
OUTSOURCED CENSORSHIP: A CASE FOR JUDICIAL REVIVAL OF THE STATE ACTION DOCTRINE’S ENCOURAGEMENT THEORY

HALEY TUCHMAN*

TABLE OF CONTENTS

INTRODUCTION.....	1040
I. THE CURRENT STATE OF FIRST AMENDMENT SPEECH PROTECTIONS AND THE STATE ACTION DOCTRINE	1043
A. WHAT IS PROTECTED UNDER THE FIRST AMENDMENT?.....	1043
1. First Amendment Exceptions.....	1044
2. Protections for Symbolic Speech and Counter-Speech.....	1044
3. Private Employee Speech Protections.....	1046
B. THE FOURTEENTH AMENDMENT’S STATE ACTION REQUIREMENT	1047
1. State Action Tests	1048
i. Public Function Theory.....	1048
ii. Judicial Enforcement Theory	1048
iii. State Encouragement Theory	1049
iv. Nexus Theory	1050
II. THE PRESIDENT’S WORDS AND ACTIONS COERCED OR ENCOURAGED THE NFL TO INSTATE ITS ANTHEM POLICY IN VIOLATION OF THE FIRST AMENDMENT	1052

*. Executive Development Editor, Southern California Law Review, Volume 93; J.D. 2020, University of Southern California Gould School of Law; B.A. Government 2016, University of Texas at Austin. First and foremost, I am deeply grateful to my parents, Deborah and Jeremy, who have always encouraged and supported me in everything that I do. Thank you to Professor Rebecca Brown for your steadfast faith in our Constitution and your invaluable guidance in drafting this Note. Also, many thanks to my friends and family who endured countless iterations of this argument with me. Finally, thank you to the team of editors at the Southern California Law Review who made editing during a pandemic a seamless process. I have the utmost respect and appreciation for your exceptional work.

A. THE INCEPTION OF THE NFL PROTESTS	1053
B. PRESIDENT TRUMP’S CRITICISM AND THE LEAD-UP TO THE NFL’S ANTHEM POLICY	1053
C. ANALYZING THE PRESIDENT’S ROLE IN VIOLATING THE FIRST AMENDMENT	1055
III. THE GROWING DANGER OF OUTSOURCED CENSORSHIP	1059
A. UNIVERSITIES	1059
B. NEWS OUTLETS	1061
C. SOCIAL MEDIA AND TECHNOLOGY COMPANIES	1063
IV. THE COURT MUST REVIVE THE STATE ACTION DOCTRINE’S ENCOURAGEMENT THEORY	1066
CONCLUSION	1067

INTRODUCTION

In May 2018, in response to nearly two years of player protests, the National Football League (“NFL”) released a statement that it would now require all players to stand for the National Anthem. Specifically, the League’s well-known anthem policy mandated, in part, that, “[a]ll team and league personnel on the field shall stand and show respect for the flag and the anthem,” “[p]ersonnel who choose not to stand for the anthem may stay in the locker room or in a similar location off the field until after the anthem has been performed,” “[a] club will be fined by the League if its personnel are on the field and do not stand and show respect for the flag and the anthem,” and “[t]he commissioner will impose appropriate discipline on league personnel who do not stand and show respect for the flag and the anthem.”¹ While the policy sparked a thorough debate on the bounds of the First Amendment (namely, whether the NFL as a private employer could restrict its players’ rights to protest) many began to wonder, what exactly spurred the League’s decision?

In the 1960’s, when states sought to evade constitutional anti-discrimination standards by encouraging private parties to commit acts of racial discrimination that the states themselves could not, the Supreme Court responded by adopting a broader view of state action. Recognizing that licensees, lessees, contractors, and other private actors imbued with a semblance of state authority were claiming the freedom to discriminate because they did not act with or under explicit state authority, the Court

1. Roger Goodell’s Statement on National Anthem Policy, NFL (May 23, 2018, 5:15 AM), <http://www.nfl.com/news/story/0ap3000000933962/article/roger-goodells-statement-on-national-anthem-policy> [https://perma.cc/BUA5-TPVD].

expanded the Fourteenth Amendment's reach to inhibit the evasion of its requirements. Unfortunately, as the Civil Rights movement subsided, so did the Court's new, more rigorous standard. During the 1970's and 1980's the Burger Court severely curtailed the doctrine's reach, refusing to follow its expanded interpretation "in almost every case presenting a state action issue."² As a result, any broad notion of the state action doctrine was functionally abandoned.

While overt state-sanctioned race discrimination may no longer present the same threat to constitutional values that it did when the Warren Court took on the problem, a different kind of constitutional evasion has flourished under the Court's current understanding of which private entities are subject to First Amendment behavioral constraints. As it stands, the NFL's 2018 anthem policy, various acts by private universities, changes in the media landscape, and social media companies' policies and priorities, are all considered beyond the Constitution's reach because state actors do not nominally commit these speech restrictions. But under a view of state action similar to that adopted by the Warren Court, some of these nominally "private" actions would be better understood as sufficiently encouraged by government action to warrant First Amendment analysis. Just as threats to racial equality were a focal point of the Warren Court's jurisprudence, threats to freedom of speech, in the form of outsourced censorship, present problems of equal concern today. In an era in which constitutional and presidential norms have broken down³ due to President Trump's regular attacks on, and attempts to censor, private employees, universities, the press, and private corporations, the Court must revive discarded precedent and once again hold private actors accountable for state-coerced or encouraged behavior that would be independently unconstitutional if undertaken by the state.

Reworking the state action doctrine is not a new idea—some scholars have argued for radically expanded notions of the standard,⁴ while others have called for its elimination altogether.⁵ And even though recent

2. Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 505 n.10 (1985) (describing cases in which the Court held no state action existed despite factual similarities to earlier cases in which state action was present).

3. See Sonja R. West, *Suing the President for First Amendment Violations*, 71 OKLA. L. REV. 321, 321–25 (2018).

4. Professor Jesse Choper argued for a new judicial standard known as "power theory," suggesting that "conduct of a private individual or organization that has a widespread and fundamental impact on other private individuals should be held to the obligations that the Constitution imposes on the state." Jesse H. Choper, Commentary, *Thoughts on State Action: The "Government Function" and "Power Theory" Approaches*, WASH. U. L. REV. 757, 777 (1979).

5. Professor Erwin Chemerinsky adopted a rights-based approach in questioning the state action doctrine's utility, and concluded it was "time to begin rethinking state action . . . [and] ask why infringements of the most basic values—speech, privacy, and equality—should be tolerated just because the violator is a private entity rather than the government." Chemerinsky, *supra* note 2, at 505.

scholarship has focused on the extent to which private employers like the NFL may restrict its players' free speech rights,⁶ and other scholars have explored the mechanisms by which individuals could sue the President directly for raising First Amendment violations,⁷ this note utilizes the NFL's anthem policy as a case study to illustrate the dangers of a state action doctrine that holds neither the government nor private actors accountable for their constitutional violations.

Part I traces the evolution of First and Fourteenth Amendment jurisprudence and examines the existing doctrine as it pertains to the NFL's anthem policy. Although the Court has developed a patchwork of state action tests over the years, this Note focuses specifically on the impact and necessity of expanding the state encouragement theory. Part II proposes that the President unconstitutionally coerced and influenced the NFL to change its longstanding anthem policy by unleashing a calculated media firestorm, encouraging fans to boycott games, and threatening to revoke the league's tax-exempt status. Trump's success in employing these unprecedented tactics to suppress speech he deemed objectionable exemplifies his willingness to disregard constitutional principles and norms in pursuit of unfettered executive control. Overall, the government's ability to influence the NFL to depart from its longstanding position, and censor player protests, sets a frightening precedent. Part III focuses on the vulnerability of three private actors: universities, news outlets, and social media and technology companies, and assesses the mounting danger of outsourced censorship beyond the NFL. Part IV argues that the Court has abdicated a core part of its role as a co-equal branch of government by abandoning formerly-broad notions of state action and allowing the Executive Branch to hide behind private actors.

In order to combat the growing threat of outsourced censorship, the Court must revive the state encouragement theory and unequivocally apply the doctrine to cases in which the government has manifestly coerced or influenced a private actor's speech restrictions. The future of the First Amendment is at a crossroads, and if the Court continues to turn a blind eye to the Executive's constitutional abuses, truly meaningful speech or press

6. See generally, e.g., Sarah Brown & Natasha Brison, *More than an Athlete: Constitutional and Contractual Analysis of Activism in Professional Sports*, 7 ARIZ. ST. SPORTS & ENT. L.J. 249, 264 (2018) (discussing the constitutionality of past and present athlete activism under and current major-league contract law); Marc Edelman, *Standing to Kneel: Analyzing NFL Players' Freedom to Protest During the Playing of the U.S. National Anthem*, 86 FORDHAM L. REV. ONLINE 1 (2018) (discussing various protections NFL players may have to engage in protests); Jonathan G. Finck, Note, *Can NFL Players Be Punished for Kneeling? An Analysis of the Banter Surrounding the Star-Spangled Banner*, U. DEN. SPORTS & ENT. L.J. 125 (2018) (analyzing the constitutionality of the NFL punishing player protests).

7. See West, *supra* note 3.

protections will cease to exist.

I. THE CURRENT STATE OF FIRST AMENDMENT SPEECH PROTECTIONS AND THE STATE ACTION DOCTRINE

Any analysis of the constitutional problems posed by the NFL's reaction to Trump's rhetoric requires a thorough examination of both the First and Fourteenth Amendments. The First Amendment is patently relevant because the NFL's policy prohibited a player from exhibiting expressive conduct on the field during the national anthem.⁸ The Fourteenth Amendment is related because professional sports leagues are ordinarily classified as private actors⁹ with the power to evade almost all of the First Amendment's reach.

Unfortunately, acquiring a sufficient understanding proves challenging when such an incoherent standard emerges at the convergence of these two amendments.¹⁰ This section will trace the evolution of the First and Fourteenth Amendments and explore the current tests the Court employs to determine what constitutes state action, in an attempt to untangle the complex relationship between speech, state actors, and private actors.

