

CAN THE NBA PUNISH DENNIS RODMAN? AN ANALYSIS OF FIRST AMENDMENT RIGHTS IN PROFESSIONAL BASKETBALL

I disapprove of what you say, but I will defend to the death your
right to say it.

-Voltaire¹

INTRODUCTION

Professional athletic associations are running roughshod over the First Amendment rights of their athletes, coaches, and fans. These associations frequently do not allow members of the sporting community to exercise their rights to free speech. They remove or punish those with unpopular messages. There are numerous examples throughout each of the professional leagues in recent years.

Last year, Chicago Bulls forward Dennis Rodman characterized Mormons as "assholes" to a reporter after the Bulls lost Game 3 of the National Basketball Association (NBA) finals in Salt Lake City.² The NBA fined Rodman \$50,000 for these remarks.³ When handing down the fine, NBA Commissioner David Stern stated that "insensitive or derogatory comments involving race or other classifications are unacceptable in the NBA [O]ffensive remarks . . . cannot be tolerated or excused."⁴ Mr. Stern also fined New Jersey Nets coach John Calipari \$25,000 for calling a reporter an "[expletive] Mexican idiot"⁵ and Miami Heat broadcaster David Halberstam for "making . . . insensitive remarks."⁶

Punishment of unpopular ideas is not limited to the NBA, however. There have been similar incidents in professional baseball and football as well. Cincinnati Reds owner Marge Schott found herself "muzzled by the baseball commissioner and stripped of some of her powers" for making bigoted remarks.⁷ New York Yankees owner George Steinbrenner told Yankee Stadium officials to remove banners proclaiming "George Must Go,"

1. *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 63 (1976) (citing S. TALLENTYRE, *THE FRIENDS OF VOLTAIRE* 199 (1907)).

2. See *Carl's Jr. to Drop Rodman Ads Following Anti-Mormon Slams*, SAN DIEGO UNION-TRIB., June 15, 1997, at 14 (shortening "assholes" to "a-----s") [hereinafter *Carl's Jr. to Drop Rodman*].

3. See Carol Slezak, *Comments Cost Worm \$50,000*, CHICAGO SUN-TIMES, June 13, 1997, at 136.

4. *Id.*

5. Judy Battista, *Rodman Fined For Remarks*, NEWSDAY, June 13, 1997, at A88. I was unable to find out what Coach Calipari said. It seems that his words were not appropriate for the newspaper.

6. Terry Armour, *Rodman Must Tithe \$50,000 for Insult*, CHI. TRIB., June 13, 1997, § 4, at 1.

7. Jerry Klein, *America's Thought Police Have Different Rules for Different Thoughts*, PEORIA J. STAR, June 23, 1996, at A4.

"George, YOU are the Problem," and "Fire George."⁸ Security officers at Yankee Stadium removed a fan for, among other comments, urging an Oakland Athletics player to return to Cuba.⁹ Stadium personnel forbade a religious banner in Robert F. Kennedy Stadium,¹⁰ while officials at Cleveland Stadium forbade anti-management banners.¹¹

Professional athletic associations are clearly dictating what can be said in their stadiums. In doing so, these associations are infringing upon the rights of players, owners, and fans. Do these professional associations have the authority to decide what constitutes appropriate speech? Under the First Amendment to the Constitution, the answer must be no.

As private entities, professional athletic associations may appear to be exempt from the provisions of the United States Constitution.¹² Under the "state actor doctrine," however, private entities may be considered state actors when the actions of the private entity are "so entwined" with the state that the state can be held responsible for the actions of the private entity.¹³ If the NBA was found to be a state actor, it would have to abide by the Constitution of the United States.¹⁴ Thus, Dennis Rodman would enjoy the same guarantees of free speech from the NBA that he has from the government.

Yet even if a court finds that the NBA is a state actor, Dennis Rodman is still not guaranteed that his speech will be protected. The First Amendment's guarantee of free speech "is not absolute,"¹⁵ and several categories of unprotected speech have emerged from First Amendment jurisprudence. If the speech contains fighting words,¹⁶ libelous words,¹⁷ advocacy that is directed to or is likely to produce imminent unlawful activity,¹⁸ or obscenity (pornography),¹⁹ it is not entirely protected by the First Amendment. Consequently, once a court has determined that the NBA is a state actor, it must still determine whether the regulated speech is protected or whether it falls within one of these unprotected categories.

8. Lawrence A. Israeloff, *The Sports Fan v. The Sports Team Owner: Does a Franchise's Prohibition of Spectators' Banners Violate the First Amendment?*, 24 COLUM. J. L. & SOC. PROBS. 419, 420 (1991).

