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The Professional Athlete and the First Amendment: A Question of Judicial Intervention

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THE PROFESSIONAL ATHLETE AND THE FIRST AMENDMENT: A QUESTION OF JUDICIAL INTERVENTION*

> I'm tired of that rule. Tonight I'm going to speak out. I'll get the American Civil Liberties Union to defend my rights in court. Jerry Loeber sets a standard for ineptitude for referees that is unequaled. I think he is unqualified to be an official in this league. They fine you when you say things about officials, but I think he stinks. I want you to understand. This is for quotes.[1]

On March 11, 1975, Kareem Abdul-Jabbar, center for the Milwaukee Bucks of the National Basketball Association, was ejected from a game with six fouls.[2] After the game Abdul-Jabbar approached members of the media and launched a personal attack on the gag-rule,[3] one of sport's most coveted regulations. The gag-rule is the popular term for provisions found in player's contracts, collective bargaining agreements, and league by-laws which place restrictions on an athlete's public outbursts. The athlete is threatened with an automatic fine for public remarks which are critical of game officials. Referees and umpires traditionally have occupied a hallowed position in professional sports. Mistakes and incompetence to a great extent remain hidden and protected by this restriction.

Abdul-Jabbar's outburst was not costly on a purely monetary basis. He received an automatic $200 fine for his initial statements and an additional $100 fine for continuing his tirade near the official's dressing room.[4] Although disputes of this nature are common in professional sports, this time Abdul-Jabbar chose to subject the issue to public scrutiny and to test its constitutional

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1. Kareem Abdul-Jabbar, *as quoted in* N.Y. Times, Mar. 12, 1975, at 46, col. 1 (Sam Goldaper's remarks omitted); Anderson, *The Case for Kareem*, N.Y. Times, Mar. 30, 1975, § 5 (Sports), at 5, cols. 1-2 (Dave Anderson's remarks omitted).

2. N.Y. Times, Mar. 12, 1975, at 46, col. 1, Anderson, *supra* note 1, at 5, cols. 1-2.

3. The constitution of the National Basketball Association, cl. 35 (c) provides:

> Any person who gives, makes, issues, authorizes or endorses any statement having, or designed to have, an effect prejudicial or detrimental to the best interests of basketball . . . shall be liable to a fine not exceeding $1000, to be imposed by the Board of Governors.

For further discussion of these restrictions see notes 82 & 91 *infra* and accompanying text.

4. Anderson, *supra* note 1, at 5, cols. 1-2; N.Y. Times, Apr. 1, 1975, at 46, col. 3.

validity. Believing his first amendment freedom of speech was being abridged, he stood ready to refuse to pay the fine and was willing to go to court to contest its imposition.[5] Interests on both sides rapidly polarized and it appeared that the courtroom would indeed be the stage for the remaining drama. Several months after his public outburst Abdul-Jabbar was traded to the Los Angeles Lakers in a purportedly unrelated maneuver.[6] The superstar apparently lost interest in challenging the gag-rule when he reached his new surroundings.[7] The suit never materialized and the constitutionality of the gag-rule is no longer a public issue. Recent statements[8] issued by the office of the Commissioner of the National Basketball Association, however, make it certain that this question will surface once again.

The events of March and April of 1975 focused on a constitutional infirmity that pervades the professional sports industry. In player's contracts, collective bargaining agreements, and league constitutions, certain "necessary" limitations have been placed upon the first amendment freedom of athletes.[9] Because of their high salaries, glamorous lives, and seemingly pleasant vocations, it is inconceivable to many observers that such limitations in any way restrict the freedom of these unique individuals. The gag-rule, however, exerts a potentially disproportionate, adverse effect on the marginal player as opposed to the superstar. There is a considerable difference between a $1000 loss to an athlete earning $200,000 per year and the same loss to a reserve player receiving $20,000 per year. In addition, there is an even greater underlying difference in the rule's effect on the two player types. While their abilities in no way affect the rule's application, it is clear that a greater stigma is likely to attach to the marginal player who is so penalized. The regulation embodies a league policy which states that improper remarks will not be tolerated. The application of this policy in the extreme situation can cost the marginal player his job, whereas a ballclub is much less willing to part with its superstar. Application of the gag-rule results not only in a fine which has an inequitable impact, but the inevitable chilling effect is more oppressive to one class of player than to the other.

Professional sports today are plagued by various problems,

5. *Id.*
6. N.Y. Times, June 17, 1975, at 27, col. 1.
7. Anderson, *supra* note 1, at 5, cols. 1-2.
8. N.Y. Times, Nov. 8, 1975, at 18, col. 7.
9. *See* notes 74, 82 & 91 *infra* and accompanying text.

the roots of which lie in the changing stature of the athlete himself. The contemporary sports figure has been noted for his "means to an end"[10] attitude toward his trade. The Abdul-Jabbar controversy embodies this transition; in his accession to wealth and power the athlete has begun to use his idyllic position to his advantage. In his role as a hero he has placed pressures upon management to advance his financial and perhaps political stature. In many instances the athlete has become a spokesman for those who worship his feats. The growing ease with which the athlete has assumed this outspoken role has made a conflict with the limitations placed on his freedom of speech inevitable.

The changed attitude of the athlete is not, however, the sole cause of the problems currently plaguing the sports industry. During the last century, professional sports evolved from privately owned and operated teams into large corporate structures which brought to the industry both the legal and moral problems of big business. Despite their rapid diversification and growing complexity, the structures of the leagues have changed little since the rule of Judge Keenesaw Mountain Landis, the first commissioner of major league baseball.[11]

In more recent years, the commissioners have technically remained the dominant force in maintaining discipline over players and owners. In practice, however, league officials no longer have great influence[12] over decisionmaking by the owners.[13] It has become apparent in recent months[14] that the owners are seeking

10. *See, e.g., Pain Pays the Bills for Joe's Good Life,* LIFE Nov. 3, 1972 at 36. "Namath has pulled out of much ballyhooed ventures in franchise foods and temporary help, and now keeps his money in real estate, stocks, and bonds." *Id.* at 38.

11. Retired Judge Keenesaw Mountain Landis ruled over baseball with an iron hand during the years 1921 to 1944. His appointment came on the heels of the "Black Sox" scandal (the infamous fixing of the 1919 World Series by the Chicago White Sox), and the owners felt that by turning full power over to him, corruption of this nature could be eliminated and the game preserved. During this era there was rather little criticism or scrutiny of the commissioner's actions; his decisions governed baseball without question or dispute. *See generally* J. SPINK, JUDGE LANDIS AND TWENTY FIVE YEARS OF BASEBALL (1947).

12. The lessened strength and stature of the contemporary commissioners might make appropriate the label of "weakened czar."

13. *See, e.g.,* Deford, *Heirs of Judge Landis, Commissioners of Major Sports,* SPORTS ILLUSTRATED, Sept. 30, 1974, at 82.

14. The most recent indication of this trend is the hiring of former Democratic Party National Committee Chairman Lawrence O'Brien as Commissioner of the National Basketball Association, N.Y. Times, Apr. 29, 1975, at 25, col. 6; *id.,* May 1, 1975, at 51, col. 1.

The two most recently appointed commissioners were chosen on the basis of their professional backgrounds. In one instance the National Basketball Association chose

to replace these figureheads with powerful and influential individuals[15] as both political and economic pressures have mounted against management.[16] Owners are thereby attempting to maintain control over the athletes by strengthening the office of the commissioner.[17]

The heat of the Abdul-Jabbar controversy was fueled by this contrasting evolution of management and player. As this conflict continues, the courts are certain to become the forum for the resolution of the constitutional issues raised. This article will explore those issues and other problems which may be encountered in such litigation.

An Overview of the Route to Court

The athlete who decides to test the gag-rule must initially demonstrate that the imposition of the gag-rule constitutes state action. Constitutional protections have been extended by courts in those situations where significant government activity has been found to exist in an otherwise private industry.[18] State action may then be viewed as a threshold question, for in its absence, the court will be unable to proceed to a final determination of the constitutional issues before it.

The individual athlete must, in addition, overcome the restrictions of the collective bargaining agreements which have been negotiated in his behalf.[19] Upon a showing that sufficient statutory jurisdiction exists, the athlete must further demonstrate that the collective bargaining remedies which are available to him do not preempt his access to a judicial determination. The court must be convinced that its expertise is required to properly

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Lawrence O'Brien for his political experience and contacts so that he could confront the legislative activity that now pervades professional basketball. Likewise, Dave DeBusschere, a former player, was chosen by the American Basketball Association because of his understanding of player desires and anxieties. N.Y. Times, May 16, 1975, at 29, cols. 2-3. It is certain that with such mounting pressure from the courts and the legislatures the owners are in need of this greater leverage.

15. Deford, *supra* note 13. This article offers an excellent synopsis of the character and nature of the men who have recently occupied the commissioners' chairs.

16. These pressures are exemplified by the current turmoil in sports involving antitrust, league merger, freedom of contract, and player organizations. *See* note 80 *infra* and accompanying text.

