²⁴³ The First Amendment recognizes the impossibility of line-drawing, particularly based on pejorative and subjective concepts, thus it precludes government from making the effort.²⁴⁴

Players may make the personal public, rendering it fertile ground for hecklers. Consider baseball player Kris Benson and his wife, Anna. In Fall 2004, Anna Benson went on a radio talk show and, in response to questions about stories of ballplayers' sexual exploits on the road, said that if her husband cheated on her, she would have sex with every single member of the team, including clubhouse attendants, as well as members of the other team.²⁴⁵ She also went into great detail about the couple's sex life.²⁴⁶ There is no constitutional reason (as opposed to one based on good taste) that this issue is off-limits to a fan with a sign reading "Hey, Anna, has Kris cheated yet?"

One commentator conclusorily asserted that teams could stop a fan from displaying a sign reading "The Manager's Mother is Easy."²⁴⁷ But why? Someone's sexual and romantic entanglements provide obvious material, as *Hustler Magazine v. Falwell*²⁴⁸ makes clear. Indeed, *Hustler* can be characterized as the ultimate heckle. The magazine published a parody of a liqueur ad series that described the drinker's "first time" (drinking the liqueur, but the sexual double entendre was intended); the parody depicted Falwell describing his first time as a drunken rendezvous with his mother in an outhouse.²⁴⁹ On its face, the ad expressed the idea that Falwell's mother was easy, that both were immoral, and that Falwell was a hypocrite.²⁵⁰ However outrageous or offensive to Falwell, the parody could not be the basis for civil

institutions to establish written policies and procedures related to sporting conduct); *see also* Wasserman, *Cheers*, *supra* note 6, at 378, 390 (discussing efforts by universities to get fans to keep cheering clean and classy).

243. *See* *Cohen v. California*, 403 U.S. 15, 25 (1971).

244. *See* *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988) ("If it were possible by laying down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm. But we doubt that there is any such standard, and we are quite sure that the pejorative description 'outrageous' does not supply one."); SMOLLA, *supra* note 51, at 47-48 (describing the conclusion that there was no way to draw principled distinction among different forms of parody or satire).

245. Jeff Merron, *They'll Love Mrs. Benson in N.Y.*, ESPN.com, Jan. 10, 2005, <http://sports.espn.go.com/espn/page2/story?page=sexsports/three/2004>; Lillian Ross, *Talk of the Town: The Pitcher's Wife*, THE NEW YORKER, June 6, 2005, at 36.

246. Merron, *supra* note 245; *see also* Ross, *supra* note 245 (interview with Anna Benson talking about meeting her husband while working as a dancer and the development of their sexual relationship).

247. *See* *Misey*, *supra* note 10, at 257.

248. 485 U.S. 46 (1988).

249. *See id.* at 48; Post, *supra* note 27, at 606-07.

250. *Hustler*, 485 U.S. at 48.

damages.²⁵¹ If the parody was protected when published in the magazine, it should remain protected if a fan prints it (or something similar) on a poster and displays it in a public forum, such as a sports stadium. So, too, should oral expression of the same idea in that forum.

Robert Post explains *Hustler* as reflecting the view that, although human dignity requires adherence to generally accepted standards of decency and morality in a civilized community, those standards are not enforceable in the area of public discourse, at least in the absence of false statements of fact.²⁵² Cheering speech, uttered as it is in the cacophony of a large crowd,²⁵³ relies on rhetorical hyperbole, vigorous and vehement epithets, deliberately provocative overstatement, and loose, figurative language not intended to be taken literally or seriously.²⁵⁴ It does not assert (or attempt to assert) a provably true or false statement of fact.²⁵⁵ That is true whether the subject is a player's marital fidelity or sexual morality, lack of skills ("You could not play for my daughter's youth league team!"), or any other personal or team characteristic described in loose and not literally true or false terms.

Heckling is a form of satire; it is caustic, it may be deliberately injurious to its target, and it uses shock, exaggeration, humor, and ridicule to make its point and to cut its target down to size.²⁵⁶ Satire, Peter Goodrich argues, "brings with it a certain charge, potential animus, and occasionally an erotic attraction. It is a very specific mode of sparring"²⁵⁷ Satire is "critical of human institutions, human vices and follies, and often of individual humans themselves."²⁵⁸ And discourse and debate on all subjects are better for it.²⁵⁹

251. *See id.* at 57.

252. *See Post, supra* note 27, at 616.

253. *Compare* ST. JOHN, *supra* note 8, at 227 (arguing that sports crowds are more mature and self-knowing) *with* REPORT ON SPORTSMANSHIP, *supra* note 63, at 4 (citing anonymity within large crowds as a cause of sports-fan aggression).

254. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16-17, 21 (1990); *Hustler*, 485 U.S. at 57; Steven G. Gey, *A Few Questions about Cross Burning, Intimidation, and Free Speech*, 80 NOTRE DAME L. REV. 1287, 1327 (2005) [hereinafter Gey, *Questions*] (describing protection for "nasty, abusive, and vehement" hyperbole).

255. *See Milkovich*, 497 U.S. at 19-20 (emphasizing that a statement on a "matter of public concern" must be provable as false before it can be a basis for liability).

256. *Hustler*, 485 U.S. at 54-55; Post, *supra* note 27, at 613; *see also* Peter Goodrich, *Satirical Legal Studies: From the Legists to the Lizard*, 103 MICH. L. REV. 397, 426 (2004); Frederick Kiley & J.M. Shuttleworth, *Introduction to SATIRE FROM AESOP TO BUCHWALD* (Frederick Kiley & J.M. Shuttleworth eds., 1971).

257. *See Goodrich, supra* note 256, at 426.

258. *See Kiley & Shuttleworth, supra* note 256, at 1.