9. See Robert J. Misy, Jr., *Free Speech at the Ball Park? Major League Baseball Violates the First Amendment*, 3 GEO. MASON U. CIV. RTS. L.J. 227, 228 (1993).

10. See Israeloff, *supra* note 8, at 448.

11. See *id.* at 421.

12. See, e.g., *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961) (reviewing that private conduct does not fall within the ambit of the Equal Protection Clause).

13. *Ludtke v. Kuhn*, 461 F. Supp. 86, 93 (S.D.N.Y. 1978).

14. See *Burton*, 365 U.S. at 721.

15. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942).

16. See *id.* at 572; see also *Gooding v. Wilson*, 405 U.S. 518, 523 (1972).

17. See *New York Times v. Sullivan*, 376 U.S. 254, 264 (1964).

18. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

19. See *Miller v. California*, 413 U.S. 15, 23 (1973).

Once a court finds the speech to be protected, the promulgator of a regulation curbing speech must meet the strict scrutiny standard to prevail.²⁰ However, the regulator does have some defenses depending on the forum in which the words were spoken because speech may be regulated in different ways in different forums.²¹ There are three types of forums: traditional public forums, public forums opened for communication, and public forums not opened for communication.²² As I will show, NBA arenas are most accurately characterized as public forums open for communication in which valid restrictions on speech are significantly limited.

This Note will explore the right of the NBA to limit expression of professional basketball players. In particular, I will analyze the NBA's actions against Dennis Rodman of the Chicago Bulls when he made a comment about Mormons in 1997.²³ Part I discusses the various state action tests and determines if the NBA was a state actor when it fined Dennis Rodman. Part II determines if Rodman's speech was protected under the First Amendment, and whether the fine levied against him infringed upon his right to the free speech. In doing so, Part II focuses on the content-based regulation of Rodman's speech in both a public forum open to expression and a public forum closed to expression. Part II then applies the appropriate test to the regulation and determines if the NBA's actions comport with constitutional mandates. Part III will discuss the policy reasons for extending the state actor doctrine to professional athletic associations.

I. STATE ACTION

While private entities are not subject to the provisions of the Constitution, state agencies certainly are.²⁴ As the NBA is a private entity, it must meet one of three "state action" tests to be considered a state actor.²⁵ Once the NBA meets one of these tests, it has the same obligation to permit free speech that the government does under the First Amendment of the United States Constitution.²⁶ Therefore, Dennis Rodman could bring a lawsuit

20. See *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 666 (1990). Strict scrutiny means that measures infringing upon free speech "must be narrowly tailored to serve a compelling governmental interest." *Id.*

21. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44-45 (1983).

22. See *id.* at 45-46.

23. See Slezak, *supra* note 3, at 136.

24. See, e.g., *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961) (explaining that the Equal Protection Clause does not apply to individual action, but rather state action).

25. See *Ponce v. Basketball Fed'n*, 760 F.2d 375, 377 (1st Cir. 1985).

26. See, e.g., *Israeloff*, *supra* note 8, at 424; *Misey*, *supra* note 9, at 236-40. Some controversy exists about the number of state action tests that the Supreme Court has adopted. For example, *Misey* argues that "the Supreme Court has espoused many tests to decide whether or not state action is present."

against the NBA for violation of his First Amendment rights if the NBA was held responsible as a state actor.

There are three tests to determine if private action may be considered state action: A) the public function test, B) the nexus test, and C) the symbiotic relationship test.²⁷ If the NBA meets just one of these tests, it is a state actor. Each of these tests will be discussed in turn.

A. The Public Function Test

The first test to determine if a private entity is a state actor asks whether that entity has assumed a traditionally public function.²⁸ This public function will only exist "if the private entity has exercised powers that are 'traditionally the exclusive prerogative of the State.'"²⁹ Furthermore, it is necessary that the entity's scope of activity has a "tradition of municipal control."³⁰ If it does, state action will be found, despite the fact that a private entity is now controlling the area.³¹ However, "[t]hat a private entity performs a function which serves the public does not make its acts state action"—more is required.³²

The NBA is not serving a public function by providing professional basketball. While it is arguable that basketball serves the public as entertainment, the NBA still does not meet the public function test. Athletics are not traditionally under municipal control, nor are they traditionally the exclusive prerogative of the State. Furthermore, the U.S. Supreme Court held in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee* that amateur athletics were not a government function because representing the country in the Olympics could "hardly be called traditionally governmental."³³ A court is therefore unlikely to hold that professional athletics are a traditional governmental function under this test.

