"Taking a Knee for the Constitution": the Kaepernick and Reid Grievances May be Settled but Do they Nevertheless Raise Important Constitutional Questions?

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Abstract

This article is a discussion of the issues and events relating to the protests of Colin Kaepernick, an accomplished quarterback in the National Football League. Part I describes the incidents themselves, the inability of Kaepernick to secure another quarterback position, and the grievance arbitration which he filed against the National Football League. Part II deals with the question whether Kaepernick has a justiciable claim that his First Amendment rights were violated in the context of the doctrine of "state action."

Keywords: Grievance; National Football League; Arbitration; First Amendment; "State Action"

PART I

1. Who Is Colin Kaepernick?

It is important to understand the background of the main protagonist in this saga (see, e.g., Dos Santos, 2017; Abdeldaiem, 2019). Colin Rand Kaepernick was born in 1987 in Milwaukee, Wisconsin. His parents separated before Kaepernick was born. Kaepernick was placed for adoption with a white couple, Rick and Teresa Kaepernick. The couple had two older children, a son Kyle and a daughter Devon. The Kaepernicks lived in Fond du Lac, Wisconsin, until Colin was age four, when his family moved to California. Kaepernick began playing football when he was eight years old. In high school, he was an excellent student, earning a 4.0 GPA at John H. Pitman High School in Turlock, California, where he played football, basketball, and baseball and was nominated for All-State selection in all three sports his senior year. Kaepernick received several scholarship offers in baseball, but he wanted to play college football.

The University of Nevada, Reno was the only collegiate football program to offer him a football scholarship and Kaepernick signed with Nevada in February 2006. Kaepernick began his college career in 2007 at Nevada as a back-up, playing quarterback in all but two of the team's 13 games.

He finished the season with nineteen passing touchdowns, threw three interceptions, and compiled 2,175 passing yards—with a 53.8% completion percentage, adding 593 rushing yards and six rushing touchdowns. During his sophomore year, Kaepernick passed for 2,849 yards, 22 passing touchdowns, threw seven interceptions, and ran for 1,130 yards, with 17 rushing touchdowns. Kaepernick was drafted in the 43rd round in the 2009 Major League Baseball Draft by the Chicago Cubs. However, Kaepernick elected to continue to play football at the University of Nevada, Reno and chose not to sign with the Cubs. Kaepernick finished his junior season with 2,052 passing yards, twenty passing touchdowns, threw six interceptions and compiled 1,183 rushing yards and sixteen rushing touchdowns. Kaepernick ended his senior season with 3,022 passing yards, twenty-one passing touchdowns, threw eight interceptions and 1,206 rushing yards and twenty rushing touchdowns. Kaepernick was the first and only quarterback in the history of Division I college football to have passed for over *10,000 yards* and rushed for over *4,000 yards* in a collegiate career. Kaepernick continued to excel in academics as well, maintaining a 4.0 grade point average and graduated in 2011 with a bachelor's degree in business management. After his senior season, Kaepernick was eligible for the 2011 NFL Draft.

His professional career may be highlighted as follows:

- 2011 - Taken as 36th overall draft pick by the San Francisco 49ers (49ers)
- 2011 - Makes his playing debut for the 49ers, playing in three games
- 2012 - Becomes the 49ers starting quarterback midway through the 2012 season. During the 2012 season, Kaepernick rushed for 163 rushing yards in a playoff game against Green Bay—a record by a quarterback in postseason. Kaepernick led the 49ers to the Super Bowl, where they lost to the Baltimore Colts
- 2013 – As the 49ers' starting quarterback, Kaepernick guides the team to the NFC Championship game, before losing to the Seattle Seahawks
- 2014 - Plays in 16 games
- 2015 - Plays in nine games
- 2016 - Begins kneeling during the pre-game playing of U.S. National Anthem to protest police brutality and racial injustice—the first and most prominent of dozens of NFL players to do so during the 2016 season
- 2016 - Plays 12 games for the 49ers

2. The Controversy

In the 49ers third preseason game of the 2016 season, Kaepernick sat down on the team bench during the playing of the National Anthem. During a post-game interview, he stated: "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." Kaepernick added that the American flag "represents what it's supposed to represent" (see also Intravia, Piquero, & Piquero, 2018). In the 49ers' fourth and final preseason game, instead of sitting on the team bench, Kaepernick knelt during the U.S. National Anthem in order to show respect to former and current U.S. military members. After the September 2016 police shootings, Kaepernick commented publicly on the shootings saying, "This is a perfect example of what this is about." Kaepernick, however, went further. Photos surfaced on the Internet of Kaepernick wearing socks depicting police officers as pigs. In a statement he acknowledged wearing the socks as a protest against "rogue cops." Kaepernick went on to kneel during the National Anthem prior to every 49ers game that season (see Coombs, Lambert, Cassilo, & Humphreys, 2010).

The backlash in the media and among NFL fans against Kaepernick was immediate (see Boykoff & Carrington, 2019). Some fans and commentators called for Kaepernick to be "fired" (see Finck, 2018). At the same time as the controversy was brewing, Kaepernick pledged $1 million to "organizations working in oppressed communities." He donated $25,000 to the *Mothers Against Police Brutality* that was started by Collette Flanagan, whose son, Clinton Allen, was a victim of alleged police brutality. [Clinton was unarmed; he was shot once in the arm, five times in the chest, and once in the back.] In 2018, Kaepernick announced that he would make the final $100,000 donation of his "Million Dollar Pledge" in the form of $10,000 donations to charities that would be matched by celebrities (Ingrassia, 2016; Bishop & Baskin, 2017; Parry & Burke, 2018; Jacobs, 2018). Celebrities who joined Kaepernick included: Snoop (Mothers Against Policy Brutality), Serena Williams (Imagine, LA), Kevin Durant (De-Bug), Jesse Williams (Advancement Project), TI (Angel by Nature), Jhene Aiko (Schools on Wheels), Chris Brown (Schools on Wheels), Meek Mill (Youth Services), Usher (Helping Oppressed Mothers Endure), and Steph Curry (United Playaz).