A. WHAT IS PROTECTED UNDER THE FIRST AMENDMENT?

The First Amendment's free speech clause is perhaps one of the most well-known and fiercely defended constitutional rights in modern history.¹¹ The text provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."¹²

8. Roger Goodell's *Statement on National Anthem Policy*, *supra* note 1.

9. Christopher J. McKinny, Comment, *Professional Sports Leagues and the First Amendment: A Closed Marketplace*, 13 MARQ. SPORTS L. REV. 223, 232 (2003). *But see* *Ludtke v. Kuhn*, 461 F. Supp. 86, 93–94 (S.D.N.Y. 1978) (holding that New York City's substantial financial involvement with the Yankees and its stadium was sufficient to make its commissioner's policy state action).

10. See Stephen K. Wirth, Note, *State Action, Government Speech, and the Narrowing Spectrum of Private, Protected Speech*, 99 CORNELL L. REV. 485, 493 (2014) ("Taken together, the various threads of the state-action doctrine form a patchwork of rules but no consistent standard.").

11. See *Americans Are Poorly Informed About Basic Constitutional Provisions*, ANNENBERG PUB. POL'Y CTR. (Sept. 12, 2017), <https://www.annenbergpublicpolicycenter.org/americans-are-poorly-informed-about-basic-constitutional-provisions> [<https://perma.cc/Y5AP-DVW8>] ("Nearly half of those surveyed (48 percent) say that freedom of speech is a right guaranteed by the First Amendment. But, unprompted, 37 percent could not name any First Amendment rights. And far fewer people could name the other First Amendment rights: 15 percent of respondents say freedom of religion; 14 percent say freedom of the press; 10 percent say the freedom of assembly; and only 3 percent say the right to petition the government.").

12. U.S. CONST. amend. I.

1. First Amendment Exceptions

At first glance, the relevant portion, “Congress shall make no law . . . abridging the freedom of speech,” appears rhetorically unlimited.¹³ However, First Amendment jurisprudence has evolved to exclude entire categories of speech from protection, and the power of judicial review entrusts courts with the lofty responsibility of determining exactly what and who falls under the First Amendment’s protective wing.¹⁴

Although not exclusively limited to these categories, the Court has carved out exceptions for obscenity, defamation, and fighting words, labeling this speech as that which is “of such slight social value,” that any of its plausible benefits will not outweigh the government’s interest in “order and morality.”¹⁵ Other categories of speech and speakers also receive diminished First Amendment protections. For example, commercial speech may be suppressed if it is inaccurate or “related to illegal activity,”¹⁶ and K-12 schools may censor ordinarily protected student speech when it is “inconsistent with the school’s ‘basic educational mission.’”¹⁷ Despite these exceptions, which are undoubtedly the result of historical “struggles and compromises,” modern First Amendment jurisprudence has ultimately left America with the most “fierce and stringent . . . system of legal protection for speech” in the developed world.¹⁸

2. Protections for Symbolic Speech and Counter-Speech

The Court has decided that both the freedoms of speech and expression also extend to symbolic speech.¹⁹ While not necessarily spoken or written word, an act constitutes presumably protectable symbolic speech if it is “sufficiently imbued with elements of communication.”²⁰ In *Texas v.*

13. *Id.*

14. See Howard M. Wasserman, *Symbolic Counter-Speech*, 12 WM. & MARY BILL RTS. J. 367, 414 (2004) (arguing that the First Amendment “actually fears participation by the people, trusting courts to respect and protect dissenters, to be tolerant of opposing views, and to protect vulnerable minorities from the will of political majorities”).

15. *R.A.V. v. St. Paul*, 505 U.S. 377, 382–83 (1992) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

16. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563–64 (1980).

17. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266–67 (1988) (quoting *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986)).

18. Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 229 (1992).

19. See Wasserman, *supra* note 14. *But see Texas v. Johnson*, 491 U.S. 397, 406 (1989) (“The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word.”).

20. *Johnson*, 491 U.S. at 406 (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)); see also *Rumsfeld v. F. for Acad. & Inst. Rts., Inc.*, 547 U.S. 47, 65–66 (2006) (“[W]e have extended First Amendment protection only to conduct that is inherently expressive.”).

Johnson, the Court struck down a Texas law that prohibited burning the American flag because the act did not threaten the state interest of maintaining the peace, nor did it represent anything other than speech itself.²¹ The Court also rejected Texas's stated interest in preserving the flag as a symbol of nationhood and unity, affirming that "the government may not prohibit the expression of an idea simply because society finds [it] offensive or disagreeable."²²

However, symbolic speech has not always been deemed worthy of judicial protection—it may be regulated if the government can show that the law in question furthers a substantial interest unrelated to the suppression of free speech, and that any incidental restrictions on speech are "no greater than [what are] essential" to further that interest.²³ In *United States v. O'Brien*, a federal law criminalized knowingly destroying a draft card.²⁴ The defendant, who was convicted for burning his draft card, argued that the law abridged his right to protest the draft and the Vietnam War.²⁵ The Court upheld the conviction because the government showed that the physical card aided the proper function of the draft system by providing proof of registration, a means for contact between drafters and draftees, and by preventing fraudulent efforts to join or escape the armed forces.²⁶ Furthermore, the law did not inherently restrict the message that draft card burning promoted, as protesters could still espouse anti-war rhetoric in public.

The First Amendment also protects an actor's nonparticipation in a symbolic activity,²⁷ which some have classified as "symbolic counter-speech."²⁸ *West Virginia State Board of Education v. Barnette* invalidated a public school resolution that compelled students to salute the flag and recite the Pledge of Allegiance because it infringed on the students' nonparticipation rights.²⁹ While the government argued that the policy was an important tool to foster national unity, Justice Jackson's opinion warned of the perils of nationalism, and specifically critiqued the government's attempts to compel patriotism.³⁰ Perhaps because *Barnette* was argued

21. *Johnson*, 491 U.S. at 407–10.

22. *Id.* at 410–20.

23. *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

24. *Id.* at 375.

25. *Id.* at 376.

26. *Id.* at 378–80.

27. *See W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (overruling *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940)).

28. Wasserman, *supra* note 14, at 369.

29. *See Barnette*, 319 U.S. at 642.

30. *Id.* at 640–42 ("To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our

during World War II, the opinion reads as a cautionary tale, as Justice Jackson powerfully rejected a regime that prescribes “what shall be orthodox in politics, nationalism, religion or other matters of opinion.”³¹ That is why refusing to participate in a national ritual like the Pledge or the anthem is so powerful—because the actor’s nonparticipation implicitly recognizes the significance of that symbol and imbues it with a message contrary to or separate from its ordinary meaning.³²

3. Private Employee Speech Protections

While private employees are not afforded strong speech protections in the scope of their employment, limited exceptions exist to prevent employer overreach. One such law is the National Labor Relations Act, which protects an employee’s right to engage in “concerted activities for . . . mutual aid or protection.”³³ Scholars are split on how to interpret this. Some recognize it narrowly, applying only to collective speech that protests working conditions,³⁴ while others construe it broadly to protect “political advocacy around issues that affect” employees’ lives.³⁵ Other federal laws safeguarding employee speech include the Sarbanes-Oxley Act of 2000, which extended protections to whistleblowers at public and private companies,³⁶ and Title VII of the Civil Rights Act of 1964, which forbids employer retaliation if an employee reports discriminatory conduct on the basis of race, color, national origin, sex, or religion.³⁷

Robust protections also exist at the state level. For example, Connecticut prevents private employers from disciplining or firing employees for exercising any right guaranteed by the First Amendment, as long as their exercise does not “materially interfere with the employee’s . . . job performance or the working relationship between the employee and the employer.”³⁸

institutions to free minds.”).

31. *Id.* at 642.

32. *See* Wasserman, *supra* note 14, at 398–99.

33. 29 U.S.C. § 157 (2018).

34. E. Gary Spitko, *Workplace Speech Protections and the NFL Player National Anthem Protests*, MARKKULA CTR. FOR APPLIED ETHICS (Sept. 7, 2018), <https://www.scu.edu/ethics/all-about-ethics/workplace-speech-protections-and-the-nfl-player-national-anthem-protests> [<https://perma.cc/4KZ3-7HML>].

35. Benjamin Sachs & Noah Zatz, *The Law Is on the N.F.L. Players’ Side*, N.Y. TIMES (Oct. 17, 2017), <https://www.nytimes.com/2017/10/17/opinion/law-nfl-protests.html> [<https://perma.cc/TG7U-LX9Y>].

36. *Lawson v. FMR LLC*, 571 U.S. 429, 435–37 (2014).

37. 42 U.S.C. § 2000e-3 (2018).

38. Conn. Gen. Stat. Ann. § 31-51q.

B. THE FOURTEENTH AMENDMENT'S STATE ACTION REQUIREMENT

While the First Amendment seems to protect the majority of speech from regulation and outright censorship, its grasp extends only to state actors. Standing alone, the First Amendment's reach stops at the federal government, because the text proscribes only Congress³⁹ from abridging an individual's freedom of speech.⁴⁰ However, through the incorporation doctrine, the Fourteenth Amendment's mandate that "[n]o State shall . . . deprive any person of life, liberty or property without due process of law"⁴¹ has slowly extended the Bill of Rights to the states, and in turn to limited private actors.⁴²

Following the Fourteenth Amendment's ratification in 1868, the *Civil Rights Cases* attempted to clarify that in the context of due process violations, the scope of the term "State" was limited to governmental actors, and any discrimination on the part of an individual was "simply a private wrong, or a crime of that individual."⁴³ This formalistic delineation between public and private actors not only diminished the federal government's power to regulate civil rights violations on an individual level, but also eroded the amendment's arguable intended purpose.⁴⁴

More than half a century later, the Court applied the amendment to private actors under limited circumstances.⁴⁵ In *Marsh v. Alabama*, a citizen was convicted for distributing religious literature on the sidewalk under an Alabama law that prohibited entering or remaining on another's premises after being warned not to do so.⁴⁶ It was settled law that the First Amendment would ordinarily invalidate state and local ordinances that prohibited distributing political or religious literature in a public place.⁴⁷ However, the

39. Limited scholarship has argued that the First Amendment is inapplicable to the President or the courts. See West, *supra* note 3, at 326–28.