Misey, *supra* note 9, at 236. Misey then identifies four tests: the symbiotic relationship test, the nexus/public function test, the state encouragement test, and the actions fairly attributable to the state test. *See id.* at 237-40. Israeloff, on the other hand, argues that there are two tests: the public function test and the nexus approach. *See Israeloff, supra* note 8, at 424. Israeloff incorporates the symbiotic relationship test into the nexus test. *See id.* Nonetheless, I am persuaded by the reasoning of the First Circuit in the *Ponce* decision in which the court outlined three tests, which I detail *infra* Parts I.A, B, and C.

27. *See Ponce*, 760 F.2d at 377.

28. *See id.*

29. *Blum v. Yaretsky*, 457 U.S. 991, 1005 (1982) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974)).

30. *Evans v. Newton*, 382 U.S. 296, 301 (1966).

31. *See id.*

32. *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982).

33. *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 545 n.27 (1987).

B. The Close Nexus Test

The second test to determine whether a private entity is a state actor is the nexus test.³⁴ This test requires a "sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."³⁵ The "nexus approach attempts to determine whether the state can be deemed responsible for the specific conduct of which the plaintiff complains."³⁶

The nexus test was first enunciated in *Moose Lodge No. 107 v. Irvis*.³⁷ In *Moose Lodge*, a private club holding a state liquor license refused to serve an African-American man solely because of his race.³⁸ The Supreme Court held that having a state liquor license was not enough to show state action, as the State was not affirmatively approving the discrimination.³⁹ The nexus test was then clarified in *Jackson v. Metropolitan Edison Co.*⁴⁰ In *Jackson*, a customer sued a privately owned public utility.⁴¹ The utility not only held a certificate of public convenience from the state of Pennsylvania but also was part of a heavily-regulated industry.⁴² Again, the Supreme Court held that there was no state action because extensive regulation is not enough to make a private entity's action that of the State.⁴³ It determined that for there to be state action, the State and the actor must have a close enough nexus that the action of the entity could be treated as that of the State.⁴⁴

The NBA is not likely to meet the nexus test because more than close ties are required. The NBA is not a heavily regulated industry comparable to a public utility, nor can it be said that the actions of the NBA can be held attributable to the State. Considering that the Supreme Court refused to hold that a heavily-regulated public utility was a state actor,⁴⁵ it is unlikely that any court would hold that the NBA qualifies as a state actor. Thus, the NBA does not fulfill the nexus test.

34. See *Ponce*, 760 F.2d at 377.

35. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974).

36. *Community Med. Ctr. v. Emergency Med. Servs.*, 712 F.2d 878, 881 (3d Cir. 1983).

37. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

38. See *id.* at 164-65.

39. See *id.* at 177.

40. See *Jackson*, 419 U.S. at 349-59.

41. See *id.* at 346-47.

42. See *id.* at 346.

43. See *id.* at 350.

44. See *id.* at 351.

45. See *id.* at 357.

C. The Symbiotic Relationship Test

The third state action test is whether there is "a symbiotic relationship involving the sharing of profits" between the subject entity and the state.⁴⁶ The NBA is most likely to meet the symbiotic relationship test. The analysis is divided into three subsections: (1) recent applications of the symbiotic relationship test, (2) the symbiotic relationship test in athletic cases, and (3) the application of the symbiotic relationship test to the National Basketball Association.

1. Recent Applications of the Symbiotic Relationship Test

The symbiotic relationship test was formulated in *Burton v. Wilmington Parking Authority*.⁴⁷ In *Burton*, a restaurant refused service to an African-American man because of his race.⁴⁸ The restaurant was located in a building owned and operated by the Wilmington Parking Authority (the Authority), an agency of the State of Delaware.⁴⁹ The restaurant actually leased the space from the Authority, creating a contractual relationship with the state.⁵⁰ The Court determined that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."⁵¹ The Court then noted that the upkeep and maintenance of the building were the responsibility of the Authority, the building was dedicated to public use, and that there were "benefits mutually conferred" on the Authority and the restaurant.⁵² The Court further determined that "no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be."⁵³ Therefore, a State's inaction, together with sufficient factual connections, are enough to make the State responsible for the actions of a private entity. The Court concluded that when a "State has so far insinuated itself into a position of interdependence with [the private entity] . . . it must be recognized as a joint participant in the challenged activity."⁵⁴ This is the symbiotic

46. *Ponce*, 760 F.2d at 377.

47. *See Burton*, 365 U.S. at 725.

48. *See id.* at 716.

49. *See id.*

50. *See id.*

51. *Id.* at 722.

52. *Id.* at 723-24.

53. *Id.* at 725.