259. *See Hustler*, 485 U.S. at 54-55 (describing the historical influence of satirical political cartooning); *see also* Kiley & Shuttleworth, *supra* note 256, at 1 (arguing that satire is one of the oldest and

Underpinning satire is humor, which “persuades in large part because it attracts attention [and] it is engaging and engaged.”²⁶⁰ Humor removes the mask of seriousness.²⁶¹ Humor makes “explicit . . . human behaviors or attitudes that usually go unnoticed because they are so common or ordinary.”²⁶² Many of the First Amendment’s heroes have used humor as their expressive weapon of choice.²⁶³ It should not matter whether that attack occurs in a comedy club or at a football game. Not all humor will succeed, of course.²⁶⁴ The point is the effort, however sophomoric or unfunny.²⁶⁵ There thus is a protected attempt at humor (not subject to prohibition, even if not successful) inherent in Ohio State students attending a game against the University of Michigan wearing T-shirts reading “Ann Arbor is a whore.”²⁶⁶

Finally, we cannot ignore the political commentary that infuses some heckling. For example, fans have targeted college athletes charged with sexual assault with chants of “rapist” and “no means no.”²⁶⁷ Fans have taunted players for past involvement with drugs by waving fake joints during the game.²⁶⁸ Jeering or taunting the player in such circumstances could be characterized, at least in part, as a social or political protest against the fact that this player continues to represent his team or his school despite his off-court misconduct. Such heckling draws attention to the social problem of athlete misbehavior generally.²⁶⁹

most durable forms of literature and will continue to endure).

260. Goodrich, *supra* note 256, at 505; *id.* at 501 (“Humor engages the body, it causes a physical eruption, ‘broken sounds,’ trembling or convulsion.”).

261. *Id.* at 503.

262. Kitrosser, *Communicative Manner*, *supra* note 64, at 1392.

263. See RONALD K.L. COLLINS & DAVID M. SKOVER, *THE TRIALS OF LENNY BRUCE: THE RISE AND FALL OF AN AMERICAN ICON* 430 (2002) (“Lenny Bruce hoped to liberate words That was the reason and risk of his humor The date of Lenny Bruce’s death is as good a marker as any of the moment when words alone—any performance words spoken in comedy clubs—ceased to be targets of prosecution.”); STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 80-81 (1990) (discussing comedian George Carlin, a target of an FCC indecency charge and thus a central figure in establishing the meaning of the First Amendment).

264. See COLLINS & SKOVER, *supra* note 263, at 23 (“The funny thing about Lenny Bruce is that he was, at times, *not* funny.”).

265. *Yankee Publ’g Inc. v. News America Publ’g Inc.*, 809 F. Supp. 267, 280 (S.D.N.Y. 1992) (“First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed.”).

266. Calvert & Richards, *supra* note 6, at 27.

267. See *id.* at 3 (describing chants directed at a University of Iowa basketball player in January 2004); Hoover, *Crying Foul*, *supra* note 233, at A1.

268. See Hoover, *Crying Foul*, *supra* note 233, at A1.

269. See JAY, *supra* note 20, at 4 (“[T]he problems of sports—cheating, drugs, violence, and an overweening emphasis on financial gain—are bemoaned as representing the decline of the nation itself, with

In similar fashion, baseball fans jeered and heckled John Rocker after he made racist, sexist, homophobic, and generally offensive statements in a 1999 magazine article.²⁷⁰ The taunts directed at Rocker functioned as fan commentary on Rocker's statements, as counter-speech demonstrating the unacceptability of his social views.²⁷¹ Of course, no one in Major League Baseball suggested that such targeted jeering should cease—Baseball itself imposed a lengthy suspension and fine as punishment for his comments.²⁷² This again reveals the viewpoint bias inherent in objections to heckling; fans are not restricted when they heckle or jeer players in order to promote a favored idea—here, the social norm of “condemn[ing] contemptible views and the people who express them.”²⁷³

D. Profanity

In suggesting the concept of “sports speech,” Jed Rubenfeld pointed to the most ancient and revered form of heckling: calling Roger Clemens a “bum.”²⁷⁴ That word long has been the ultimate expression of criticism and endearment in sport, especially baseball.²⁷⁵

The modern, and far more controversial, equivalent is announcing, via the spoken or written word, that a team, player, or anyone else “sucks.” That word has become central to the modern sports lexicon.²⁷⁶ Objection to it is grounded in its sexual, and apparently homophobic, origins.²⁷⁷ Those objections were given voice in 2002 at Safeco Field in Seattle, an almost entirely publicly funded facility on which the team pays \$700,000 plus a percentage of defined net income in annual rent, and retains nearly 100% of

sports serving as a sort of public barometer of ethical values and decency.”).

270. See Volokh, *Deterring Speech*, *supra* note 70, at 1432-33.

271. See Martin H. Redish & Christopher R. McFadden, *HUAC, the Hollywood Ten, and the First Amendment Right of Non-Association*, 85 MINN. L. REV. 1669, 1688 (2001) (discussing how private individuals may react to ideas, and the holders of those ideas, that they find abhorrent or offensive); Volokh, *Deterring Speech*, *supra* note 70, at 1415 (“We should be polite and welcoming to those who have unorthodox views on social security reform. We needn’t, however, apply the same social ground rules to those who have the unorthodox view that certain races are subhuman.”).

272. See Volokh, *Deterring Speech*, *supra* note 70, at 1432.

273. *Id.* at 1414.

274. Rubenfeld, *supra* note 4, at 824.

275. *Cf.* ROGER KAHN, *THE BOYS OF SUMMER* (1971).

276. See WAGNER, *supra* note 198, at 131-32 (describing the use of words, in written and oral form, in confrontations between rival fans); see also Frank Deford, Commentary, *Crowd Noise* (NPR radio broadcast Apr. 7, 2004) (criticizing the increasingly common use of word).

277. See Kende, *supra* note 4, at 240.

revenue from concessions, advertising, naming rights, and enhanced seating.²⁷⁸ Baseball's Seattle Mariners tried to bar from the park fans wearing "Yankees Suck" T-shirts.²⁷⁹

More controversial were events at the University of Maryland in January 2004, during the men's basketball game between Maryland and Duke University, when Maryland fans chanted and sported T-shirts reading "Fuck Duke" and directed homophobic epithets at Duke's star player.²⁸⁰ The incident dismayed Maryland officials, leading to an examination of possible regulations on student cheering speech.²⁸¹ It brought to the fore the NCAA's insistence with respect to cheering speech that "[s]creaming obscenities at opposing players is not OK."²⁸²

The University of Maryland sought the counsel of the state Attorney General, who advised the school that a written code of fan conduct at the university-owned and operated athletic facility, if "carefully drafted," would be constitutionally permissible.²⁸³ Maryland's Athletics Director began working with a committee of students to devise rules of fan conduct.²⁸⁴ Teams at all levels struggle with the question of whether hostile, profane messages should be permitted in the forum.²⁸⁵

Not that profanity is new to sport. In fact, one commentator suggests that old-school profane cheering has been drained away from new publicly funded sports cathedrals: "I found myself terrifically nostalgic for the excessive, the inappropriate, the picaresque—the vernacular behavior and the comportment of the rowdies blissfully exiled together in the cheap seats in the old park. I longed for the foul-mouthed commentary about the umpire's decisions . . ."²⁸⁶

278. Forsythe, *supra* note 103, at 279; Long, *supra* note 103, at 122; *supra* Part II.B.1.

279. See *M's Ban Controversial Anti-Yankees T-shirts from Safeco Field* (Apr. 29, 2002), at <http://www.komotv.com/news/story.asp?ID=18115>.