40. U.S. CONST. amend. I.

41. U.S. CONST. amend. XIV, § 1.

42. *Incorporation Doctrine*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/incorporation_doctrine [<https://perma.cc/7TD7-TCED>] ("Under selective incorporation, the Supreme Court would incorporate certain parts of certain amendments . . ."); see also *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (holding that the Free Speech clause applies to state governments).

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

44. See Wirth, *supra* note 10, at 489 (discussing Justice Harlan's expansive conception of the state action requirement); see also John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws"*, 50 COLUM. L. REV. 131, 162–66 (1950) (arguing that following the Fourteenth Amendment's ratification, a majority of Congress believed that "a state denied equal protection of the laws when it tolerated widespread [private] abuses against a class of citizens because of their color without seriously attempting to protect them by enforcing the law"); Richard F. Watt & Richard M. Orlikoff, *The Coming Vindication of Mr. Justice Harlan*, 44 ILL. L. REV. 13, 31–33 (1949).

45. See *Marsh v. Alabama*, 326 U.S. 501 (1946).

46. *Id.* at 503–04.

47. *Id.* at 504.

case presented an interesting dilemma: a private corporation, not a government municipality, owned the town. Despite this difference, the Court shed its rigid public-private dichotomy in favor of a functionalist approach, holding that citizens of towns run by private corporations are entitled to the same constitutional protections as citizens in an ordinary municipality.⁴⁸

1. State Action Tests

In applying this more expansive interpretation of the state action doctrine, the Court has developed various theories to determine when state action is present. These tests are commonly referred to as the public function theory, the judicial enforcement theory, the state encouragement theory, and the nexus theory.⁴⁹

i. Public Function Theory

The public function test asserts that a private actor's conduct may constitute state action when it concerns an area that is traditionally handled by government actors. The Court first articulated this theory in *Marsh*, when it found the privately owned town's attempts to restrict its citizens' free speech rights unconstitutional because the town performed the same municipal functions as a state actor.⁵⁰ More recently, the Court has restricted the public function theory to private exercise of only those powers it has characterized as "traditionally exclusively" governmental.⁵¹ This limited interpretation raises difficulties, however, because the Court has never defined which powers are traditionally exclusively governmental.⁵²

ii. Judicial Enforcement Theory

The judicial enforcement theory, first articulated in *Shelley v. Kraemer*,⁵³ alleges that court enforcement of a private actor's discriminatory behavior may constitute state action. *Shelley* held that although private landowners' racially restrictive covenants did not violate the Fourteenth Amendment standing alone, the behavior nonetheless implicated state action because the covenants would likely require future adjudication, and any judicial enforcement of the agreements would result in state-based discrimination.⁵⁴

48. *Id.* at 507-09 ("[T]hat the property rights to the premises where the deprivation of liberty . . . took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties . . .").

49. McKinny, *supra* note 9, at 230; *see also* Brown & Brison, *supra* note 6, at 264.

50. *Marsh*, 326 U.S. at 507-09.

51. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974).

52. *Wirth*, *supra* note 10, at 493.

53. *See Shelley v. Kraemer*, 334 U.S. 1 (1948).

54. *See id.* at 33-35.

iii. State Encouragement Theory

While the state encouragement theory and the nexus theory are often analyzed as one, separate analyses help to highlight the former's focus on a more active government role, while the latter permits a passive government connection. The state encouragement theory holds a state actor responsible for private conduct when the state has either "exercised coercive power" or "provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."⁵⁵

In *Blum v. Yaretsky*, the Court found no state encouragement of private physicians' and nursing-home administrators' decisions to discharge or transfer Medicaid patients to lower levels of care because the state adjusted the patients' Medicaid benefits *in response* to the private parties' original discharge and transfer actions.⁵⁶ The Court clarified that if the state acts in response to a private actor's initiative, it is not "*responsible* for those [original private] actions," and it cannot be said to have encouraged them.⁵⁷ However, *Lombard v. Louisiana*⁵⁸ held that a state official could sufficiently compel private behavior if the government official's "command or threat of sanctions" coerces the private act.⁵⁹ The Court clarified that "an official command . . . has at least as much coercive effect" as legislation, and found the mayor of New Orleans' public statement to the city's police superintendent that "no additional sit-in demonstrations . . . will be permitted" to be sufficiently coercive of a private restaurant's refusal to seat and serve Black patrons.⁶⁰

In the employment context, circuit courts have found a sufficient connection between a government actor's retaliatory behavior and a private business's decision to fire an employee on the basis of speech. In *Paige v. Coyner*, a private employee, acting outside the capacity of her employment, voiced concerns at a public hearing about her employer's pending highway project.⁶¹ In retaliation, a county official called the employee's boss to relay what was said at the meeting, fabricated the employee's statements, and she was subsequently fired.⁶² While the majority found it unnecessary to analyze

55. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). *But see id.* at 1004–05 ("Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment.").

56. *Id.* at 1005.

57. *Id.*

58. *Lombard v. Louisiana*, 373 U.S. 267, 273–74 (1963).

59. Barbara Rook Snyder, *Private Motivation, State Action and the Allocation of Responsibility for Fourteenth Amendment Violations*, 75 CORNELL L. REV. 1053, 1066 (1990).

60. *Lombard*, 373 U.S. at 271–74.

61. *Paige v. Coyner*, 614 F.3d 273, 276 (6th Cir. 2010).

62. *Id.* at 277.

whether the county official coerced the employer's actions, since the official fabricating statements in retaliation to protected speech undoubtedly constituted state action in violation of § 1983,⁶³ the concurrence emphasized that the analysis was relevant to hold her employer liable for damages.⁶⁴ The concurrence subsequently found that the employee's termination was likely sufficiently coerced, and the employer's conduct constituted state action for the purposes of recovery.⁶⁵ The Eighth Circuit has also recognized liability for a private employer in a similar retaliatory scenario.⁶⁶

iv. Nexus Theory

Finally, under the nexus theory, state action may exist if there is such a "close nexus between the State and the challenged action" that a private action "may be fairly treated as that of the State itself."⁶⁷ An often-cited articulation of the nexus theory is the symbiotic relationship theory, born out of *Burton v. Wilmington Parking Authority*, a test that assesses the factual degrees of codependence between the public and private entities.⁶⁸ In *Burton*, a coffee shop located in a government parking lot's refusal to serve a Black patron was sufficiently tied to state action because both the land and the building were public property,⁶⁹ state code dedicated the building to "public uses," and the shop was maintained using public funds.⁷⁰ However, in keeping with its restrictive interpretation of the state action doctrine, the Burger Court later clarified in a separate case that a private actor's receipt of a government "benefit or service" (like public funding) in-and-of-itself does not transform ordinarily private action into state action.⁷¹

The nexus theory extends beyond federal case law, as states like New Jersey have codified and interpreted state constitutional speech protections⁷² to prohibit a private actor from exhibiting "unreasonably restrictive or oppressive conduct" if it is subject to widespread "public use of [its] property."⁷³

63. *Id.* at 280.

64. *Id.* at 286.

65. *Id.* at 286–87.

66. See *Dossett v. First St. Bank*, 399 F.3d 940, 951 (8th Cir. 2005) ("[B]oth state officials and private actors may be liable under § 1983 for conspiring to retaliate against protected speech . . .").

67. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974).

68. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725–26 (1961).

69. *Id.* at 724.

70. *Id.* at 724–25.

71. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972) ("Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from state conduct . . .").

72. N.J. CONST. art. I, ¶ 6.

73. *State v. Schmid*, 423 A.2d 615, 628 (N.J. 1980).

While this note focuses primarily on the state encouragement theory, courts have successfully applied the nexus test to sports teams and their respective stadiums. As stated previously, professional sports leagues are ordinarily classified as private actors.⁷⁴ However, this test led the court in *Ludtke v. Kuhn* to find that New York City's extensive involvement with Yankee Stadium transformed the team commissioner's policy banning women from the stadium's clubhouse into cognizable state action.⁷⁵ The court noted that factually, the city and the team maintained a high level of interdependence, as Yankee stadium was owned and leased out by the city, the city spent public money to pay for stadium upgrades, and the stadium was statutorily committed to public use.⁷⁶ Perhaps the most important factor was that the city profited considerably off of the stadium's lease, and thus maintained a "clear interest" in preserving the team's "audience, image, popularity, and standing."⁷⁷

Profits are undoubtedly top of mind for local governments as they spend millions in public money subsidizing NFL stadiums.⁷⁸ In 2016, Nevada committed \$750 million towards a new stadium for the Las Vegas Raiders.⁷⁹ With numbers like these, it is difficult to understand judicial reluctance to consider the NFL anything but a "public-private hybrid"⁸⁰ worthy of an expanded state action doctrine.⁸¹

Although the Court has refused to find state action based on the receipt of public funds alone,⁸² its previous decisions failed to anticipate current business realities, as states have increasing influence over private actors due to sizeable investments, tax breaks, and subsequent expectations of profiting. Accordingly, the logic underlying *Ludtke* likely justifies holding other

74. McKinny, *supra* note 9, at 232.

75. *Ludtke v. Kuhn*, 461 F. Supp 86, 93–96 (1978).

76. *Id.* at 93–95.

77. *Id.* at 94.

78. Chicago provided \$205 million to the Bears in 2003, Cincinnati gave \$164 million to the Bengals in 2000, and Indianapolis spent \$163 million on the Colts's stadium in 2008. *Sports Stadiums of the NFL Ranked by Value of Federal Subsidy Since 2000*, STATISTA, <https://www.statista.com/statistics/790953/federal-subsidy-to-nfl-stadiums> [<https://perma.cc/9PWN-U933>].

