

# FOLLOWING KAEPERNICK’S EXAMPLE: A COMPARISON OF THE FIRST AMENDMENT RIGHTS OF HIGH SCHOOL AND COLLEGE ATHLETES AND HOW THOSE RIGHTS APPLY TO KNEELING DURING THE NATIONAL ANTHEM

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## I. INTRODUCTION

The right to protest has long been an integral part of American society and a way for citizens to publicly express their objection and disapproval about something, generally a government policy or practice. While the Supreme Court has not interpreted the First Amendment to the United States Constitution to grant an absolute right to protest, the First Amendment does provide a sphere of protected activity in which citizens can engage in protest as a manifestation of the right to peaceably assemble or the right to freedom of speech granted by the First Amendment.<sup>1</sup> Another longstanding tradition in the United States is to play the National Anthem before most, if not all, sporting events. Part of this tradition has been to stand and face the flag while the National Anthem is being played. The United States Code even contains a statute stating that all those present for the National Anthem should stand and face the flag.<sup>2</sup> However, in a relatively recent trend, many professional athletes have started kneeling during the National Anthem as a form of protest against police brutality and racial injustice. As is the case with many protest trends started by professional athletes, such as wearing Black Lives Matter shirts, many high school and college athletes have also begun to take a knee in protest. This protest has been deeply divisive and has raised issues of whether high school and college athletes should even be allowed to protest during the National Anthem. As long as these protests by high school and college athletes persist, this topic will continue to be debated passionately nationwide.

This note will examine and compare whether the First Amendment right to freedom of speech covers this type of protest by high school and college athletes respectively. Part II of this note will examine the origins of the kneeling in protest movement along with its goals. Part III of this note will discuss the adoption of this movement at the high school and collegiate level and the consequences these athletes face by way of participation. Part IV of this note will examine the general First Amendment rights of high school and collegiate athletes while identifying key differences between them. Finally, Part V of this note will determine whether these First Amendment rights apply to kneeling during the National Anthem.

## II. ORIGINS OF THE KNEELING MOVEMENT

Before discussing how the kneeling movement has been adopted at the high school and collegiate levels, it is important to understand the origins of the movement. This section will examine how the movement began, how the

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<sup>1</sup> Edwards v. South Carolina, 372 U.S. 229, 235-38 (1963).

<sup>2</sup> 36 U.S.C. § 301.

movement became notable by spreading, and what the goals driving the movement are.

#### A. The Beginning of the Movement

The kneeling movement is not the first example of protest that has occurred during the National Anthem. An example of protesting the *de facto* National Anthem at the time, “My Country, ‘Tis of Thee,” dates back as early as 1892 when a crowd of people refused to sing the song following a lynching in Memphis, Tennessee.<sup>3</sup> The kneeling movement is not even the first example of not standing for the National Anthem in United States history. Refusing to stand for the National Anthem became widely adopted as a form of protest against conscription and other issues during World War I.<sup>4</sup> Refusing to stand for the National Anthem has been used as a form of protest until the beginning of the kneeling movement, thus making the kneeling movement the newest variation of a previously used form of protest in American history.<sup>5</sup>

During the 2016 NFL preseason, former San Francisco 49ers quarterback, Colin Kaepernick, remained seated during the National Anthem to protest police brutality and racial injustice.<sup>6</sup> Despite remaining seated for the first two preseason games, Kaepernick’s actions went unnoticed until Week 3 of the preseason, when the media brought attention to him sitting on the bench during the National Anthem, rather than standing and facing the flag. Kaepernick released a statement after the game saying that he was protesting racial injustice and police brutality.<sup>7</sup> One week later, instead of remaining seated, Kaepernick knelt in protest during the National Anthem.<sup>8</sup> Kaepernick made the switch at the suggestion of former NFL player Nate Boyer, who was a United States Army Green Beret, in order to be respectful to current and former members of the military while still being able to

<sup>3</sup> *Not Their Country*, DECATUR HERALD, March 29, 1892, at 1, [https://www.newspapers.com/clip/6657652/not\\_their\\_country\\_the\\_decaturn\\_herald/](https://www.newspapers.com/clip/6657652/not_their_country_the_decaturn_herald/).

<sup>4</sup> *YMCA Boys Force A Slacker to Salute*, ST. LOUIS STAR AND TIMES, June 1, 1917, at 3, [https://www.newspapers.com/clip/7116016/the\\_st\\_louis\\_star\\_and\\_times/](https://www.newspapers.com/clip/7116016/the_st_louis_star_and_times/).

<sup>5</sup> Louis Jacobson, *A Short History of the National Anthem, Protests and the NFL*, POLITIFACT (Sept. 27, 2017), <https://www.politifact.com/article/2017/sep/25/short-history-national-anthem-and-sports/>.

<sup>6</sup> Josh Levin, *Colin Kaepernick’s Protest is Working*, SLATE (Sept. 12, 2016, 6:54 PM), <https://slate.com/culture/2016/09/colin-kaepernicks-protest-is-working.html>.

<sup>7</sup> Mark Sandritter, *A Timeline of Colin Kaepernick’s National Anthem Protest and the Athletes Who Joined Him*, SBNATION (Sept. 25, 2017, 10:28 AM), <https://www.sbnation.com/2016/9/11/12869726/colin-kaepernick-national-anthem-protest-seahawks-brandon-marshall-nfl>.

<sup>8</sup> Nick Schwartz, *Nate Boyer Speaks Out on Colin Kaepernick*, USA TODAY (Sept. 7, 2018, 2:09 PM), <https://www.usatoday.com/story/sports/ftw/2018/09/07/former-green-beret-nate-boyer-on-colin-kaepernick-its-ok-to-be-different/111290108/>.

continue his protest.<sup>9</sup> During the final preseason game, Kaepernick was joined in taking a knee by his teammate, Eric Reid, and by Jeremy Lane of the Seattle Seahawks, who sat on the bench during the National Anthem in a different game.<sup>10</sup> Kaepernick continued kneeling during the National Anthem throughout the entire 2016 NFL regular season.<sup>11</sup>

During Week 1 of the regular season, eleven NFL players joined Kaepernick's protest, including Brandon Marshall of the Denver Broncos, who was formerly Kaepernick's teammate at the University of Nevada.<sup>12</sup> As more players joined the movement, other forms of protest and solidarity began, such as players raising their fists or entire teams interlocking arms during the National Anthem.<sup>13</sup> Kaepernick opted out of his contract with the 49ers at the end of the 2016 season in order to become a free agent, but to this day he has not been signed by another NFL team.<sup>14</sup> However, this movement would not end despite the fact Colin Kaepernick is no longer playing in the NFL.

#### B. Kneeling Spreads Throughout the NFL

Early in the 2017 NFL regular season, President Trump spoke at a campaign rally for Luther Strange in Huntsville, Alabama where he advocated for players who knelt during the National Anthem to be fired by saying, "Wouldn't you love to see one of these NFL owners when someone disrespects our flag to say '[g]et that son of a bitch off the field right now. He's fired. He's fired!'"<sup>15</sup> President Trump also advised fans to walk out of the stadium if someone knelt during the National Anthem.<sup>16</sup> Just two days after President Trump's statements, over 200 NFL players knelt during the

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<sup>9</sup> *Id.*

<sup>10</sup> *Colin Kaepernick Joined by Eric Reid in Kneeling for National Anthem Protest*, THE GUARDIAN, <https://www.theguardian.com/sport/2016/sep/01/colin-kaepernick-eric-reid-kneel-national-anthem-protest-san-francisco-49ers> (last updated July 14, 2017, 2:48 PM).

<sup>11</sup> Harry Lyles, Jr., *Colin Kaepernick is Still an NFL Free Agent. These are the Rumored Reasons Why*, SBNATION, <https://www.sbnation.com/2017/5/9/15590404/colin-kaepernick-reasons-he-isnt-signed-nfl-protest> (last updated June 12, 2017, 2:58 PM).

<sup>12</sup> John Breech, *Here Are the 11 Players Who Joined Colin Kaepernick's Protest in Week 1*, CBS SPORTS (Sept. 12, 2016, 3:11 PM), <https://www.cbssports.com/nfl/news/here-are-the-11-players-who-joined-colin-kaepernicks-protest-in-week-1/>.

<sup>13</sup> Sandritter, *supra* note 7.

<sup>14</sup> Martenzie Johnson, *All the Quarterbacks Who Signed Since Colin Kaepernick Became a Free Agent*, THE UNDEFEATED, <https://theundefeated.com/features/33-quarterbacks-signed-before-colin-kaepernick-free-agent/> (last updated Nov. 15, 2019).

<sup>15</sup> Brian Stelter, *With 'Son of a Bitch' Comments, Trump Tried to Divide NFL and its Players*, CNN BUSINESS (Sept. 23, 2017, 2:32 PM), <https://money.cnn.com/2017/09/23/media/donald-trump-nfl-protest-backlash/index.html>.

<sup>16</sup> *Trump to NFL Owners: Fire Players Who Kneel During National Anthem*, CBS NEWS (Sept. 23, 2017, 9:56 AM), <https://www.cbsnews.com/news/trump-to-nfl-owners-fire-players-who-kneel-during-national-anthem/>.