17. N.Y. Times, June 6, 1975, at 23, col. 2; Anderson, *The McGinnis Rebound, id.*, June 8, 1975, § 5 (Sports), at 5, col. 2.

18. For a discussion of state action and its ramifications for the athlete see notes 26-73 *infra* and accompanying text.

19. *See* discussion of collective bargaining at notes 74-103 *infra* and accompanying text.

adjudicate the issues. Restrictions which limit the athlete to labor remedies alone may be invalidated as either a denial of due process or as an inappropriate application of national labor policy.[20]

Once he has established state action and the court's jurisdiction over the case, the athlete will be given the opportunity to demonstrate that his first amendment rights are being abridged by the imposition of the gag-rule. While some jurists maintain that freedom of speech is afforded absolute constitutional protection, that right has often been subjected to judicial balancing.[21] The court may balance the actual injury that limitations on his speech impose on the athlete with the harm that their absence would bring to professional sports.

It is a court's duty to resolve a constitutional issue on the most narrow ground.[22] The court may then avoid a determination of the first amendment issue by basing its decision on established principles of contract law. The court may, for instance, merely void the controverted clauses[23] on the ground that they violate public policy[24] or operate as a penalty.[25]

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20. *See* notes 89 & 90 *infra* and accompanying text.

21. *See* discussion of judicial balancing in the text accompanying notes 104-112 *infra*.

22. Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

23. The courts are not confined to a constitutional resolution of these issues. It is conceivable that the courts will focus on the clauses themselves in resolving the dispute:

> While it is true that labor contracts have peculiar features distinguishing them in some respects from ordinary contracts, nevertheless Congress has seen fit to adopt the concept of "contract" as the vehicle or instrumentality for regulating labor relations. A consequence of this is that the general principles of contract law do apply to such agreements.

United Steelworkers of America v. Reliance Universal, Inc., 227 F. Supp. 843, 845-46 (W.D. Pa. 1964), *citing* Roadway Express, Inc. v. Teamsters Local 249, 211 F. Supp. 796, 797 (W.D. Pa. 1962). Thus, whether a union and an employer have negotiated a valid collective bargaining agreement can be determined by examining such principles of contract as meeting of the minds, offer and acceptance, and definiteness.

24. The basic notion that a contract cannot be upheld if in violation of the Constitution, a statute, or public policy also applies to a collective bargaining agreement. "Any bargain is illegal if either the formation or performance thereof is prohibited by Constitution or statute." RESTATEMENT (FIRST) OF CONTRACTS § 580 (1) (1932).

25. It is obvious that any litigation that may arise involving the gag-rule will consider the penal nature of the clauses. Management will naturally advance the position that the clause acts as liquidated damages. The courts, however, have been quick to strike such clauses where the damages bear no reasonable relation to the amount of harm which may flow from a contemplated breach. "[T]he infliction of punishment through courts is a function of society and should not inure to the benefit of individuals." Pribe & Sons v. United States, 332 U.S. 407, 418 (1947) (Frankfurter, J., dissenting).

Thus those provisions which enable professional sports management to levy fines in response to statements which are deemed detrimental to the league may very well be construed by the courts as penalties and therefore will not be enforced.

STATE ACTION

One of the more unique legal fictions that has evolved from constitutional litigation is the concept of state action.[26] It is clear that the fourteenth amendment[27] protections of due process and equal protection apply to all situations involving public employer-employee controversies.[28] Difficulties arise, however,

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26. *See* Civil Rights Cases, 109 U.S. 3 (1883).

> In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings . . . . Hence, in all those cases where the Constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the state by prohibiting such laws, it is not individual offenses, but abrogation and denial of rights, which it denounces, and for which it clothes the Congress with power to provide a remedy.

Id. at 17-18. 42 U.S.C. § 1983 (1970) provides:

> Every person, who, under color of any statute, ordinance, or usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the person injured in an action at law, suit in equity, or other proper proceeding for redress.

The requirement under § 1983 that the deprivation be "under color of any statute" has been treated as being equivalent to the state action requirement of the fourteenth amendment. United States v. Price, 383 U.S. 787, 795 n.7 (1965). *But cf.* Adickes v. S.H. Kress & Co., 398 U.S. 144, 211 (1970) (Brennan, J., concurring and dissenting):

> When a private party acts alone, more must be shown, in my view, to establish that he acts "under color of" a state statute or other authority than is needed to show that his action constitutes state action.

27. U.S. CONST. amend. XIV. Section one of the fourteenth amendment provides in part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

See generally Shelley v. Kramer, 334 U.S. 1, 13 (1948):

> [T]he action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.

28. Civil Rights Cases, 109 U.S. 3 (1883). *See also* Baldwin v. Morgan, 251 F.2d 780 (5th Cir. 1958) (Alabama public service commissioners and city commissioners were acting as agents of the state in their enforcement of the state policy of racial segregation in railway waiting rooms); Berry v. Macon County Bd. of Educ., 380 F. Supp. 1244 (M.D. Ala. 1971) (improper action of members of county board of education in refusing to rehire employees because employees exercised their constitutional rights and sent their children to private schools rather than complying with the board's requirement that its employees send their children to public schools was under 'color of law' and constituted state action).

when dealing with problems that are generated by supposedly private sectors of the economy. The growth of American industry and technology has brought with it much government activity in what were once strictly private sectors of business.[29] It is in this area that the courts have been forced to decide when the private activity takes on a color of state law.[30] It is not clear upon what bases the courts have decided what constitutes private as opposed to public activity.

Historically, the state action doctrine has undergone an erratic development. In the aftermath of early civil rights legislation,[31] the courts adopted an absolute position by not allowing application of the fourteenth amendment protections to private industry.[32] As the presence of government in the private sectors of the economy increased, the courts gradually recognized a need to apply constitutional protection to those interests. The courts were inclined to find state action where private enterprise reflected a totally public function.[33]

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29. This is exemplified by the growing strength of the federal regulatory administrative agencies and their control over formerly exclusive private industry and interest, *e.g.*, the Federal Communications Commission, the Interstate Commerce Commission, and the Securities and Exchange Commission. Another example of the government's role in contemporary economic activity may be demonstrated by the control of collective bargaining and labor relations by the National Labor Relations Board.

30. As recently as 1974, the Supreme Court admitted its own inability to differentiate between the two areas. In its attempt to determine how publicly oriented a private utility company was, the Court conceded the following:

> While the principle that private action is immune from the restrictions of the Fourteenth Amendment is well established and easily stated, the question whether particular conduct is 'private,' on the one hand, or 'state action,' on the other, frequently admits of no easy answer.

Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349-50 (1974), *citing* Moose Lodge No. 107 v. Irvis, 407 U.S. 153, 172 (1972) *and* Burton v. Willmington Parking Authority, 365 U.S. 715, 723 (1961). *See also* Gilmore v. City of Montgomery, 417 U.S. 556 (1974). "We are reminded, however, that the Court has never attempted to formulate 'an infallible test for determining whether the State . . . has become significantly involved in private discriminations' so as to constitute state action." *Id.* at 574, *quoting* Reitman v. Mulkey, 387 U.S. 369, 378 (1967).

31. U.S. CONST. amend. XIV. In addition, 42 U.S.C. § 1983 (1970) authorized a civil action for deprivation of civil rights when the alleged deprivation is caused by a person acting under state law. *See* note 26 *supra*.

32. *See, e.g.*, Civil Rights Cases, 109 U.S. 3 (1883).

33. The Court was willing to apply the state action doctrine only in those instances where the private nature of the enterprise was strictly limited to ownership, *i.e.*, where the private enterprise was operated as a public entity, the Court was willing to apply the constitutional protections. *See* Marsh v. Alabama, 326 U.S. 501 (1946), where the Court reversed the trespass conviction of a Jehovah's Witness who distributed religious material on the streets of the privately-owned town of Chickasaw despite the denial of permission to do so by the town's managers. Justice Black stated that aside from being privately

It was not until the 1960's that the Supreme Court attempted to formulate a definitive test for the application of the state action doctrine. The landmark case of *Burton v. Wilmington Parking Authority*[34] provided that the cumulative effect of the state's involvement with a private organization should be weighed in determining whether there is state action.[35] In *Burton*, an operator of a restaurant refused to serve the plaintiff solely because of his race. The Supreme Court held that the exclusion of a black due to his color from a private restaurant leased from the state parking authority was discriminatory state action in violation of the equal protection clause of the fourteenth amendment.[36] *Burton* has been relied on by lower federal courts in finding state action when the state has "so far insinuated itself into a position of interdependence [with the private entity] that it must be recognized as a joint participant"[37] in the alleged wrong.

During the 1960's, the Court's determination of when and where state action existed was limited to a case-by-case analysis:[38]

> [T]o fashion and apply a precise formula for recognition of state responsibility under the Equal Protection clause is an impossible task which the court has never attempted [citation omitted]. . . . Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance.

