

Taking A Knee and the “First Amendment”

Welcome to *Constitutional Context*. This is Professor Glenn Smith with another “five-minute bite of background about the Court and Constitution.”

You probably don’t need reminding about the controversy swirling around NFL players “taking a knee” during the national anthem to protest mistreatment of racial minorities. The dispute has been a regular subject in speeches and tweets by the President. It’s been prominent on news, sports, and talk shows.

What I find especially interesting as a constitutional law professor is how pundits and the public keep referring to the “first amendment rights” of players. I’m glad for their gut feeling that important free-speech matters are involved. But, as a technical matter -- and, as a lawyer AND a professor, I’m doubly capable of being technical! -- talk about the players having “first amendment rights” is inaccurate.

The U.S. Constitution in general – and its First Amendment protection against “abridging the freedom of speech” in particular – only protect individuals against suppression by *governmental* officials and a narrow band of private entities acting like the government. The Constitution and its First Amendment have no legally binding effect on the rights of football players or of any *private*-sector employees to engage in speech or expressive conduct at work.

The expressive rights of private employees can end up being protected by federal laws and regulations. For example, federal labor laws prevent employers from retaliating against employees for labor organizing or grievance activities accomplished by spoken and written advocacy. And private employers can enter into agreements with workers or their unions to protect worker speech. Thus, the discussion and news coverage about whether the NFL’s rules allow player protest are on the mark.

But it bears repeating: As an initial and general matter (and you’ll see in a minute why I’m using this qualified phrasing), private employees can’t look to *the U.S. Constitution itself* as a source of legally binding protection against employers infringing their freedom of expression. The same goes for other important rights, such as the privacy of personal materials kept in office desks, files, and computers.

Of course, the central purpose of the First Amendment is to prevent suppression of private free speech by *governmental officials*. A series of legal decisions protects a wide range of speech and expressive conduct from outright prohibition and more subtle limitations or selective burdens. So if, as suggested by the President, the NFL were to lose tax advantages or suffer other penalties for the protests of players or the League’s standing up for players this would clearly implicate First Amendment prohibitions on governmental retaliation against private speech.

And, ironically, even though NFL players had no legally enforceable “first amendment rights” at the outset, the more the President pressures the League to take some action to silence the players, the greater the risk that eventual League action would end up directly subject to First Amendment strictures. At least a plausible argument would arise under a complicated legal doctrine known as “state action.” Private entities not generally subject to the Constitution’s strictures can as an exceptional matter be treated as though they are bound by our founding document; the most relevant thread of this multi-strand doctrine constitutionalizes private action when governmental officials “command,” “coerce,” or significantly “encourage” private behavior.

Beyond legal technicalities I’m deeply gratified that disputants in the taking-a-knee controversy are implicitly looking to constitutional values for inspiration. Even when the Constitution doesn’t apply as a binding limitation, it represents the product of exceptional deliberation and consensus at special moments in our nation’s history.

The Constitution is not perfect. But we do well to let our societal discussions and policies be guided by its principles for limiting governmental power and promoting individual rights.