National Anthem in response to these comments, resulting in more protests, with many notable examples occurring at this time.<sup>17</sup> For example, NFL players from the Baltimore Ravens and the Jacksonville Jaguars, in a game played in London, England, knelt during the United States National Anthem, but stood for the British National Anthem.<sup>18</sup> Additionally, the New Orleans Saints knelt in solidarity before their game and then stood during the National Anthem.<sup>19</sup> Several more teams, including the Pittsburgh Steelers, Seattle Seahawks, and Tennessee Titans, stayed in their locker rooms during the National Anthem to avoid the scrutiny that comes with kneeling during the National Anthem.<sup>20</sup> The game between the Seahawks and Titans even saw the performer who sang the National Anthem, Meghan Linsey, kneel once she was finished.<sup>21</sup> After this week of the NFL season, the kneeling movement in protest of racial injustice and police brutality had a strong foothold that continues to this day. While it is hard to determine whether kneeling in protest has increased or decreased since the 2017 season following President Trump's comments, it remains clear that many NFL players continue to kneel or employ some other form of protest during the National Anthem.<sup>22</sup>

### C. The Goals of the Kneeling Movement

It is clear that these NFL players are kneeling during the National Anthem as a form of protest, but what exactly are these NFL players protesting? Several issues have been identified as the reason for various NFL players kneeling or employing another form of protest during the National Anthem.<sup>23</sup> Colin Kaepernick, the NFL player who started this movement, began sitting and eventually kneeling during the National Anthem in order to

<sup>17</sup> *NFL Player Protests Sweep League After President Donald Trump's Hostile Remarks*, USA TODAY, <https://www.usatoday.com/story/sports/nfl/2017/09/24/donald-trump-nfl-player-protests-national-anthem-week-3-response/697609001/> (last updated Sept. 25, 2017, 12:04 PM).

<sup>18</sup> Don Sweeney, *NFL Players in London Kneel for the US National Anthem but Stand for the British One*, MIAMI HERALD (Sept. 24, 2017, 10:57 AM), <https://www.miamiherald.com/news/nation-world/world/article175130091.html>.

<sup>19</sup> Josh Katzenstein, *Drew Brees: Saints Plan to Kneel Before National Anthem, Stand During it on Sunday*, THE TIMES-PICAYUNE (July 22, 2019, 2:16 PM), [https://www.nola.com/sports/saints/article\\_a580edef-4bdd-59ba-9185-5c51a5d21d83.html](https://www.nola.com/sports/saints/article_a580edef-4bdd-59ba-9185-5c51a5d21d83.html).

<sup>20</sup> *NFL Player Protests Sweep League After President Donald Trump's Hostile Remarks*, *supra* note 17.

<sup>21</sup> *Meghan Linsey Kneels After Singing National Anthem*, THE TENNESSEAN, <https://www.tennessean.com/story/sports/nfl/titans/2017/09/24/meghan-linsey-kneels-after-singing-national-anthem-titans-seahawks-game/698362001/> (last updated Sept. 24, 2017, 5:58 PM).

<sup>22</sup> Des Bieler, *Jay-Z Has 'Moved Past Kneeling.'* *Some NFL Players Have a Problem With That*, WASH. POST (Aug. 20, 2019, 5:38 AM), <https://www.washingtonpost.com/sports/2019/08/20/jay-z-has-moved-past-kneeling-some-nfl-players-have-problem-with-that/>.

<sup>23</sup> Jane Coaston, *2 Years of NFL Protests, Explained*, VOX, <https://www.vox.com/2018/8/15/17619122/kaepernick-trump-nfl-protests-2018> (last updated Sept. 4, 2018, 12:10 PM).

protest racial inequality and police brutality in the United States.<sup>24</sup> Kaepernick said:

I am not going to stand up to show pride in a flag for a country that oppresses black people and people of color. To me, this is bigger than football and it would be selfish on my part to look the other way. There are bodies in the street and people getting paid leave and getting away with murder.<sup>25</sup>

However, athletes have stressed that these protests are not specifically directed towards the flag or National Anthem as many people have incorrectly interpreted the act.<sup>26</sup> The protest is instead directed at racial inequalities inherent in the justice system and a lack of accountability for these inequalities.<sup>27</sup> The choice of protesting during the National Anthem was made in order to draw attention to the cause and raise awareness.<sup>28</sup> Unfortunately, while protesting during the National Anthem has drawn a tremendous amount of attention towards the protest, it has also led to these misinterpretations.<sup>29</sup> A lot of the discussions surrounding these protests have been about the act of kneeling during the National Anthem itself, rather than a discussion of police brutality and racial inequality as it was previously intended to be.<sup>30</sup> Many have considered the movement to be unpatriotic.

However, these are not the only issues that players have knelt in response to. Tampa Bay Buccaneers wide receiver, Mike Evans, chose to sit during the National Anthem for the game following the election of Donald Trump.<sup>31</sup> Evans said, “[i]f this happens, then America’s not right right now. I said this a long time ago. When he ran, I thought it was a joke, and the joke continues. I’m not a political person that much, but I got common sense. And I know when something’s not right.”<sup>32</sup> Notably, Evans’ protest took place the

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<sup>24</sup> Steve Wyche, *Colin Kaepernick Explains Why He Sat During National Anthem*, NFL, <http://www.nfl.com/news/story/0ap3000000691077/article/colin-kaepernick-explains-protest-of-national-anthem> (last updated Aug. 28, 2016, 4:33 PM).

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

<sup>26</sup> Eric Reid, *Eric Reid: Why Colin Kaepernick and I Decided to Take a Knee*, N.Y. TIMES (Sept. 25, 2017), <https://www.nytimes.com/2017/09/25/opinion/colin-kaepernick-football-protests.html>.

<sup>27</sup> Megan Garber, *They Took a Knee*, THE ATLANTIC (Sept. 24, 2017), <https://www.theatlantic.com/entertainment/archive/2017/09/why-the-nfl-is-protesting/540927/>.

<sup>28</sup> Mark Sandritter, *A Timeline of Colin Kaepernick’s National Anthem Protest and the Athletes Who Joined Him*, SBINATION (Sept. 25, 2017, 10:28 AM), <https://www.sbnation.com/2016/9/11/12869726/colin-kaepernick-national-anthem-protest-seahawks-brandon-marshall-nfl>.

<sup>29</sup> Bryan Armen Graham and Les Carpenter, *Colin Kaepernick’s Critics are Ignoring the Target of His Protest*, THE GUARDIAN (Nov. 27, 2017, 2:51 PM), <https://www.theguardian.com/sport/blog/2016/sep/16/colin-kaepernick-protest-racial-iniquity-nfl-american-football>.

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

<sup>31</sup> *Tampa Bay Receiver Mike Evans Sits During Anthem to Protest Trump Election*, CBS (Nov. 13, 2016, 10:08 PM), <https://www.cbsnews.com/news/tampa-bay-receiver-mike-evans-sits-for-anthem-to-protest-donald-trump-election/>.

<sup>32</sup> *Id.*

day after Veterans Day and was seen by many as disrespectful towards veterans, thereby leading Evans to change his method of protest the following week.<sup>33</sup>

Another issue that led players to kneel in protest involved the owner of the Houston Texans.<sup>34</sup> In Week 8 of the 2017 NFL season, a majority of Houston Texans players knelt during the National Anthem in response to a comment about the “inmates running the prison” made by then team owner, Bob McNair.<sup>35</sup> McNair later apologized and claimed he was referring to the relationship between the league office and team owners, rather than the players who were engaging in protest during the National Anthem.<sup>36</sup> Even though many different issues have led to players to join this movement, it is important to recognize that its roots lie in protesting police brutality and racial inequality.<sup>37</sup>

### III. ADOPTION OF THE MOVEMENT

While the modern kneeling movement was started by football players in the NFL, the movement has not remained exclusive to football. Athletes from various other sports, such as soccer,<sup>38</sup> baseball,<sup>39</sup> and basketball,<sup>40</sup> have knelt in protest during the National Anthem. The movement has not even remained exclusive to professional athletes. Many athletes at the collegiate and high school levels have also started kneeling in protest during the National Anthem.<sup>41</sup>

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<sup>33</sup> Jenna Laine, *Bucs' Mike Evans Ends Protest, Stands for National Anthem*, ESPN (Nov. 20, 2016), [https://www.espn.com/blog/tampa-bay-buccaneers/post/\\_/id/15124/bucs-mike-evans-stands-for-national-anthem](https://www.espn.com/blog/tampa-bay-buccaneers/post/_/id/15124/bucs-mike-evans-stands-for-national-anthem).

<sup>34</sup> Sarah Barshop, *Texas' Duane Brown on Kneeling for Anthem: Team Felt Sense of Unity Playing for Each Other*, ESPN (Oct. 29, 2017), [https://www.espn.com/nfl/story/\\_/id/21215907/majority-houston-texans-players-kneeled-linked-arms-national-anthem](https://www.espn.com/nfl/story/_/id/21215907/majority-houston-texans-players-kneeled-linked-arms-national-anthem).

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

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

<sup>37</sup> Coaston, *supra* note 23.

<sup>38</sup> Euan McKirdy, *USWNT Star Megan Rapinoe Takes Knee in Solidarity with Kaepernick*, CNN, <https://edition.cnn.com/2016/09/05/sport/megan-rapinoe-colin-kaepernick-anthem-kneel/index.html> (last updated Sept. 5, 2016, 5:49 AM).

