

A Discourse Analysis on the Extension and Application of First Amendment Free Speech Rights
for Student Athletes in Private Universities

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PSC 393 Language and Politics

Professor May

16 March 2020

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Introduction

Sports in the United States contribute largely to what it is to be an American. Watching and playing sports creates a sense of unity across the nation in that it bonds us and forms American culture. Professional sports leagues such as the National Football League (NFL), the National Basketball Association (NBA), and the Major League Baseball (MLB) revenue billions a year, while the National Collegiate Athletic Association revented nearly one billion in 2016 (NCAA). Although this exemplifies the importance of sports in American culture, it is important to consider that regardless of profit, athletes in both professional and collegiate sports are subjected to specific guidelines and regulations implemented by either entity, and to examine the burden this holds on the athlete.

In analyzing this situation, the NCAA, specifically, is responsible for awarding high school students athletic scholarships to pursue their career. These, however, are very limited, thus adding more to its value. In fact, only about “2 percent of high school athletes are awarded some form of athletics scholarship to compete in college” (NCAA). Those who accept their offer are expected to comply with the conducts and regulations of both the NCAA and the college they will be playing for, thereby reinforcing the restrictions placed on student athletes. Although public and private universities decide upon their conducts independently, public universities are largely influenced by the state, while private universities are given more freedom to write and implement their policies, which has become a complication over the past several years. Furthermore, it is important to note when private universities are abusing their power in establishing rules for their students, and whether or not it is deemed constitutional.

Literature Review

The First Amendment's basic guarantee is of freedom to advocate ideas, including unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion (Baker 1978). It has been largely debated within many contexts, primarily in public and private institutions, and has been taken to the United States Supreme Court. The 1969 court case *Tinker v. Des Moines* established that a student is entitled to their First Amendment rights in public schools. Public schools have since tried to include those constitutional values that are essential to democratic participation, such as freedom of expression, freedom to worship as one pleases, and the right to privacy (Salomone 1992). However, some argue otherwise and state that the courts have made it clear that students leave most of their constitutional rights at the schoolhouse gate (Chemerinsky 2000).

Public schools aside, it is also crucial to discuss the implementation and execution of the First Amendment in the private sector. In this case, however, it becomes difficult to transport First Amendment norms to the private sector because it creates a conflict between the free speech rights of the institution and the free speech rights of the individual (Chemerinsky 1998). Although it is important to protect the rights of individuals, one also has to consider that it interferes with the free speech interests of private entities (Chemerinsky 1998). This is directly correlated with the issue of free speech in private colleges. Colleges are loathe to take any action perceived as encroaching on free speech, thus undermining their image as centers of learning, creative thinking and open discourse. Many would argue that simply because a college can limit speech does not mean it should (Nguyen and Dragga 2016).

The paradox between private institutions and the extension of our free speech rights under the First Amendment is also portrayed in the private sports sector. More specifically in the case of Colin Kaepernick in 2016. Kaepernick became a headline name when he refused to stand

for the National Anthem, as he was not going to show pride in a flag for a country that oppresses black people and people of color. While Kaepernick certainly has that right to be heard, the reader is asked to question whether Kaepernick has abridged the rights of others, and certainly, if he has a constitutional defense to back up his actions that are not associated with any government action. It is a difficult topic to address as the NFL is a private entity that sets forth its own conduct rules and has the power to dictate what an employee can or cannot say. Although Kaepernick was not criminalized for his action and opted out from continuing his contract with the NFL, he was not able to successfully claim freedom of speech under the First Amendment, because he has given up that freedom to be employed by the NFL and the 49ers (McGinty 2017).

The goal of this literature review is to compare how the First Amendment's freedom of speech is implemented in both public and private sectors. More specifically, it discloses the technicality of free speech rights in private institutions. It is important to note how private institutions, both universities and sport sectors in this case, establish and implement their regulations on this particular topic. Although there is extensive research on the implications of Kaepernick's action as a professional athlete, there is a lack of information on what the consequences for a similar action would be for student athletes playing for a private college.