In response to the Court's edict, the lower courts developed their own particular trends.[39] This resulted in a more lenient standard

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owned, the company town had all the characteristics of a public town including free access to everyone. *Id.* at 508. *See also* Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir.), *cert. denied*, 326 U.S. 721 (1945) (library deemed a state instrumentality due to the contribution of operating funds by the city).

34. 365 U.S. 715 (1961).

35. Addition of all these activities, obligations and responsibilities of the Authority, the benefits mutually conferred, together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn.

Id. at 724.

36. In rendering its decision the Court noted that: "By its inaction, the Authority, and through it the state, has not only made itself a party to the refusal of service but has elected to place its power, property and prestige behind the admitted discrimination." *Id.* at 725.

37. *Id.*

38. *Id.*

39. In the absence of any definitive guide from the Supreme Court, the lower courts proceeded to evolve their own application of the state action doctrine. In those areas where

for determining the state action issue in cases involving allegations of race discrimination.[40]

The momentum of this judicial liberality was curtailed when the Supreme Court rendered its decision in *Moose Lodge No. 107 v. Irvis*.[41] In that case the Court was unwilling to allow the minimal contact of a state liquor license to implicate the state in a club's practice of discriminating against its members' guests. The majority noted that mere involvement by the state in some activity of the institution alleged to have caused the injury is not enough. The state must instead be involved with the very activity that caused the injury.[42]

Many commentators have found the Court's decision in *Moose Lodge*, when coupled with its subsequent holding in *Jackson v. Metropolitan Edison Co.*,[43] to be a substantial basis for the notion that the state's role must pervade the activity rather than merely color it.[44] State action, however, remains primarily

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constitutional freedoms involving racial discrimination are at stake a liberal tendency has been discernible. *See* Lefcourt v. Legal Aid Soc., 445 F.2d 1150 (2d Cir. 1971); Coleman v. Wagner College, 429 F.2d 1120 (2d Cir. 1970); Wolin v. Port Authority, 392 F.2d 83 (2d Cir. 1968). These holdings indicate that a state is required to maintain a neutral position. If a state in any way authorizes or encourages the alleged discrimination, it then becomes a party to the act and the discrimination falls within the ambit of the fourteenth amendment. Reitman v. Mulkey, 387 U.S. 369 (1967).

40. Faced with these sensitive issues the courts were willing to find state action in those situations where the constitutional infringements of the supposedly private activity were of a compelling nature. "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." Evans v. Newton, 382 U.S. 296, 299 (1966).

It was during this period that the Court equated the language of section 1983 of the Civil Rights Act with the state action standard of the Civil Rights Cases, 109 U.S. 3 (1883); *see* United States v. Price, 383 U.S. 787, 794 n.7 (1966); 42 U.S.C. § 1983 (1970). *See also* note 39 *supra*.

41. 407 U.S. 163 (1972).

42. Our holdings indicate that where the impetus for the discriminations is private, the State must have "significantly involved itself with the invidious discriminations". . . [citation omitted] in order for the discriminatory action to fall within the ambit of constitutional prohibition.

Id. at 173.

43. 419 U.S. 345 (1974). The Court adopted a *Moose Lodge*-type holding by finding an insufficient connection between the state involvement and the alleged activity:

[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.

Id. at 453.

44. *See generally* Note, *Public Utilities—State Action and Informal Due Process After Jackson*, 53 N.C.L. REV. 817 (1975). For additional commentary on the doctrine itself and the confusion of its application see Black, *Forward: "State Action," Equal Protec-*

a threshold question and the case development in this area indicates that in those instances where the courts have expressed a sincere desire to hear the issues, a sufficient nexus has been found.[45]

As noted earlier,[46] *Burton* established the proposition that when a private entity leases public property and carries on its business in a symbiotic relationship with the state whereby it appears that the two parties are "joint participants," state action will be inferred and actions of the private entity will be governed by the fourteenth amendment. In order for such a symbiotic relationship to exist, there must be a significant exchange of benefits between the private and public sectors.

The fact that most professional sports franchises, although privately owned, are lessees of municipally-owned stadiums[47] and arenas[48] whose primary purpose is to accommodate such teams, effectively helps to establish such a symbiotic relationship. In *Fortin v. Darlington Little League, Inc.*,[49] the First Circuit found state action based on the fact that the city-owned baseball facility at which Darlington played, although open to the general public, geared its schedule toward accommodating Darlington rather than any other group.[50] Due to this rationing, the court

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tion, and California's Proposition 14, 81 HARV. L. REV. 69 (1967); Note, *State Action and the Burger Court*, 60 VA. L. REV. 840 (1974).

45. *See* Buckley v. AFTRA, 496 F.2d 305 (2d Cir.), *cert. denied*, 419 U.S. 1093 (1974). Here the court confronted the first amendment claims because of the crucial nature of the constitutional issues involved and found it unnecessary to make a determination regarding the existence of state action.

46. *See* text accompanying notes 34-37 *supra*.

47. Eighteen of the 24 Major League Baseball Teams and 23 of the 26 National Football League Teams play at publicly-owned stadiums.

48. Eight of 18 National Basketball Association Teams and 5 of the 18 National Hockey League teams play at publicly-owned arenas.

49. 514 F.2d 344 (1st Cir. 1975) (ten-year-old female brought suit for declaratory and injunctive relief after she was excluded from participation in the little league on the basis of her sex).

50. The court of appeals agreed with the lower court's findings,

> that the Slater Park diamonds, laid out and maintained by the City to Little League specifications, were primarily for the benefit of Darlington and only incidentally for other groups of youth and the general public; that they were made available at specific times for practice and games; that a new diamond was being laid out at city expense primarily for Darlington; that while others required diamonds of different dimensions, there was no evidence that the City of Pawtucket dedicated its resources to these groups on a scale approaching that afforded Darlington; that a significant proportion of the Slater Park diamonds are prepared to meet the needs of Darlington and other Little League groups; and that as a result of Darlington's use of diamonds five nights a week and on

concluded that a symbiotic relationship existed between the city and the league.[51] Although it was a private enterprise, the Darlington League's extensive use of the baseball diamonds resulted in its assuming characteristics similar to those recreational programs sponsored by the city.[52]

In the same sense, the system of rationing employed by municipally-owned stadiums and arenas which house professional sports teams cause those teams to take on public characteristics.[53] In addition, the citizenry receives benefits which are far more extensive than in the *Fortin* case. For instance, professional sports offer entertainment possessing a glamour unlike that in any other form of entertainment. Moreover, a sports franchise can help bring about a sense of civic pride in a community which ultimately enhances an area's prestige. In expressing his views on professional sports, Dave DeBusschere once stated:[54]

> Saturday throughout the baseball season, the general public is often precluded from utilizing the facilities.

Id. at 347.

51. *Id.*

52. *Id.*

53. Section 2206-a of the County Government Law of Nassau County pertains to the Nassau County Veterans Memorial Coliseum. It states that the Coliseum was constructed to be the site of "a wide variety of activities including athletic games, contests, spectacles, entertainment events, trade shows and exhibitions." *Id.* § 2206-a (1).

In addition the law provides:

> Any contract . . . entered into for the purposes of furthering the use and operation of the Nassau County Veterans Memorial Coliseum may grant to the person . . . contracting with the county the right to use . . . such coliseum . . . (a) for any purpose or purposes which are of such a nature as to furnish to, or foster or promote among, or provide for the benefit of, the people of the county, recreation, entertainment, amusement, education, enlightenment, cultural development or betterment . . . including professional, amateur and scholastic sports and athletic events. . . . It is hereby declared that all of the purposes referred to in this subdivision are for the benefit of the people of the county and for the improvement of their health, welfare, recreation and prosperity, for the promotion of competitive sports for youth and prevention of juvenile delinquency . . . and that such purposes are and shall continue to be deemed county and public purposes.

Id. § 2206-a(2).

Agreement between the County of Nassau and Long Island Sports Enterprises, Inc. (New York Nets Basketball Team) cl. 27 provides:

> The County agrees that it will not permit, without the written consent of the NETS, any other professional basketball games or exhibition games to be played in the Coliseum during the term of this contract, provided that the NETS have not defaulted in any of the terms of said contract.

Such an "exclusivity" clause coupled with the intention of the parties involved, places the NETS and the County in the requisite symbiotic relationship.

54. DeBusschere, *Views of Sport: You Can't Find What Really Matters In Statistics*, N.Y. Times, Oct. 13, 1974, § 5 (Sports), at 2, col. 5. Mr. DeBusschere, a player for 12 years

> I often think about the City of Detroit in 1967, torn apart by riots, a city divided. But in 1968 the Tigers won the pennant and the World Series. The city united behind them. The people were allied in a cause, rooting for the Tigers.
>
> It has happened here in New York in 1968 with the Jets, 1969 with the Mets, 1970 and 1973 with the Knicks and 1974 with the Nets.

Further, the existence of a sports franchise brings a municipality added publicity. As a result, an image of overall community progress is projected to outsiders. This leads to added commerce and economic activity in the area.[55]

Professional athletes undoubtedly cast an enormous influence over the community in which they play. They are, therefore, a valuable asset when they become involved in civic concerns. Campaigns to raise money to combat diseases,[56] programs providing jobs for poverty stricken youth,[57] and provision of sheer recreational enjoyment for the public[58] are just some of the activities in which athletes regularly participate.