<sup>39</sup> Susan Slusser, *A's Bruce Maxwell First MLB Player to Kneel for Anthem*, SFGATE, <https://www.sfgate.com/athletics/article/A-s-Bruce-Maxwell-first-MLB-player-to-kneel-for-12223798.php> (last updated Sept. 25, 2017, 8:14 AM).

<sup>40</sup> Amanda Sakuma, *Ole Miss Basketball Players Kneel During National Anthem in Protest of Confederate Rally*, VOX (Feb. 24, 2019, 11:24 AM), <https://www.vox.com/2019/2/24/18238432/ole-miss-basketball-players-kneel-national-anthem-protest-confederate-rally>.

<sup>41</sup> *Student Protests in Colleges and Schools: A Resource*, NAT'L COAL. AGAINST CENSORSHIP, <https://ncac.org/students-protesting-during-anthem-pledge-a-resource-timeline#unique-identifier> (last visited Jan. 29, 2021).

### A. Adoption by Collegiate Athletes

At the collegiate level, football has seen very few examples of athletes kneeling because many college teams traditionally remain in the locker room during the National Anthem.<sup>42</sup> However, there have been a few examples. In 2016, at Northwestern University, where the players traditionally remain on the field for the National Anthem, three players from the University of Nebraska knelt.<sup>43</sup> Aside from football, many athletes from other sports have also knelt during the National Anthem. In 2016, three volleyball players from West Virginia University Institute of Technology knelt during the National Anthem.<sup>44</sup> Also, in 2016, the University of Arkansas' women's basketball players knelt.<sup>45</sup> In 2019, eight members of University of Mississippi's men's basketball program knelt during the National Anthem in protest of a pro-confederate rally that was occurring on campus.<sup>46</sup>

Even college students participating in other extracurricular activities have engaged in the kneeling movement. In 2016, approximately 19 members of the East Carolina University Marching Band knelt during the National Anthem while several other members of the band refused to play the National Anthem at all.<sup>47</sup> In 2017, several cheerleaders from Kennesaw State University's cheerleading squad knelt during the National Anthem.<sup>48</sup> Spectators at these sporting events have also joined in the protests. In 2016, spectators at Texas Christian University remained seated during the National Anthem at a football game.<sup>49</sup>

### B. Responses to Collegiate Protests and Consequences Faced

There has been a varying array of responses to these protests by college athletes, ranging from some intense backlash to bandwagon support of the protests. In response to the football players from the University of Nebraska

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<sup>42</sup> Eric Olson, *Anthem Protest Opportunities are Limited in College Football*, ASSOCIATED PRESS (Sept. 29, 2016), <https://apnews.com/631b1c8fc821453992c68569e24b879c/anthem-protest-opportunities-are-limited-college-football>.

<sup>43</sup> Brian Christopherson, *Prior to Game, Rose-Ivey Told Team of His Decision to Kneel for Anthem*, LINCOLN JOURNAL STAR (Sept. 26, 2016), [https://journalstar.com/sports/huskers/football/prior-to-game-rose-ivey-told-team-of-his-decision/article\\_781e987e-82b0-11e6-93cc-53559523f8fe.html](https://journalstar.com/sports/huskers/football/prior-to-game-rose-ivey-told-team-of-his-decision/article_781e987e-82b0-11e6-93cc-53559523f8fe.html).

<sup>44</sup> Lindsay Gibbs, *Tracking the Kaepernick Effect: The Anthem Protests are Spreading*, THINKPROGRESS (Sep. 20, 2016, 4:15 PM), <https://thinkprogress.org/national-anthem-sports-protest-tracker-kaepernick-284ff1d1ab3e/#.c5u4c1qw>.

<sup>45</sup> *Student Protests in Colleges and Schools: A Resource*, *supra* note 41.

<sup>46</sup> Sakuma, *supra* note 40.

<sup>47</sup> *Student Protests in Colleges and Schools: A Resource*, *supra* note 41.

<sup>48</sup> Shaddi Abusaid, *Protesting KSU Cheerleader Don't Make the Cut*, MARIETTA DAILY JOURNAL, (Aug. 22, 2018), [https://www.mdjonline.com/news/protesting-ksu-cheerleaders-don-t-make-the-cut/article\\_bbeb3402-a65a-11e8-9022-d3b576b20d01.html](https://www.mdjonline.com/news/protesting-ksu-cheerleaders-don-t-make-the-cut/article_bbeb3402-a65a-11e8-9022-d3b576b20d01.html).

<sup>49</sup> *Student Protests in Colleges and Schools: A Resource*, *supra* note 41.



who knelt, Nebraska Governor, Pete Ricketts, characterized the kneeling as “disrespectful” and “disgraceful.”<sup>50</sup> However, Governor Ricketts later made an offer to meet with the athletes who knelt in order to have a conversation with them about the protest.<sup>51</sup> The protest by the University of Arkansas’ women’s basketball team resulted in outrage where Republican lawmakers threatened to make cuts to the University’s budget.<sup>52</sup> The University of Mississippi men’s basketball players who knelt received national attention and backlash despite the fact that the athletes had the support of University officials and their coach.<sup>53</sup> These players also later received support from the National Collegiate Athletic Association (“NCAA”).<sup>54</sup> Following the protest by East Carolina University Marching Band members, University officials said the protests would not be tolerated in the future because of the “unique privilege and responsibility that comes with wearing the uniform of the Marching Pirates.”<sup>55</sup> The spectators who sat during the National Anthem at Texas Christian University were booed by other spectators in the stands.<sup>56</sup> A survey found that 60% of players in the Big 12 Conference were in support of allowing kneeling during the National Anthem.<sup>57</sup>

Some college athletes have faced consequences for their decision to take a knee during the National Anthem. In 2017, Gyree Durante, a football player at Albright College, chose to kneel during the National Anthem despite a team-wide decision to kneel during the coin toss instead.<sup>58</sup> As a result, Durante was dismissed from the team.<sup>59</sup> Four out of the five cheerleaders from Kennesaw State University who knelt during the National Anthem did not make the cheerleading squad the next year.<sup>60</sup> The University claimed that tryouts for joining the squad had become more competitive than

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

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Sakuma, *supra* note 40.

<sup>54</sup> Mike Brest, *NCAA Supports Ole Miss Players That Knelt During National Anthem*, DAILY CALLER (Feb. 25, 2019, 3:09 PM), <https://dailycaller.com/2019/02/25/ncaa-mississippi-college-basketball-anthem-kneel/>.

<sup>55</sup> George Crocker, *ECU: Marching Pirates Protests Will Not Be Tolerated Moving Forward*, WNCT 9, <https://www.wnct.com/news/ecu-marching-pirates-protests-will-not-be-tolerated-moving-forward/?elqTrackId=03575f6808e34350bf4419e6b9e0396e&elq=119f8d3822574bbd89626f12f5db67ef&elqaid=10986&elqat=1&elqCampaignId=4200> (last updated Oct. 3, 2016, 9:06 PM).

<sup>56</sup> *Student Protests in Schools and Colleges: A Resource*, *supra* note 41.

<sup>57</sup> Jori Epstein, *Nearly 60 Percent of Big 12 Players Support Allowing Kneeling During Anthem*, *Survey Says*, DALL. MORNING NEWS (July 25, 2018, 8:00 AM), <https://www.dallasnews.com/sports/2018/07/25/nearly-60-percent-of-big-12-players-support-allowing-kneeling-during-anthem-survey-says/>.

<sup>58</sup> Tim Daniels, *Gyree Durante Cut by Albright College After Kneeling During National Anthem*, BLEACHER REPORT (Oct. 11, 2017), <https://bleacherreport.com/articles/2738139-gyree-durante-cut-by-albright-college-after-kneeling-during-national-anthem>.

<sup>59</sup> *Id.*

<sup>60</sup> Abusaid, *supra* note 48.

ever.<sup>61</sup> The cheerleaders who were left off the squad claimed their participation in the protests played a large part in the decision to cut them from the squad.<sup>62</sup> One of the cheerleaders later filed suit against the president of the university and two men in the athletic department for the violation of her First Amendment rights.<sup>63</sup> She also filed suit against the Sheriff of Cobb County, Georgia and a former Republican state legislator who she claims conspired to pressure the president of the university to take action against the protest.<sup>64</sup> After the sheriff and state legislator were dismissed from the case, the cheerleader later reached a settlement for \$145,000.<sup>65</sup>

Many other athletes were forced to abandon their protests because the universities outright banned kneeling during the National Anthem or made changes to pre-game policies to keep athletes from kneeling without actually banning kneeling in order to avoid conflict.<sup>66</sup> In 2017, Colorado Christian University banned all athletes from kneeling during the National Anthem.<sup>67</sup> Buena Vista University took the same approach after Alyssa Parker, a cheerleader, and several of her friends knelt during the National Anthem before the homecoming game.<sup>68</sup> Parker ended up resigning from the cheerleading squad in order to continue her protest and protect her chances of being admitted to law school.<sup>69</sup> In 2018, Southern Illinois University (SIU) implemented a policy banning athletes from engaging in expressive activities while on the field, in uniform, after three cheerleaders knelt during the National Anthem in 2017.<sup>70</sup> SIU Chancellor Carlo Montemagno originally claimed he supported the protest when it occurred and the policy ended up being rescinded the policy after SIU was accused by free speech groups of restricting their students' free speech with SIU claiming that was never the

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

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

<sup>63</sup> Derrick Bryson Taylor, *Cheerleader Punished for Taking a Knee Is Awarded \$145,000*, N.Y. TIMES (Dec. 7, 2019), <https://www.nytimes.com/2019/12/07/us/kennesaw-cheerleader-lawsuit-anthem.html>.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Jeremy Bauer-Wolf, *Still Taking a Knee Against Racism*, INSIDE HIGHER ED (Feb. 19, 2019), <https://www.insidehighered.com/news/2019/02/19/college-students-are-still-taking-knee-against-racism>.