Seemingly inspired by Kaepernick, several NFL players and other professional athletes conducted various forms of "silent protests" during the playing of the National Anthem as well. At the same time, the NFL experienced an 8 percent decline in viewership during the 2016 season (Ozonian, 2016)—with the No. 1 reason, cited by 30 percent of fans in a *J. D. Power* survey, being the player protests.

Kaepernick's San Francisco teammates largely rallied around him and awarded him the team's *Len Eshmont Award* as the player who best epitomized the" inspirational and courageous play" of former 49er Len Eshmont (Wagoner, 2016).

The chronology continues:

- **March 3, 2017:** Kaepernick decides to opt out of his contract with the 49ers. Reports indicated that the 49ers would have cut Kaepernick had he not opted out of his contract (Brinson, 2017). Even though Kaepernick was now a *free agent* who could be signed by any NFL team, Kaepernick remained unsigned during the offseason.
- **Sept. 22, 2017:** President Donald Trump calls on NFL owners to fire players who refuse to stand for the national anthem. "Wouldn't you love to see one of these NFL owners, when somebody disrespects our flag, say: 'Get that son of a bitch off the field right now. Out. He's fired. He's fired.'" Trump made these comments as the he stood in front of a giant American flag at a campaign rally for Alabama Senator Luther Strange (who later lost the Republican senatorial primary to Roy Moore).
- **Sept. 25, 2017: Kaepernick remained unsigned.** Teams from both the NFL and NBA respond to President Trump's comments. Several owners kneel or lock arms with players during the National Anthem. Fan reaction is still mixed—but remains largely negative.
- **Oct. 15, 2017:** Kaepernick files a *grievance* against the NFL (generally Sussman, 2019; Boyce, 2019) in which he accused owners of "colluding" by not signing him and keeping him out of the NFL (see McElvenny, 2019). Kaepernick claims that the collusion stems from his "leadership and advocacy for equality and social justice and his bringing awareness of peculiar institutions still undermining racial equality in the United States" (Epstein, 2017). [See Appendix I for a Text of the Grievance filed by Kaepernick's attorneys.]
- **Dec. 3, 2017:** The American Civil Liberties Union (ACLU) honors Kaepernick with the *Courageous Advocate* award. Kaepernick is later also named a finalist for Time Magazine's "Person of the Year."
- **May 2, 2018:** A second player, Eric Reid, who was cut by 49ers, files a collusion grievance against the NFL, claiming that he went unsigned during the offseason because of his protests alongside Kaepernick (Lyles, Jr., 2018).
- **August 30, 2018:** An arbitrator denies the NFL's request to dismiss Kaepernick's complaint, ruling in favor of Kaepernick on the NFL's motion for summary judgment, and moving the case toward a grievance arbitration hearing.
- **Sept. 3, 2018:** Nike reveals its new controversial advertising campaign featuring Kaepernick with the slogan, "Believe in something, even if it means sacrificing everything" (see, e.g. Beer, 2019).
- **Sept. 27, 2018:** Reid signs a one-year contract with the Carolina Panthers. Reid finished the season with 50 solo tackles and an interception.
- **Feb. 11, 2019:** Reid signs a three-year, $22 million contract with the Panthers.
- **Feb. 15, 2019:** Kaepernick and Reid end their collusion grievance against the NFL. A statement was issued by their counsel: "For the past several months, counsel for Mr. Kaepernick and Mr. Reid have engaged in an ongoing dialogue with representatives of the NFL. As a result of those discussions, the parties have decided to resolve the pending grievances. The resolution of this matter is subject to a confidentiality agreement so there will be no further comment by any party."

3. Kaepernik's Grievance Against the NFL

McCann (2018) writes that "Collusion occurs when two or more teams, or the league and at least one team, join to deprive a player of a contractually earned right. Such a right is normally found in the collective bargaining agreement signed by a league and its players' association. For example, the right of a free-agent player to negotiate a contract with a team cannot be impaired by a conspiracy of teams to deny that a player a chance to sign." Upon filing the grievance, Kaepernick's attorney, Mark Geragos, stated: "If the NFL (as well as all professional sports leagues) is to remain a meritocracy, then principled and peaceful political protest—which the owners themselves made great theater imitating weeks ago—should not be punished and athletes should not be denied employment based on partisan political provocation by the Executive Branch of our government. Such a precedent threatens all patriotic Americans and harkens back to our darkest days as a nation. Protecting all athletes from such collusive conduct is what compelled Mr. Kaepernick to file his grievance. Colin Kaepernick's goal has always been, and remains, to be simply be treated fairly by the league he performed at the highest level for and to return to the football playing field."At the same time, the National Football League Players' Association (NFLPA) released a statement in support Kaepernick. The statement reads: "Our union has a duty to assist Mr. Kaepernick as we do all players and we will support him.

The NFLPA has been in regular contact with Mr. Kaepernick's representatives for the past year about his options and our union agreed to follow the direction of his advisors throughout that time. We first learned through media reports today that Mr. Kaepernick filed a grievance claiming collusion through our arbitration system and is represented by his own counsel. We learned that the NFL was informed of his intention to file a grievance before today. We are scheduling a call with his advisors for early this week."In July, the NFL filed a motion for summary judgment on Kaepernick's collusion grievance. Daniels (2018) reported the NFL had asked the arbitrator, Stephen Burbank, to "review information brought forward in the case's 14 depositions, including those with [NFL] commissioner Roger Goodell and Dallas Cowboys owner Jerry Jones, to determine whether there's 'sufficient evidence' to continue or if the league and its teams can be cleared." Had the arbitrator agreed to the NFL's motion to dismiss at that time, it would have essentially ended Kaepernick's grievance.

On August 28, 2018, the arbitrator issued a ruling in favor of Kaepernick and denied the NFL's request for summary judgment, which moved the case to the hearing phase. The text of the denial of the motion for a summary judgment stated: "On August 28, 2018, the System Arbitrator [Burbank] denied the NFL's request that he dismiss Colin Kaepernick's complaint alleging that his inability to secure a player contract since becoming a free agent in March 2017 has been due to an agreement among team owners and the NFL that violates Article 17, Section 1 of the collective bargaining agreement between the NFL and the NFLPA (union)."