280. See Calvert & Richards, *supra* note 6, at 2; Hoover, *Crying Foul*, *supra* note 233, at A35.

281. See Wasserman, *Cheers*, *supra* note 6, at 377.

282. See Calvert & Richards, *supra* note 6, at 2-3 (quoting NCAA President Myles Brand in 2003).

283. Letter from John K. Anderson, Chief of the Educational Affairs Division of the Maryland Attorney General's Office to C.D. Mote, President, University of Maryland 1, 4 (Mar. 17, 2004) (on file with author); see Calvert & Richards, *supra* note 6, at 4; Wasserman, *Cheers*, *supra* note 6, at 377-38.

284. See Hoover, *Crying Foul*, *supra* note 233, at A37.

285. See Anderson, *supra* note 283, at 4 ("[I]t does not seem reasonable for the University to be utterly without any means to address a phenomenon that has proved to be upsetting to large numbers of fans."); see also Kende, *supra* note 4, at 240 (stating that Major League teams are split about what to do about T-shirts bearing hostile messages). See generally REPORT ON SPORTSMANSHIP, *supra* note 63.

286. ROSENWEIG, *supra* note 6, at 7; see also Vecsey, *supra* note 7, at 122 (describing hockey fans in 1974 holding a sign reading "FUCK THE FLYERS"). But see Calvert & Richards, *supra* note 6, at 52 (describing 1948 list of "Rules of Scientific Heckling," the first of which was "No profanity").

The linchpin of regulations on vulgar, profane, or indecent cheering speech is the notion that fans at sporting events, particularly children, are “captive auditors.”²⁸⁷ They are captives in the stadium; the only way to avoid being bombarded by chants or signs is to leave the arena and stop coming to games.²⁸⁸ Such captive auditors are, unlike most objecting listeners, unable to “avert their eyes” (or the more difficult task of averting their ears) in order to avoid objectionable speech.²⁸⁹ The university or other stadium operator can force speakers to alter their manner of communication to protect the sensibilities of these captive fans.

In reality, the captive-audience doctrine is too limited to apply at the stadium. Courts have found listeners to be captives in only four places: their own homes, the workplace, public elementary and secondary schools, and inside and around reproductive health facilities.²⁹⁰ Even in those places, captive status permits government to limit oral expression, but not the identical message in written form.²⁹¹ Even captive fans can avert their eyes to avoid seeing the “Fuck Duke” or “Yankees Suck” shirts or posters.

More importantly, the captive-audience doctrine never has been applied to listeners in public places of recreation and entertainment, public forums to which people voluntarily go to engage in expressive activity, such as watching and cheering the game. Fans who pay to sit in the grandstand forum are not

287. See Anderson, *supra* note 283, at 3.

288. *Id.* (“[P]eople attending the game . . . are captives whose only recourse is to leave the stadium or stop attending games.”).

289. See *Frisby v. Schultz*, 487 U.S. 474, 487 (1988); *Cohen v. California*, 403 U.S. 15, 21 (1971).

290. See *Hill v. Colorado*, 530 U.S. 703, 716-18 (2000) (recognizing a governmental interest in protecting unwilling listeners from offensive messages on the sidewalk outside reproductive health clinics); *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 767-68 (1994) (holding that patients and workers inside a reproductive health facility are captive); *Frisby*, 487 U.S. at 484-85 (emphasizing the different nature of protection for unwilling listeners in their homes); *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (“Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home”); *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 210 (3d Cir. 2001) (“[S]peech may be more readily subject to restrictions when a school or workplace audience is ‘captive’ and cannot avoid the objectionable speech.”); *Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1541 (7th Cir. 1996) (“Children in public schools are a ‘captive audience’ that ‘school authorities acting in loco parentis’ may ‘protect.’”); Eugene Volokh, *Freedom of Speech and Appellate Review in Workplace Harassment Cases*, 90 NW. U. L. REV. 1009, 1023 (1996) [hereinafter Volokh, *Freedom of Speech*] (“[I]t seems clear that workplace speech is generally protected despite the presence of an arguably captive audience.”).

291. See *Madsen*, 512 U.S. at 773 (“[I]t is much easier for the clinic to pull its curtains than for a patient to stop up her ears, and no more is required to avoid seeing placards through the windows of the clinic.”).

captive auditors there, any more than an individual walking on a city street or in a public park who stumbles across an objectionable parade or rally.²⁹²

This constitutional analysis does not change because the audience at professional and college games includes “young, impressionable children.”²⁹³ The crowd at a game is, at best, a large mixed audience of adults and children; the presence of adults constrains government’s ability to protect children from purportedly harmful expression.²⁹⁴ The level of discourse for adults cannot be reduced to what is fit or proper for children.²⁹⁵ Similarly, the level of discourse cannot be reduced to what is acceptable to the most sensitive adults.²⁹⁶ In a mixed audience, there are two possibilities. First, children unavoidably hear or see some “adult” expression and sensitive adults hear or see what offends them. Or, second, we reduce the level of speech at the stadium to what is suitable for a sandbox.²⁹⁷ Since the latter is impermissible as a matter of free-speech principle, the former is, in some degree, inevitable.

The problem is even more difficult at college arenas, because the intended audience is not families with young children, but the adult eighteen- to twenty-year-old undergraduates who dominate the university community.²⁹⁸ While families—children of faculty, alumni, and area residents²⁹⁹—are an expected part of the audience, they are not the target and thus should not provide the baseline for the appropriate level or manner of fan expression.

The Hobson’s Choice that teams and commentators believe this creates for young or offended fans—leave the arena and stop attending games or

292. See *Collin v. Smith*, 578 F.2d 1197, 1207 & n.18 (7th Cir. 1978) (stating that offended residents could avoid a Nazi Party rally simply by avoiding Village Hall for thirty minutes on a Sunday afternoon).