79. Michael David Smith, *NFL Stadiums Have Received an Estimated \$6.7 Billion from Taxpayers*, NBC SPORTS (Mar. 28, 2017, 9:23 AM), <https://profootballtalk.nbcsports.com/2017/03/28/nfl-stadiums-have-received-an-estimated-6-7-billion-from-taxpayers> [<https://perma.cc/KMM7-24GG>].

80. Nick DeSiato, *Silencing the Crowd: Regulating Free Speech in Professional Sports Facilities*, 20 MARQ. SPORTS L. REV. 411, 413 (2010).

81. For a thorough analysis of this theory as applied to sports facilities, see generally Robert H. Hendricks, *Don't Take Me Out to that Ballpark: State Action, Government Speech, and Chief Wahoo After Matal*, 103 CORNELL L. REV. 1589 (2018).

82. *Rendell-Baker v. Kohn*, 457 U.S. 830, 832, 837 (1982) (holding that there was no state action when a private school fired a teacher for her speech, despite receiving over 90 percent of its funding from the government).

private businesses accountable for constitutional violations. Much like the benefits for sports stadiums, cities and states often provide millions of dollars in tax breaks to incentivize corporate expansion, promote job creation, and revitalize ailing neighborhoods. This practice is expanding at a rapid pace—over the past five years, cities and states have pledged more than \$9 billion in subsidies for technology companies,⁸³ excluding the \$2.8 billion in incentives New York and Virginia offered for Amazon’s recent HQ2 expansion.⁸⁴

However, given the strong evidence supporting government coercion of, and at the very least, encouragement of the NFL’s anthem policy, the Court need not expand the state action doctrine beyond current precedent. That is not to say that it can sit back and do nothing. Reviving and enforcing the current doctrine to fit modern realities is of the utmost importance—but courts already have all of the necessary tools at their disposal.

II. THE PRESIDENT’S WORDS AND ACTIONS COERCED OR ENCOURAGED THE NFL TO INSTATE ITS ANTHEM POLICY IN VIOLATION OF THE FIRST AMENDMENT

In 2016, when NFL players initially took a knee during the national anthem, it was a method of protesting police brutality and the inequality Black citizens face in America. This movement rapidly evolved into a national debate that attracted the attention of the media, Hollywood, and most importantly, the President. President Trump criticized the anthem protests from the start, and his message was clear: the NFL should force its players to stand for the national anthem. As the protests grew, Trump continued to provoke the NFL. His statements imploring the League to change its policy turned the issue into a conservative rallying cry.⁸⁵ When the NFL failed to respond, the President touted its declining ratings during campaign rallies, press conferences, and most of all, on Twitter.⁸⁶

83. Dominic Rushe, *US Cities and States Give Big Tech \$9.3bn in Subsidies in Five Years*, GUARDIAN (July 2, 2018, 6:00 AM), <https://www.theguardian.com/cities/2018/jul/02/us-cities-and-states-give-big-tech-93bn-in-subsidies-in-five-years-tax-breaks> [<https://perma.cc/PVA3-F5U5>].

84. The New York incentives have since been revoked, and subsequently, Amazon pulled out of its HQ2 expansion there. Lydia DePillis, *Helipads and Everything Else Amazon Is Getting out of its Deals with New York and Virginia*, CNN (Nov. 14, 2018, 7:33 AM), <https://www.cnn.com/2018/11/13/business/amazon-hq2-subsidies/index.html> [<https://perma.cc/8BSX-AW5M>].

85. Tara Golshan, *The 2018 Midterms, as Told by Republican and Democratic Campaign Ads*, VOX (Sept. 14, 2018, 7:10 AM), <https://www.vox.com/2018/9/14/17852386/campaign-ads-2018-midterm-gop-cruz> [<https://perma.cc/AY2H-84R3>] (highlighting Texas senator Ted Cruz’s use of the NFL protests in a campaign ad against Congressman Beto O’Rourke).

86. While Trump’s use of Twitter has been a source of debate amongst scholars and courts, it is now settled law that tweets from his personal account, @realDonaldTrump, carry the same political and policy weight as any of his other verbal or written statements. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018) (stating that the Court may consider “extrinsic evidence” such as tweets, to inform its

Accordingly, this unrelenting pressure on the NFL, through provocations, statements, and protests sparked by the President, constituted government-sponsored coercion or encouragement of its subsequent anthem policy. This undeniable government connection was sufficient for the League's action to be attributed to the state, rendering it unconstitutional.

A. THE INCEPTION OF THE NFL PROTESTS

The protests that eventually led to the NFL's anthem policy started out small. At first, Colin Kaepernick's August 14, 2016 decision to remain seated during the national anthem was largely uncontested.⁸⁷ Days later, media interest grew after Kaepernick spoke to reporters about his actions, saying, "I am not going to stand up to show pride in a flag for a country that oppresses Black people and people of color."⁸⁸ At the beginning of September, after consulting former NFL player and military veteran Nate Boyer, Kaepernick switched his protest strategy from sitting to taking a knee in order to "get the message back on track" while still showing "respect to the men and women who fight for this country."⁸⁹

Soon, other players and teams joined in, and the anthem protests became a political movement. During the height of the protests, more than 200 NFL players linked arms, sat, and knelt during the national anthem to protest issues ranging from police brutality to the white supremacist "Unite the Right" rally in Charlottesville, Virginia.⁹⁰

B. PRESIDENT TRUMP'S CRITICISM AND THE LEAD-UP TO THE NFL'S ANTHEM POLICY

More than a year after Kaepernick's initial protest, President Trump weighed in on the issue at a rally in Alabama. He argued that team owners should fire players who knelt during the anthem, saying "wouldn't you love

understanding of Presidential policy motives); *see also* Knight First Amend. Inst. at Columbia Univ. v. Trump, 302 F. Supp. 3d 541, 575 (S.D.N.Y. 2018) (holding that the President's Twitter handle @realDonaldTrump constitutes a public forum); Shontavia Johnson, *Donald Trump's Tweets Are Now Presidential Records*, WORLD (Feb. 19, 2018, 10:45 AM), <https://www.pri.org/stories/2018-02-19/donald-trumps-tweets-are-now-presidential-records> [<https://perma.cc/8KNC-WEF8>].

87. Jane Coaston, *2 Years of NFL Protests, Explained*, VOX (Sept. 4, 2018, 12:10 PM), <https://www.vox.com/2018/8/15/17619122/kaepernick-trump-nfl-protests-2018> [<https://perma.cc/2L29-GMBX>].

88. Steve Wyche, *Colin Kaepernick Explains Why He Sat During National Anthem*, NFL (Aug. 27, 2016, 3:04 AM), <http://www.nfl.com/news/story/0ap3000000691077/article/colin-kaepernick-explains-why-he-sat-during-national-anthem> [<https://perma.cc/9WN8-LVW7>].

89. Georgia Chambers, *Colin Kaepernick: From Kneeling NFL Player to Face of the New Nike Advert, how Has He Become a Political Force?*, EVENING STANDARD (Sept. 4, 2018, 12:05), <https://www.standard.co.uk/news/world/who-is-colin-kaepernick-nfl-player-nike-advert-whats-his-kneeling-protest-for-a3927201.html> [<https://perma.cc/E5RW-6DLV>].

90. Coaston, *supra* note 87.

to see one of these NFL owners, when somebody disrespects our flag, you'd say, 'Get that son of a bitch off the field right now. Out! He's fired.'"⁹¹ The President also credited himself for declining NFL viewership.⁹² The following day, league Commissioner Roger Goodell defended the protests and fired back at Trump in a statement: "[d]ivisive comments like these demonstrate an unfortunate lack of respect for the NFL . . . and all of our players."⁹³ A month later, following continued protests and increased solidarity amongst many players, coaches, and owners, Vice President Mike Pence walked out of a Colts versus 49ers game after players knelt during the anthem.⁹⁴

It was around this time that Trump's statements shifted from callous political rhetoric to consequential threats. At 3:13 a.m. on October 10, 2017, Trump tweeted "[w]hy is the NFL getting massive tax breaks while at the same time disrespecting our Anthem, Flag and Country? Change tax law!"⁹⁵ Faced with the idea of the League losing its tax-exempt status,⁹⁶ Goodell released a statement later that morning with a markedly different tone than the previous month's. In a memorandum addressed to team owners and players, Goodell altered his stance, and stated, "[w]e believe that everyone should stand for the National Anthem. It is an important moment in our game."⁹⁷

Fortunately for the league, Trump applauded Goodell's request, tweeting that it was "about time . . . the NFL is finally demanding that all players STAND for our great National Anthem."⁹⁸ Despite the memo, neither NFL nor team policies required players to stand for the anthem, and

91. Riley Michel, *Timeline of NFL Protests During the National Anthem*, KIRO 7, <https://www.kiro7.com/news/local/timeline-of-nfl-protests-during-the-national-anthem/614679920> [<https://perma.cc/39GA-WFJE>] (last updated Sept. 3, 2019).

92. *Id.*

93. *Id.*

94. *Id.*

95. Donald Trump (@realDonaldTrump), TWITTER (Oct. 10, 2017, 3:13 AM), <https://twitter.com/realDonaldTrump/status/917694644481413120>.

96. "[S]ince 1942, the NFL's league office – not the teams – has been treated as a trade association by the Internal Revenue Service, conferring a tax exemption under section 501(c)(6) of the tax code." Noah Feldman, *The Guy in the Bully Pulpit Can't Be a Bully*, BLOOMBERG (Oct. 11, 2017, 11:35 AM), <https://www.bloomberg.com/opinion/articles/2017-10-11/trump-s-presidential-bullying-violates-the-first-amendment> [<https://perma.cc/XPD7-99L4>].

97. Jerry Barca, *NFL Commissioner Roger Goodell: 'We Believe that Everyone Should Stand for the National Anthem'*, FORBES (Oct. 10, 2017, 3:15 PM), <https://www.forbes.com/sites/jerrybarca/2017/10/10/nfl-commissioner-roger-goodell-we-believe-that-everyone-should-stand-for-the-national-anthem/#791bf34f4c89> [<https://perma.cc/KQ8K-NDWN>].