3.1 The Edelman View

Marc Edelman is a Professor at Baruch College. He is one of the foremost experts in the area of sports law. Edelman (2017) outlines some of the main factors relating to Kaepernick's claim of collusion:

1. **"The term "collusion" typically means a secret or illegal agreement."** Claims of **c**ollusion arise under Section 1 of the *Sherman Antitrust Act* (1896), which states that any "contract, combination or conspiracy in the restraint of trade shall be illegal" (see Heitner & Postal, 2018). However, because of the close relationship between labor law and antitrust law, in order to evaluate the collusion claim properly, it would be necessary to focus on the language that appears in the NFL's collective bargaining agreement. Specifically, Article XVII(a)(1) of the NFL Collective Bargaining Agreement (CBA) states that no NFL club or its employees "shall enter into any agreement, express or implied, with the NFL or any other club, its employees or agents to restrict or limit individual club decision making as to .... whether to negotiate or not to negotiate with any player."
2. **"If Kaepernick prevails, he will recover at least double his lost salary."** Article XVII(a)(8)-(9) specifies the remedy for violating this section of the CBA as *double* the compensatory damages awarded in the event of a first-time offense. (This provision differs from the *Sherman Act* which provides for the award of treble (three times) damages in cases of a proven violation.)
3. **"In some well-known cases, professional sports owners were found liable for colluding against players**." Perhaps the most well-known collusion grievances were brought by the Major League Baseball Players Association against Major League Baseball for colluding in the free-agent market during the 1985, 1986, and 1987 off-seasons in order to suppress players' salaries. Thereafter, two separate arbitrators, Thomas Roberts and Georges Nicolau, found that the teams had in fact engaged in collusion, and the league ultimately paid nearly $280 million to the league's players to settle these grievances (Durland & Sommers, 1991).
4. **"However, other collusion claims in sports that might have seemed strong on the surface failed because of a lack of evidence."** As noted by Egelko (2017), "Kaepernick's collusion claim [may be hard] to prove." A failed claim of collusion involved Major League Baseball's career home run leader, Barry Bonds after he could not sign with a new team for the 2008 season, even after he had offered to play for the league minimum salary of $400,000," a steep discount from his most recent salary of $15.5 million" (McCann, 2009). Edelman (2017) wrote: "While it seems likely that Bonds, in actuality, was a victim of collusion, the arbitrator found that Bonds had failed to meet his burden of proof in establishing that his lack of offer was anything more than the 30 teams simply engaging in consciously parallel behavior."
5. **"Unless there is strong, written evidence of collusion, Kaepernick's biggest obstacle in prevailing may be that he is not a superstar."** To be more accurate, perhaps the point should state "… is no longer a superstar at age 32."

4. The Arbitration

Michael McCann, the legal analyst for *Sports Illustrated*, and Associate Dean of the University of the New Hampshire School of Law, has written extensively on the Kaepernick controversy. McCann (2018) noted that *w*hile arbitrator Stephen Burbank denied the NFL's request for summary judgment, Burbank's ruling means that, in the absence of a negotiated settlement between Kaepernick and the NFL, Kaepernick's grievance would proceed to a trial-like hearing before Burbank. The ruling also indicated that all 32 teams would remain parties in the grievance.

Noted McCann (2018), "This is a subtle but potentially groundbreaking point since if Burbank finds that 14 or more teams engaged in collusion, the NFLPA could acquire the option of terminating the collective bargaining agreement."In a legal sense, Burbank's decision was not based on an evaluation of the merits of Kaepernick's grievance. Instead, Burbank ruled that the defendants had not met the necessary standard for granting summary judgment under Article 17 of the CBA.

At the same time, Burbank would have granted summary judgment against Kaepernick if Kaepernick had not been able to show enough evidence sufficient to "raise a genuine issue of material fact." The "genuine issue of fact" raised by the Kaepernick grievance is whether two or more teams, or the league and at least one team, had conspired to deprive him of his collectively bargained right to sign with a NFL team. Kaepernick's legal team had deposed a targeted group of owners and executives, including NFL commissioner Roger Goodell, Dallas Cowboys owner Jerry Jones, Houston Texans owner Bob McNair, New England Patriots owner Robert Kraft, and Denver Broncos general manager John Elway. Kraft was of special interest to Kaepernick's attorneys because he had flown with the President Trump on Air Force One on March 19, 2017. Just one day later, Trump had sharply criticized Kaepernick and his anthem protests. NFL officials and owners vehemently denied that there was any conspiracy to deny Kaepernick a chance to play, but the arbitrator believed that the matter required the further scrutiny of the grievance arbitration hearing.

4.1 Evidentiary Questions

Had the matter reached the full hearing stage, the proceedings would not have been a "trial" as that term is conventionally understood, but rather, a hearing where there is no jury. During the arbitration hearing, evidence would be presented and attorneys for each side would have the opportunity to question and cross-examine witnesses, who would testify under oath (see Donegan, 1994). However, since Burbank had already ruled against the NFL on the issue of summary judgment, presumably he had seen *some evidence* of collusion and had determined issues of credibility relating to the owners, as well as that of Kaepernick. The scope of evidence presented in the arbitration hearing would also be "more expansive" than the evidence the arbitrator had already considered in ruling on the motion for summary judgment by the NFL. If Kaepernick were to prevail in the arbitration hearing, he could be awarded substantial monetary damages. Under Article 17, Kaepernick could be awarded both *compensatory* damages and *non-compensatory* damages. Compensatory damages would reflect the amount of money Kaepernick *would have potentially earned but for the collusion,* while non-compensatory damages would equal *twice* the amount of compensatory damages. In real terms, for example, if Kaepernick were able to prove that he would have signed an $8 million contract but for collusion, he would be awarded *$24 million in damages*: $8 million in compensatory damages, plus $16 million in non-compensatory damages (see, e.g., Isidore, 2017).