Considering the limitations private colleges place on freedom of speech and in analyzing recent social and political protests in the professional private sports sector by the athletes themselves along with the rights they are given to do so, it begs the question: to what extent are student athletes in private colleges guaranteed their freedom of speech rights under the First Amendment? This study seeks to analyze the free speech protections granted to student athletes in several private universities and provide a better understanding of differing interpretations.

More importantly, it seeks to explore the significance of the First Amendment along with its symbolic and metaphorical connotations.

Methodology

In conducting this research, discourse analysis will be employed. It will be focused on Caterina Carta's deduction and induction approaches to discourse analysis. Carta defines deduction as "a "top-down" process that departs from logical assumptions to hypothesize and then test hypotheses against empirical cases in order to draw laws of regularities" (Carta 2019). Induction, on the other hand, is "a bottom-up approach, which departs from the observation of given phenomena to infer laws or theories. Induction is generally accompanied by a commitment to a self-reflective approach" (Carta 2019). Her approaches will be applied to five private colleges' 2019-2020 Student Athlete Handbooks and university policies on freedom of speech across campus, most likely being the School's Code of Conduct, in order to analyze two things: their terminology of free speech and any language alluding to conduct.

Through deduction, I will analyze the language of free speech in the 2019-2020 Student Athlete Handbooks and the universities' policies to hypothesize the consequences student athletes would face if they were to protest similarly to the way Kaepernick did in 2016. The student athlete's punishment, if any, will be based on their university's interpretation of the First Amendment. In other words, this will attempt to answer how much value the school places on freedom of speech along with the way it extends to students. With induction, I will analyze the Student Handbook's free speech policies and connect it back to athletes themselves. Although this moves away from policies directly affecting only student athletes, it is important to note that the school's policies apply to everyone. This allows one to consider all the possible risks of

jeopardizing their athletic careers that student athletes take when exercising their First Amendment rights.

The universities whose policies will be analyzed are those that are ranked top five in “2020 Best College Athletics.” They must be private 4-year universities that are Division I in football. These include: the University of Southern California, Duke University, the University of Notre Dame, Syracuse University, and Stanford University. Division I universities in football were selected to mirror Kaepernick’s incident. Discourse analysis is the main approach to this research as the language in the 2019-2020 Student Athlete Handbooks and the universities’ policies regarding freedom of speech is crucial when considering the consequences of a student athlete’s actions in a private university. The technicality of the words and phrases used is what determines how their situation will be settled. Something as important as an athletic scholarship may potentially be in jeopardy solely based on the language of the policies.

Furthermore and what is at the core of this study is the significance of the First Amendment itself. Its terminology and interpretations by different private institutions is what makes the aforementioned an issue to begin with. After Carta’s approaches to discourse analysis, the First Amendment’s connotations will be analyzed through Murray Edelman’s theory of symbols in his book, *The Symbolic Uses of Politics*. This theory is derived from political leadership, especially on how it is defined, attained, and maintained. Edelman asserts that leaders in politics gain followers based on the way they are perceived as a symbol - either positive or negative. This concept will be applied by analyzing the First Amendment as a symbol, and how people and their views interpret it differently. The purpose is to explore the discrepancies in how the First Amendment is perceived among different audiences.

Limitations

A few concerns may arise from the execution and conclusion of the study. It is broken down into two overarching parts: the quantity of universities and the types of universities they are. To begin, the quantity of schools that will be analyzed is significantly low and specific. This study only considers the top five private colleges and their First Amendment policies that succeed in sports. That, within itself, is a very limited scope. In addition to limiting the paper to universities that are considered “sports colleges,” this study is mostly concerned with football. There are other sports in every chosen university, but football was selected to be closely tied to Colin Kaepernick’s case. Next and because only five schools are being considered, the conclusion of the research will not be applicable to every private university. It is likely that other schools have differing policies for their students and athletes; therefore, the findings of this paper cannot be universally applied to every private college in the nation.