98. Donald Trump (@realDonaldTrump), TWITTER (Oct. 11, 2017, 3:47 AM), <https://twitter.com/realDonaldTrump/status/918065431939829760>.

Trump continued to excoriate the league on Twitter for the rest of the year.⁹⁹ At the end of the 2017 season, NFL TV ratings fell by 9.7 percent.¹⁰⁰ While the chief source of the ratings declines is debatable, the President's comments certainly played a role in turning viewers away.¹⁰¹

As a result, on May 23, 2018, the NFL enacted its anthem policy.¹⁰²

C. ANALYZING THE PRESIDENT'S ROLE IN VIOLATING THE FIRST AMENDMENT

Over a seven-month period, Trump utilized a combination of rallies, threats, and public displays of anger to push the NFL to unconstitutionally enact its aforementioned anthem policy. Aside from the issue of state action, an NFL player's choice to kneel during the national anthem is speech that is categorically afforded First Amendment protections. Kneeling is a symbolic act, through which the players initially intended to communicate a criticism of American police brutality and racial inequality. Furthermore, any government restriction on the players' behavior would not pass the test articulated in *O'Brien*, which would require such a law to further a substantial non-speech interest.¹⁰³ An anti-kneeling law's core justification would likely be to keep the peace. However, kneeling is a silent protest, similar to flag burning, and *Johnson* largely repudiated the "keeping the peace" defense in cases concerning symbolic speech restrictions.¹⁰⁴ Furthermore, if the state couched an anti-kneeling law in patriotism and national security, *Barnette* would squarely apply, as the First Amendment also protects individual nonparticipation rights.¹⁰⁵

Of course, the inquiry does not stop there, as the League is a private actor.¹⁰⁶ Unlike the National Basketball Association,¹⁰⁷ NFL rules and

99. After Trump's October 11th tweet, he tweeted at least thirteen more times about the NFL's anthem dilemma before the league changed its policy. *See, e.g.*, Donald Trump (@realDonaldTrump), TWITTER (Nov. 24, 2017, 3:48 AM), <https://twitter.com/realDonaldTrump/status/934026050388013056>; Donald Trump (@realDonaldTrump), TWITTER (Jan. 8, 2018, 3:19 PM), <https://twitter.com/realDonaldTrump/status/950507353094356993>.

100. Darren Rovell, *NFL Television Ratings Down 9.7 Percent During 2017 Regular Season*, ESPN (Jan. 4, 2018), http://www.espn.com/nfl/story/_id/21960086/nfl-television-ratings-97-percent-2017-regular-season [<https://perma.cc/X2ZC-XA4U>].

101. Aaron Mansfield, *Trump Takes Credit for NFL Ratings Dip Because He's More 'Exciting' and 'a Hell of a Lot More Dangerous'*, COMPLEX (June 28, 2018), <https://www.complex.com/sports/2018/06/trump-takes-credit-for-nfl-ratings-dip-more-exciting-and-dangerous> [<https://perma.cc/KTX6-JGZZ>].

102. *Roger Goodell's Statement on National Anthem Policy*, *supra* note 1.

103. *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

104. *Texas v. Johnson*, 491 U.S. 397, 407–10 (1989).

105. *See W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

106. McKinny, *supra* note 9, at 232.

107. Brown & Brison, *supra* note 6, at 279.

guidelines have historically not required players to stand for the national anthem. It is more than just a coincidence that the anthem policy, which represented such a severe shift within the league, occurred only after Trump's targeted attacks. Nonetheless, some commentators and scholars argue Trump had nothing to do with the policy, maintaining that profits motivated the NFL's decision,¹⁰⁸ while others contend that ratings began to decline well before Trump took a stance.¹⁰⁹ However, these arguments overlook the fact that profits likely did not prompt the policy, as the League's revenue actually increased by 4.9 percent during the 2017 season, well-after Kaepernick's initial 2016 protests.¹¹⁰ Furthermore, the impact was demographically significant—between 2014 and 2018, Republican viewership declined at almost twice the rate of Democrats'.¹¹¹ Consequently, the President's role in precipitating the anthem policy cannot be understated.

As noted previously, the state encouragement theory provides that the NFL's enactment of its anthem policy constitutes state action if Trump either "exercised coercive power" or "provided such significant encouragement, either overt or covert," that its choice to require players to stand during the anthem "must in law be deemed to be that of the State."¹¹²

Beginning with overt encouragement, during the seven-month period in question, Trump posted more than thirty tweets that implored the league to change its policy, criticized players who protested, and encouraged viewers to boycott the NFL unless it required players to stand.¹¹³ It is certainly

108. Jonathan Turley, *NFL Has Every Right Under Law to Push New National Anthem Policy*, HILL (May 26, 2018, 9:00AM), <https://thehill.com/opinion/civil-rights/389495-nfl-has-every-right-under-law-to-push-new-national-anthem-policy> [https://perma.cc/A4EW-5GQ5] ("Historically, the only thing unfailingly saluted by the NFL is profits, and these protests are cutting into profits.").

109. Rovell, *supra* note 100 (noting that during the 2016 regular season, the NFL experienced an 8 percent ratings decline); see also Derek Thompson, *Yes, NFL Viewership Is Down. No, It's Not All Trump*, ATLANTIC (Sept. 27, 2017), <https://www.theatlantic.com/business/archive/2017/09/nfl-ratings-trump-anthem-protests/541173> [https://perma.cc/8MFV-UAV4].

110. Marc Edelman, *NFL Financial Disclosures Refute Claim that Player Protests Hurt League Revenues*, FORBES (July 17, 2018, 10:46 AM), <https://www.forbes.com/sites/marcedelman/2018/07/17/nfl-financial-disclosures-refute-claim-that-players-protests-hurt-league-revenues/#38cad3e85a22> [https://perma.cc/28FZ-GFTF].

111. Dante Chinni & Sally Bronston, *Concussions and Protests: Football's Popularity Drops*, NBC NEWS (Feb. 4, 2018, 8:35 AM), <https://www.nbcnews.com/storyline/super-bowl/concussions-protests-football-s-popularity-drops-n844506> [https://perma.cc/NV8C-9PBQ].

112. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

113. See, e.g., Donald Trump (@realDonaldTrump), TWITTER (Sept. 24, 2017, 3:44 AM), <https://twitter.com/realDonaldTrump/status/911904261553950720> ("If NFL fans refuse to go to games until players stop disrespecting our Flag & Country, you will see change take place fast. Fire or suspend!"); Donald Trump (@realDonaldTrump), TWITTER (Sept. 24, 2017, 3:25 PM), <https://twitter.com/realDonaldTrump/status/912080538755846144> ("Sports fans should never condone players that do not stand proud for their National Anthem or their Country. NFL should change policy!").

possible to characterize Trump's tweets as harmless—some may argue that the President should have the right to speak to the American people regarding pressing social issues. However, in a world in which social media influencers are paid solely to disseminate messages to impressionable followers, it is not a stretch to say that the President's tweets advocating for boycotts and policy changes significantly encouraged the NFL to change its policies, particularly when those tweets reached more than fifty-six million Twitter followers and an unknown number of offline NFL fans.

Even if Trump did nothing to impact ratings or profits, his tweets created a bona fide public relations disaster for the league, as “the narrative of the season was dominated by [his] tirade.”¹¹⁴ Sports organizations were unprepared for the overwhelming amount of media attention that Trump attracted, and many were “downright uncomfortable and afraid to address it.”¹¹⁵ Commentators argue that the President's and conservative media outlets' publicity strategies were purposeful and transparent, highlighting an uptick of planned “empty performances of allegiance” during rallies and interviews to foster a “false perception” that the players' actions were unpatriotic.¹¹⁶ Some even contend that the Vice President's Colts game walkout was a staged attempt by the White House to provoke negative headlines and ignite further criticism.¹¹⁷ Considering all of the evidence, Trump's influence on the league is undeniable. This influence was pronounced when the NFL announced the anthem policy, and explicitly cited its desire to reclaim control of this runaway narrative as a justification: “today's decision will keep our focus on the game and the extraordinary athletes who play it—and our fans who enjoy it.”¹¹⁸

While the NFL may have emphasized its desire to focus on its fans, it is clear that its decision to change the anthem policy was also prompted, at least in part, by the President's threatening overtures.¹¹⁹ Perhaps the most

114. Abraham D. Madkour, *A Controversial Choice, but Trump's Influence Is Undeniable*, SPORTS BUS. J. (Dec. 11, 2017), <https://www.sportsbusinessdaily.com/Journal/Issues/2017/12/11/Most-Influential/1.aspx> [<https://perma.cc/M8FA-S57A>].

115. *Id.*

116. Jamil Smith, *The NFL Panders to Trump*, ROLLING STONE (May 24, 2018, 3:25 PM), <https://www.rollingstone.com/politics/politics-features/the-nfl-panders-to-trump-627884> [<https://perma.cc/DQ6G-X2PV>].

117. Aaron Gordon, *Here's How Much it Cost for the Vice President Not to Watch an NFL Game*, HUFFPOST (Oct. 6, 2018, 1:51 PM), https://www.huffingtonpost.com/entry/vice-president-mike-pence-colts-nfl-anthem-stunt_us_5bb8cfd5e4b0876eda9e78fe?t6c [<https://perma.cc/75FC-PQ3B>].