The adverse ruling on the motion for summary judgment didn't guarantee that the arbitrator would ultimately rule in Kaepernick's favor on the underlying grievance. Under Article 17 of the CBA which governs arbitration, the issue on the motion for summary judgment is whether Kaepernick has shown enough evidence to raise a *genuine issue of material fact*. In contrast, in the actual arbitration hearing Kaepernick will be required to demonstrate by a "clear preponderance of evidence" that collusion occurred and that such collusion caused him economic injury. The phrase "clear preponderance" reflects a high standard of persuasion—higher than the "preponderance of evidence" or "more likely than not" standard used in civil trials. Accordingly, it might be possible that the arbitrator could find that while Kaepernick had proved initially that there was a "genuine issue of material fact" as to the issue of collusion on the NFL's motion for summary judgment, he was not able to prove by "a clear preponderance of evidence" that collusion had actually occurred. Even assuming that the arbitrator might rule in Kaepernick's favor, a long process of appeals might then ensue. Whichever side loses the arbitration hearing could bring suit in a U.S. District Court (see generally Hunter, 2011), arguing that the arbitration award should be *vacated* or set-aside on grounds that it was improperly decided.

Grenig (2014) writes that the *Federal Arbitration Act* (1925): "provides the following grounds for vacating an arbitration award: (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."Reflecting on the criteria established above, when Major League Baseball challenged the arbitration decision in the "*Messersmith-McNally Grievances"* (1976), the United States Circuit Court held as follows in responses to these issues:

1. We hold that the arbitration panel had *jurisdiction* to hear and decide the Messersmith-McNally grievances;
2. That the panel's award *drew its essence from the collective bargaining agreement*; and

3. That the *relief fashioned by the District Court was appropriate*.

4.2 Other Issues Raised in the Arbitration

Other issues must be considered. One of the clauses in Article 17 of the CBA provides that the NFLPA can elect to terminate the entire CBA if the arbitrator identifies "severe and pervasive collusion" by "clear and convincing evidence" that 14 or more teams engaged in collusion and if the arbitrator finds that teams engaged in "willful collusion with the intent to restrain competition among teams." The termination of the CBA would potentially be extremely impactful. American labor law and antitrust law work in tandem under rules known as the *statutory* and *non-non-statutory labor exemptions* (Freedman, 2005; Sia, 2006; Swanson, 2019). The statutory labor exemption to federal antitrust laws is designed to protect legitimate union organizing activities. The statutory exemption is based on various sections of both the *Clayton Act* (1914) and the *Norris-LaGuardia Act* (1932). The non-statutory exemption is based on an 'accommodation between the congressional policy favoring collective bargaining under the [National Labor Relations Act] and the congressional policy favoring free competition in business markets'" (see *Connell Construction Co. v. Plumbers & Steamfitters Local,* 1975).

McAllister (1987) noted that the United States Supreme Court drew from its decisions in *United Mine Workers v. Pennington* (1965) and *Amalgamated Meat Cutters v. Jewel Tea* (1965) (Columbia Law Review (Note), 1966; Di Cola, 1972). In order to apply the non-statutory labor exemption, courts will ask three questions: (1) Does the challenged agreement primarily affect only the parties to the collective bargaining agreement? (2) Does the agreement relate to a mandatory subject of collective bargaining? (i.e., "wages, hours and working conditions," broadly speaking); and, (3) Is the agreement embodied in a formal collective bargaining agreement that is the product of "bona fide, arm's-length bargaining?" If all three questions are answered affirmatively, the non-statutory exemption applies and the practices will be protected from challenges on anti-trust grounds.

Through the non-statutory labor exemption, the CBA immunizes or protects many NFL rules that restrain competition relating to "wages, hours and working conditions" from antitrust lawsuits that are collectively bargained. Specifically, those rules include core aspects of the NFL business model, such as the *salary cap, the draft, free agency exceptions, and the rookie wage scale* (Shapiro, 1965; Albert & Albert, 1995; see also *Clarett v. NFL,* 2004). The stakes were very high indeed. The termination of the CBA would open the door to a new labor crisis that could lead to very different reality for both the players and management. Would a compromise be possible?

5. Settlement of the Grievance

Precisely because the stakes were so high, Abdelaiem (2018) and West (2018) reported that the NFL and lawyers for players, Mark Geragos and Ben Meiselas, announced that they had settled the complaint of collusion filed by the players. A joint statement was issued: *"For the past several months, counsel for Mr. Kaepernick and Mr. Reid have engaged in an ongoing dialogue with representatives of the NFL. As a result of those discussions, the parties have decided to resolve the pending grievances. The resolution of this matter is subject to a confidentiality agreement so there will be no further comment by any party."*According to the *Wall Street Journal,* the terms of the settlement included an unspecified monetary payment to Kaepernick and Reid (estimates were in the range of $10 million or slightly less) were confidential (West, 2019). The NFL Players Association released its own statement in response to the news of the settlement:"Today, we were informed by the NFL of the settlement of the Colin Kaepernick and Eric Reid collusion cases. We are not privy to the details of the settlement, but support the decision by the players and their counsel…." "We continuously supported Colin and Eric from the start of their protests, participated with their lawyers throughout their legal proceedings and were prepared to participate in the upcoming trial in pursuit of both truth and justice for what we believe the NFL and its clubs did to them. We are glad that Eric has earned a job and a new contract, and we continue to hope that Colin gets his opportunity as well."PART II

6. One Final Issue: Might Kaepernick have a Constitutional Argument?

There are still a few "unknowns." Because the terms of settlement in the Kaepernick and Reid grievances (Mangan, 2019) were not made public, there is no way at present to know if the settlements were made contingent on the parties dropping their cases against the NFL or on signing "confidentiality agreements." However, should Kaepernick at some point decide to claim that his constitutional rights were violated, could he meet the challenge of demonstrating "state action" on the part of the NFL by filing a lawsuit as opposed to filing a grievance? Many Americans believe that the actions of the NFL, spurred on by the comments of President Trump, may have amounted to a violation of Kaepernick's First Amendment right to "freedom of speech" or certainly to his right of "freedom of expression." Several commentators analogized Kaepernick's situation to *Tinker v. Des Moines Independent School District* (1969)— a case that involved *symbolic speech*—certainly implicated by Kaepernick's actions in sitting and then kneeling for the National Anthem.