293. Calvert & Richards, *supra* note 6, at 24.

294. See *Reno v. ACLU*, 521 U.S. 844, 876 (1997) (stating that restricting speech whenever it is known that one member of the intended audience is a minor would burden adult-to-adult communication, where there is no effective way to filter out non-adult members of the mixed audience).

295. See *id.* at 875 n.40 (“Government may not ‘reduc[e] the adult population . . . to . . . only what is fit for children.’” (quoting *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 128 (1989))); *Butler v. Michigan*, 352 U.S. 380, 383 (1957) (striking down a state law whose effect was to “reduce the adult population of Michigan to reading only what is fit for children” and stating that to do so was to “burn the house to roast the pig”).

296. See *Cohen v. California*, 403 U.S. 15, 25 (1971) (“Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most sensitive among us.”).

297. See *Reno*, 521 U.S. at 875 (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74-75 (1983)).

298. See SHULMAN & BOWEN, *supra* note 23, at 3-4 (describing ways in which sports develop a campus ethos by appealing to undergraduate students); ST. JOHN, *supra* note 8, at 72 (“Pro football crowds consist mainly of well-fed, middle-aged males, but for the college game in the South there is an abundance of youth and women . . .”).

299. See Calvert & Richards, *supra* note 6, at 24 (one of the authors recalling attending several basketball games at the University of California at the age of six or seven).

tolerate offensive cheers³⁰⁰—is precisely the choice people make in any place at which expression occurs. It is the same choice that people in a California courthouse had to make when confronted with the “Fuck the Draft” message on Paul Cohen’s jacket.³⁰¹ In fact, leaving the courthouse was even less an option for an objector whose job required her to be there or who had business before the court and likely had to be there on pain of contempt or default.³⁰²

Moreover, it is inconceivable that “Fuck the Draft” is protected in a courthouse, but “Fuck Duke” or “Yankees Suck” is unprotected in the cacophony of a live sporting event. It is even more inconceivable that Paul Cohen’s intellectual heir could be prohibited from wearing his jacket to a basketball game.

The real import of *Cohen* is the principle that a speaker’s choice of words and manner of communication are essential elements of the overall message expressed and government cannot prohibit certain words without also suppressing certain messages or ideas in the process.³⁰³ As Ronald Krotoszynski argues, the “ability to define language becomes the ability to control thoughts” and the First Amendment must be “an impediment to any such project.”³⁰⁴ This is true even when the chosen word is the ultimate taboo.³⁰⁵ The use of particular words in creating cheering speech reflects, in part, fans’ intensity, passion, and emotion in support of their team or in opposition to their rival.³⁰⁶ “Fear the Turtle,” “We Hate Duke,” “Duke

300. *See id.* at 23-24 (“Other than putting in ear plugs, there is very little that a fan can do to block out exposure to the uninvited and offending messages that he or she does not want to hear at a game.”).

301. *Cohen*, 403 U.S. at 16; Ronald J. Krotoszynski, Jr., *Cohen v. California: “Inconsequential” Cases and Larger Principles*, 74 TEX. L. REV. 1251, 1252 (1996) [hereinafter Krotoszynski, *Inconsequential*].

302. *See* Volokh, *Freedom of Speech*, *supra* note 290, at 1023.

303. *See Cohen*, 403 U.S. at 26 (“[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.”); Kitrosser, *Communicative Manner*, *supra* note 64, at 1350 (arguing that the “*Cohen* Court laid the doctrinal groundwork for the notion that the manner in which one chooses to express one’s self can have as much communicative significance as one’s underlying message . . .”); Wasserman, *Symbolic Counter Speech*, *supra* note 3, at 388-89 (arguing that “[p]oint-of-view includes everything surrounding and contributing to the message,” including choice of words, choice of communicative manner, the choice to appeal to visceral emotion, and the time, place, and circumstance in which the message is presented).

304. Krotoszynski, *Inconsequential*, *supra* note 301, at 1253-54.

305. *See* SMOLLA, *supra* note 51, at 47 (emphasizing that the word “fuck” is “one of the single most vulgar words in the American vocabulary”); Robert F. Blomquist, *The F-Word: A Jurisprudential Taxonomy of American Morals (in a Nutshell)*, 40 SANTA CLARA L. REV. 65, 65-66 (1999) (discussing comedian George Carlin’s take on the word “fuck”); *see also* FCC v. Pacifica Found., 438 U.S. 726, 751-55 app. (1978) (transcript of George Carlin routine on the words that cannot be spoken on television and radio).

306. As the *Cohen* Court stated:

Sucks,” and “Fuck Duke” are four distinct, increasingly emphatic and passionate ways of cheering for the Maryland Terrapins and against Duke. Each conveys a distinct message and distinct point of view and each should be protected within the expressive milieu of a sports stadium.³⁰⁷ Similarly distinct, and equally protected, messages and points of view arise from the speaker’s decision to use (or attempt to use) humor, including risqué or scatological humor, in creating her message.³⁰⁸

Profanity is, at least in the realm of discourse occurring in this forum, a protected element of cheering speech. As Justice Harlan wrote in *Cohen*, “one man’s vulgarity is another’s lyric.”³⁰⁹ At a more “rarefied” level, Robert Blomquist argues, “use of an F-word is almost always viewed as being unfortunate, messy, repellent, or controversial,” but we must make “judgments about the context of the F-word usage,” especially if it expresses something stylistically.³¹⁰ Cheering fans often use profanity just as stylistically. The intent of that style may be to shock, but it is style nonetheless.

One problem with a stadium rule banning profanity is its inevitable overbreadth. It is not clear that stadium operators can (or in fact intend to) distinguish between George Carlin’s Seven Dirty Words on the one hand and epithets that, while not employing profanity, target opposing teams, players, coaches, or officials. What of Maryland students who chant “Duck Fuke” or Kansas students wearing “Muck Fizzou” T-shirts—both are obvious plays on the profanity that draw meaning only by reference to it, without employing the magic word? Alternatively, the scatological nature of cheers could be lost on those who might otherwise be offended. Students at the University of Kansas

[W]ords are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated. *Cohen*, 403 U.S. at 26; see SMOLLA, *supra* note 51, at 46 (“Speech does not forfeit the protection that it would otherwise enjoy merely because it is laced with passion or vulgarity.”); Kitrosser, *Communicative Manner*, *supra* note 64, at 1349-50 (“[T]he Court’s discussion suggested that word choice, and possibly other aspects of manner of speech, can have as much communicative significance . . . and thus should be similarly protected, regardless of the nomenclature used to categorize such communicative choices.”).