<sup>67</sup> Mike Chiari, *Colorado Christian University Bans Athletes from Kneeling During National Anthem*, BLEACHER REPORT (Sept. 26, 2017), <https://bleacherreport.com/articles/2735324-colorado-christian-university-bans-athletes-from-kneeling-during-national-anthem>.

<sup>68</sup> Monica Lengyel Karlson, *The Cheerleader Who Took a Knee and Made Space For a New Wave of Activists*, VICE (Aug. 13, 2018, 10:03 AM), [https://www.vice.com/en\\_us/article/vbjyk4/alyssa-parker-cheerleader-who-took-a-knee-and-made-space-for-a-new-wave-of-activists](https://www.vice.com/en_us/article/vbjyk4/alyssa-parker-cheerleader-who-took-a-knee-and-made-space-for-a-new-wave-of-activists).

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

<sup>70</sup> Brian Munoz, *SIU Athletics Bans Displays of Activism to "Put Forward a Message of Unity," One Cheerleader Returns Following 2017 Protests*, DAILY EGYPTIAN (Aug. 28, 2018), <https://dailyegyptian.com/85732/news/siu-athletics-bans-displays-of-activism-to-put-forward-a-message-of-unity-one-cheerleader-returns-following-2017-protests/>.

intent behind the policy.<sup>71</sup> Eastern Michigan University received notice ahead of time that a protest was planned and in response, the University kept the players and the band off of the field during the National Anthem, claiming that they were concerned for the safety of everyone involved.<sup>72</sup>

### C. Adoption by High School Athletes

The high school level has seen numerous athletes take a knee in protest during the National Anthem. In 2016, a football player in Brunswick, Ohio knelt during the National Anthem after he heard his teammates using a racial slur.<sup>73</sup> Also in 2016, a football player from Worcester, Massachusetts knelt during the National Anthem in order to promote the Black Lives Matter movement.<sup>74</sup> In 2017, two students from Victory & Praise Christian Academy made the decision to kneel during the National Anthem.<sup>75</sup> In October 2018, all the football players of Capital Christian Academy, as well as the coaching staff, knelt in protest during the National Anthem.<sup>76</sup> Other high school athletes besides football players have begun kneeling in protest during the National Anthem such as cheerleaders,<sup>77</sup> soccer players,<sup>78</sup> and dance team members similarly to what has occurred at the collegiate level.<sup>79</sup>

### D. Responses to High School Protests and Consequences Faced

Similar to the protests taking place at the professional and collegiate levels, high school athletes have seen an array of reactions to their protests from intense backlash to support for their actions.<sup>80</sup> The football player from Brunswick, Ohio who was protesting the use of a racial slur by his teammates received racial threats after he knelt during the National Anthem.<sup>81</sup> The

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<sup>71</sup> Brian Munoz, *SIU Athletics Rescinds Activism Ban, Legal Experts Weigh In on Code of Conduct Addition*, DAILY EGYPTIAN (Aug. 30, 2018), <https://dailyegyptian.com/85792/news/siu-athletics-rescinds-activism-ban-legal-experts-weigh-in/>.

<sup>72</sup> *Student Protests in Schools and Colleges: A Resource*, *supra* note 41.

<sup>73</sup> Gibbs, *supra* note 44.

<sup>74</sup> *Student Protests in Schools and Colleges: A Resource*, *supra* note 41.

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

<sup>76</sup> Erik Ortiz, *Football, the Anthem and Taking a Knee: One All-Black High School Team Takes a Stand*, NBC NEWS (Oct. 13, 2018, 4:02 AM), <https://www.nbcnews.com/news/sports/football-anthem-taking-knee-one-all-black-high-school-team-n919116>.

<sup>77</sup> *Student Protests in Schools and Colleges: A Resource*, *supra* note 41.

<sup>78</sup> Valeriya Safronova & Joanna Nikas, *High School Students Explain Why They Protest Anthems and Pledges*, N.Y. TIMES (Oct. 21, 2017), <https://www.nytimes.com/2017/10/21/style/high-school-students-explain-why-they-protest-anthems-and-pledges.html>.

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

<sup>80</sup> Jason Jordan, *High School Players' National Anthem Protests Prompt Range of Reaction*, USA TODAY (Nov. 3, 2017, 11:07am) <https://usatodayhss.com/2017/national-anthem-kneeling-high-school-football-protest-racial-injustice>.

<sup>81</sup> Gibbs, *supra* note 44.

principal of Parkway High School in Louisiana called the kneeling protests during the National Anthem a “disruption.”<sup>82</sup> One cheerleader recounted how she was fortunate enough to receive support for her role in protesting, but some football players from her school who were also protesting received death threats telling the players it was disrespectful to kneel.<sup>83</sup> The cheerleader also noted that some people who came to the next game where the students knelt showed up with a Confederate flag, a symbol associated with slavery and the oppression of people of color.<sup>84</sup> One soccer player, who is white, knelt with some of her teammates to show solidarity with others engaging in protest and encountered critics who argued that she had nothing to complain about for being “white.”<sup>85</sup> A Massachusetts football player received death threats and had another student reportedly threaten to “lynch” him and use him for “target practice.”<sup>86</sup>

Many of these high school athletes have faced harsher consequences than college athletes for their decision to kneel during the National Anthem due to high schools being able to exercise more control over their students and their conduct and speech.<sup>87</sup> The football player from Worcester, Massachusetts received a suspension for his decision to kneel during the National Anthem.<sup>88</sup> However, that suspension was later rescinded by the school district.<sup>89</sup> The two students from Victory & Praise Christian Academy were dismissed from the football team by their coach, a former Marine and pastor, because they decided to kneel for the National Anthem.<sup>90</sup> Four players at Lansing Catholic High School started a game on the bench as a punishment for kneeling during the National Anthem.<sup>91</sup> The South Jersey Times Editorial Board noted that private Catholic schools in the Diocese of Camden had informed football players that they would be suspended from the team if they

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<sup>82</sup> Jacob Bogage, *Louisiana High School Will Kick Students Off Team If They Don't Stand for National Anthem*, WASH. POST (Sept. 28, 2017, 1:02 PM), <https://www.washingtonpost.com/news/early-lead/wp/2017/09/28/louisiana-high-school-will-kick-students-off-team-if-they-dont-stand-for-national-anthem/>.

<sup>83</sup> Safronova & Nikas, *supra* note 78.

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

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

<sup>86</sup> *Student Protests in Schools and Colleges: A Resource*, *supra* note 41.

<sup>87</sup> David R. Wheeler, *Do Students Still Have Free Speech in School?*, THE ATLANTIC (Apr. 7, 2014), <https://www.theatlantic.com/education/archive/2014/04/do-students-still-have-free-speech-in-school/360266/>.

<sup>88</sup> *Student Protests in Schools and Colleges: A Resource*, *supra* note 41.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Eric Lacy, *Coach: Lansing Catholic Football Players Who Kneel During Anthem Won't Be Disciplined*, LANSING STATE J., <https://www.lansingstatejournal.com/story/news/2018/08/21/lansing-catholic-anthem-kneeling-high-school-football/1055112002/> (last updated Aug. 22, 2018, 1:56 PM).

did not stand for the National Anthem.<sup>92</sup> Orange County Public Schools in Florida briefly had a policy that required a student to get the permission of their parents to be able to kneel during the National Anthem.<sup>93</sup> The principal of Louisiana’s Parkway High School threatened any athlete who did not stand for the National Anthem with a reduction in playing time that would ultimately lead to that athlete’s dismissal from the team.<sup>94</sup> Many types of policies have been instituted in attempts to stop high school athletes from kneeling in protest during the National Anthem.<sup>95</sup>

#### IV. FIRST AMENDMENT RIGHTS

##### A. First Amendment Rights Generally

The First Amendment was included within the Bill of Rights as a part of the Constitution when it was adopted in 1791.<sup>96</sup> The First Amendment provides, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”<sup>97</sup> Originally, it was held that the First Amendment only applied to the federal government and did not apply to the states.<sup>98</sup> It was later held that the First Amendment now applied to the states by means of incorporation, under the Due Process Clause, in the first section of the Fourteenth Amendment.<sup>99</sup> It must be noted that the First Amendment only applies to state actors; private citizens are not bound by the First Amendment, and therefore, have more freedom to restrict the speech of others.<sup>100</sup>

While it is true that the First Amendment protects some speech from restriction by state actors, it does not follow that all speech is protected from restriction.<sup>101</sup> The government is allowed to restrict speech if that speech is directed at creating imminent lawless action and is likely to create lawless

<sup>92</sup> Christine Hauser, *High Schools Threaten to Punish Students Who Kneel During Anthem*, N.Y. TIMES (Sept. 29, 2017), <https://www.nytimes.com/2017/09/29/us/high-school-anthem-protest.html>.

<sup>93</sup> *Student Protests in Schools and Colleges: A Resource*, *supra* note 41.

<sup>94</sup> Bogage, *supra* note 82.