6.1 The Constitutional Argument

It is true that a number of provisions of the United States Constitution prohibit the government from infringing on individual constitutional rights— including First Amendment "freedom of speech" rights. However, only the Thirteenth Amendment, which prohibits the institution of slavery whether imposed by the government or by a private party, extends to both private and governmental action.

If an action does not involve rights under the Thirteenth Amendment, it would is necessary to demonstrate that the actions of an individual owner, or in this case the NFL, were undertaken "under color of law" to find that Kaepernick's constitutional rights had been violated. An indication of *state action* may occur when the government "requires, sanctions, or significantly encourages" private acts of discrimination or violations of individual rights.

6.2 What is State Action?

Hunter and Alexander-Becker (2007) note that when Congress enacted Title 42, Section 1983 of the United States Code as the statutory remedy for violations of the Constitution, it specified that the conduct at issue must have occurred "under color of law." This requirement attaches liability for constitutional violations only to those parties who act with the apparent authority of the state, even if they might act outside of or abuse their authority (*United States v. Classic*, 1941). Closely associated with the "color of law" requirement is the concept of "state action." State action would normally includes actions undertaken by legislative, executive, judicial, and administrative branches or agencies of both the federal and state governments and their political subdivisions, including counties, cities, and districts. State action also includes conduct or actions performed by government officials in their official capacities "under color of law," even though their actions may be specifically forbidden by law. A number of cases have arisen which have involved circumstances where the government has either required or significantly encouraged the specific acts complained of—especially in the area of racial discrimination in violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution. At the same time, the Supreme Court concluded in Burton v. Wilmington Parking Authority (1961) that the Fourteenth Amendment "'erects no shield against merely private conduct, however discriminatory or wrongful' . . . unless to some significant extent the State in any of its manifestations has been found to have become involved in it." Thus, to bring a claim of a violation of the Constitution, Kaepernick would have to prove that the NFL had become a "state actor" or that state had either undertaken actions to "compel" or "significantly participate" in the private conduct of NFL owners or the NFL as an entity. Whether state action may be found requires a *case-by-case* determination, which will turn on the particular facts brought before a court. Two Supreme Court cases may shed some light on the discussion: *NCAA v. Tarkanian* (1988) and *Brentwood Academy v. Tennessee Secondary School Athletic Association* (2001) (see generally Hunter and Alexander-Becker, 2007; Hunter, Shannon, & McCarthy, 2013).

In *NCAA v. Tarkanian* (1988), the United States Supreme Court was called upon to decide a case involving a rather notorious figure embroiled in a bitter and protracted controversy with the NCAA that extended for more than three decades. The status of the NCAA was at the heart of the controversy. Coach Jerry Tarkanian of UNLV filed suit alleging that the NCAA had violated his constitutional rights under the Fifth Amendment by essentially suspending him without providing him with "due process of law." The United States Supreme Court concluded that the NCAA, which is a voluntary association of public and private universities and colleges that establishes rules ("legislation") for its members, was *not* a state actor. Thus, the Court held that Coach Tarkanian could not sue the NCAA for allegedly violating his constitutional rights. The decision of the Court, however, was not unanimous. Justice White stated in his dissenting opinion that he would have found that the NCAA was a "state actor" because it had in effect "*acted jointly*" with UNLV in suspending Coach Tarkanian. In a second case, the Supreme Court in *Brentwood Academy* (2001) departed from the majority opinion in *Tarkanian* and held that the Tennessee Secondary School Athletic Association (TSSAA), an association that regulates high school sports within Tennessee, and to which most public and private schools belonged, was so *entwined* with the state of Tennessee that its actions could fairly be considered those of the state, i.e., constituting "state action."The decision in *Brentwood Academy* implicated the Fourteenth Amendment, which had made important provisions of the Bill of Rights applicable to the states through what is termed the "incorporation doctrine" (Hunter & Lozada, 2010). One of these provisions of the Bill of Rights was the First Amendment guarantee of "freedom of speech."

7. Does Brentwood Academy Hold the Key? Could the NFL be considered a "State Actor"?

In *Brentwood Academy* (2001), the Supreme Court focused on the "close nexus between the State and challenged action [to determine if the private action] may be fairly treated as that of the State itself." Justice Souter, who wrote the majority opinion, concentrated on what he believed was the most important consideration in imposing due process obligations of the Fourteenth Amendment on the defendant. "Thus, we say that state 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.' " The majority decision in *Brentwood Academy* was met with a sharp dissent. Chief Justice Rehnquist and Justices Scalia and Kennedy joined in Justice Thomas' dissenting opinion. Justice Thomas addressed the "entwinement doctrine" by stating, "[w]e have never found state action based upon mere 'entwinement.'"

Moreover, Justice Thomas noted that the Court has "found a private organization's acts to constitute state action only when the organization *performed a public function*; was *created, coerced, or encouraged* by the government; or *acted in a symbiotic relationship* with the government.'" Quoting *Lugar v. Edmondson* (1982), Justice Thomas reiterated, "[c]areful adherence to the state action requirement ... preserves an area of individual freedom by limiting the reach of federal law and federal judicial power."Clearly, the NFL does not perform a "public function" as the term is commonly understood. However, based on both *Tarkanian* and *Brentwood Academy*, what particular facts or factors, *if any*, might serve as the basis for a claim of a constitutional violation on behalf of Kaepernick?

7.1 The NFL as a State Actor?

Waldron (2018) quotes attorney Mark Edelman who argues that the NFL could in fact be considered a state actor for two reasons: "First, because it receives tax breaks from the federal government"; and second, "because most of its teams play in stadiums that are partly financed by local governments"—often constructed through the use of the government's power of eminent domain (Hunter & Simansky, 2014). Waldron adds that "It is also true that NFL stadiums have also received billions of dollars in federal tax subsidies." In *Ludtke v. Kuhn* (1978), a New York judge had found that the policy of the New York Yankees and Major League Baseball that had banned female reporters from their locker room violated the Constitution's Equal Protection Clause because New York City *owned* Yankee Stadium, qualifying the Yankees as a state actor.