307. See Wasserman, *Symbolic Counter-Speech*, *supra* note 3, at 390 (“[A] different speaker using a different communicative medium and manner . . . is, in fact, presenting a different point of view—something else worth saying and needing to be said.”); see also Calvert & Richards, *supra* note 6, at 2 n.4 (discussing a faction of college basketball fans who “hate Duke. Or really ‘HATE’ (expletive) Duke”).

308. See *supra* notes 256-67 and accompanying text.

309. *Cohen*, 403 U.S. at 25.

310. Blomquist, *supra* note 305, at 97; cf. Eric Vanatta, *The F-Motion*, 21 CONST. COMMENT. 285 (2004).

were praised for their cleverness during a 2004 basketball game when they chanted “salad tosser” at Texas Tech coach Bob Knight.³¹¹ On the surface, this referenced Knight’s infamous verbal altercation several days earlier with the Texas Tech Chancellor at a salad bar in Lubbock, Texas.³¹² But the phrase is a slang term for a particular sexual act, a double entendre the students almost certainly knew (which explains why they chose a particular phrase which did not precisely capture what had happened at the salad bar), but many listeners (including Kansas coaches and officials) likely did not.

The Maryland Attorney General supported its argument with reference to broadcast indecency cases. The argument was that, as with indecent radio or television broadcasts, offensive language at the game comes without warning, is heard by children, and cannot be avoided by the captive audience.³¹³ Commentators similarly suggest that factors the FCC uses in regulating “highly offensive” or “sexual or excretory” descriptions can be useful in defining the type of language that may be permissible at sporting events, given the presence of children in the audience.³¹⁴

This reliance on the broadcast paradigm ignores the narrow context to which the *Pacifica* Court took great pains to limit itself—the “uniquely pervasive” medium of broadcast radio or television received in the privacy of the home³¹⁵—and extends it to a heretofore-protected live public forum. This approach apparently defines “broadcast” to mean any loud oral expression heard by a large crowd, even if not through government-owned airwaves. By that expansive definition, of course, any mass-dissemination of oral expression to a sizeable audience constitutes “broadcasting” subject to the same child-protective limitations that never have applied to public spaces at large.³¹⁶

311. See Mike Norris, *Knight Complimentary After Game*, UNIV. DAILY KANSAN, Feb. 8, 2004, available at http://www.kansan.com/stories/2004/feb/08/knight_complime/.

312. *Id.*

313. See Anderson, *supra* note 283, at 3 (“Foul-mouthed fans ‘broadcast’ their words to the audience just as offensive language was broadcast by *Pacifica*.” (referencing *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727 (1996) and *FCC v. Pacifica Found.*, 438 U.S. 726 (1978))).

314. See Calvert & Richards, *supra* note 6, at 10.

315. See *Pacifica*, 438 U.S. at 748; *id.* at 744 (narrowing the prohibition to the factual context of that case); *id.* at 750 (emphasizing the narrowness of the holding in the case); *id.* at 762 (Powell, J., concurring in part and concurring in the judgment) (“The result turns instead on the unique characteristics of the broadcast media”); Thomas G. Krattenmaker & Marjorie L. Esterow, *Censoring Indecent Cable Programs: The New Morality Meets the New Media*, 51 *FORDHAM L. REV.* 606, 628 (1983) (“The Court’s opinion is, in fact, narrowly confined to cases concerning both the precise language conveyed and the particular medium of communication *Pacifica* is about dirty words on radio.”).

316. See *United States v. Playboy Entm’t Group*, 529 U.S. 803, 814 (2000) (stating that the “unique

Finally, the fact that most professional and major-college games are broadcast on radio and television does not give teams or universities greater regulatory authority over fan profanity at the arena.³¹⁷ The FCC's regulatory authority over indecent speech extends to the broadcast licensees, but not to individuals whose expression in a fully protected designated public forum happens to be captured and shown over the airwaves.³¹⁸ Otherwise, the scope of free expression in a parade held on city streets could be limited to what is permissible on television simply because the event is covered by the broadcast media.

The Supreme Court's continued insistence that what works for broadcast does not work in other contexts means that First Amendment protection for speech occurring in public forums remains at its highest.³¹⁹ The fact that expressive activities occurring in the arena bleachers incidentally may find their way onto television does not change the analysis. Indeed, given the ubiquity of video cameras and mass communications in modern society, any other answer would represent a serious incursion into the scope of free expression in a public forum.

E. Zoning the Grandstand

One current First Amendment controversy is the practice of zoning speakers (especially at controversial protest rallies) into narrow designated areas within the broader public forum, often far from the intended audience or protest target.³²⁰ Unable under basic free-speech principles to prohibit dissenting, disturbing, and unsettling speech,³²¹ government instead has sought to segment such expression into particular places.³²²

problems" of cable and broadcast media may justify regulations that are unacceptable in other contexts).

317. *But see* Calvert & Richards, *supra* note 6, at 47, 50 (relying on the fact that games are broadcast to justify a requirement that fans with clothing containing large letters be placed at least 25 rows from the court).

318. *See* 47 C.F.R. § 73.3999(b) (2005) (imposing on licensees of radio or television broadcast stations limitations on the broadcast of indecent material).

319. *See Playboy*, 529 U.S. at 814.

320. *See Zick, Spatial Tactics, supra* note 38, at 581-83.

321. *See Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988) (rejecting broad government power to shut off discourse solely to protect others from having to hear it); SHIFFRIN, *supra* note 263, at 10 ("If we must have a 'central meaning' of the First Amendment, we should recognize that the dissenters—those who attack existing customs, habits, traditions, and authorities—stand at the center of the First Amendment and not at its periphery."); Wasseman, *Symbolic Counter-Speech, supra* note 3, at 384 (emphasizing the need to protect the rights and interests of "those speakers who attack prevailing notions").

322. *See Zick, Spatial Tactics, supra* note 38, at 581-82.

Stadium operators have attempted the same zoning within the grandstand, in order to separate more vocal and offensive fans and to decrease the purported harm that their speech causes.³²³ They utilize two basic approaches. The first, primarily in college venues, establishes a “buffer zone” of several rows between the student section (containing primarily undergraduates, expected to be the most boisterous, profane, and pro-school fans) and the visiting team’s bench.³²⁴ The stated purpose is to minimize “interference” or “intimidation” by student fans of opposing players.³²⁵ It also lessens the likelihood that a verbal exchange could devolve into a physical confrontation. The second method creates a “family section” at the stadium in which profanity (oral and written) and alcohol (profanity’s frequent enabler³²⁶) are prohibited. This provides a small number of fans, especially those with young children, the limited benefit of not having a neighbor screaming profanities in their ears.