Once a particular area is granted a franchise or even before,[59]

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in the National Basketball Association, is currently Commissioner of the American Basketball Association. In the past he has served as player-coach of the Detroit Pistons (NBA) and as Vice-President and General Manager of the New York Nets (ABA).

55. In 1954 the Baltimore Orioles reported that tourists constituted approximately 25 percent of their total attendance. In addition, it was estimated that these 276,000 persons spent an average of 20 to 30 dollars or between 5.5 million dollars and 8.3 million dollars while in the city. Okner, *Subsidies of Stadiums and Arenas*, GOVERNMENT AND THE SPORTS BUSINESS 325, 328 (R. Noll ed. 1974), *citing* Baltimore Orioles, Baltimore Baseball Club Survey, 1954 (1955).

56. Athletes Against Multiple Sclerosis was chaired by Ara Parseghian and included Frank Gifford, Pete Gogolak, and Jim Plunkett as chapter campaign chairmen. Also involved were Hank Aaron, Jimmy Connors, John Havlicek, and Muhammed Ali. Smith, *Fight in the Ring, and Out*, N.Y. Times, Feb. 9, 1975, § 5 (Sports) at 3, col. 6.

In addition, the NBA and the ABA recently sponsored a drive to raise funds for the 140,000 mentally retarded youngsters in America. N.Y. Times, Mar. 1, 1975, at 15, cols. 1-2 (caption).

57. For instance, the New York Jets and the New York Giants held a 48-hour basketball marathon this past summer to benefit under-privileged youth in Manhattan. N.Y. Times, June 21, 1975, at 16, col. 7.

58. In Nassau County, New York, the Parks and Recreation Department held six clinics at which the New York Nets, the New York Islanders, the New York Sets, and the Long Island Tomahawks instructed youth in the various techniques of their sports. The ballclubs did not receive compensation for these services. *See* letter from Stephen Berheim, Assistant to the Commissioner, Department of Recreation and Parks, County of Nassau, to Jonathan Falk, Oct. 2, 1975, a copy of which is on file in the office of the *Hofstra Law Review*.

59. The City of Seattle began construction of King County Stadium in hopes of obtaining a professional ballclub for the city. Burck, *Its Promoters vs. Taxpayers in the Superstadium Game*, FORTUNE, Mar. 1973, at 106.

that community will see to it that the team has a suitable place to play. To this end, vast sums are expended either to refurbish an older stadium or to construct a new one. Within the last 15 years, it has been estimated that one billion dollars has been spent on the construction of municipally-owned stadiums.[60] In addition, sports complexes serve as more than merely the home of a ballclub. They are considered cultural assets and are placed in a similar category as municipal libraries or museums.[61] Stadiums such as the Astrodome in Houston, the Superdome in New Orleans, and Metropolitan Stadium in Pontiac, Michigan, are architectural wonders which in their own right attract tourists to their communities.

In many cases, the construction of a stadium or arena brings about improvements in highway and transportation facilities for the public's convenience in traveling to the complex. For instance, one report estimated that the City of Seattle will have to spend nearly eight million dollars to elevate a street and provide ramps leading to King County Stadium.[62] At Riverfront Stadium in Cincinnati, new bridges and roads were constructed at a considerable cost to provide easy access to the ballpark.[63] And at the Hackensack Meadlowlands Complex, reports have circulated that improvements in transportation facilities will cost the State of New Jersey nearly 15 million dollars.[64]

A municipality receives great benefit by having a professional ballclub play in its area. It is equally clear that the team derives many benefits from the municipality. Public financial assistance[65] has long been considered an important factor leading to a finding of state action in a wide variety of cases.[66] In a recent

60. FORBES, Feb. 15, 1975, 24, 26.

61. *Id.* at 26.

62. Burck, *supra* note 59, at 104-06.

63. *See generally* Comment, *Discipline in Professional Sports: The Need for Player Protection*, 60 Geo. L.J. 771, 791 n.87 (1972).

64. Burkese, *Transport Centers Proposed at Seven Sites*, N.Y. Times, June 8, 1975, at 71, col. 1.

65. *See* Koppett, *Tax Laws A Part of Sports Structure*, N.Y. Times, Nov. 14, 1975, at 44, cols. 4-7.

66. In Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir.), *cert. denied*, 326 U.S. 721 (1945), city contributions of operating funds to a private library influenced the court's finding that the library was a state instrumentality. In Everett v. Riverside Hose Co. No. 4, 261 F. Supp. 463 (S.D.N.Y. 1966), the same conclusion was reached for a volunteer fire department. And in Farmer v. Moses, 232 F. Supp. 154 (S.D.N.Y. 1964), the investment of New York City funds in permanent improvements in Flushing Meadow Park and the use of state and city funds to build and maintain their own exhibits was a factor considered by the court in holding that the New York World's Fair was subject to the fourteenth amendment.

survey conducted by Richard Okner of the Brookings Institution, it was estimated that local governments subsidize sports franchises with amounts of approximately 23 million dollars per year by allowing teams to pay substantially reduced rents and by granting tax-exempt status to land upon which stadiums and arenas are built.[67]

In order to establish what a suitable rent on a sports complex should be, the total cost of operation, consisting of both fixed costs and variable operating costs must first be determined. Fixed costs include such expenses as interest and debt amortization, while variable costs include the cost of utilities and similar expenditures. In Okner's survey it is revealed that the total costs of operation on a select group of baseball and/or football stadiums ranged from 1.3 million to 2.3 million dollars. Breaking this amount down even further, the survey showed the annual fixed costs to be between 80 and 90 percent of the total, with the remainder accounting for the variable operating costs.

The survey indicated that each rental agreement requires the tenant team to pay a sufficient amount so that the variable operating costs of the sports complex will be covered. Ideally, it is desirable to cover as much of the annual fixed costs as possible. This can only be achieved, however, by increasing the burden of payment on the team. As an alternative, in most lease situations provisions are made whereby the municipality receives a certain percentage of gross receipts of the concessions or parking facility so that annual fixed costs can more easily be recouped.[68] The survey revealed, however, that a ballclub's gross revenues hardly meet the annual operating costs, and only in those instances where the most successful franchises are involved do the annual fixed costs ever become a consideration. Thus, for 20 of the 25 baseball and/or football stadiums examined, government subsidies totaled over 8 million dollars for fiscal year 1970-1971.

The franchises received additional subsidies by being able to forego the payment of property taxes on the sites upon which the stadiums are built. During this same year, 1970-1971, tax exemp-

67. Okner, *supra* note 55, at 345. The statistics which follow have been taken from the results of Mr. Okner's survey.

68. For instance, cl. 21 (a) of the Agreement between the New York Nets and the County of Nassau and cl. 24 (a) of the Contract between the New York Islanders and the County of Nassau provide that the County will receive 11 percent of the gross receipts from the sale of novelties at the coliseum. In addition, the County receives 100 percent of all parking revenues. Interview with Steven Leiter, Assistant County Attorney, County of Nassau, in Uniondale, N.Y., Oct. 24, 1975.

tions amounted to 8.7 million dollars on baseball and/or football facilities, and 4.7 million dollars on basketball and/or hockey arenas.[69]

Private ballclubs also derive financial assistance from the federal government by being allowed to amortize player contracts.[70] When a team is purchased, the new owner is permitted to allocate a portion of the amount paid for player contracts.[71] Such allocations usually range from 75 to 90 percent of the purchase price.[72] The owner is then able to amortize or depreciate this amount over the number of years that he feels will constitute the "useful life" of the ballplayer. Thus, the owner is permitted to write off this amount against his income.

This enables a modest franchise to be turned into a successful one overnight. Okner's findings in examining one National Basketball Association expansion team[73] serve to illustrate this point. Having purchased the team for 3 million dollars, its owners chose to allocate 2.5 million dollars for player contracts over the first 18 months of ownership. At the end of the first year, the club had received 300,000 dollars more in revenue than it had paid out. When the amortization was added in as a cost to the team, however, a 1.6 million dollar loss was reported by the team owners. This enabled each owner to write off his share of the loss against profits from other enterprises.

This activity costs the Internal Revenue Service millions of dollars each year in potential taxes. The fact that Congress allows the practice to continue can be construed as congressional sup-

69. Thus one would arrive at a 13.4 million dollar figure for total exempted tax revenue. Mr. Okner does, however, warn the reader that his figure is not totally accurate. Aware that these sites might house other tax exempt facilities in the absence of the stadiums (*i.e.*, housing projects, hospitals), Mr. Okner states that a more accurate figure depicting the lost revenue, *i.e.*, the opportunity costs, would be in the area of 8.8 million dollars. Okner, *supra* note 55, at 343.

70. INT. REV. CODE OF 1954, § 167 (Depreciation). Under this section of the Code amortization of players contracts is permitted. *See also* Rev. Rul. 137, 1971-1 CUM. BULL. 104.