118. Roger Goodell's *Statement on National Anthem Policy*, *supra* note 1.

119. While this Note primarily focuses on federal coercion, other threatening policies arose at the state level. In Indiana, State Representative Milo Smith proposed legislation that would require the Indianapolis Colts to refund fans' ticket costs if any Colts player knelt during the anthem. See Justin L. Mack & Kaitlin Lange, *Colts Fans Offended by Anthem Kneeling Could Receive Refunds Under Legislative Proposal*, INDYSTAR (Dec. 28, 2017, 11:54 AM), <https://www.indystar.com/story/news/2>

influential threat in response to the protests and the League's inaction was Trump's October 10 tweet, in which he questioned the NFL's tax-exempt status and casually suggested that the IRS should revoke it.¹²⁰ In this tweet, and the numerous statements in which the President repeatedly called on the League to change its policies, his motive was clear—and legally, his motive to exert undue influence is what matters most. Scholars have labeled this “attempt to leverage the threat of presidential power to compel certain actions by . . . private organizations” as “emphatically and quintessentially unconstitutional.”¹²¹

It is evident that this threat influenced the League's departure from its decades-long anthem policy, with an NFL team source pointing unequivocally to Trump as the catalyst, stating, “Our league is f—king terrified of Trump. We're scared of him.”¹²² A concrete manifestation of this fear reveals itself in the markedly different tones between Goodell's September and October statements. In September, Goodell firmly condemned Trump's hateful rhetoric in Alabama, along with the President's clear lack of respect for the League's players.¹²³ However, responding within a matter of hours to Trump's October tweet calling for a reclassification of the NFL's tax-exempt status,¹²⁴ Goodell notably departed from his previous statement's critical tone and agreed with the President that all players should stand for the anthem.¹²⁵ The latter statement mirrored the league's official anthem policy, which debuted in May of 2018.¹²⁶

The anthem policy was ultimately rescinded after the players union filed a formal grievance in July, alleging that it infringed on players' rights and violated their collective bargaining agreement.¹²⁷ Because negotiations between the two parties remained ongoing at the start of the 2018–2019 season, the anthem restrictions never took effect. At the League's annual meeting in October of 2018, the owners punted the issue and kept the anthem policy on the sidelines. The decision not to revisit the controversy was due in part to fewer player protests, improved ratings, televised broadcasts no

017/12/28/colts-fans-offended-anthem-kneeling-could-receive-reindiana-lawmaker-pushes-legislation-refund-sport/986895001 [https://perma.cc/Y5L3-8QAN].

120. Trump, *supra* note 95.

121. Sara Swartzwelder, *Taking Orders from Tweets: Redefining the First Amendment Boundaries of Executive Speech in the Age of Social Media*, 16 *FIRST AMEND. L. REV.* 538, 555–56 (2018).

122. Smith, *supra* note 116.

123. Michel, *supra* note 91.

124. Trump, *supra* note 95.

125. Barca, *supra* note 97.

126. *Roger Goodell's Statement on National Anthem Policy*, *supra* note 1.

127. Colin Dwyer, *NFL Players Union Files Grievance over League's New National Anthem Policy*, NPR (July 10, 2018, 5:54 PM), <https://www.npr.org/2018/07/10/627717067/nfl-players-union-files-grievance-over-leagues-new-national-anthem-policy> [https://perma.cc/25MM-569G].

longer airing the national anthem, and notably, less frequent criticism from the President.¹²⁸

III. THE GROWING DANGER OF OUTSOURCED CENSORSHIP

Utilizing a combination of statements, actions, and threats, the President strongly encouraged, and attempted to coerce the League to require its players to stand during the national anthem. Even though the policy was never reinstated following the players union grievance, the Executive's willingness to break presidential norms and provoke controversy undoubtedly still exists. Trump's behavior in the months preceding the anthem policy serves as a compelling case study—one that highlights the danger of allowing government actors to violate the Constitution in the name of maintaining a formalistic distinction between public and private action. Absent strong judicial enforcement of a broad state action doctrine, the President precipitated a policy that allowed the government to defy the First Amendment by outsourcing censorship of constitutionally protected speech.

Alarming, Trump's overt encouragement and coercion of private actors transcends the NFL. Universities, news outlets, and social media and technology companies have all fallen victim to a similar breed of callous rhetoric and threats. Although these parallels do not precisely mirror the danger exposed by the NFL controversy, they provide context for the dangers facing American civil liberties if courts fail to recognize and contain the President's incessant pressure on private actors to comply with his ideology, in reckless disregard for the First Amendment.

A. UNIVERSITIES

Following an outbreak of violent protests, which led the University of California at Berkeley to cancel a February 2017 event featuring notoriously inflammatory conservative commentator Milo Yiannopoulos,¹²⁹ Trump threatened to revoke the school's federal funding due to his belief that Berkeley "does not allow free speech and practices violence on innocent people with . . . different point[s] of view."¹³⁰ Aside from the hotly debated questions of whether the Berkeley administration actually discriminated

128. Charles Robinson, *NFL Owners Take a Knee, Leave National Anthem Policy Alone*, YAHOO! (Oct. 17, 2018, 4:57 PM), <https://sports.yahoo.com/nfl-owners-take-knee-leave-national-anthem-policy-alone-235750291.html> [<https://perma.cc/LAJ3-B7VZ>].

129. See Susan Svrluga, *Trump Threatens UC-Berkeley's Funding After Violent Protests Shut Down a Speaker*, WASH. POST (Feb. 2, 2017), https://www.washingtonpost.com/local/education/trump-threatens-uc-berkeleys-funding-after-violent-protests-shut-down-a-speaker/2017/02/02/2a13198a-e984-11e6-b82f-687d6e6a3e7c_story.html?utm_term=.c69fcb0b20fa [<https://perma.cc/SB6J-Q9HC>].

130. Donald Trump (@realDonaldTrump), TWITTER (Feb. 2, 2017, 3:13 AM), <https://twitter.com/realdonaldtrump/status/827112633224544256>.

against conservative voices,¹³¹ or whether universities should be able to police campus speakers,¹³² the President's comments constitute a threat against all universities that fail to comply with, and endorse his speech preferences. Moreover, while the President's response to the Berkeley controversy certainly parallels his NFL threats, Berkeley is a public university, and should it choose to restrict students' civil liberties, finding state coercion would be superfluous.

However, private universities still face concrete risks in a country where more than a quarter of college students attend private institutions.¹³³ This risk materialized during Trump's speech at the 2019 Conservative Political Action Conference. Referencing the unfair treatment of Hayden Williams, a conservative activist who was punched in the face by a man at Berkeley,¹³⁴ the President pledged to sign an executive order conditioning universities' eligibility for federal research grants on their efforts to protect conservative students' free speech rights.¹³⁵ An active imagination is not required to envision the government, in response to speech it seeks to censor or promote, further extending this threat to private universities' favorable tax privileges or student aid funding. It is certainly questionable whether Trump actually possesses the power to singlehandedly strip federal funds from public or private universities.¹³⁶ Even if he cannot, his threats risk negatively impacting¹³⁷ and unconstitutionally influencing private universities' policies regarding sensitive speech issues.

131. See *Young Am.'s Found. v. Napolitano*, No. 17-cv-02255, 2018 U.S. Dist. LEXIS 70108, at *15–25 (N.D. Cal. Apr. 25, 2018).

132. See ROBERT POST, *THE CLASSIC FIRST AMENDMENT TRADITION UNDER STRESS: FREEDOM OF SPEECH AND THE UNIVERSITY* (Yale Law Sch., Pub. L. Res. Paper No. 619, 2017).

133. As of Fall 2010, 5,873,317 students were enrolled in private universities. *Number of Degree-Granting Institutions and Enrollment in These Institutions, by Enrollment Size, Control, and Level of Institution: Fall 2010*, NAT'L CTR. FOR EDUC. STATISTICS, https://nces.ed.gov/programs/digest/d11/table/dt11_248.asp [<https://perma.cc/WV66-VG9Q>].

134. "Neither Williams nor the man suspected of punching him are students at UC Berkeley." Harmeet Kaur, *Trump Vows to Sign an Executive Order Requiring Colleges to 'Support Free Speech'*, CNN (Mar. 2, 2019, 5:00 PM), <https://www.cnn.com/2019/03/02/politics/trump-executive-order-colleges-free-speech/index.html> [<https://perma.cc/HXT6-MYNX>].

135. *Id.*

136. Greg Toppo, *Can Trump Pull Funding from UC Berkeley? Not Likely, Experts Say*, USA TODAY (Feb. 2, 2017, 2:14 PM), <https://www.usatoday.com/story/news/2017/02/02/trumps-threat-pull-federal-funding-uc-berkeley-empty-one-experts-say/97401818> [<https://perma.cc/T93R-QQ4K>].

137. Increased protections for divisive speakers on campus have the potential to divert university funding away from crucial student services and initiatives. For example, Berkeley spent more than \$4 million in September 2017 on security efforts for far-right speakers. See Michael Simkovic, *Anti-University "Free Speech" Legislation Will Divert Education Funds to Demagogues and Facilitate Monitoring, Intimidation, and Harassment of Academic Communities*, BRIAN LEITER'S L. SCH. REP. (May 28, 2018), <https://leiterlawschool.typepad.com/leiter/2018/05/anti-university-free-speech-legislation-will-divert-education-funds-to-demagogues-and-will-facilitat.html> [<https://perma.cc/SMM5-3MJ5>].

B. NEWS OUTLETS

The President's ability to restrict press freedoms is another area ripe for judicial concern. While courts have successfully addressed some of the Administration's direct press violations,¹³⁸ private news outlets are still regularly subject to covert government influence and overt Presidential criticism and coercion. Even though the Federal Communications Commission ("FCC") is an independent agency, and thus its commissioners do not directly answer to the President, it has tremendous power to affect media companies' behavior. Notably, its decisions are well-protected and unlikely to be struck down, as FCC "procedures allow it to avoid judicial review . . . for many years," and in the event a case does make it to court, an extremely deferential standard of review is employed.¹³⁹ Behind closed doors, the FCC garners additional control by dangling prospective "discretionary government regulation," which is often "enough to influence a media company's behavior."¹⁴⁰ This, in conjunction with the Commission's non-statutorily granted merger-authority, makes for a powerful persuasive tool.¹⁴¹

Conversely, the President has attempted to exert direct control over news outlets through the Justice Department. During the AT&T-Time Warner merger, lawmakers expressed concerns that Justice Department efforts to block the deal were Trump's way of punishing CNN, a recurring antagonist and Time Warner subsidiary, for its unfavorable coverage of his administration.¹⁴² Despite repeated assurances from the Justice Department that its objection to the merger had nothing to do with the President's disdain for CNN, behind closed doors, the lawsuit reportedly stemmed directly from presidential orders given months earlier to "get [that] lawsuit filed . . . I want that deal blocked!"¹⁴³ Lawmakers were so worried about Trump's undue influence that during Senate hearings on the merger, Senator Richard Blumenthal explicitly "asked the chief executives of both companies 'to commit that [their] news coverage will in no way be influenced or impacted

138. See Transcript of Motion Hearing, *CNN, Inc. v. Trump*, No. 18-cv-02610 (D.D.C. Nov. 16, 2018), ECF No. 23-1.

139. Fred Campbell, *The First Amendment Moral in Trump's Criticism of Mass Media*, FORBES (Oct. 3, 2018, 9:48 AM), <https://www.forbes.com/sites/fredcampbell/2018/10/03/the-first-amendment-moral-in-trumps-criticism-of-mass-media> [<https://perma.cc/2337-RU5T>].