<sup>95</sup> *Student Protests in Schools and Colleges: A Resource*, *supra* note 41.

<sup>96</sup> *The Bill of Rights: A Brief History*, ACLU 100 YEARS, <https://www.aclu.org/other/bill-rights-brief-history> (last visited Apr. 3, 2020).

<sup>97</sup> U.S. CONST. amend. I.

<sup>98</sup> *Barron v. City of Balt.*, 32 U.S. 243, 250 (1833).

<sup>99</sup> *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

<sup>100</sup> *Civil Rights Cases*, 109 U.S. 3, 10-12 (1883) (explaining the State Action Doctrine under the Fourteenth Amendment); *Gitlow*, 268 U.S. at 666 (holding that the First Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment).

<sup>101</sup> *See New York Times Co. v. Sullivan*, 376 U.S. 254, 296-97 (1964) (Black, J., concurring).

action.<sup>102</sup> However, the First Amendment generally provides protection for specific types of speech such as symbolic speech, political speech, and commercial speech.<sup>103</sup> Each type of speech has its own standard, or standards, for determining whether restrictions of the speech are constitutional.<sup>104</sup>

Symbolic speech consists of nonverbal, nonwritten forms of communication, like kneeling. Symbolic speech is generally subject to the standard set forth in *United States v. O'Brien*, which created a four-part test to determine whether regulation of symbolic speech violates the First Amendment.<sup>105</sup> The *O'Brien* test asks: 1) is the law within the Constitutional power of the government, 2) does the law further a substantial or important government interest, 3) is the interest unrelated to the suppression of free expression, and 4) is this regulation the least restrictive means with regard to free speech.<sup>106</sup> This test appears to be a mix of strict scrutiny and intermediate scrutiny, as strict scrutiny requires the use of the least restrictive means possible and intermediate scrutiny requires an important government interest.<sup>107</sup> However, the *O'Brien* test has been determined to be inappropriate for some cases, and thus, courts have applied alternative standards, such as the standards in *Tinker v. Des Moines Independent Community School District* and *Texas v. Johnson* which are discussed later in this note.<sup>108</sup>

Political speech includes speech concerning politics, religion, nationalism, and other matters of opinion.<sup>109</sup> Political speech does not necessarily have to be spoken or written.<sup>110</sup> It can be symbolic as well. As Justice Black stated, “Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.”<sup>111</sup> Restrictions on political speech are generally subject to either strict scrutiny or the *O'Brien* test.

Because it has long been considered to be at the core of the First Amendment, political speech has received heightened protection in the courts

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

<sup>103</sup> David Schultz, *Commercial Speech*, THE FIRST AMENDMENT ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/900/commercial-speech> (last visited Jan. 26, 2021).

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

<sup>105</sup> *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

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

<sup>107</sup> Mariam Morshedi, *Levels of Scrutiny*, SUBSCRIPT LAW (Mar. 6, 2018), <https://www.subscriptlaw.com/blog/levels-of-scrutiny>.

<sup>108</sup> Ronald Kahn, *Symbolic Speech*, THE FIRST AMENDMENT ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/1022/symbolic-speech> (last accessed Jan. 26, 2021).

<sup>109</sup> Victoria L. Killion, *The First Amendment: Categories of Speech*, CONG. RSCH. SERV., <https://fas.org/sgp/crs/misc/IF11072.pdf> (last updated January 16, 2019).

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

<sup>111</sup> *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

and is generally analyzed under strict scrutiny.<sup>112</sup> For example, in *Texas v. Johnson*, strict scrutiny was used in analyzing a statute prohibiting flag burning because the case was determined to be outside of the *O'Brien* test due to the government's interest in the suppression of free expression.<sup>113</sup> In that case, Johnson burned an American flag while protesting the Republican National Convention and was charged with desecration of a venerated object.<sup>114</sup> The Court struck down the Texas statute under strict scrutiny because Texas' interest of "preserving the flag as a symbol of nationhood and national unity" was insufficient.<sup>115</sup>

Moreover, in *O'Brien*, the speech was considered symbolic political speech and involved the burning of draft cards as a protest of the Vietnam War, but the speech restriction was upheld because it focused on "the noncommunicative aspect of O'Brien's conduct."<sup>116</sup>

The determination of whether the *O'Brien* test or another standard such as strict scrutiny should be used hinges on whether the restriction on speech is content-based or content-neutral.<sup>117</sup>

Content-based restrictions on speech discriminate against speech based on the substance of what the speech is communicating.<sup>118</sup> Content-based restrictions are presumed to be unconstitutional.<sup>119</sup> *Texas v. Johnson* is a case that dealt with what was determined to be a content-based restriction on flag burning.<sup>120</sup> The Court determined that the Texas statute was content-based and therefore unconstitutional because the purpose of the statute was not to protect the physical integrity of the American flag, but instead to prevent intentional or knowing abuse that is designed to seriously offend others.<sup>121</sup>

In contrast, content-neutral restrictions on speech apply to all expression without regard to the substance or message of the expression.<sup>122</sup> Many, but not all, restrictions that are content-neutral are upheld.<sup>123</sup> *O'Brien* is a case that dealt with a content-neutral restriction on the burning of draft cards.<sup>124</sup> The Court determined that the federal statute was content-neutral because preserving draft cards was an interest unrelated to the suppression of

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<sup>112</sup> Killion, *supra* note 109.

<sup>113</sup> *Texas v. Johnson*, 491 U.S. 397, 410-12 (1989).

<sup>114</sup> *Id.* at 399-400.

<sup>115</sup> *Id.* at 413-16.

<sup>116</sup> *O'Brien*, 391 U.S. at 369, 381-82.

<sup>117</sup> Kahn, *supra* note 108.

<sup>118</sup> David L. Hudson, Jr., *Content Based*, THE FIRST AMENDMENT ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/935/content-based> (last visited Feb. 14, 2021).

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

<sup>120</sup> *Johnson*, 491 U.S. at 411-12.

<sup>121</sup> *Id.*

<sup>122</sup> David L. Hudson, Jr., *Content Neutral*, THE FIRST AMENDMENT ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/937/content-neutral> (last visited Jan. 26, 2021).

<sup>123</sup> *Id.*

<sup>124</sup> *O'Brien*, 391 U.S. at 369.

free expression because draft cards indicate draft status along with other information.<sup>125</sup> Draft cards also facilitate government-citizen communication about draft status.<sup>126</sup> Both of these interests were determined to be critical factors in a time of mobilization for war.<sup>127</sup>

#### B. First Amendment Rights of College Students

The First Amendment rights of college students are, in essence, nearly identical to those of the majority of American citizens who are not currently enrolled in college.<sup>128</sup> College students have historically received more freedom under the First Amendment than high school students.<sup>129</sup> In 1972, the Supreme Court held in *Healy v. James* that Central Connecticut State College had violated the First Amendment by refusing to recognize a campus chapter of Students for a Democratic Society.<sup>130</sup> Justice Powell's decision is noted for saying, "The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom."<sup>131</sup> The next year, the Supreme Court ruled in favor of college students again, holding that the expulsion of a journalism student for the distribution of a newspaper containing ideas that the University of Missouri felt was indecent also violated the Free Speech Clause of the First Amendment.<sup>132</sup> In *Papish v. Board of Curators of the University of Missouri*, the *per curiam* opinion stated, "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'"<sup>133</sup> Speech codes have been used by many universities to attempt to control the speech made by students on campus.<sup>134</sup> However, many times these speech codes have been struck down as being in violation of the First Amendment. In *Doe v. University of Michigan*, the first challenge to a speech code was brought before the United States District Court for the Eastern District of Michigan.<sup>135</sup> The speech code was intended to prevent hate speech on campus by

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<sup>125</sup> *Id.* at 378-85.

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

<sup>127</sup> *Id.* at 388.

<sup>128</sup> Philip A. Dynia & David L. Hudson, Jr., *Rights of Students*, THE FIRST AMENDMENT ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/931/rights-of-students> (last updated Sept. 2017).

<sup>129</sup> *Id.*

<sup>130</sup> *Healy v. James*, 408 U.S. 169, 194 (1972).

<sup>131</sup> *Id.* at 180-81.

<sup>132</sup> *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 671 (1973).

<sup>133</sup> *Id.* at 670.

<sup>134</sup> *Spotlight on Speech Codes 2019*, THE FIRE, <https://www.thefire.org/resources/spotlight/reports/spotlight-on-speech-codes-2019/> (last visited Feb. 25, 2021).