71. The player contract is the money paid by an owner to acquire the right to the services of a player. This must be distinguished from the player's individual contract which he has negotiated with his team.

72. *See* Klinger, *Professional Sports Teams: Tax Factors in Buying, Owning and Selling Them*, 39 J. TAXATION 276, 279 n.17 (1973), *citing Basketball Hearings on S. 2373 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 92 Cong., 2d Sess. 90 (1971).

73. Okner, *Taxation and Sports Enterprises*, GOVERNMENT AND THE SPORTS BUSINESS 159, 169 (R. Noll ed. 1974); *Upheaval in Pro Sports*, U.S. NEWS & WORLD REP., Aug. 12, 1974, at 51, 54.

port for the activity. Allowing owners to amortize player contracts in this manner effectively assists in the financing of professional ballclubs.

When all of the aforementioned factors are considered collectively, it is clear that there is sufficient basis for a court to find state action.

Collective Bargaining and the Courts

The contemporary athlete, like his counterpart in various other employment fields, is no longer satisfied with mere monetary compensation for his services. Rather, he is also concerned with job security, protection for both himself and his family, insurance, injury and pension benefits, and the right to assert his interests in any confrontation with his employer. An examination of the contractual relationship between the player and management must, therefore, take into account the existence of collective bargaining agreements.[74]

Early in the history of organized athletics, players formed informal associations which were designed to assert the athletes' interests in a unified fashion.[75] For the most part these organizations were lacking in strength and longevity. They provided, however, the conceptual basis for today's associations. The modern

74. *See Basic Agreement Between The American League of Professional Baseball Clubs and The National League of Professional Baseball Clubs and Major League Baseball Players Ass'n* (1973) [hereinafter referred to as *Baseball Player's Agreement*]; *Agreement Between National Basketball Ass'n and National Basketball Players Ass'n*, [hereinafter referred to as *Basketball Player's Agreement*]; *Collective Bargaining Agreement Between The National Football League Players Ass'n and The National Football League Player Relations Ass'n and The Member Clubs of the National Football League* (1970) [hereinafter referred to as *Football Player's Agreement*]. At the present time, of the three collective bargaining agreements noted above, only the *Baseball Player's Agreement* is currently in force. The *Football Player's Agreement* and the *Basketball Player's Agreement* have expired during the last two years. In both cases where the agreements expired, negotiations have achieved little progress toward new and finalized agreements.

The National Football League Players Association, under provisions of the National Labor Relations Act, 29 U.S.C. §§ 151-68 (1971), *amending* ch. 372, 49 Stat. 449-57 (1935) has been certified by the National Labor Relations Board as the exclusive bargaining agent for the athletes. In baseball, basketball, and hockey, certification proceedings were unnecessary. In each of these sports the employers granted recognition to the unions upon a showing of majority status. Letter from Richard M. Moss, General Counsel, Major League Baseball Players Association to Jonathan Falk, Oct. 2, 1975, a copy of which is on file in the office of the *Hofstra Law Review*.

75. Baseball offers the most detailed evolution of player organizations. The current organization was formed in 1954 but it was not until 1966 that the Major League Baseball Players Association was able to effectively negotiate on the players' behalf. For an extensive analysis, see H. Seymour, 1 & 2 Baseball (1960, 1971); D. Voight, 1 & 2 American Baseball (1966, 1970); D. Wallop, Baseball, An Informal History (1969).

athlete is represented by highly organized players' associations[76] which during the last decade negotiated agreements with management that fully outline all conditions of employment.

The fruits of this labor form the basis of the standard contracts with which every player must comply in order to pursue his livelihood.[77] Internal labor remedies, which provide the athlete with his desired protection, have accompanied the collective bargaining agreements. The existence of these internal remedies may, however, result in a conflict between the interest of an individual athlete in vindicating his constitutional rights and the interests of the bargaining unit as a whole.

Practitioners of labor law have attached great significance to the impact of an individual who wields greater bargaining power than other members of the bargaining unit. The maverick who goes outside the collective bargaining agreement erodes the strength and position of the unified body. Judicial treatment of individual negotiations has been varied with the results depending primarily upon the facts of each case. The Supreme Court has stated that:[78]

> We are not called upon to say that under no circumstances can an individual enforce an agreement more advantageous than a

76. American Basketball Association Players Association (1965), Major League Baseball Players Association (1954), National Basketball Association Players Association (1962), National Football League Players Association (1956), National Hockey League Players Association (1967), World Hockey Association Players Association (1971).

77. Both the player contracts and the collective bargaining agreements contain provisions of the following nature. The contract that every NHL player must sign provides:

> It is severally and mutually agreed that the only contracts recognized by the President of the League are the Standard Player's Contracts, Player's Termination Contracts, and Player's Option Contracts which have been duly executed and filed in the League's office and approved by him, and that this Agreement contains the entire agreement between the Parties and there are no oral or written inducements, promises or agreements except as provided herein.

National Hockey League Standard Player's Contract, cl. 20 (1974). A similar provision may be found in the collective agreement with which every professional football player must comply:

> All players in the NFL shall sign the Standard Player's Contract which shall be known as the 'NFL Standard Player Contract.' The Standard Player Contract shall govern the relationship between the clubs and the players, except that this Agreement shall govern if any terms of the Standard Player's Contract conflict with the terms of this agreement.

Football Player's Agreement, supra note 74, at art. 111, § 1. *See also Baseball Player's Agreement, supra* note 74 at art. III; *Basketball Player's Agreement, supra* note 74, at art. 1.

78. J.I. Case Co. v. NLRB, 321 U.S. 332, 338 (1944).

> collective agreement, but we find the mere possibility that such agreements might be made no ground for holding generally that individual contracts may survive or surmount collective ones. The practice and philsophy of collective bargaining looks with suspicion on such individual advantages. Of course, where there is great variation in circumstances of employment or capacity of employees, it is possible for the collective bargain to prescribe only minimum rates or maximum hours or expressly to leave certain areas open to individual bargaining.

This may have severe ramifications for both union and managerial interests. In structuring a national labor policy, Congress sought to preclude an individual from circumventing the collective bargaining agreement.[79] Certain questions, however, remain unanswered. How should the maverick who seeks to assert his constitutional rights be treated? In asserting his rights is he subject to the limitations placed upon the bargaining unit? Was it Congress' intent in structuring the policy to foreclose all but arbitration remedies to those confronted with constitutional infirmities? And finally, how have courts resolved the conflict of remedies between constitutionally-mandated rights and con-

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79. It is clear that once the agreement is finalized the player is free to negotiate all individual terms above the minimum levels established, so long as the contracted terms remain in compliance with the agreement itself. *See Football Player's Agreement, supra* note 74, at art. IV, § 1 (Compensation for Players, Individual Negotiations) where it is stated that:

> It is understood and agreed that individual NFL players have the right to negotiate regular season compensation above the minimums established in the Agreement. Each player must receive at least the applicable minimum regular season salary established in this Agreement.

The maxim "in unity there is strength" has always benefited the common employee, but unionization has had severe limiting effects on the position of the superstar, in any field, to assert his own terms.

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely choosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interest of all employees.

NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967). Two authors, in discussing antitrust controversies generated by professional sports, examined the problem of the athlete who ventures outside the agreement. "If the stars in a sport can opt out of the bargaining unit, the remnant union, consisting entirely of journeymen, will be weak indeed." Jacobs & Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1 (1971).

See also Baseball Player's Agreement, supra note 74, at art. III (Recognition); *Basketball Player's Agreement, supra* note 74, at art. 1, § 4.

gressional policy and at the same time preserved national labor tranquility?

In the past, the hierarchy of professional sports remained immune from public scrutiny. Recent controversies involving antitrust challenges,[80] as well as numerous exposés questioning the power structure of today's sports empire,[81] however, have brought about an awareness of the need for changes in player-management relations. Unionization has modified the one-sided regulatory mechanisms governing sports, but those provisions which supposedly symbolize sports survival remain entrenched in the governing constitutions. The concept of integrity, for instance, has imbued all regulations of professional athletics, since it is management's belief that in order to maintain high standards on the field, off-the-field conduct must also be controlled.[82]

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80. The antitrust litigation first surfaced in baseball. *See, e.g.*, Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953); Federal Baseball Club v. National League, 259 U.S. 200 (1922). Baseball has been accorded a special exempt status on a stare decisis basis by the courts but the other major sports have been declared subject to federal antitrust laws. *Basketball*: Haywood v. National Basketball Ass'n, 401 U.S. 1204 (1971); Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971); Washington Professional Basketball Corp. v. National Basketball Ass'n, 147 F. Supp. 154 (S.D.N.Y. 1956). *Boxing*: United States v. International Boxing Club, 348 U.S. 236 (1955); *Football*: Radovich v. National Football League, 352 U.S. 445 (1957); Kapp v. National Football League, 390 F. Supp. 73 (N.D. Cal. 1974); *Golf*: Deesen v. Professional Golfers Ass'n, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966); *Hockey*: Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972).