In addition, reflecting on *Tarkanian* and *Brentwood Academy*, other more discreet factors may prove critical in deciding if Kaepernick has a justiciable claim of a violation of his Constitutional right of freedom of speech. That is, is the NFL connected or "entwined" to the U.S. government as a result of extensive armed forces advertising during NFL games and other activities which would expose the NFL to state action standards? Schmitz (2017) wrote that "many of the military displays present at NFL games were, at one time, financed by the government. Rather than organic, wholesome expressions of patriotism — the kind Trump has claimed NFL players are disrespectfully protesting — the tradition of players standing for the national anthem is a recent tradition that may have coincided with a marketing ploy meant to sell cheap, manufactured nationalism." It appears that as recently as 2015, the Department of Defense was "doling out millions to the NFL for such things as military flyovers, flag unfurlings, emotional color guard ceremonies, enlistment campaigns, and — interestingly enough — national anthem performances" (Schmitz, 2017; see also Becker, 2018). Overall, the Defense Department spent at least *$10.4 million* on "marketing and advertising contracts with professional sports teams" across the board between 2012 and 2015. Schmitz (2017) reported that in 2015, Arizona Senators Jeff Flake and John McCain revealed that "nearly $5.4 million in taxpayer dollars had been paid out to 14 NFL teams between 2011 and 2014." Overall, they reported, "these displays of paid patriotism [were] included within the $6.8 million that the Department of Defense (DOD) [had] spent on sports marketing contracts since fiscal year 2012." Senators Flake and McCain reported that "Among the more wasteful expenditures were payments to the Atlanta Falcons to have a National Guard member sing the national anthem and a payment to the Minnesota Vikings for the "'opportunity' to sponsor its military appreciation night."" Taken together, the factual circumstances raised by Waldron, Edelman, and Schmitz might provide the basis for holding that the NFL is a state actor. But one more factor might prove more critical.

8. The "Coercion" Argument

Does Kaepernick have a "credible argument" that the NFL was an entity that was improperly influenced, or in the words of Justice Thomas, "*coerced*" or "*encouraged*" by President Trump so that it could be considered a "state actor"? Consider the following sample of tweets and comments made by President Trump regarding Kaepernick's protests (Schmitz, 2017):

- *"If a player wants the privilege of making millions of dollars in the NFL or other leagues. He or she should not be allowed to disrespect our Great American Flag (or Country) and should stand for the National Anthem";*
- *"Sports fans should never condone players that do not stand proud for their National Anthem or their Country";*
- *"Courageous Patriots have fought and died for our great American flag—we MUST honor and respect it! MAKE AMERICA GREAT AGAIN";*
- *"Sports fans should never condone players that do not stand proud for their National Anthem or their Country. NFL should change policy."*

Of special note may be the President's tweet in September which suggested that certain tax breaks (discussed earlier) be eliminated if the league didn't start punishing the protesters. President Trump had tweeted: *"Why is the NFL getting massive tax breaks while at the same time disrespecting our Anthem, Flag and Country? Change tax law!"*

Edelman (2017) wrote: "President Trump made things substantially worse for himself when he tweeted what reasonably can be construed as a threat to attempt to take away tax benefits from NFL teams if they did not fire protesting players." Grossman (2018) added that Kaepernick's legal team expressed a strong interest in issuing a subpoena to compel the testimony of both President Trump and Vice President Pence if the matter reached a trial stage.

While it is true that the NFL voluntarily relinquished its organizational tax-exempt status in 2015 (Isidore, 2015) amid a barrage of negative publicity and public comment, it is also true that individual teams and team owners have benefitted from individual and corporate tax breaks (Paulas, 2018), including an important provision in the tax code that subsidizes federal bonds used to build new stadiums. Although there had been an attempt to remove this particular break from the tax code, President Trump, signed tax reform legislation in 2017 that preserved the subsidy. Garcia (2016) estimated that the Denver Broncos stadium was "just one of 36 that have received a total of $3.2 billion in tax breaks since 2000. Brookings calculates that the federal government lost $3.2 billion in tax revenues—and $3.7 billion if you count the windfall that high-income bond holders get."

However, as Leah Litman, a Professor of Law at the University of Michigan Law School opined, had President Trump actually followed through on his threats to change NFL-related tax laws, "a First Amendment case against him would be 'more straightforward'" (quoted in Waldron, 2018). In the same article, Professor Litman also suggested that ESPN anchor Jemele Hill, who came under criticism from the White House after calling President Trump a "white supremacist," could have a potential First Amendment claim against the President had ESPN chosen to fire her. In terms of filing a First Amendment complaint, the resolution of the issue may depend upon whether the President is "merely using the presidential bully pulpit" or actually "changing minds in his capacity as president." Interestingly, based on the dissenting opinion of Justice Thomas in *Brentwood Academy,* would it be possible to argue that the mere *threat* of a sanction could bolster a possible First Amendment case if President Trump's statements were found to have "coerced" or "encouraged" the NFL to change its policies regarding protests during the playing of the anthem and to punish the athletes who protested during its playing— even if the attempt was unsuccessful?

Edelman (2017) had identified a decision of the United States Supreme Court in *Bantam Books v. Sullivan* (1963) in which the Supreme Court held that a private company had become a state actor because "a government entity used the 'threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation' to induce private entities to act in a way that chills free speech rights."

In furtherance of this theory, there were reports that testimony from the owner of the Dallas Cowboys (Jerry Jones) in a "leaked" deposition in the Kaepernick case may have directly implicated President Trump in criminal behavior in violation of a federal statute, 18 U.S. Code 227, which is captioned: "Wrongfully influencing a private entity's employment decisions by a Member of Congress or an officer of employee of the legislative or executive branch"—all "because it was good for him politically" (Smith, 2018). Waldron (2018) also reported that Miami Dolphin's owner Stephen Ross stated that "I was totally supportive of [the players] until Trump made his statement. I thought he changed the dialogue."