140. *Id.*

141. See Harold Furchtgott-Roth, *The FCC and Kafkaesque Merger Reviews*, FORBES (Apr. 19, 2016, 5:28 PM), <https://www.forbes.com/sites/haroldfurchtgottroth/2016/04/19/the-fcc-and-kafkaesque-merger-reviews/#5e2de8797b39> [<https://perma.cc/9AD4-PR9F>].

142. Campbell, *supra* note 139.

143. Jane Mayer, *The Making of the Fox News White House*, NEW YORKER (Mar. 4, 2019), <https://www.newyorker.com/magazine/2019/03/11/the-making-of-the-fox-news-white-house> [<https://perma.cc/8CM9-TRA6>].

by what the President of the United States says about this transaction.’”¹⁴⁴ In contrast, when the conservative news outlet Fox attempted, in a similar deal, to sell its entertainment business to Disney, Trump “publicly congratulated” Rupert Murdoch, Fox’s Executive Chairman, on the transaction before the Justice Department “signed off on the deal” after it failed to find any “serious antitrust concerns.”¹⁴⁵

Furthermore, the President’s unorthodox press criticisms, which are so markedly similar to his anti-NFL rhetoric, have become commonplace. Trump regularly bashes the New York Times, the Washington Post, MSNBC, and CNN,¹⁴⁶ (even referring to the Times as the “true enemy of the people,”)¹⁴⁷ while praising Fox News’ more favorable coverage.¹⁴⁸ Although it is hard to tell whether this barrage of negative attention has inhibited any of these news outlets’ critical coverage of him, it has arguably influenced their hiring and programming choices. Despite the fact that characteristically “liberal” outlets enjoyed considerable success following Trump’s election,¹⁴⁹ many have attempted to appease conservative critics by hiring right-leaning commentators and journalists.¹⁵⁰ Some argue that these new conservative positions came at the expense of left and far-left viewpoints.¹⁵¹ Even though the media’s response is not patently unconstitutional, meaningful press freedoms certainly cease to exist in a world in which the President can bully private companies into changing their hiring and programming decisions, as these practices ultimately distort the national news landscape.

Finally, much like his attacks on the NFL and U.C. Berkeley, the President has used Twitter to overtly threaten media outlets with which he disagrees. In a quasi-denial of stories covering his tumultuous relationship

144. Campbell, *supra* note 139 (alteration in original).

145. Mayer, *supra* note 143.

146. David A. Graham, *Trump Wants to Censor the Media*, ATLANTIC (Oct. 5, 2017), <https://www.theatlantic.com/politics/archive/2017/10/trump-wants-to-censor-the-press/542142> [<https://perma.cc/68J4-EGUE>].

147. Donald Trump (@realDonaldTrump), TWITTER (Feb. 20, 2019, 5:49 AM), <https://twitter.com/realDonaldTrump/status/1098218016255414272>.

148. Alex Shepard, *Donald Trump Is Treating Fox News Like it’s State TV*, NEW REPUBLIC (June 27, 2017), <https://newrepublic.com/minutes/143564/donald-trump-treating-fox-news-like-its-state-tv> [<https://perma.cc/9SB6-WD9F>].

149. “MSNBC just posted its highest-ever quarterly ratings, beating centrist CNN in prime time. The *Times* reported record-breaking subscriber growth. The *Post* is aggressively expanding amid record online traffic and ad revenue.” Will Oremus, *Why Are the Times, the Post, and MSNBC on a Conservative Hiring Spree?*, SLATE (May 9, 2017, 6:40 PM), <https://slate.com/news-and-politics/2017/05/why-are-the-nyt-wapo-and-msnbc-on-a-conservative-hiring-spre.html> [<https://perma.cc/V3C7-8BLS>].

150. *Id.*

151. Michael Sainato, *Liberal Mainstream Media Continues Blacking Out Progressives, Hires Conservatives*, OBSERVER (May 1, 2017, 7:12 AM), <https://observer.com/2017/05/mainstream-media-hires-conservatives-lacks-progressives> [<https://perma.cc/Y4YK-9L3E>].

with former Secretary of State Rex Tillerson, Trump called for a Senate investigation “into the Fake News Networks in OUR country to see why so much of our news is just made up-FAKE!”¹⁵² A few days later, after attacking the NFL’s tax-exempt status, the President threatened to “challenge” NBC’s broadcast license in response to what he characterized as perpetually unfavorable coverage.¹⁵³ Shortly after, Trump expanded his criticism to “partisan, distorted and fake” network news.¹⁵⁴ His solution? “[L]icenses must be challenged and, if appropriate, revoked.”¹⁵⁵ Almost a year later, the President reignited the controversy, and again asked the FCC to look into NBC’s license, citing the network’s low “journalistic standards” and “unethical conduct”¹⁵⁶ in the wake of a story that claimed NBC blocked journalists from investigating Harvey Weinstein.¹⁵⁷ Aside from whether or not the President actually has the power to direct the FCC to consider these licenses¹⁵⁸ or to force the Senate to investigate news outlets, he is at least abusing his presidential powers and at most toeing an unconstitutional line. By allowing Trump to constantly criticize non-conservative news outlets, conflate “fictitious news designed to mislead with reporting he simply doesn’t like,”¹⁵⁹ and subsequently threaten outlets for disseminating those stories, courts have assented to a new form of indirect First Amendment degradation, designed to censor and control the news media. If press freedoms are to remain meaningful, courts must assiduously police the connection between the Administration’s threats and news outlets’ responses to them.

C. SOCIAL MEDIA AND TECHNOLOGY COMPANIES

Finally, the President has steadily criticized and threatened Google, Twitter, and Facebook for what he claims is anti-conservative bias.¹⁶⁰ In

152. Donald Trump (@realDonaldTrump), TWITTER (Oct. 5, 2017, 3:59 AM), <https://twitter.com/realDonaldTrump/status/915894251967385600>.

153. Donald Trump (@realDonaldTrump), TWITTER (Oct. 11, 2017, 6:55 AM), <https://twitter.com/realDonaldTrump/status/918112884630093825>.

154. Donald Trump (@realDonaldTrump), TWITTER (Oct. 11, 2017, 5:09 PM), <https://twitter.com/realDonaldTrump/status/918267396493922304>.

155. *Id.*

156. Donald Trump (@realDonaldTrump), TWITTER (Sept. 4, 2018, 7:58 AM), <https://twitter.com/realdonaldtrump/status/1036991866124861440?lang=en>.

157. Makini Brice & David Shepardson, *Trump Hits CNN and NBC, Urges ‘Look at Their License’ Tweet*, REUTERS (Sept. 4, 2018, 8:44 AM), <https://www.reuters.com/article/us-usa-trump-media/trump-hits-cnn-and-nbc-urges-look-at-their-license-tweet-idUSKCN1LK1Z1> [<https://perma.cc/Q6E5-JLNA>].

158. *Id.* The FCC is an independent agency that does not answer to the President, and “the FCC’s chairman said the agency does not have authority to revoke broadcast licenses over editorial decisions.” *Id.*

159. Graham, *supra* note 146.

160. Although structural factors like Facebook’s algorithm have not been proven to systematically

August of 2018, Trump condemned the companies' allegedly unfair news results, warning them to "be careful" as they were "treading on very, very troubled territory."¹⁶¹ He specifically criticized Google's search tool and asserted that it "RIGGED" results in favor of "Fake News Media" and "shut out" conservative media sources.¹⁶² Trump contended that Google controlled "what we can & cannot see" by "hiding information and news" that favored his administration, and even stipulated that 96 percent of the site's search results for "Trump News" came from "Left-Wing Media" outlets.¹⁶³ The President ended the Twitter thread by ominously concluding that this "very serious situation-will be addressed!"¹⁶⁴ In response, both Facebook and Twitter sought conservative expertise to advise on their business practices and address growing accusations of liberal bias.¹⁶⁵

Another debate has also emerged over the platforms' uniform enforcement of community posting rules. While Twitter recently enforced policies that prohibit spreading "misinformation related to the voting process" and "glorifying violence" against two presidential tweets,¹⁶⁶ Mark Zuckerberg cited his discomfort with "acting as an 'arbiter of truth'" as the rationale behind Facebook's failure to invoke similar rules in response to the same posts.¹⁶⁷ Facebook employees, angered by the company's decision,

suppress conservative voices, former employees believe that the political biases of its "trending news" content curation team may have had a "chilling effect" on certain content because "either the curator didn't recognize the news topic or . . . they had a bias against Ted Cruz." Michael Nunez, *Former Facebook Workers: We Routinely Suppressed Conservative News*, GIZMODO (May 9, 2016, 9:10 AM), <https://gizmodo.com/former-facebook-workers-we-routinely-suppressed-conser-1775461006> [<https://perma.cc/X2ZD-L8RH>].

161. Marissa Melton, *Trump Expands Google Criticism to Include Facebook, Twitter*, VOA NEWS (Aug. 28, 2018, 7:30 PM), <https://www.voanews.com/a/trump-expands-google-criticism-to-include-facebook-twitter/4548183.html> [<https://perma.cc/U5DZ-FLT3>].