Similarly, one has to consider that the universities selected are private institutions. Although just as crucial as private schools, public schools are not included in this study. Their free speech policies are similar to those implemented by the state, while private schools have more freedom in deciding what their policies will entail. For the purpose of the study and because it was inspired by this topic, it was important to identify any discrepancies of First Amendment policies in the private sector based on Colin Kaepernick’s case. It was important to maintain a consistent foundation - in this case being private institutions. It is possible that in analyzing public schools, there would have been less margin for dissimilarity. Additionally, this study does not consider the differences that Division 1, 2, and 3 colleges may have in their policies, which may also have an impact in the way these universities form their policies for student athletes. However, Division I schools were selected as they are the most followed by the American public. Lastl, the universities selected differ in regions. This may influence the way

they interpret the First Amendment in their policies based on historical context. Once again, it emphasizes the difficulty of applying the findings of the study to other private universities.

Data

I. University of Southern California

Source Analyzed	Language explicitly stating: free speech, freedom of speech, First Amendment, free expression	Other language alluding to conduct
2019-2020 Student Athlete Handbook	"Social media is a fun and useful tool...but it can also spread information in a negative way that exposes your personal life to the world. USC supports an individual's expression of First Amendment rights of free speech. We do not place restrictions on the use of social media by our student-athletes"	USC student-athletes may be held responsible for the acts of other USC athletes. Acts include but not limited to the following types of circumstances: 1. when a member of a USC athletic team is violating state or university standards and you fail to indicate your disapproval, or your continued presence without objection condones the behavior; 2. when the act grows out of a USC athletic activity or environment created by USC; 3. when the acts are those of guests of yours or of USC athletics; 4. when a USC athletic team imposes any hazing on new athletes
USC Provost - USC Policy on Free Speech	Students and student organizations are free to support causes by all orderly means which do not disrupt or substantially interfere with university activities, as such disruption or interference violates the responsible exercise of free inquiry and expression.	

From the data above, it is evident that University of Southern California puts an emphasis on the First Amendment across university policy. Here, one should note that the terminology “First Amendment” was explicitly used in the Student Athlete Handbook. By including this, one can infer that they sincerely grant student athletes their rights to freedom of speech. The university wants to make it known that they are willing to allow students to have the rights they

are entitled to on their campus. It also contributes to the credibility of the school in assuring the best interest for the students. However, the terminology was directed towards social media usage and not anything related to what could potentially happen on the field, which is the issue being considered. Nevertheless, it is still of importance that this was mentioned.

It can be inferred that had a football athlete done something similar to what Colin Kaepernick did in 2016, the repercussions would have been similar. This is considering the fact that this right is granted in both the Student Athlete Handbook and their policies on free speech, and the significance of the university explicitly acknowledging it. Although there is emphasis on the First Amendment and being able to freely express oneself, there is also a push for holding athletes accountable for their actions. The NFL did not criminalize Kaepernick, which most likely would have been the case here as well; however, the dynamic among the athlete and the university would have changed.

II. Duke University

Source Analyzed	Language explicitly stating: free speech, freedom of speech, First Amendment, free expression	Other language alluding to conduct
2019-2020 Student Athlete Handbook	Duke University takes free expression seriously and goes to great lengths to protect that right. Social networks such as Facebook and sites such as Twitter have expanded your opportunities to express yourself, connect with friends, and to build your network. Still, there are several responsibilities to consider when you create your persona and post messages online.	
Duke University Student Conduct: Pickets, Protests and Demonstrations		Duke University respects the right of all members of the academic community to explore and to discuss questions which interest them, to express opinions publicly and privately, and to join together to demonstrate

		<p>their concern by orderly means. It is the policy of the university to protect the right of voluntary assembly, to make its facilities available for peaceful assembly, to welcome guest speakers, to protect the exercise of these rights from disruption or interference.</p>
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In Duke University’s Student Athlete Handbook and other policies alike, freedom of speech is emphasized, much like the regulations imposed by the University of Southern California. It is imperative for the university to acknowledge the rights they are giving their students and student athletes, especially this topic. Although it is used in the context of social media, the terminology used in this case is heightened as they state that they take “free expression seriously and goes to great lengths to protect that right.” It can be inferred that this would project onto actions that occur during the field. The mere fact of the university phrasing it the way it did allows one to believe that there would not have been many consequences had an athlete taken a knee during the national anthem. The technicality they use to describe the way they extend free speech in university policy is what leads to this conclusion. They state that this right is protected under great measures; therefore, the act of taking a knee would not have been penalized, much less criminalized. One can infer that they are willing to allow student athletes to express themselves regardless of their beliefs, so long as the action is not dangerous or harmful. As stated in the Student Conduct Handbook, they are willing to provide university services that will allow students to express themselves, further reinforcing their emphasis on granting students their free speech rights.