Of course, neither zoning method does anything to protect unwilling fans or players from seeing potentially offensive clothing or signs or from hearing profane chants and taunts emanating from elsewhere in the stadium. And we should not blandly accept zoning as a content-neutral restriction on place, because, as Timothy Zick argues, to “decide *where* expression takes place is to . . . make normative judgments about what speech should be seen and heard and what speech should be segregated and avoided.”³²⁷ Moving the student section in anticipation of students’ hostile cheering speech (and the offense that players or other fans may feel from hearing such speech) regulates according to speaker identity (regardless of what they, in fact, are going to say), which is not a content-neutral basis for regulation.³²⁸

Objections to zoning generally sound in the concern that it will disadvantage speakers by placing them into distant cages or pens or protest zones far removed from the audience.³²⁹ This is less of a concern within the

323. See Calvert & Richards, *supra* note 6, at 44.

324. See *id.* at 43-44 (describing conference and NCAA proposals to move students and the band away from visiting benches or to leave rows empty or reserved for fans of the visiting team); *id.* at 47 (proposing a regulation involving a five-row buffer zone); REPORT ON SPORTSMANSHIP, *supra* note 63, at 7 (describing zoning efforts in college football and basketball venues).

325. Calvert & Richards, *supra* note 6, at 43.

326. WANN ET AL., *supra* note 4, at 160-61 (describing the connection among sport, sport fandom, and alcohol).

327. Zick, *Spatial Tactics*, *supra* note 38, at 651.

328. See *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991) (treating as content-based a law that burdened speech by the identity of the speaker, there, persons convicted of crimes).

329. See Zick, *Spatial Tactics*, *supra* note 38, at 620 (“[T]he character of place substantially affects

relatively narrow confines of a basketball arena; the student section cannot be moved that far away, certainly not so far that the students cannot be seen and heard. But the size of the buffer zone between students and the court must be limited so as not to hamper fans' ability to make their cheering speech in its most effective form, the form that will best help their team win.³³⁰

Similarly, a family section likely is permissible as a narrow carve-out from the forum, so long as it occupies only a relatively small number of seats, say 3,000 seats in a 40,000 seat baseball park. A team could not designate the entire grandstand, or even a substantial part of it, as a profanity-free family section. That would function, in effect, as a restriction on the (protected, albeit profane) cheering speech of all the other, non-family-section fans, reducing the level of stadium-wide discourse to what is acceptable to children and sensitive listeners.

F. *Limits of the First Amendment*

The First Amendment, of course, is not absolute.³³¹ No one may falsely yell "fire" in a crowded theatre³³² nor, we could add, in a crowded basketball arena or baseball park. This only advances the argument so far, because the categories of speech falling outside of First Amendment protection—the expression that is not part of "the freedom of speech"—remain narrow, finely defined, and limited.³³³ Three unprotected categories are worth considering at the sports stadium: incitement to unlawful action,³³⁴ true threats,³³⁵ and

the *experience* of expression."); *id. passim* (describing the problematic use of protest zones, demonstration zones, and security zones to control speech).

330. See Hoover, *Crying Foul*, *supra* note 233, at A36 (quoting a Duke University basketball fan on the effect student cheering has on opposing teams); see also ROSENWEIG, *supra* note 6, at 55 (describing fans waving their arms behind the backboard as visiting players shoot free throws).

331. See *Virginia v. Black*, 538 U.S. 343, 358 (2003); Rubinfeld, *supra* note 4, at 782 ("Doesn't everyone know . . . that First Amendment rights are not absolute?").

332. See *Schenck v. United States*, 249 U.S. 47, 52 (1919); see also Robert Tsai, *Fire, Metaphor, and Constitutional Myth-Making*, 93 GEO. L.J. 181, 196-97 (2004) (calling this a "prototype for unprotected expression").

333. See Heidi Kitrosser, *Containing Unprotected Speech*, 57 FLA. L. REV. 843, 854 (2005) (describing the "fine line separating protected and unprotected speech" and emphasizing "the view that unprotected speech categories must be carefully defined"); see also *NAACP v. Button*, 371 U.S. 415, 433 (1963) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.").

334. Incitement is "advocacy of the use of force or of law violation . . . directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

335. True threats are those statements "where the speaker means to communicate a serious expression

fighting words.³³⁶ But analysis and application of these categories is context-dependent; sporting events ordinarily will not provide a context in which the cheering speech that fans utter will be left unprotected.

Importantly, we must distinguish between expression targeted at someone, in that it speaks about a particular identifiable individual, and expression directed or addressed to that person in a close, face-to-face confrontational exchange. Much protected expression does the former,³³⁷ but the unprotected categories reach only the latter type of engagement.³³⁸ The difference between targeted and general dissemination means the difference between an unprotected threat and protected cheering.³³⁹

Heckling targets an individual player by name or identity. It is not truly directed to the individual, however, but rather to everyone in the crowd. The taunting fan is one person standing at a distance in a large crowd and speaking to whoever will hear. Fans are separated from their targets by distance, space, and usually a wall or fence. Cheering could cross over into fighting words where a fan and player are close enough to engage in a direct and one-on-one confrontation, perhaps where the fan is sitting in a front-row seat or sitting just across the fence from the bullpen.³⁴⁰ A fighting words situation also could

of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Black*, 538 U.S. at 359-60.

336. Fighting words are those “personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.” *Cohen v. California*, 403 U.S. 15, 20 (1971) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)).

337. See, e.g., *Hustler Magazine v. Falwell*, 485 U.S. 46, 51 (1988); Post, *supra* note 27, at 645; *supra* Part III.C.

338. See *Gooding v. Wilson*, 405 U.S. 518, 523 (1972) (applying fighting words category to state law interpreted as applying to remarks directed to an individual addressee); *Cohen*, 403 U.S. at 20 (holding that the use of profanity did not constitute fighting words because it was not directed to the person of the hearer and no individual present reasonably could have regarded the words as a direct personal insult); SMOLLA, *supra* note 51, at 162 (arguing that only a “verbal attack directed at a particular individual in a face-to-face confrontation” can be penalized); Randall P. Bezanson & Gilbert Cranberg, *Institutional Reckless Disregard for Truth in Public Defamation Actions Against the Press*, 90 IOWA L. REV. 887, 913 (2005) (“To the extent that there is a coherent true threat doctrine, it requires that threats be made to specific targets”); Gey, *Questions*, *supra* note 254, at 1288 (2005) (arguing that true threats only should cover speech “directed toward a specific and identifiable target”).