<sup>135</sup> *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 853 (E.D. Mich. 1989).



instituting discipline for students who engaged in any physical or verbal behavior that stigmatized or victimized an individual based on race, sex, and a variety of other factors.<sup>136</sup> The court struck down the speech code for being vague due to a lack of distinction between protected and unprotected conduct, and overbroad, because it prohibited constitutionally protected conduct.<sup>137</sup>

However, in recent years, the judicial system has shown an openness to allow universities to be more restrictive of the speech allowed on campus. In 2005, the United States Court of Appeals for the Seventh Circuit applied standards used for K-12 students in a case concerning college students.<sup>138</sup> In *Hosty v. Carter*, the Seventh Circuit held that college newspapers were subject to the same standards as high school newspapers, as decided in *Hazelwood School District v. Kuhlmeier*, meaning school officials can exercise control over student speech in both high school and college school-sponsored activities, as long as the officials' actions are reasonably related to legitimate pedagogical concerns.<sup>139</sup> In *Hazelwood*, the court held a school newspaper intended to be a supervised learning experience for journalism students rather than a public forum for student expression can be subject to regulation by school officials.<sup>140</sup> In 2012, the Minnesota Supreme Court held that the University of Minnesota's punishment of a student for posting classroom work on Facebook was not a violation of the First Amendment.<sup>141</sup> The Minnesota Supreme Court said discipline of students enrolled in a "professional program" for online speech that violates "academic program rules that are narrowly tailored and directly related to established professional conduct standards."<sup>142</sup>

Students-athletes at universities also face greater restrictions to their speech than those faced by students who are not participating in athletics. This includes speech that is not specifically tied to the students' participation in their sport. For example, many institutions, such as the University of Kentucky, have their athletes sign an agreement that allows for the athletes' social media accounts to be monitored.<sup>143</sup> Some schools have even imposed bans on the use of social media by their student-athletes.<sup>144</sup> One football

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<sup>136</sup> *Id.* at 856.

<sup>137</sup> *Id.* at 864-67.

<sup>138</sup> *Hosty v. Carter*, 412 F.3d 731, 735 (7th Cir. 2005).

<sup>139</sup> *Id.* at 734-35.

<sup>140</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988).

<sup>141</sup> *Tatro v. Univ. of Minn.*, 816 N.W.2d 509, 524 (Minn. 2012).

<sup>142</sup> *Id.* at 521.

<sup>143</sup> Matt Norlander, *The New Way Kentucky and Louisville Are Monitoring Athletes' Social Media Behavior*, CBS SPORTS (Aug. 20, 2012, 7:15 PM), <https://www.cbssports.com/college-basketball/news/the-new-way-kentucky-and-louisville-are-monitoring-athletes-social-media-behavior/>.

<sup>144</sup> Jason Scott, *Do Social Media Bans Violate the First Amendment?*, ATHLETIC BUS. (Sept. 2015), <https://www.athleticbusiness.com/web-social/do-social-media-bans-violate-the-first-amendment.html>.

player from the University of Central Florida was declared ineligible by the NCAA for operating a monetized YouTube account which led the University of Central Florida to rescind his scholarship.<sup>145</sup> The student later sued the University alleging that his First Amendment rights were violated because his ineligibility should not prevent the University of Central Florida from honoring his scholarship, and thereby punishing him for continuing to post videos on YouTube.<sup>146</sup> He settled the case before it could be decided.<sup>147</sup> Additionally, athletes have been suspended from athletic teams for inappropriate text messages sent to other teammates.<sup>148</sup> Athletes have also been dismissed after a video laced with profanity went viral on the internet.<sup>149</sup>

### C. First Amendment Rights of High School Students

The First Amendment right to freedom of speech for high school students can be subject to more restrictions than the rights enjoyed by most other people.<sup>150</sup> However, this does not mean that high school students do not have the benefit of the right to freedom of speech. This simply means that schools have more leeway in ways that they can restrict the speech of their students. For example, in *West Virginia Board of Education v. Barnette*, the Supreme Court held that a law requiring expulsion for those who refused to stand and recite the Pledge of Allegiance due to religious reasons was a

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<sup>145</sup> Zach Greenberg, *Former Student-Athlete Sues UCF to Vindicate First Amendment Rights*, THE FIRE (Feb. 7, 2018), <https://www.thefire.org/former-student-athlete-sues-ucf-to-vindicate-first-amendment-rights/>.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*; see also David Harris & Iliana Limón Romero, *Former UCF Kicker, YouTube Star Settles Lawsuit with School*, ORLANDO SENTINEL (Nov. 2, 2018), <https://www.orlandosentinel.com/news/breaking-news/os-ne-donald-de-la-haye-lawsuit-settle-20181102-story.html>.

<sup>148</sup> Max Kutner, *When 'Locker Room Talk' Leads to Suspensions From College Sports*, NEWSWEEK (Jan. 26, 2017, 3:23 PM), <https://www.newsweek.com/2017/02/03/college-athletes-suspended-locker-room-talk-548819.html>.

<sup>149</sup> Des Bieler, *Tennessee's Nightmare Season Continues as Vols Dismiss WR for Profanity-Laced Tirade*, WASH. POST (Nov. 22, 2017, 11:10 PM), <https://www.washingtonpost.com/news/early-lead/wp/2017/11/23/tennessees-nightmare-season-continues-as-vols-dismiss-wr-for-profanity-laced-tirade/>; It must be noted that these issues usually arise in relation to the actions of public universities attempting to limit speech. The First Amendment, by way of the Due Process Clause of the Fourteenth Amendment, only applies to state actors as held in *Gitlow v. New York*, 268 U.S. 652 (1925). Because of this, public universities, which are government institutions which receive government funding, are classified as state actors meaning that they engage in state action and thus fall under the jurisdiction of the First Amendment as held in *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 192 (1988). Private universities are subject to less restrictions than public universities and therefore, are usually not state actors meaning that private universities have more freedom to restrict the speech of their students as held in *Klunder v. Brown Univ.*, 778 F.3d 24, 32 (1st Cir. 2015). The state action doctrine similarly applies to the discussion of public and private high schools.

<sup>150</sup> *The First Amendment in Schools: A Resource Guide*, NAT'L COALITION AGAINST CENSORSHIP, <https://ncaac.org/resource/first-amendment-in-schools> (last visited Feb. 15, 2021).

violation of the student's First Amendment right to freedom of speech.<sup>151</sup> In the opinion, the Court said freedom of speech is "susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect."<sup>152</sup>

In the 1969 Supreme Court decision, *Tinker v. Des Moines Independent Community School District*, students wore black armbands to school as a form of protest against the Vietnam War.<sup>153</sup> The principals of several Des Moines schools caught wind of the planned protest before it occurred and created a policy providing that any student wearing an armband would be asked to remove it and failure to comply would result in the student's suspension.<sup>154</sup> The students continued with the protest anyway, resulting in three of the students being suspended.<sup>155</sup> The students challenged their suspensions, claiming that their First Amendment rights had been violated.<sup>156</sup> The Court determined that the symbolic act of wearing the armbands was "akin to pure speech."<sup>157</sup> In this case, the Court held that because the schools could not prove that the protests would substantially interfere with school activities or affect the rights of others, the policy and suspensions could not stand as they were violations of the students' First Amendment right to free speech.<sup>158</sup> Fear of a disturbance was not enough in the Court's eyes to warrant a restriction on wearing the armbands.<sup>159</sup> Famously, the Court said:

First Amendment rights, applied in light of special characteristics of school environment, are available to teachers and students. Neither students nor teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. In absence of specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.<sup>160</sup>

Because *Tinker* involves symbolic political speech, the use of this standard, rather than the *O'Brien* test, suggests that the restriction here was

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<sup>151</sup> W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); *The First Amendment in Schools: A Resource Guide*, NAT'L COALITION AGAINST CENSORSHIP, <https://ncac.org/resource/first-amendment-in-schools.1>

<sup>152</sup> *Id.* at 639.

<sup>153</sup> *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 504 (1969); *The First Amendment in Schools: A Resource Guide*, NAT'L COALITION AGAINST CENSORSHIP, <https://ncac.org/resource/first-amendment-in-schools>.

<sup>154</sup> *Tinker*, 393 U.S. at 504.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 504-05.

<sup>157</sup> *Id.* at 505.

<sup>158</sup> *Id.* at 514.

<sup>159</sup> *Tinker*, 393 U.S. at 508.

<sup>160</sup> *Id.* at 506.

actually content-based rather than content-neutral, so the *Tinker* test is regularly applied to content-based restrictions.<sup>161</sup>

Later decisions made by the Supreme Court upheld certain restrictions made by schools upon students' speech. For example, in *Bethel School District No. 403 v. Fraser*, a student gave a speech during a school assembly that was filled with sexual innuendos.<sup>162</sup> As a result of the speech, the student was suspended from school for violations of school policies prohibiting disruptive behavior and the use of vulgar and offensive speech.<sup>163</sup> The student had his suspension overturned in the District Court and that decision was upheld at the Court of Appeals, but the school appealed the case to the Supreme Court.<sup>164</sup> The Supreme Court held that the student engaged in offensively lewd and indecent speech which was not protected under the First Amendment and that the student's suspension should be reinstated.<sup>165</sup>

In *Hazelwood School District v. Kuhlmeier*, a student newspaper at Hazelwood East High School submitted articles for approval by the principal, as was the customary practice at the time, and the principal objected to two of the articles.<sup>166</sup> The first article was about teen pregnancy and the principal was concerned that pregnant students who were interviewed would be identified despite name changes and certain issue discussed in the article were too mature for some younger students.<sup>167</sup> The second article was about divorce and featured one student discussing her parents' divorce and complaining that her father did not spend enough time with his family which led the principal to be concerned that the family should have been given an opportunity to respond or object to the publication.<sup>168</sup> The principal decided it was too close to publication for changes to be made to the articles and opted to leave them out when the newspaper was published.<sup>169</sup> The editor of the newspaper and two reporters filed suit alleging a violation of their First Amendment rights.<sup>170</sup> The Supreme Court held that a newspaper published by students for a journalism class did not qualify as a public forum and the school retained the right to place reasonable restrictions on the newspaper.<sup>171</sup> As such, the Supreme Court also held that the principal's decision to cut the

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<sup>161</sup> Geoffrey A. Starks, *Tinker's Tenure in the School Setting: The Case for Applying O'Brien to Content-Neutral Regulations*, YALE L.J. (Aug. 30, 2010), <https://www.yalelawjournal.org/forum/tinkers-tenure-in-the-school-setting-the-case-for-applying-obrien-to-content-neutral-regulations>.