Perhaps the most attention and controversy was generated by Curt Flood when he launched an unsuccessful attack against baseball's reserve clause. *See* Flood v. Kuhn, 407 U.S. 258 (1972).

81. *See generally* J. Bouton, Ball Four (1970); D. Meggysey, Out of Their League (1970); J. Scott, The Athletic Revolution (1971).

82. In the past NFL Commissioner Pete Rozelle pressured N.Y. Jet quarterback Joe Namath to divest himself of his interests in a New York night club, and also advised Namath and other players to avoid this and other such establishments. *See* N.Y. Times, July 20, 1969 § 5 (Sports) at 1, col. 3. In the early 1960's football players Paul Hornung and Alex Karras were suspended for one season for gambling associations and betting activities. *See* N.Y. Times, Mar. 17, 1963, at 41, col. 1. Baseball player Denny McLain was suspended for similar reasons. *See Slap on the Wrist*, Newsweek, Apr. 15, 1970, at 48; N.Y. Times, Apr. 2, 1970, at 48, col. 1.

The NBA constitution in section 35 (b) gives the commissioner full power to deal with matters of a similar type:

> The Commissioner shall direct the dismissal and perpetual disqualification from any further association with the Association or any of its members, or any person found by the Commissioner after a hearing to have been guilty of offering, agreeing, conspiring, aiding or attempting to cause any game of basketball to result otherwise than on its merits.

Under section 35 (c), the constitution places a definitive limitation on all statements made by a player:

> Any person who gives, makes, issues, authorizes or endorses any statement having, or designed to have, an effect prejudicial or detrimental to the best

For years ownership interests have been able to maintain control over their players in a chattel-like fashion by way of the reserve and option clauses.[83] They have further been able to escape judicial scrutiny due to the courts' treatment of their antitrust status.[84] While labor law has slowly begun to dominate all aspects of modern sports, it remains to be seen whether management interests will find protection in the conflict of remedies between national labor policy and judicial intervention.[85]

It is therefore necessary to examine certain basic tenets of labor relations before discussing the constitutional issues that may arise in the context of professional athletics. Team owners must now bargain over all contract or by-law provisions relating to wages, hours, and working conditions.[86] Paramount to the bargaining procedure is the concept of fair representation.[87] So long as the "fairness" of the negotiator is unquestioned, the players are subject to and bound by all terms which their representative has obtained for them at the bargaining table.[88] However, where there

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interests of basketball or of the Association or of a member or its team, shall be liable to a fine not exceeding $1,000 to be imposed by the Board of Governors.

83. *See, e.g., Baseball Player's Standard Contract* § 4 (a) (reserve clause); *National Basketball Ass'n Uniform Player's Contract*, § 22 (option clause); *National Hockey League Standard Player's Contract, supra* note 77, at § 17 (option clause).

84. To date the baseball antitrust controversy remains unsettled primarily because the owners have been able to convince the courts that any change in their status must emanate from legislative action and not from judicial holding.

> Accordingly, we adhere once again to *Federal Baseball* and *Toolson* and to their application to professional baseball . . . . If there is any inconsistency or illogic in all this, it is an inconsistency or illogic of long standing that is to be remedied by the Congress and not by this Court.

Flood v. Kuhn, 407 U.S. 258, 284 (1972). *See* note 80 *supra*.

85. The preemption doctrine as applied to labor matters has no relevance when confronting constitutional issues. *See* notes 90 & 92 *infra* and accompanying text.

86. 29 U.S.C. § 158(d) (1971).

87. *See* Vaca v. Sipes, 385 U.S. 171, 177 (1967):

> Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.

See also Seay v. McDonnell Douglas Corp., 427 F.2d 996, 1000 (9th Cir. 1970):

> Applying a broad interpretation, obedient to the Supreme Court, we determine that appellant's complaint alleges a violation of the agreement in that the agreement by implication imposes upon the union the well-recognized statutory duty of fair representation toward all employees. This duty evolved from racial discrimination cases. It was applied to labor unions in Ford Motor Co. v. Huffman, 345 U.S. 330 (1953) [footnotes omitted].

88. *See* NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967).

has been unfair representation on either side of the table the courts have stood ready to apply statutory remedies.[89]

The collective bargaining agreement often looms as a serious problem for the frustrated athlete despite the protection it offers. By invoking an exhaustion-type doctrine the courts have preempted individuals from judicial remedies until such time as the arbitration process renders its final holding.[90] This is often a protracted and tedious process which offers at best long-delayed results. If this exhaustion doctrine is misapplied, the athlete may find himself in a rather unfavorable legal position. Under the collective bargaining agreement, which may exist before he comes to contract terms and over which he has limited control, he is

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89. [W]e think the wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, provided the employees can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance . . . .

. . . If a breach of duty by the union and a breach of contract by the employer are proven, the court must fashion an appropriate remedy.

Vaca v. Sipes, 386 U.S. 171, 186-87 (1967).

In Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953), the Court in finding that the members of the union involved had been fairly represented stated: "The bargaining representative whoever it may be, is responsible to, and owes complete loyalty to, the interests of all who it represents."

90. Any determination of an individual's right in a collective bargaining situation must consider the effect of the preemption doctrine in labor law. A basic understanding of its tenets is essential, for any decision that is rendered by a court will have to reconcile the conflict between labor and judicial remedies.

When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the State from acting . . . .

When it is clear or may be fairly assumed that the activities which a State purports to regulate are protected by [the NLRA] . . . . due regard for the federal enactment requires that state jurisdiction must yield . . . .

. . . [C]ourts are not primary tribunals to adjudicate such issues. [Citations omitted.]

San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243-44 (1959). *But see* Vaca v. Sipes, 386 U.S. 171 (1967).

Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.

Garner v. Teamsters Local 776, 346 U.S. 485, 490-91 (1953); Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971); Capital Serv. v. NLRB, 347 U.S. 501 (1954).

For further discussion of the doctrine itself see Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337 (1972).

forced to accept all limitations and may only question their application through the agreement's arbitration provision. Examination of the collective agreements and standard contracts of the professional leagues reveals that all contain provisions which in some way place limitations upon the athlete's right to make certain statements.[91] Should the athlete question the provision through the arbitration process, he could only attack the application of the provision to himself in a particular instance and not the provision itself.[92] The role of the arbitration panel is limited. It can interpret and apply the agreement, but it cannot question its validity. Thus the arbitration process presents the athlete with a final and fruitless end insofar as his desire to challenge the agreement itself is concerned.[93]

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91. The NFLPA (National Football League Players Ass'n) and NFLPRA (National Football League Player Relations Ass'n) agree that each will use its best efforts to avoid public comments by Clubs, owners, non-playing personnel, as well as by players or coaches, which express adverse criticism of the Club, the coach or the operation and policy thereof, or which tend to cast discredit upon a Club, a player or any other person involved in the operation of the Club or the League.

Football Player's Agreement, *supra* note 74, at art. XV, § 3 (Adverse Public Statements). *See* note 82 *supra*.

92. *See Basketball Player's Agreement*, *supra* note 74, at art. XVI § 1 (Grievance and Arbitration Procedure):

> Any dispute involving the interpretation or application of, or compliance with, the provisions of this Agreement or a Uniform Player Contract between a Player and a Club (except as provided in paragraph 9 of a Uniform Player Contract) shall be resolved in accordance with the Grievance and Arbitration Procedure set forth in this Article.

NBA Uniform Player's Contract, cl. 21 provides that:

> In the event of any dispute arising between the Player and the Club relating to any matter arising under this contract, or concerning the performance or interpretation thereof, (except for a dispute arising under paragraph 9 hereof), such dispute shall be resolved in accordance with the Grievance and Abritration Procedure set forth in the Agreement currently in effect between the N.B.A. and the National Basketball Players Association.

Under the *Basketball Player's Agreement*, *supra* note 74, at art. XVI, § 29, a grievance is defined as "[a] complaint which involves the interpretation or application of, or compliance with, the provisions of this Agreement or a Uniform Player Contract between a player and a club." The *Basketball Player's Agreement* further provides that:

> The Parties recognize that a player may be subjected to disciplinary action for just cause by his club or the commissioner. Therefore, in Grievances regarding discipline, the issue to be resolved shall be whether there has been just cause for the penalty imposed.

Id. at art. XVI, § 4e. *See also Baseball Player's Agreement*, *supra* note 74, at arts. 10(a)-(f); *Football Player's Agreement*, *supra* note 74, at art. II, §§ 1-8.

93. Application of the preemption doctrine has been narrowed by the courts for just this very purpose; not all disputes arising out of collective bargaining agreements can be

Recent statements by the Supreme Court, however, appear to indicate that labor arbitration is no longer viewed as a total panacea. Where individual rights are at stake, the Court has noted that the arbitration process was not designed to resolve such issues and as a result is not the only appropriate forum for their resolution.[94] In these instances legal issues are at stake which may also be subjected to judicial reasoning, and for which the specialized competence of the arbitrator is not final.[95]

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governed by arbitration proceedings. In many instances the expertise of the arbitrator may be found wanting in its application to the particular problem involved, in that the problem may be only tangential to the labor relationship. Certainly in cases where questions involving violations of a union's duty of fair representation arise, the courts will allow a cause of action to accrue without arbitration exhaustion. *See, e.g.*, Steel v. Louisville & N.R.R., 323 U.S. 192 (1944). *See also* note 90 *supra*.