Ironically, according to Edelman (2017), the statements of owners Jerry Jones and Ross and the Presidential tweets themselves could "strengthen the argument that the president of the United States violated the First Amendment rights of NFL players by petitioning their bosses to fire them and threatening financial harm to their bosses if they do not do so." And, by the close affiliation of the NFL with the President, the constitutional rights of Colin Kaepernick had been violated.

9. A Tentative "Constitutional Conclusion"

It does appear that the President's comments and tweets did affect the policies of the NFL, but not in the precise way President Trump had envisioned. In May of 2018, Garcia-Navarro (2018) reported that owners had unanimously approved a new National Anthem policy that requires players to stand if they are on the field during the performance, but gave them the option to remain in the locker room if they prefer. Seifert & Graziano (2018) wrote: "The policy subjects teams to a fine if a player or any other team personnel do not show respect for the anthem. That includes any attempt to sit or kneel, as dozens of players have done during the past two seasons to protest racial inequality and police brutality. Those teams also will have the option to fine any team personnel, including players, for the infraction." Commissioner Roger Goodell said the vote was "unanimous" among owners, although San Francisco 49ers owner Jed York said he that he had abstained. Interestingly, the policy was to become a part of the NFL's *game operations manual* and thus would not be subject not subject to collective bargaining. The NFL Players' Association responded by filing

yet another grievance. However, Darlington (2019) reported that by July the league decided to "hit pause" on its new policy. The league and the NFL Players Association issued a joint statement that said "no new rules relating to the anthem will be issued or enforced for the next several weeks" while both sides continued to hold discussions to figure out how to move forward.

"The NFL and NFLPA reflect the great values of America, which are repeatedly demonstrated by the many players doing extraordinary work in communities across our country to promote equality, fairness and justice. Our shared focus will remain on finding a solution to the anthem issue through mutual, good faith commitments, outside of litigation."

Hunter and Alexander-Becker (2007) wrote that it is certainly true that "the majority in *Brentwood Academy* applied but never fully defined 'entwinement.' Therefore, the scope of its holding remains unclear. Justice Thomas' criticism, however, is both stinging and direct." Justice Thomas remarked, "[i]f we are fortunate, the majority's fact-specific analysis will have little bearing beyond this case." He warned that should the majority's new entwinement test develop in future years and become an accepted basis for finding "state action," it could affect many activities in high schools, not merely athletics. Could the doctrine of entwinement also be expanded to the NFL? Did his inclusion of the words "*created, coerced, or encouraged*" open the door to a further expansion of "state action"? Unknowingly, the Thomas dissent in *Brentwood Academy* may prove to be most prophetic and may provide Kaepernick with an avenue not previously explored.

Appendix I – The Demand For Arbitration

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IN THE MATTER OF ARBITRATION OF
COLIN KAEPERNICK, CLAIMANT,
vs.
NATIONAL FOOTBALL LEAGUE, et al., RESPONDENTS.
No.:
CLAIMANT COLIN KAEPERNICK'S DEMAND FOR ARBITRATION
SBN 108325 SBN 277412 SBN 251614

TO THE NATIONAL FOOTBALL LEAGUE AND ALL 32 TEAMS COMPRISING THE LEAGUE:
PLEASE TAKE NOTICE THAT CLAIMANT COLIN KAEPERNICK hereby commences an Enforcement Proceeding pursuant to Articles 15 and 17 of the National Football League (―NFL‖) Collective Bargaining Agreement (―CBA‖). CBA Article 17, Section 1 states:
No club, its employees or agents shall enter into any agreement, express or implied, with the NFL, or any other Club, its employees, or agents to restrict or limit individual Club decision making as follows:
(i) whether to negotiate or not to negotiate with any player; . . .
(iii) whether to offer or not to offer a Player Contract to any player; . . . or

(v) concerning the terms or conditions of employment offered to any player for inclusion, or included in, a Player Contract.
CBA Art. 17, § 1.
During the 2017 NFL season and continuing to the present, the NFL, by and through
all NFL team owners, NFL employees, and team employees, have entered into and enforced, implied and/or express agreements to specifically deprive Claimant Colin Kaepernick from employment in the NFL, as well as from practicing with and/or trying out for NFL teams for which Mr. Kaepernick is eminently qualified. Respondents NFL and NFL Team Owners have colluded to deprive Mr. Kaepernick of employment rights in retaliation for Mr. Kaepernick's leadership and advocacy for equality and social justice and his

bringing awareness to peculiar institutions still undermining racial equality in the United States. Further, Respondents have retaliated against Mr. Kaepernick in response to coercion and calculated coordination from the Executive Branch of the United States government. Colin Kaepernick demands the prompt selection of a System Arbitrator pursuant to Article 15 of the CBA, expedited discovery including depositions and document production pursuant to Article 15, and a prompt Article 17 enforcement proceeding.

PLEASE TAKE FURTHER NOTICE THAT pursuant to the CBA and the Federal Rules of Evidence, you are required by law to preserve all documents, emails, text messages, memoranda, notes, and all other electronically stored information (ESI) which is reasonably calculated to lead to the discovery of admissible evidence in this action. Any deletion of or tampering with evidence shall be deemed willful spoliation and will subject you and your agents to the fullest extent of penalties permitted by law.

I. FACTUAL BACKGROUND

1. After setting numerous athletic records at the University of Nevada, Reno, Mr. Kaepernick began his professional football career in 2011, when he was selected by the San Francisco 49ers during the 2011 NFL draft.
2. Mr. Kaepernick quickly rose to the position of starting quarterback for the 49ers in 2012.
3. Mr. Kaepernick ultimately led his team to the National Football Conference (―NFC‖) Championship and to its first Super Bowl in nearly two decades.
4. Mr. Kaepernick continued to perform as a top tier quarterback while playing with the 49ers.
5. During the 2016 season, following numerous instances of police brutality against minority individuals, Mr. Kaepernick opted not to stand during the national anthem in an effort to raise awareness of racial inequality and minority oppression in the United States through a silent and peaceful protest of a nation that was not living up to its ideals of freedom and equality guarantees to all citizens. In addition to his silent and peaceful expression of protest by kneeling, Mr. Kaepernick also pledged to donate $1 million of his 2016–2017 season salary to support organizations helping communities in need.
6. To date, and specifically from the 2016 season through the present, there has been no NFL rule prohibiting players from kneeling during the national anthem. Mr. Kaepernick has a constitutionally protected First Amendment right to engage in a silent and peaceful protest.