<sup>162</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 678 (1986).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 679-80.

<sup>165</sup> *Id.* at 685.

<sup>166</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988).

<sup>167</sup> *Id.* at 263.

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

<sup>169</sup> *Id.* at 264.

<sup>170</sup> *Id.*

<sup>171</sup> *Hazelwood*, 484 U.S. at 270.

articles from the newspaper was not a violation of the students' First Amendment rights.<sup>172</sup>

In *Morse v. Frederick*, students and staff at Juneau-Douglas High School were allowed to go outside to watch the Olympic Torch pass by.<sup>173</sup> As television cameras came, a group of students held up a banner that read "BONG HITS 4 JESUS."<sup>174</sup> When the principal of the school noticed the banner, she ran across the street and confiscated it.<sup>175</sup> The principal suspended one of the students for ten days for a violation of the school's anti-drug policy.<sup>176</sup> The student later filed suit challenging the suspension as a violation of his First Amendment rights.<sup>177</sup> The Supreme Court held that schools can take steps to safeguard those whose care they are entrusted with from speech that can reasonably be regarded as encouraging illegal drug use.<sup>178</sup> As such, the Supreme Court found that the principal's confiscation of the banner and decision to suspend the student was not a violation of the student's First Amendment rights.<sup>179</sup>

High school students have also seen their speech restricted through punishment for things they have posted on social media. Students have been suspended for a variety of actions on social media, such as encouraging others to make complaints to the school, mocking the school's principal, and posting suggestive photos.<sup>180</sup> However, only some of these punishments have been upheld as valid restrictions on the students' speech, while other punishments were struck down as violations of the students' First Amendment rights.<sup>181</sup> One student created a post where she called for others to complain to the school over a dispute concerning a battle of the bands competition.<sup>182</sup> The student was barred from participating in student government as a result and the punishment was upheld by the Court of Appeals because calling for others to complain to the school was disruptive.<sup>183</sup> Another student created a Myspace profile for the purpose of mocking his school's principal and the student was suspended as a result.<sup>184</sup>

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<sup>172</sup> *Id.* at 276.

<sup>173</sup> *Morse v. Frederick*, 551 U.S. 393, 397 (2007).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 398.

<sup>177</sup> *Id.* at 399.

<sup>178</sup> *Morse*, 551 U.S. at 397.

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

<sup>180</sup> *Watch What You Tweet: Schools, Censorship, and Social Media*, NAT'L COALITION AGAINST CENSORSHIP, <https://ncac.org/watch-what-you-tweet-schools-censorship-and-social-media> (last visited Feb. 1, 2021).

<sup>181</sup> *Id.*

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

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

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

The Third Circuit overturned the student's suspension, determining the Myspace profile to not be a material disruption.<sup>185</sup>

For the most part, high school athletes face the same restrictions as their fellow students who do not participate in sports. However, in some instances, high school athletes face additional restrictions and can be subject to increased scrutiny compared to non-athletes. For example, Oil City High School in Pennsylvania had a social media policy that was tailored specifically toward athletes.<sup>186</sup> The policy stated that it is the student-athlete's responsibility "to not use any form of social media ... to be critical of teammates, coaches, game officials, school administrators, opponents, opposing schools or any other personnel involved in the athletic program."<sup>187</sup> A similar situation is what led to the suspension of several volleyball players at Akins High School in Austin, Texas.<sup>188</sup> The players tweeted certain phrases used in practices and games to disrespect the coaches leading to the players' suspension.<sup>189</sup>

In summary, the Supreme Court has held that freedom of speech can be restricted only to prevent grave and immediate danger to interests which the state may lawfully protect.<sup>190</sup> Under *Tinker*, schools cannot restrict speech unless they can prove the speech will substantially interfere with school activities or affect the rights of others.<sup>191</sup> Because *Tinker* involves symbolic political speech and uses a standard other than the *O'Brien* test, the *Tinker* test is used for content-based restrictions in schools.<sup>192</sup> However, schools have more freedom to restrict certain kinds of speech not mentioned by *Tinker*, such as vulgar and offensive speech,<sup>193</sup> school-sponsored speech,<sup>194</sup> and speech promoting illegal drug use.<sup>195</sup>

#### D. Comparison of the Rights of College and High School Athletes

When comparing the extent of the First Amendment rights held by college athletes to those held by high school athletes, the glaring truth is that high school athletes have much heavier restrictions placed upon their First Amendment rights than college athletes do. Both are similar in that they are

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<sup>185</sup> *Watch What You Tweet: Schools, Censorship, and Social Media*, *supra* note 180.

<sup>186</sup> Michael Popke, *Social Media Complicating Efforts to Oversee Student-Athlete Behavior*, ATHLETIC BUS. (Mar. 2013), <https://www.athleticbusiness.com/web-social/social-media-complicating-efforts-to-oversee-student-athlete-behavior.html#lightbox/0/>.

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

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

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

<sup>190</sup> *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

<sup>191</sup> *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 514 (1969).

<sup>192</sup> Starks, *supra* note 161.

<sup>193</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).

<sup>194</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988).

<sup>195</sup> *Morse v. Frederick*, 551 U.S. 393, 397 (2007).

among the most heavily restricted groups within their institutions. However, high school athletes are subject to restrictions on their speech for things such as vulgar and offensive speech and disruptive conduct.<sup>196</sup> College athletes have no such restrictions placed on their speech.

Both college and high school athletes have seen restrictions placed upon their speech when it comes to social media. College athletes have been forced into signing agreements with their schools which allow the schools to monitor their social media profiles.<sup>197</sup> Some collegiate athletic programs have even imposed a ban on using social media for their athletes.<sup>198</sup> High school athletes have seen schools create policies specifically for high school athletes regarding the use of their social media.<sup>199</sup>

## V. DO THE FIRST AMENDMENT RIGHTS OF COLLEGE AND HIGH SCHOOL ATHLETES COVER KNEELING?

While the courts have held that college and high school athletes have rights to free speech under the First Amendment, that is not where the discussion ends. It has to be determined whether kneeling as a form of protest during the National Anthem is speech that is protected by the First Amendment or if kneeling is allowed to be restricted by high schools and universities.

### A. Do College Athletes' First Amendment Rights Cover Kneeling?

College athletes enjoy nearly the full extent of First Amendment protection for freedom of speech, unless they have waived their rights through means such as schools' social media policies, thereby consenting to restrictions placed upon their speech by universities.<sup>200</sup> The question is whether kneeling in protest falls under one of the ways the speech of college athletes can be restricted. One way that kneeling would not be protected under the First Amendment is if the speech is considered to be directed at creating imminent lawless action and is likely to create said lawless action.<sup>201</sup>

<sup>196</sup> E.A. Gjelten, *When Can Schools Limit Students' Free Speech Rights?*, LAWYERS, <https://www.lawyers.com/legal-info/research/education-law/when-can-schools-limit-students-free-speech-rights.html> (last visited Feb. 15, 2021).

<sup>197</sup> Frank D. LoMonte, *Fouling the First Amendment: Why Colleges Can't, and Shouldn't, Control Student Athletes' Speech on Social Media*, 9 J. BUS. & TECH. L. 1, 2 (2014).

<sup>198</sup> *Id.*

<sup>199</sup> Lauren E. Rosenbaum, *Your Coach is Watching: Can a High School Regulate its Student-Athletes' Use of Social Media?*, 25 MARQ. SPORTS L. REV. 329, 330 (2014).

<sup>200</sup> LoMonte, *supra* note 197, at 2.

<sup>201</sup> John R. Vile, *Incitement to Imminent Lawless Action*, THE FIRST AMENDMENT ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/970/incitement-to-imminent-lawless-action> (last visited Feb. 1, 2021).

36 U.S.C. §301 states that people *should* stand during the National Anthem, rather than must. Thus, choosing to kneel during the National Anthem is not prohibited by law. Therefore, the argument that kneeling in protest creates lawless action by encouraging others to also kneel in protest rests on a clear misinterpretation of the law.<sup>202</sup>

Consider a situation in which a university chose to ban kneeling during the National Anthem or an athlete agreed to a policy that he or she would not kneel. First, the situation would need to be analyzed under the *O'Brien* test which asks: 1) is the law within the Constitutional power of the government, 2) does the law further a substantial or important government interest, 3) is the interest unrelated to the suppression of free expression, and 4) is this regulation the least restrictive means with regard to free speech.<sup>203</sup> If these elements are met, then a restriction on symbolic speech is permissible under the First Amendment.<sup>204</sup> Here, assuming that these restriction are within the constitutional power of the schools and that the school's interest is unrelated to the suppression of free expression, the schools would most likely claim an important interest in ensuring the safety of the athletes and the public due to threats that have been received in similar situations. However, these methods would not be the least restrictive available for this purpose. Instead, the schools could invest in greater security at sporting events and achieve the same result thus making the restrictions unconstitutional. If the universities were to assert an interest that was related to expression, such as disagreement with the message, strict scrutiny would apply instead, as illustrated in *Texas v. Johnson*.<sup>205</sup> To pass strict scrutiny, these regulations need to be "narrowly tailored: to a "compelling state interest."<sup>206</sup> Yet again, the universities would likely claim that imposing restrictions on kneeling would serve their admittedly compelling interest of ensuring the safety of everyone present at the event where kneeling is taking place. However, as indicated already, the universities could invest in more security and have more guards at the sporting events to ensure safety without infringing upon the athletes' First Amendment rights meaning that placing these restrictions on kneeling is not a narrowly tailored way to serve the interest of ensuring safety and so the universities would fail to meet strict scrutiny and be in violation of the First Amendment.