162. Donald Trump (@realDonaldTrump), TWITTER (Aug. 28, 2018, 8:02 AM), <https://twitter.com/realDonaldTrump/status/1034456273306243076>.

163. Donald Trump (@realDonaldTrump), TWITTER (Aug. 28, 2018, 8:02 AM), <https://twitter.com/realDonaldTrump/status/1034456281120206848>.

164. *Id.*

165. Jessica Guynn, *'Fake Social,' 'Fake Search' Are the New 'Fake News' as Trump Attacks Tech Ahead of Midterms*, USA TODAY, <https://www.usatoday.com/story/tech/news/2018/08/30/trump-attacks-facebook-google-and-twitter-midterms/1144471002> [<https://perma.cc/DLY4-PLU2>] (last updated Sept. 5, 2018).

166. The first tweet, which Twitter flagged for spreading misinformation about the voting process, stated that "Mail-In Ballots will be . . . substantially fraudulent. Mail boxes will be robbed, ballots will be forged & even illegally printed out & fraudulently signed." The second tweet, which Twitter flagged because it violated rules about glorifying violence, threatened Minneapolis protestors stating, "when the looting starts, the shooting starts." Donald Trump (@realDonaldTrump), TWITTER (May 26, 2020, 5:17 AM), <https://twitter.com/realDonaldTrump/status/1265255835124539392>; Donald Trump (@realDonaldTrump), TWITTER (May 28, 2020, 9:53 PM), <https://twitter.com/realdonaldtrump/status/1266231100780744704>.

167. Kevin Roose, *The President Versus the Mods*, N.Y. TIMES (May 29, 2020), <https://www.nytimes.com/2020/05/29/technology/trump-twitter.html> [<https://perma.cc/4H3H-JPVZ>].

believed that Trump's posts remained untouched "out of fear of Facebook being regulated or broken up."¹⁶⁸ Facebook is right to fear regulatory retaliation. In response to Twitter's initial fact-check of the mail-in voting post,¹⁶⁹ the administration issued an executive order targeting social platforms' broad legal immunity.¹⁷⁰ The order instructed the FCC to "start a rule-making process to clarify when social media companies should" retain their liability protections.¹⁷¹ One FCC commissioner publicly noted her concern for the "huge thicket of First Amendment issues" that the order raises, fearing that it would transform the agency into "the president's speech police."¹⁷²

While the danger of technology and social media companies censoring content at the behest of the government is nothing new, (the Obama Administration "held closed-door meetings with social media executives to 'learn how' [the companies'] platforms could counter 'radicalization' ") never before has the government overtly attempted to coerce restraints on personally damaging and politically unfavorable content.¹⁷³ These censorship attempts are particularly dangerous because social media and technology companies' virtual "monopoly status" engenders "unusually strong incentives to comply with federal officials' requests regarding content curation."¹⁷⁴ As a result, Trump's threats presumably have a higher likelihood of being heeded, seeing as this inherent vulnerability to "antitrust enforcement and other regulatory intervention . . . makes [these companies] more susceptible to coercion."¹⁷⁵ The apparent ease with which the Trump administration can influence social media and technology companies presents a slippery slope for online content distortion. Because these

168. Mike Isaac, Cecilia Kang, & Sheera Frenkel, *Zuckerberg Defends Hands-Off Approach to Trump's Posts*, N.Y. TIMES (June 2, 2020), <https://www.nytimes.com/2020/06/02/technology/zuckerberg-defends-facebook-trump-posts.html> [<https://perma.cc/8MRY-KMKJ>].

169. The President characterized "the fact-checking labels" as "censorship" designed to "stifl[e] conservative voices." Bobby Allyn, *Stung by Twitter, Trump Signs Executive Order to Weaken Social Media Companies*, NPR (May 28, 2020, 4:59 PM), <https://www.npr.org/2020/05/28/863932758/stung-by-twitter-trump-signs-executive-order-to-weaken-social-media-companies> [<https://perma.cc/EG7U-ZV8Z>].

170. The order suggests § 230(c) of the Communications Decency Act, which shields internet platforms from liability for user-posted content, should no longer protect social media companies that "remove[] or restrict[] access to content" and "engage[] in editorial conduct." Exec. Order No. 13925, 85 Fed. Reg. 34,079 (June 6, 2020).

171. Allyn, *supra* note 169.

172. *Id.*

173. Fred Campbell, *Why the First Amendment Won't Save Google from Trump*, FORBES (Sept. 4, 2018, 3:54 PM), <https://www.forbes.com/sites/fredcampbell/2018/09/04/why-the-first-amendment-wont-save-google-from-trump/#32f80dce237b> [<https://perma.cc/HP7L-GPVX>].

174. *Id.*

175. *Id.*

companies maintain relative monopolies on search and social platforms, careful protection against government overreach is critical, as consumers essentially cannot access these services from any other providers.

While the ostensible strength of government coercion is undoubtedly cause for concern, the deceptive tactics that social media companies have used to defuse negative media attention are equally alarming. For example, in an effort to alleviate mounting conservative criticism, Facebook hired an opposition research group to allegedly write and proliferate pro-Facebook content on a right-wing news site that funneled stories to larger conservative outlets like Breitbart.¹⁷⁶ Facebook was also accused of directing the group to shift media narratives by creating and disseminating disparaging content that drew “attention to unsavory business practices” at its competitors, Apple and Google.¹⁷⁷ These questionable tactics, employed in part as a response to Presidential criticism, reflect the dangerous lines companies seem increasingly willing to cross when faced with bad press. If threats of regulation and relentless negative commentary strong-arm private actors into creating, manipulating, and regulating speech in ways that appease the government’s wishes, objectivity is woefully distorted. Much like the risk with news outlets, if the courts allow the President to exploit regulation as a threat in order to elicit favorable search rankings and social-media policy decisions, they effectively acquiesce to outsourced censorship and its myriad constitutional consequences.

IV. THE COURT MUST REVIVE THE STATE ACTION DOCTRINE’S ENCOURAGEMENT THEORY

As it stands today, in cases in which a constitutional violation arguably falls within a grey area, the Court has abdicated its responsibility as a coequal branch of government by interpreting the state action requirement to insulate both government and private actors from accountability. However, in an era in which Presidential norms have arguably broken down,¹⁷⁸ and the Administration regularly uses threats and negative press to precipitate and outsource censorship to private actors, it is imperative for the Court to revive and rework the standard espoused in *Lombard*,¹⁷⁹ and hold private actors more vigorously accountable for state-coerced or encouraged behavior that

176. Aaron Mak, *How Facebook’s PR Firm Used a Conservative News Site to Fiercely Attack its Rivals*, SLATE (Nov. 15, 2018, 5:14 PM), <https://slate.com/technology/2018/11/facebook-definers-ntk-network-conservative-news-site.html> [<https://perma.cc/AH8Z-4785>]. Facebook denied these allegations, writing in a blog post that “The New York Times [was] wrong to suggest that we ever asked Definers to pay for or write articles on Facebook’s behalf—or to spread misinformation.” *Id.*

177. *Id.*

178. See West, *supra* note 3, at 321–25.

180. *Lombard v. Louisiana*, 373 U.S. 267, 270–74 (1963).

would be independently unconstitutional if undertaken by the state.

This realist approach, one that acknowledges the fact that the government's use of coercive tactics and rhetoric indirectly violates the First Amendment, is necessary to restore a sense of equilibrium to American civil liberties and combat the growing threat of outsourced censorship. While the Court need not expand the state action doctrine, reconceptualizing its application to today's realities and applying it aggressively to cases in which there is strong evidence that the government has coerced or influenced private actors to restrict speech will help to curtail at least some of the current Administration's most deplorable constitutional abuses.

CONCLUSION

That the Trump Administration could unconstitutionally induce the NFL to instate its restrictive anthem policy raises grave concerns for the future of constitutional protections concerning universities, news outlets, and social media and technology companies. It remains to be seen what the Roberts Court would do if confronted with a case ripe for judicial review.

On the one hand, the Roberts Court's proponents paint it as an unprecedented champion of free speech, lauding its efforts to "expand the scope of individual choice about speech and reduce the area of government control and censorship."¹⁸⁰ Others have less faith in the new conservative majority, arguing that its continued Presidential deference invites Trump to "keep flouting the rule of law."¹⁸¹ This concern was validated by *Trump v. Hawaii*, an Establishment Clause case in which the Court declined to interrogate the overtly discriminatory motives behind the President's travel ban.¹⁸² Justice Sotomayor's dissent echoed similar concerns and excoriated the majority's failure to "hold the coordinate branches to account when they defy our most sacred legal commandments."¹⁸³

While there may be reason to believe that the Court's deference to the President's First Amendment violations will be confined to national security

180. Joel M. Gora, *Free Speech Matters: The Roberts Court and the First Amendment*, 25 J.L. & POL'Y 63, 123 (2016).

181. David Gans, *The Supreme Court Is Enabling President Trump*, TAKE CARE BLOG (June 28, 2018), <https://takecareblog.com/blog/the-supreme-court-is-enabling-president-trump> [<https://perma.cc/DW22-MBCY>].

182. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

183. *Id.* at 2448 (Sotomayor, J., dissenting).

issues,¹⁸⁴ skeptics believe it will continue to give him a free pass.¹⁸⁵ However, holding private actors accountable for unconstitutional responses to government coercion does not require overreach into an area traditionally warranting judicial deference—the state encouragement theory is buried precedent waiting to be unearthed. Accordingly, if our freedoms of speech and press are to survive as the Constitution intended, the Court must revive the state action doctrine, assert its role as a coequal branch of government, and carefully scrutinize the effects of Trump’s threats against private actors’ behavior.

184. Justice Roberts’ majority opinion made a point to distinguish cases concerning national security from others, noting “‘when it comes to collecting evidence and drawing inferences’ on questions of national security, ‘the lack of competence on the part of the courts is marked.’” *Id.* at 2419 (majority opinion) (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010)).

185. Gans, *supra* note 181.