Thus although the agreement with a league may provide the athlete with grievance or arbitration procedures, conceivably these need not be exhausted in the presence of an obstruction to his constitutional rights. When dealing with first amendment rights the courts have been careful to emphasize that "freedom of speech . . . has long been a basic tenet of federal labor policy." Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 270 (1974).

> The Court has often recognized that in cases involving free expression we have the obligation, not only to formulate principles capable of general application, but also to review the facts to insure that the speech involved is not protected under federal law.

Id. at 282, *citing* Pickering v. Board of Educ., 391 U.S. 563 (1967); New York Times Co. v. Sullivan, 376 U.S. 254 (1963); *and* Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1961).

Similarly the athlete going into court on a 42 U.S.C. § 1983 (1970) statutory basis should theoretically not be precluded from a judicial determination by virtue of available collective bargaining remedies.

94. The Supreme Court has held the view that the arbitral decision is always final and binding upon both employer and employee, United Steelworkers of America v. Enterprise Wheel & Car Corp., 353 U.S. 593 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960). In Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), however, the employee did not seek review of the arbitral decision but rather asserted a statutory right (Title VII) independent of the arbitral process. The Court held that the remedies available pursuant to Title VII were totally independent: "Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparitively inappropriate forum for the final resolution of rights created by Title VII." *Id.* at 56.

> Moreover, a contractual right to submit a claim to arbitration is not displaced simply because Congress also has provided a statutory right . . . [B]oth rights have legally independent origins and are equally available to the aggrieved employee.

Id. at 52.

95. The courts in upholding national labor policy and in placing their support behind collective bargaining have been careful to define the scope of arbitration.

> [T]he specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land. . . .

The courts have not yet been confronted by a disgruntled athlete like Abdul-Jabbar who would have directly challenged the constitutional validity of the gag-rule. In the aftermath of the Supreme Court's decision in *Flood v. Kuhn*,[96] however, the conflict between the individual nature of the player's contract and the collective bargaining agreement has been examined.[97] For the most part the discussion has been limited to the means by which the traditional enforcement of negative covenants has been used to assert control over players and to the area of antitrust.[98]

Courts have rarely considered questions involving first amendment rights which are raised outside the collective bargaining agreement. In *Buckley v. American Federation of Television and Radio Artists*,[99] the Second Circuit was presented with such an issue. The case involved the constitutionality of the compulsory membership requirement of AFTRA which was alleged to abridge the plaintiffs' right of free speech. William F. Buckley, Jr. and M. Stanton Evans, two media personalities, brought suit to contest their "impressment" into AFTRA. They sought an order enjoining the union from forcing them to pay dues; they wished to fully disassociate themselves from union membership and to be free from union regulations. The district court held, partly on constitutional grounds, that any provision of a collective agreement which required the plaintiffs' membership as a condition precedent to radio and television appearances was void and of no effect.[100] The court of appeals found that the district court was without jurisdiction to adjudicate that which pertained to compulsory union membership and compulsory compliance with union orders and regulations:[101]

> Moreover, the factfinding process in arbitration usually is not equivalent to judicial factfinding. . . . Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of (non-labor) issues than the federal courts.

Alexander v. Gardner-Denver Co., 415 U.S. 36, 56 (1974).

96. 407 U.S. 258 (1972).

97. *See generally* Morris, *In the Wake of the Flood*, 38 LAW & CONTEMP. PROB. 88 (1974); Note, *Flood in The Land of Antitrust*, 7 IND. L. REV. 541 (1973).

98. *See, e.g.*, Leavell & Millard, *Trade Regulation and Professional Sports*, 26 MERCER L. REV. 603 (1975).

99. 496 F.2d 305 (2d Cir.), *cert. denied*, 419 U.S. 1093 (1974).

100. Evans v. AFTRA, 354 F. Supp. 823 (S.D.N.Y. 1973), *rev'd sub nom.* Buckley v. AFTRA, 496 F.2d 305, *cert. denied*, 419 U.S. 1093 (1974).

101. Buckley v. AFTRA, 496 F.2d 305, 309 (2d Cir.), *cert. denied*, 419 U.S. 1093 (1974).

> [W]e hold that as to the issues of compulsory membership and compliance with union regulations, the National Labor Relations Board had primary jurisdiction under the preemption principle of San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959). Thus we hold that the federal district court exceeded its power in deciding these two issues, and we do not reach the merits with respect to them. Regarding the dues requirement, however, we do reach the merits and hold, contrary to the result reached by the district court, that this requirement does not abridge appellee's first amendment right of free speech.

The position taken by the Second Circuit in *Buckley* is germane to an analysis of the athlete's right to challenge an allegedly unconstitutional contractual provision outside the collective bargaining agreement. The court confronted both the problem of preemption and the freedom of speech argument. In rendering its decision regarding the first amendment aspects of the case, the court effectively asserted its jurisdiction over these matters. While it held that the court below had no basis to consider the compulsory dues and membership issues, the Second Circuit did not deem the preemption doctrine applicable to the constitutional issues before it:[102]

> [W]e conclude, without having to decide the issue of whether AFTRA's dues requirement is "government action," that the district court has jurisdiction to adjudicate the appellees' first amendment rights. First of all, the constitutional claim is neither 'immaterial' nor presented solely for the purpose of obtaining jurisdiction.
>
> In so deciding, we do not reach the issue of whether government action is involved. We conclude that even if it were, which we do not intimate, the dues requirement is not constitutionally infirm.

This distinction drawn between those issues which fall within the purview of the preemption doctrine and those which do not, must be applied to all confrontations arising under collective bargaining agreements. Labor controversies do not ordinarily pose an immediate threat to an individual's freedom. The remedies and scope of arbitration are designed to deal with the problems confronting a disenchanted employee. The preemption doctrine was designed for a twofold purpose: one, as noted, was to alleviate the courts' burden of adjudicating collective bar-

102. *Id.* at 310.

gaining disputes; the other was to offer the employee the best and most well-equipped forum to enforce the terms for which he has negotiated.

Arguments have been made by both players and management for and against the enforcement of the gag-rule. The argument, however, must be heard by the proper forum. Accordingly, whenever a case arises in which an individual is faced with a potential chilling of his constitutional rights, the judicial system requires that immediate relief be forthcoming. Despite their recognition that the NLRA governs labor relations, when disputes touch upon constitutional rights, the courts have been reluctant to surrender their adjudicatory powers.[103] Once the court determines that it has jurisdiction over the case, it is ready to consider the plaintiff's constitutional claim.

THE CONSTITUTIONAL CONSIDERATIONS

The guarantees of the first amendment are based on the premise that the "free debate of ideas will result in the wisest governmental policies."[104] The view that the truth can only be realized through "a robust exchange of ideas" and a "multitude of tongues" has often been expressed.[105] Thus, it has always been in the tradition of the courts to allow the widest room for discussion.[106]

The amendment itself provides that "Congress shall make no law . . . abridging the freedom of speech."[107] The strength of the language of the first amendment seems to indicate that the framers of the Constitution intended that it be given an absolute construction.[108] In spite of this, judicial evolution and constitutional interpretation have resulted in much debate over whether this protection may in fact be compromised. Thus, the Justices of the Supreme Court have adopted various interpretations regarding the amendment's constitutional application.

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103. Persons adversely affected by the results of collective bargaining agreements which impinge upon their constitutional rights are not required to exhaust administrative or intra-union remedies before suing in federal court. *Cf.* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); Buckley v. AFTRA, 496 F.2d 305 (2d Cir.), *cert. denied*, 419 U.S. 1093 (1974).

104. Dennis v. United States, 341 U.S. 494, 503 (1951).

105. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 512 (1969). *See also* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970).

106. Thomas v. Collins, 325 U.S. 516, 530 (1945).

107. U.S. CONST. amend. I.

108. McKay, *The Preference For Freedom*, 34 N.Y.U.L. REV. 1182 (1959).

The absolutist position is best exemplified by the opinions of Justices Black and Douglas. Justice Black's view is illustrated by his concurring opinion in *Time, Inc. v. Hill*,[109] where he stated:

> The freedoms guaranteed by [the first amendment] are essential freedoms in a government like ours. The amendment was deliberately written in language designed to put its freedom beyond the reach of government to change while it remained unrepealed.