339. The disposition in *Virginia v. Black* suggests this difference. The Court held that the cross burning at a group rally on property leased by that group and not directed anywhere or targeted at anyone could not be punishable as a true threat, while the Court remanded for trial a case involving a cross burning on an African-American individual’s private property, which, depending on intent, could have been punishable as a directed and targeted threat. See *Black*, 538 U.S. at 348, 350, 367-68; Gey, *Questions*, *supra* note 254, at 1352-53.

340. See Calvert & Richards, *supra* note 6, at 28; see also Steve Wilstein, *Ballplayers Need Thicker Skins to Tolerate Hecklers*, ASSOCIATED PRESS, Sept. 16, 2004 (describing a controversy when a player in the bullpen responded to nearby hecklers by tossing a chair into the crowd, striking one woman in the face).

arise from a face-to-face confrontation between two fans, one of whose cheering is personally directed and insulting to the other.³⁴¹ It then becomes necessary to consider whether the words directed to the target truly would cause a reasonable person to respond violently, as opposed to merely being disturbed.³⁴²

In any event, most heckling (such as “You Suck” or “Your stats are as steroid-bloated as you are” or “No means no”) is in no way a threat of or incitement to physical violence.³⁴³ Nor can we forget cheering speech’s dependence on humor, satire, and rhetorical hyperbole and overstatement, none of which is intended or reasonably capable of being taken literally.³⁴⁴ Except perhaps when Casey is at the bat in Mudville,³⁴⁵ no one expects or intends “kill the umpire” to be taken seriously as a threat or call to immediate arms.³⁴⁶ Similarly, hyperbolic cheers (e.g., “we’ll kill you if you blow this game” or “we’re going to kick your ass”) shouted from within a large crowd at distant targets with no true intent or desire to cause imminent harm to the directed individual are not reasonably taken seriously as a threat or call to arms.³⁴⁷

341. See Calvert & Richards, *supra* note 6, at 28.

342. See Zick, *Space*, *supra* note 42 (manuscript at 28) (“[O]ur expressive culture has traditionally contained a healthy notion of tolerance for speech at close range, in personal spaces, even if that speech upsets or disturbs.”); see also *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); SMOLLA, *supra* note 51, at 161-62.

343. See MARTIN H. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* 188 (1984) (arguing that there must be a showing of a “real threat of harm” to justify suppressing statements); Bezanson & Cranberg, *supra* note 338, at 913 (arguing that a threat must “have a concrete and direct message such as, ‘You will be harmed.’”).

344. See *supra* notes 256-67 and accompanying text.

345. See Thayer, *supra* note 236:

From the benches, black with people, there went up a muffled roar

Like the beating of the storm-waves on a stern and distant shore.

“Kill him! Kill the umpire!” shouted someone in the stand.

And it’s likely they’d have killed him had not Casey raised his hand.

346. See EDWARDS, *supra* note 3, at 271 (arguing that the fact that fans bind their fortunes to their teams’ success makes their shouts to kill the umpire or murder the opposing quarterback understandable rhetoric); see also REDISH, *supra* note 343, at 188 (“[O]nly such truly exacerbating circumstances, in which listeners’ reactions are easily predictable, should justify upholding expression of a statement which does not on its face urge unlawful conduct.”). But see *Misey*, *supra* note 10, at 257 (arguing, without explanation or recognition of hyperbole, that “kill the ump” is unprotected).

347. See *Watts v. United States*, 394 U.S. 705, 708 (1969) (holding that statement “[I]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J.” could not, in context, constitute a proscribable true threat); Bezanson & Cranberg, *supra* note 338, at 907-08; Gey, *Questions*, *supra* note 254, at 1345 (questioning whether *Black* expands unprotected categories to cover generally and ambiguously threatening statements expressed in public and directed at a general audience).

Any attempt to define particular cheering speech into an unprotected category must account for its political content. Return to the KKK at Shea Stadium during the Jackie Robinson ceremony.³⁴⁸ The players on the field, as well as many fans in the crowd, undoubtedly would feel offended, intimidated, angered, and perhaps threatened or moved to violence by a group of protesting fans making racially and ethnically disparaging remarks.³⁴⁹ But as symbolic counter-speech on an issue of social, historical, and political import (the integration and ethnic composition of a culturally vital institution such as baseball³⁵⁰) in a forum uniquely dedicated to speech related to that institution, this is the political expression at the core of the First Amendment that may be vehement and caustic.³⁵¹ The fact that listeners exposed to offensive political messages may feel intimidated or may take offense does not deprive such caustic expression of constitutional protection.³⁵² Fans within the larger crowd waving Confederate flags or denouncing Jackie Robinson, no matter how offensive the form or content of the message, does not constitute fighting words or threats as to untargeted fans elsewhere in that crowd.

Finally, genuine controversies over fan behavior have not involved speech, but rather physical confrontations among players and fans. Most famous, of course, was the “Malice at the Palace” in November 2004, when a fan at an NBA game in Detroit threw a beer at an opposing player, precipitating a brawl in which players and fans fought both in the stands and on the court.³⁵³ Another example is the father-son team who ran onto the field at Comiskey Park in Chicago and assaulted an opposing coach.³⁵⁴ The NCAA

348. See *supra* notes 230-32 and accompanying text.

349. Cf. *Virginia v. Black*, 538 U.S. 343, 366 (2003) (“It may be true that a cross burning, even at a political rally, arouses a sense of anger or hatred among the vast majority of citizens who see a burning cross.”).

350. See TYGIEL, *supra* note 203, at 9 (arguing that “[b]aseball was one of the first institutions in modern society to accept blacks on a relatively equal basis,” therefore it “offers an opportunity to analyze the integration process in American life”).

351. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (stating that political expression “may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials”).

352. See *Black*, 538 U.S. at 366; *Cohen v. California*, 403 U.S. 15, 21 (1971); *Collin v. Smith*, 578 F.2d 1197, 1206 (7th Cir. 1978); Gey, *Questions*, *supra* note 254, at 1309 (“If the virulence exception [to the prohibition on content-based regulations] is defined to include the listeners’ generalized reactions to the frightening ideas conveyed by a speaker, then every dissenter speaking on a highly contentious issue will fall within the exception.”).