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<sup>202</sup> 36 U.S.C. § 301.

<sup>203</sup> *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

<sup>204</sup> *Id.*

<sup>205</sup> *Texas v. Johnson*, 491 U.S. 397, 410 (1989).

<sup>206</sup> Morshedi, *supra* note 107.



## B. Do High School Athletes' First Amendment Rights Cover Kneeling?

High school athletes are subjected to many different ways in which the schools can limit their freedom of speech. As with college athletes, one way that kneeling would not be protected under the First Amendment is if the speech is directed at creating imminent lawless action and is likely to create said lawless action.<sup>207</sup> As determined for college athletes, kneeling during the National Anthem is not illegal, meaning that encouraging others to join the cause is not speech directed at creating lawless action that is likely to create said lawless action. Thus, kneeling cannot be restricted this way for high school athletes either.

Bans and policies on kneeling that high school athletes would be forced into agreement with would also violate the high school athletes' First Amendment rights like the college athletes. For these types of regulations to be upheld, they would have to pass the strict scrutiny test, because kneeling is being used to convey a specific message that makes these bans and policies content-based, meaning that these regulations need to be "narrowly tailored" to achieving a "compelling government purpose."<sup>208</sup> The school's strongest interest is likely the safety for everyone present. However, the regulations would likely not survive strict scrutiny because they are not "narrowly tailored" because less restrictive means, such as more security, are available to these schools.

The difference between public and private high schools is where there is a divergence as to what restrictions are allowed for kneeling as compared to college athletes. Public high schools are state actors who are subject to the First Amendment. As such, public high schools cannot restrict the speech of their athletes, except when the speech is both directed towards creating lawless action and is likely to create said lawless action, as well as when the regulations survive strict scrutiny, meaning they are narrowly tailored to achieve a compelling government interest.<sup>209</sup> As neither of these have been the case so far, public high schools cannot restrict their athletes' ability to kneel during the National Anthem without violating the First Amendment.

Private high schools are not typically state actors and have more freedom to restrict their athletes' speech.<sup>210</sup> However, because the Supreme Court has held that private institutions can be considered state actors for First Amendment purposes, if a private institution is so intertwined with state organizations that it was exercising state action, the private school could be

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<sup>207</sup> Vile, *supra* note 201.

<sup>208</sup> Morshedi, *supra* note 107.

<sup>209</sup> *Id.*; Vile, *supra* note 201.

<sup>210</sup> The Civil Rights Cases, 109 U.S. 3, 10-12 (1883) (explaining the State Action Doctrine under the Fourteenth Amendment); *Gitlow*, 268 U.S. at 666 (holding that the First Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment).

considered a state actor if found to be sufficiently intertwined with state organizations.<sup>211</sup> As state actors, private schools would have to meet all the same requirements when suppressing student speech as public schools. So far, this has not been done.

Therefore, athletes at public high schools are free to kneel in protest until these schools can pass a regulation that would survive strict scrutiny. Moreover, athletes at private high schools are free to kneel in protest if the private school is considered so intertwined with state organizations as to be considered a state actor under *Brentwood Academy*.<sup>212</sup>

Under *Hazelwood*, athletes at both public and private high schools could be punished for kneeling in protest.<sup>213</sup> *Hazelwood* held that schools can regulate school-sponsored speech, so long as the regulations are reasonably related to legitimate pedagogical concerns, without violating the First Amendment.<sup>214</sup> The idea is that participation in athletics is school-sponsored, so any speech made while participating in athletics would be school-sponsored speech and, thus, *Hazelwood* would enable public schools to regulate athletes' speech.<sup>215</sup> However, in *V.A. v. San Pasqual Valley Unified School District*, kneeling in protest was distinguished from the type of speech in *Hazelwood*.<sup>216</sup> In this case, a student who kneeled in protest challenged rules implemented later that forbid kneeling, arguing that the rules were a violation of his First Amendment rights.<sup>217</sup> The Court held that the policy did not relate to school-sponsored speech, so the *Tinker* standard applied rather than *Hazelwood*.<sup>218</sup> Under the *Tinker* standard, the Court held that kneeling in protest is speech that is protected by the First Amendment.<sup>219</sup>

### C. Why *Tinker* is the Appropriate Standard

Symbolic speech is defined as nonverbal, nonwritten forms of communication.<sup>220</sup> Here, student-athletes are choosing to kneel during the National Anthem to communicate that they are against racial injustice and police brutality.<sup>221</sup> In addition to symbolic speech, kneeling in this situation is also political speech because it is being used to communicate the faults of law enforcement in the United States, as well as the oppression of African-

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<sup>211</sup> *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001).

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

<sup>213</sup> Zack Zastrow, *Everyone Take a Knee and Listen Up! Examining Student-Athlete Protests During the National Anthem*, 29 MARQ. SPORTS L. REV. 157, 173 (2018).

<sup>214</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

<sup>215</sup> Zastrow, *supra* note 213, at 174.

<sup>216</sup> *V.A. v. San Pasqual Valley Unified Sch. Dist.*, 2017 WL 6541447, at \*5 (S.D. Cal. 2017).

<sup>217</sup> *Id.* at \*1-3.

<sup>218</sup> *Id.* at \*5.

<sup>219</sup> *Id.* at \*4-7.

<sup>220</sup> Kahn, *supra* note 108.

<sup>221</sup> *Student Protests in Schools and Colleges: A Resource*, *supra* note 41.

Americans. *Tinker* is a much more appropriate standard than *Hazelwood* because *Tinker* involved symbolic political speech. Also, as acknowledged by *Hazelwood*, speech that is a student's personal expression that happens to take place on school premises is different from speech as part of a school-sponsored activity, hence why the court in *V.A. v. San Pasqual Valley Unified School District* used the *Tinker* standard rather than the *Hazelwood* standard.<sup>222</sup> Kneeling has been used as student-athletes' personal expression of their belief that racial injustice and police brutality are prevalent in the United States. That is distinct from a student publishing the beliefs in a school-sponsored newspaper because that student's opinion could be reasonably interpreted as also being the school's opinion. When kneeling, the students are representing their own values rather than the schools, which is readily apparent when only some students are kneeling and others are not. If the students who were kneeling were representing the school's values, all the students would likely be *forced* to kneel along with coaches and other employees. Under the *Tinker* standard, there is not a likelihood of a substantial disruption of school activities or infringement of others' rights because of kneeling. The kneeling, which is a silent act that is fundamentally no different from standing or sitting, takes place during the National Anthem, which is a roughly two minute song, that begins and ends before the sporting event even begins so kneeling will not disrupt any school activities. These student-athletes are also not infringing upon anybody else's rights. The athletes are not coercing others into kneeling. Thus, unlike a lewd speech filled with sexual innuendo or calling on others to create a flood of complaints towards the school, kneeling would likely not be considered disruptive similar to the armband protest from *Tinker* as it has no discernable effect on the school or its activities.

Because *Tinker* used a standard other than the *O'Brien* test, *Tinker* has been used for content-based restrictions which are presumed to be unconstitutional.<sup>223</sup> It has been suggested that these restrictions on kneeling are content-based because the school authorities disagree with the content of the message.<sup>224</sup> This is yet another reason why the *Tinker* standard is the most appropriate standard to apply to restrictions on kneeling during the National Anthem. Therefore, by restricting kneeling, schools have created content-based restrictions which are intended to keep student-athletes from protesting against racial injustice and police brutality and these restrictions should be presumed to be unconstitutional.

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<sup>222</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988).

<sup>223</sup> Starks, *supra* note 161.

<sup>224</sup> Laura Rene McNeal, *From Hoodies to Kneeling During the National Anthem: The Colin Kaepernick Effect and Its Implications for K-12 Sports*, 78 LA. L. REV. 146, 187 (2017).

## VI. CONCLUSION

Kneeling during the National Anthem will continue to be a controversial topic in the United States so long as athletes keep doing it. People will continue to debate whether athletes are allowed to kneel during the National Anthem and whether it is disrespectful and unpatriotic for these athletes to kneel during the National Anthem. Despite the debate, it is clear that college athletes at public universities do have a First Amendment right to kneel in protest during the National Anthem. Athletes at private universities, however, do not necessarily have this same right, unless these private universities are held to be so intertwined with state organizations that they are engaging in state action under the standard set forth in *Brentwood Academy*.<sup>225</sup>

Additionally, it is clear that high school athletes at public schools also have a First Amendment right to kneel in protest during the National Anthem under the *Tinker* standard. Athletes at private high schools would have a First Amendment right to kneel if the school is determined to be so intertwined with state organizations that the school is considered a state actor. However, with a situation such as this, changes are happening all the time. Currently though, students at public schools and private schools considered to be state actors have a right under the First Amendment to kneel in protest during the National Anthem. For as long the kneeling movement continues, it is a fascinating situation that should be watched closely.

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<sup>225</sup> *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001).