This position is rather extreme in its support of a fundamental ideal. In contrast, the majority of the Court has long maintained that in examining a possible infringement of an individual's rights, practicality of application must govern. The Court has taken the approach that the proper resolution of first amendment cases can best be accomplished by a balancing of interests.[110] In each instance the Court has carefully weighed the competing considerations of the particular controversy at bar.[111]

Thus freedom of speech must be cloaked in qualified terms. Where there is a compelling or paramount state interest on one side of the scale, the courts have cautiously, but consistently, narrowed the scope of the guarantee. Freedom of speech can no longer be strictly equated with the right to unlimited expression; while it still remains a constitutional ideal, it is an ideal that at times must be tempered by compelling and necessary state prerogatives:[112]

> An analysis of the leading cases in this Court which have involved direct limitations on speech, however, will demonstrate that both the majority of the Court and the dissenters in particular cases have recognized that this is not an unlimited, unqualified right, but that the societal value of speech must, on occasion, be subordinated to other values and considerations.

This balancing scheme could provide the framework for a constitutional resolution of the gag-rule controversy. The interests on each side will have to be carefully weighed. By establish-

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109. 385 U.S. 374, 400 (1967).

110. Konigsberg v. State Bar, 366 U.S. 36, 49-51 (1960).

111. *See* NAACP v. Button, 371 U.S. 415 (1963); Bates v. Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958).

For decisions in the area of freedom of press see Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974); Gertz v. Welch, 418 U.S. 323 (1974); Branzburg v. Hayes, 408 U.S. 665 (1972); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

112. Dennis v. United States, 341 U.S. 494, 503 (1951).

ing state action, the athlete is protected from unconstitutional actions of his employer. At the same time, however, in the context of this embodiment as the state, the employer can assert certain substantial interests which may outweigh the constitutional rights of the employee. The entire balance operates within the scope of a legal fiction. The criticism of the referee by the athlete is elevated to constitutionally protected speech, but at the same time the interest of management in preserving sports integrity may be elevated to governmental action. It is at this level, albeit fictitious, that the courts may choose to resolve the dispute.

THE CONFLICTING INTERESTS—THEIR CONSTITUTIONAL BALANCE

In order to understand the varying and conflicting interests that operate in this sensitive area of first amendment rights, the authors conducted interviews with representatives of both players and management.[113] Their responses to the various questions asked[114] were the basis upon which the following generalizations are made. All that can be gleaned is the ground work that is necessary to resolve the controversy between player and management. Substantial interests exist on both sides, and it is the court's role to determine which arguments will prevail.

Management Interests

Competition is the cornerstone of professional sports. As a

113. During the course of a seven-week period, interviews were conducted on an informal basis with players, coaches, game officials, management representatives, and players' attorneys and agents. In order to achieve candid results, the authors were obliged to assure anonymity to all those who participated.

114. The questions asked at sessions with representatives of league management included:

1. Does the provision allowing the league commissioner to fine a player who he feels has made a statement detrimental to the league have a "chilling effect" on a player's actions?
2. Is the player being deprived of a first amendment right?
3. Is restraint of this nature necessary as opposed to the player imposing such a restriction on himself?
4. Could the league function without the provision?
5. How has the provision been enforced in the past?

The questions asked at sessions with ballplayers included:

1. Does the provision allowing the league commissioner to fine a player who he feels has made a statement detrimental to the league have a "chilling effect" on your actions?
2. Do you feel that you are being deprived of a Constitutional right?
3. If this were not a standard provision, how high a priority would this be in your contract negotiations?
4. Do you feel that you are now being compensated for this loss?
5. Could the league function without this provision?

result, each contest generates interest because the outcome remains in doubt. Central to this notion is the fact that the skill and abilities of the players themselves account for the game's result. In many ways management feels that preservation of this ideal can only be achieved through control of player personnel. The attainment of public interest, approval, and trust are the essential goals of management. Thus, it is felt that the control mechanisms which the leagues have promulgated will assure this necessary credibility in the eyes of the spectator.[115]

Representatives of management have expressed the belief that rampant criticism of league officials can only result in the erosion of this ideal. The absence of such provisions, it is believed, will cause a damaging shift in emphasis from the skills of the players to the performance of the officials. The referee's role is perhaps the most difficult and necessary in sports, and yet it must remain limited as compared with the players' role. It is essential that the referee exercise stringent control over the game. In accomplishing this task he must enforce the rules of the game in the most objective fashion possible. In order to accomplish this, the official must be allowed to operate in a pressureless environment. Naturally, this is not totally practical. Management contends, however, that the absence of restrictions on players engaging in blatant criticism can only hamper this goal and damage the sport.

An athlete's emotional involvement with his game is another factor which management feels necessitates the presence of the restrictions. While on the field in this fervent state, players have been known to act in an irrational fashion. Management feels that it is in the best interest of sports and the players themselves to shield the public from these outbursts. It is hoped and believed that the awareness of the provisions serves to prevent the opening of a floodgate of adverse and needless remarks which can in no way serve the game's betterment.

In a constitutional sense, perhaps the greatest support for management's desire to preserve these controls is the fact that their application is confined to the daily operation of league affairs. In no way do they affect the private realm of an athlete's

115. Professional sports exist under the eye of public scrutiny. Traditionally the image of the player has been maintained at an impeccable level. The entire concept of the sports contest operates within this realm and in order to assure this public approval league officials have used their control mechanisms as a means to limit controversy to the field contest. *See* discussion of gambling and life-styles of athletes at note 82 *supra*.

life. What the athlete does in his private life is entirely his concern, and in no way are his political beliefs or associations restricted or limited by the gag-rule. The operation of the rules has always had and has always been given this rather narrow effect.

Finally, each league provides the player with an internal means by which he can voice his objections to the daily operation of the game.[116] It has long been management's contention that more constructive results can be achieved through such measures than by way of public sensationalism.

Players' Rights

In asserting their absolute rights to free speech, the athletes have adopted traditional viewpoints. It is their belief that only through the free exercise of conflicting ideas can the progress and betterment of their own working institution be achieved.[117] They feel that open commentary in a public forum will serve to expedite the league's awareness and improve these conditions:[118]

> Sports shouldn't be above acknowledging that its game officials aren't infallible. The gag-rule has protected the worst officials. Without it, the best officials would be more apparent and more appreciated. The worst officials would disappear quicker, instead of being able to hide in the immunity that has protected them from justified criticism.

The players feel, therefore, that apart from the protection of their constitutional freedoms, public exposure to the game's deficiencies would have positive results.

The player's position is strengthened by the infrequency with which the leagues enforce the rules. The clauses themselves, as has been earlier noted,[119] lack definitive guidelines for their application. In the minds of many, this has resulted in their arbitrary and capricious use. Moreover, the infrequency with which the regulations are applied only supports the belief that such control is superfluous. The players contend that they are capable of exer-

116. The National Basketball Association, for example, makes provisions for players and coaches who are dissatisfied with the performance of a game official. They can file a complaint with the Commissioner or the supervisor of officials. In addition, the Commissioner's office makes use of five observers to rate officials, a questionnaire is circulated among general managers and coaches, and feedback on performance is received from the Players Association. Anderson, *supra* note 1, at 5, cols. 1-2.

117. Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting).

118. Anderson, *supra* note 1, at 5, cols. 1-2.

119. *See* discussion of clauses at notes 3, 82 & 91 *supra*.

cising self-restraint in discussing sensitive issues, and feel that they would continue to do so in the absence of the regulations.

An important consideration for the courts is the varying effect the provisions have on different players. For the superstar, the rule is only an added term in the employment contract. For the less-skilled player, however, the effects of the rule can be overwhelming. To him the rule is a condition upon which he earns his livelihood. If he does not wish to comply he can do little else than seek alternative means of employment. The potential control that the rules have over such an athlete is certain to be an important factor in any court decision.

As a final consideration, many of the players and their representatives have expressed the belief that the conflict between referee and player only helps to add luster to the game. They feel it is an added dimension which heightens the human element of the game. The players offer an interesting argument in support of their contention. The referee, in the age of technology, no longer operates in a protected vacuum. The instant replay has been used to demonstrate to millions of viewers through an objective medium, the accuracy of the game official.

Conclusion

The athlete who seeks to vindicate his first amendment rights with respect to the gag-rule will be faced with numerous procedural and substantive roadblocks. Should an athlete decide to fully test the gag-rule in the near future, it is the substantive issues which shall prove to be the more unique in nature. Initially the question of the existence of state action, like most other threshold questions, will have to be answered by the court that confronts the issue. While it cannot be gainsaid that state action in professional sports rests on tenuous grounds, it is certain that should a court desire to examine the constitutional issues involved, there is more than a substantial basis upon which to do so. Finally, the "balancing test" that has been presented serves to indicate the extremely delicate nature of this entire issue.

The burden rests with the athlete and his attorney to demonstrate that the court is the proper forum for their contentions, *i.e.*, they must offer the court proper justification for any preemption of their internal labor remedies. Once inside the confines of the court the burden remains on the athlete to overwhelmingly display that the infirmities within the collective bargaining agreement do in fact exist.

The problem remains twofold: the potential "chilling effect" on the athlete's rights as opposed to the management interest in sustaining its own self-control and prerogative in these areas. There are indications from both sides that some control is necessary. It will perhaps be the task of a court to examine the clauses and constitutionally temper their effect. The present application of these clauses appears to be sound and their subjection to judicial scrutiny should provide the athlete with the protection of precise application in the future.

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