353. See Chris Ballard, *The Eye of a Perfect Storm*, SPORTS ILLUSTRATED, Nov. 29, 2004, at 50.

354. See Associated Press, *Father Sentenced in Attack on Coach*, N.Y. TIMES, Aug. 7, 2003, at D6 (describing the sentencing of a man who, with his teenaged son, ran onto the field at a baseball game in Chicago and assaulted the opposing team’s first-base coach).

Report enumerated several instances of fan violence, although most of them took place outside the stadium following the game.³⁵⁵ And, of course, the phrase “soccer hooligans” has been coined to describe violent fans in other countries.³⁵⁶

Of course, violent conduct is not protected as part of the freedom of speech on any interpretation.³⁵⁷ Put differently, individuals can be punished as a result of activities that run afoul of the law, so long as they are not punished for their expression.³⁵⁸ This obviously should be true of sports fans. There are no obvious free-speech defects in a 2005 New York City ordinance imposing fines and jail time for fans who run onto the playing field or throw objects at players.³⁵⁹

Teams attempt the additional step of regulating cheering speech on a visceral desire to punish not only the fans who throw beer or run onto the field, but also those whose raucous and offensive cheering created the “emotionally charged” conditions or atmosphere in which those assaults took place.³⁶⁰ But outside of the narrow categories described above, expression, no matter how outrageous, cannot be punished simply because someone, unconnected to the speaker, engages in violence.³⁶¹ Free speech ultimately commands that the ordinary remedy is to punish listeners for the crimes they commit, not speakers for the comments they make.³⁶²

In fact, fan violence falls far outside a social norm that fans themselves maintain. As one commentator explains:

Crowds, as a result, have become self-policing. A group compact, predicated on the understanding of a crowd’s power, keeps the peace. When a fight breaks out at an

355. See REPORT ON SPORTSMANSHIP, *supra* note 63, at 3.

356. See Edward Grayson, *Sentencing Soccer Hooligans*, 140 NEW L.J. 831 (1990).

357. See NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982) (“The First Amendment does not protect violence.”); EMERSON, *supra* note 25, at 8 (describing the line between expression and action); Rubinfeld, *supra* note 4, at 782 (“[M]y right to express my political opinion of the President does not entitle me to car-bomb the White House.”).

358. See Rubinfeld, *supra* note 4, at 776, 784 (distinguishing being punished “for speaking” from being punished “as a result of” speaking); *id.* at 782 (“A person arrested for trying to car-bomb the White House need not, and should not, be arrested for what he is *saying*. He can, however, be arrested for what he is *doing*.”)

359. Sara Kugler, *Throw Debris on the Field, Get Thrown in Jail*, ASSOCIATED PRESS, Nov. 16, 2005.

360. See *Claiborne Hardware*, 458 U.S. at 906 n.40, 928.

361. See *id.* at 927-28.

362. See *Whitney v. California*, 274 U.S. 357, 378 (1927) (Brandeis, J., concurring); Michael Kent Curtis, *Lincoln, Valladolid, and Anti-War Speech in the Civil War*, 7 WM. & MARY BILL RTS. J. 105, 172 (1998).

Alabama game, people ease back rather than join in. They wait for the cops to come and boo and hiss at those who would put the peace in jeopardy . . . no matter what team they pull for.³⁶³

That compact frees fans in their cheering: they can wear their colors and scream their heads off without feeling the need to edit themselves.³⁶⁴ And there is no need for universities or professional sports leagues and franchises to edit them.

Universities, colleges, and professional sports leagues and their franchises have one final arrow in their quivers in their efforts to combat objectionable cheering speech: their own speech.³⁶⁵ After all, the remedy to be applied is more speech, not enforced silence.³⁶⁶ We expect government, or anyone else, to talk back to objectionable speakers.³⁶⁷ Schools and teams use the scoreboard, sound system, band, mascot, and cheerleaders to drown out negative cheers and to create their own messages.³⁶⁸ Schools also might create an “official” student cheering section, in which students engage in school-sanctioned cheering, effectively functioning as the school’s official voice in the bleachers. Again, however, the area for such an official voice cannot consume the entire forum space.

Those who control the stadium also have the power to try to persuade fans, especially students, to keep their cheering clean, stylish, classy, and creative.³⁶⁹ These efforts can include, as some conferences require, a public-address announcement requesting student cooperation in maintaining good sportsmanship, cheering in a supportive manner, and ensuring a safe and enjoyable atmosphere at the game.³⁷⁰ Following the Duke controversy, the University of Maryland established “voluntary compliance” policies, including a profane T-shirt exchange program (presumably allowing fans to trade “Fuck Duke” shirts for “Fear the Turtle” shirts), contests to encourage

363. ST. JOHN, *supra* note 8, at 227.

364. *Id.* at 227-28.

365. See Chemerinsky, *More Speech*, *supra* note 82, at 1642 (“Institutions still can express their own messages . . .”).

366. *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring); Wasserman, *Symbolic Counter-Speech*, *supra* note 3, at 387.

367. See Wasserman, *Symbolic Counter-Speech*, *supra* note 3, at 387-88.

368. See ROSENWEIG, *supra* note 6, at 55; WANN ET AL., *supra* note 4, at 182; Calvert & Richards, *supra* note 6, at 44; *supra* notes 68-70.

369. See Hoover, *Crying Foul*, *supra* note 233, at A36; Norris, *supra* note 311; see also Volokh, *Deterring Speech*, *supra* note 70, at 1414 (“Persuading people that the speech is bad is the obvious example. Neither we nor the government need sit idle when evil ideas are spread.”).

370. See Calvert & Richards, *supra* note 6, at 34-36, 48.

students to create appropriate signs and banners, and having coaches address students about the need for good sportsmanship.³⁷¹

What public universities and powerful private entities such as universities and professional sports teams jointly wielding government power cannot do is compel cooperation. Nor can teams express their own messages by silencing fans who cheer differently in the designated public forum that is a stadium grandstand. They may not punish—even via non-criminal sanction such as removal from the stadium—those fans who depart from generally accepted cheering norms by loudly wielding loaded words and ideas to inform opposing players that they are not very good players or people and that they are going to lose this game.

371. See Eric Hoover, *U. of Maryland Students Seek to Police their Peers at Games*, CHRON. HIGHER EDUC. (Wash., D.C.), July 9, 2004, at A32.