III. University of Notre Dame

<p>Source Analyzed</p>	<p>Language explicitly stating: free speech, freedom of speech, First Amendment, free</p>	<p>Other language alluding to conduct</p>
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	expression	
2019-2020 Student Athlete Handbook		Student-athletes must comply with all University rules and guidelines, including those set out both in the student handbook, du Lac, and in the Student-Athlete Handbook. The Office of Residence Life and Housing enforces the University-wide rules according to procedures applicable to all student disciplinary matters.
du Lac: A Guide to Student Life	What the University asks of all its scholars and students, however, is not a particular creedal affiliation, but a respect for the objectives of Notre Dame and a willingness to enter into the conversation that gives it life and character. Therefore, the University insists upon academic freedom which makes open discussion and inquiry possible.	

In the case of the University of Notre Dame, their Student Athletic Handbook did not explicitly mention any language regarding the First Amendment and its rights, and rather relies on university policies. With that in mind, it is possible that there would have been more consequences for a student athlete had they taken a knee during the national anthem. This is not definitive, but there are more ways granting a student athlete their free speech rights can be avoided solely based on the language used for the rules and regulations. To begin and as already mentioned, the Student Athlete Handbook does not utilize words or phrases that seem to acknowledge the First Amendment for student athletes in any context. This does not mean that the university does not; however, it becomes more difficult to argue that they do. Next, they rely on university policies that refer to “academic freedom,” which once again, does not directly infer freedom of speech. Although there is some language that can imply that both students and athletes have First Amendment rights, it is still open to interpretation. Therefore, one can infer

that there would have been more complications in deciding an outcome for a student athlete who took a knee during the national anthem.

IV. Syracuse University

Source Analyzed	Language explicitly stating: free speech, freedom of speech, First Amendment, free expression	Other language alluding to conduct
2019-2020 Student Athlete Handbook		Every Syracuse University student will have the capacity to learn, connect and thrive in a healthy, respectful and supportive environment. We strive to be leaders in college wellness by providing integrated care and an unsurpassed student experience. Utilizing a social justice framework, we endeavor to create an inclusive and welcoming environment that is safe and comfortable for all we serve.
Syracuse University Student Handbook	Students have the right to express themselves freely on any subject provided they do so in a manner that does not violate the Code of Student Conduct. Students in turn have the responsibility to respect the right of all members of the University to exercise these freedoms.	

Although Syracuse University's Student Athlete Handbook does not explicitly state First Amendment rights for student athletes, the Student Handbook acknowledges these rights for their students. In this case, one handbook states free speech rights and one does not. However, because the Student Handbook is applied to every student, athlete or not, it can be inferred that student athletes would have a less difficult time defending their actions if the case was presented. It would be more beneficial to the student athlete had the Student Athlete Handbook explicitly noted their rights; however, the regulations mentioned in the Student Handbook can be considered sufficient enough to protect themselves. In other words, if a similar instance as Colin Kaepernick's occurred the athlete would not be completely unprotected as the Student Handbook

applies to them as well. In this case, being considered a student is beneficial to them because they are granted rights in both contexts.

V. Stanford University

Source Analyzed	Language explicitly stating: free speech, freedom of speech, First Amendment, free expression	Other language alluding to conduct
2019-2020 Student Athlete Handbook		<p>California has codified law to provide protections and privileges to student-athletes within the state. The law articulates protections in the following areas:</p> <ul style="list-style-type: none"> ● Scholarship renewals for a permanently incapacitating injury or illness ● Scholarship terms ● Degree completion funds ● Life skills, financial literacy, and time management programming ● Due process rights ● Timely notice following a request to transfer ● Health insurance requirements for student-athletes ● Guidelines regarding concussions and rehydration ● Title IX adherence
Stanford University Policies and Guidelines: The Fundamental Standard	The Fundamental Standard does not restrict speech that is otherwise protected, including speech that some may find objectionable. The interplay between freedom of speech and the Fundamental Standard is complex and we invite you to learn more about freedom of speech and the Office of Community Standards' (OCS) student conduct process here.	