7. Mr. Kaepernick's actions gained nationwide attention. Numerous other members of the NFL also began kneeling or making comparable gestures in peaceful protest during performances of the national anthem at professional sporting events.
8. Mr. Kaepernick became a free agent on or around March 3, 2017. Based on his consistently exceptional career performance, his age, and all other objective metrics, Mr. Kaepernick was an ideal candidate—and, in fact, the best-qualified candidate—to fill the vacant starting quarterback positions on many NFL teams, or at the very least, the numerous vacant backup positions. Goodell himself has been quoted as stating that the NFL is about ―meritocracy and opportunity.‖
9. However, during his free agency period, the purportedly ―free market‖—whose natural function should have resulted in a bidding war (or at least high-level interest) for a quarterback of Mr. Kaepernick's caliber—instead functioned as a peculiar institution with suspicious design and objective.
10. NFL teams exhibited unusual and bizarre behavior regarding Mr. Kaepernick's prospective employment. Multiple NFL head coaches and general managers stated that they wanted to sign Mr. Kaepernick, only to mysteriously go silent with no explanation and no contract offer made to Mr. Kaepernick. Other NFL teams stated they had no interest in Mr. Kaepernick and refused to explain why. NFL teams who ran offensive systems favorable to Mr. Kaepernick's style of play instead employed retired quarterbacks or quarterbacks who had not played in a regular season game in years, and signed them to significant contracts while prohibiting Mr. Kaepernick from even trying out or interviewing for those jobs.
11. On or around September 22, 2017, during a campaign rally speech in Alabama, President Donald Trump referred to NFL players that knelt during the national anthem, as

sons of b****es (implying that Mr. Kaepernick was a ―son of a b****‖) and demanded that NFL teams fire these players. Since then, President Trump and Vice President Mike Pence have posted Tweets and engaged in various public relations stunts designed to retaliate against Mr. Kaepernick and other players that have joined in Kaepernick's peaceful protest. Following Trump's September 22, 2017 campaign rally, NFL owners and affiliates feigned concern for players by either kneeling alongside them or joining them in locking arms, and were even featured on the cover of Sports Illustrated Magazine doing the same. However, such conduct by NFL owners

proved to be a public relations stunt, designed to appear empathetic to players; in reality, NFL owners threatened players with fines and suspension if they refused to stand for the national anthem in the following weeks.
12.On or around October 10, 2017, NFL Commissioner Goodell announced a proposed NFL rule change requiring players to stand during the national anthem, thereby conceding there was no such prior rule in place.
13.The owners of Respondent NFL Teams have been quoted describing their communications with President Trump, who has been an organizing force in the collusion among team owners in their conduct towards Mr. Kaepernick and other NFL players. Owners have described the Trump Administration as causing paradigm shifts in their views toward NFL players.
14.The mere suspicion of collusion against Mr. Kaepernick has risen to the level of
concrete and actual collusion. It is no longer a statistical anomaly but instead a statistical
impossibility that Mr. Kaepernick has not been employed or permitted to try out for any NFL team since the initiation of his free agency period. NFL General Managers and team leaders have referred to directives from NFL owners to not let Mr. Kaepernick so much as practice

with a team. In a league that is seventy percent (70%) African American, with not a single African American owner, the NFL and its owners have colluded to deprive Mr. Kaepernick of employment for the purpose of making him an example to other players of the repercussions of challenging the NFL power paradigm, even by peaceful protest. It is with a heavy heart that Mr. Kaepernick submits this Demand for Arbitration, as he has been saddened to confirm the baleful machinations that underlie the professional administration of America's pastime.
II. VIOLATION OF COLLECTIVE BARGAINING AGREEMENT— ANTI- COLLUSION
15. Claimant Colin Kaepernick incorporates the above-referenced allegations as though set forth fully herein.
16. Respondent NFL and all 32 constituent Respondent NFL Teams are in violation of the CBA's anti-collusion provisions, as set forth in Article 17.
17. Article 17 states:
No Club, its employees or agents shall enter into any agreement, express or implied, with the NFL or any other Club, its employees or agents to restrict or limit individual Club decision-making as follows:
(i) whether to negotiate or not to negotiate with any player; . . .
(iii) whether to offer or not to offer a Player Contract to any player; . . . or
(v) concerning the terms or conditions of employment offered to any player for inclusion, or included, in a Player Contract.
CBA Art. 17, § 1.
18. Respondents have engaged in express or implied collusion by prohibiting Mr.
Kaepernick from practicing with any team, prohibiting Mr. Kaepernick from trying out with any team, and prohibiting Mr. Kaepernick from being employed by any team despite his

qualifications. Respondents have undertaken said collusive conduct in retaliation for Mr.Kaepernick's invocation of his rights under the First Amendment and his leadership in bringing attention to racial inequality and social injustice. Said conduct has been manifest in NFL team owner communications with each other, with the Executive Branch of the United States government, on social media, and through efforts announced by NFL Commissioner Goodell on October 10, 2017 to nunc pro tunc enact rules and regulations, not previously on the books, to prohibit and preclude Mr. Kaepernick and other players from kneeling.
19. Claimant Colin Kaepernick requests all relief permitted by Article 17 of the CBA.
20. Based on the public statements made by NFL Owners and NFL Commissioner Goodell regarding the foregoing matters, Claimant Colin Kaepernick respectfully requests that the NFL and its team owners waive such confidentiality requirements as may exist under Article 15, Section 10 and permit all proceedings to be presumptively open to the public.
DATED: October 15, 2017

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