As seen in the data above, Stanford University's Student Athlete Handbook lists protections granted to student athletes, but does not mention First Amendment rights, thus complicating the situation in this context. That is not to say Stanford University does not value or

grant their athletes freedom of speech rights, but the terminology of the handbook makes it more difficult to argue that they do. Their policies and guidelines mention that the university does not restrict free speech, giving more leeway to athletes, but it is more notable to consider that it was not mentioned in the handbook, especially if they are given the opportunity to do so when they list other rights.

When considering the consequences that would occur to a football athlete at Stanford University had they taken a knee during the anthem, it is difficult to definitively predict the outcome. The technicality of words and phrases has become a pattern in deciding what would happen to an athlete in this case; however, in this case, it is more or so open to interpretation. What makes this difficult is the fact that they could have mentioned free speech protections and did not. It questions why it was left out if the Student Handbook states that they grant these rights to their students. Although this extends to athletes as well, it does not overshadow that this could have been mentioned. It emphasizes the significance of the terminology used in these regulations.

The Significance of the First Amendment as a Symbol

As seen, the interpretations of the First Amendment contributes largely to a student athlete's ability to express those rights. Moreover, it is important to understand the language surrounding the First Amendment as a whole. In his book, *The Political Language of the Helping Professions*, Murray Edelman describes the significance of language and how it is not merely a tool of communication. With language, he states, "...we not only describe reality but create our own realities, which take forms that overlap with each other and may not be mutually consistent" (Edelman 296). This is crucial when the rhetoric of the First Amendment is considered. People create their own meaning of the First Amendment, which is exemplified through its terminology.

In this case, the way the university chose to write their regulations on this fundamental right is the extent to which the student will be able to exercise it. In other words, the way it is interpreted is the way it is executed. Something as important as freedom of speech is limited to student athletes based on the technicality used by the university. As seen in the data above, the language of free speech in these private universities' regulations is based on how that particular school views the First Amendment and its rights.

Furthermore, it alludes to the symbolic connotations of the First Amendment and, in essence, why there are many interpretations of it to begin with. It is one thing to analyze the language the universities used to structure the rights of the students; however, it is more important to understand why this is by examining the First Amendment in a broader sense. There are many scholarly sources solely on the terminology the Founding Fathers used in writing the First Amendment resulting in distinct ways it can be interpreted. The differing interpretations of it contributes to the bigger picture: we give it meaning. The First Amendment is only words on paper until people decide to give it importance, which mirrors Edelman's theory of symbols. In his book, *The Symbolic Use of Politics*, he states that "the meanings, however, are not in the symbols. They are in society and therefore in men" (Edelman 11). It is important to note that students have restrictions in their exercise of free speech, but it is more crucial to understand why and how the university selected these limitations. In this case, what does the First Amendment represent to these universities? However, this question can be extended to the nation or the individual.

We give meaning to the First Amendment, which is dependent on our perspectives and how it affects us. Continuing Edelman's theory of symbols, the individual will determine the meaning of this fundamental right based on various contexts on what it entails for them. For

example, one may view the First Amendment and the entire Constitution as one of the many freedoms granted as citizens. However, someone with a different lens may view freedom of speech as still being too limited. It is dependent on the contexts the individual bases their views, but it brings attention to the importance of having these perspectives in the first place. While it is important to have multiple interpretations, for it contributes to larger conversations, it may also result negatively. As seen in the data above, the act of having different definitions for the First Amendment is not necessarily a bad thing; however, it creates inconsistency throughout various schools. This margin can either be advantageous or disadvantageous to the student, which is the bigger conversation that should be had.

Conclusion

To conclude, analyzing the First Amendment through the perspective of student athletes in the context of private universities contributes to the importance of language as a whole. As seen, Edelman's assertions on language and its power is applied in determining free speech regulations for student athletes. In the end, the technicality of the words and phrases ultimately sets a standard for exercising the First Amendment. It was crucial to compare different universities to further understand their interpretations of this amendment and the symbolic connotations that can be inferred. The university did not directly restrict student athletes on their free speech rights; it was the language of their regulations. It brings attention to the power language can have on things that affect us most.

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