54. *Id.*

relationship test. Under this test, the State of Delaware was responsible for the restaurant's racially discriminatory refusal of service.⁵⁵

Courts have found that private action constituted state action in many cases using the symbiotic relationship test. In *Citizens Council on Human Relations v. Buffalo Yacht Club*, a yacht club in a privately-owned building was located on city land adjacent to public parks.⁵⁶ The club would not allow women to join.⁵⁷ The club received substantial benefits from the city, including a 30-year lease with an annual rental rate of one dollar.⁵⁸ The district court determined that a "mutually beneficial relationship between a city lessor and a private lessee may sufficiently involve the municipality to satisfy [the symbiotic relationship] standard."⁵⁹ In particular, the court focused on the low yearly rental fee and the ability of the club to cater parties for the general public under a city restaurant license and a state liquor license.⁶⁰ The court concluded that "substantial benefits flow in both directions."⁶¹ The court explained that "[t]he Club leases prime lakefront property for a pittance and has ready access to public land and docks. Buffalo benefits by the development and care of public park land."⁶² Accordingly, the Court found the yacht club to be a state actor.⁶³

2. The Symbiotic Relationship Test in Athletic Cases

Courts have also found state action in athletic cases. In *Ludtke v. Kuhn*, a female reporter sued the Commissioner of Baseball, Bowie Kuhn, because he did not allow women in the New York Yankees' locker room.⁶⁴ The district court looked at the particular facts surrounding the stadium in question, and found that New York City owned Yankee Stadium and leased it to the Yankees.⁶⁵ Furthermore, the New York State Legislature had passed a statute that recognized the importance of Yankee Stadium to the city.⁶⁶ The court applied the *Burton* test⁶⁷ and determined that indeed there was a

55. *See id.*

56. *See Citizens Council on Human Relations v. Buffalo Yacht Club*, 438 F. Supp. 316, 319 (W.D.N.Y. 1977).

57. *See id.*

58. *See id.*

59. *Id.* at 322.

60. *See id.* at 323-24.

61. *Id.* at 324.

62. *Id.*

63. *See id.*

64. *See Ludtke v. Kuhn*, 461 F. Supp. 86, 87-88 (S.D.N.Y. 1978).

65. *See id.* at 92.

66. *See id.*

67. *See Burton*, 365 U.S. at 722.

"relationship of interdependence."⁶⁸ Thus, Commissioner Kuhn was responsible for discrimination as a state actor.⁶⁹

A lower court also found state action in *Hertel v. City of Pontiac*.⁷⁰ In *Hertel*, two Michigan residents challenged the National Football League's blackout rule.⁷¹ The district court pointed out that the Silverdome was subleased to the Detroit Lions football team from the City of Pontiac Stadium Authority.⁷² The city was responsible for "maintenance, repair, and police supervision" while the Lions paid rent and a fee per ticket sold.⁷³ The State of Michigan also allotted \$800,000 annually to the city's Stadium Authority.⁷⁴ The court reasoned: "The relationship between the State and the private parties here is more interdependent than that which existed in *Burton*. Thus, the nature of the relationship shown here compels the conclusion that the conduct of the purported private actors should be treated as that of the State."⁷⁵

The U.S. Supreme Court has not addressed state action in professional sports. However, the Court did address state action in collegiate athletics in *National Collegiate Athletic Association v. Tarkanian*.⁷⁶ In *Tarkanian*, the basketball coach for the University of Nevada, Las Vegas (UNLV) was suspended because of ten National Collegiate Athletic Association (NCAA) rule violations.⁷⁷ The case originated when, upon finding the violations, the NCAA threatened to impose severe sanctions on UNLV's athletic programs unless Coach Tarkanian was suspended.⁷⁸ Because of this threat, UNLV suspended the coach.⁷⁹ Coach Tarkanian sued the NCAA and UNLV.⁸⁰ His case was difficult because, while UNLV was clearly a state actor,⁸¹ the NCAA's status was uncertain.⁸² The issue in *Tarkanian* was whether UNLV's

68. *Ludtke*, 461 F. Supp. at 93.

69. *See id.* at 98.

70. *See Hertel v. City of Pontiac*, 470 F. Supp. 603, 605 (E.D. Mich. 1979).

71. *Id.* at 604. The blackout rule "prohibits television broadcasts of 'home' football games in areas within 75 miles of the 'home' stadium." *Id.*

72. *See id.*

73. *Id.* at 604-05.

74. *See id.* at 605.

75. *Id.*

76. *See NCAA v. Tarkanian*, 488 U.S. 179 (1988).

77. *See id.* at 180-81.

78. *See id.* at 181.

79. *See id.* at 187.

80. *See id.* at 181.

81. *See id.* at 183. "UNLV is a branch of the University of Nevada, a state-funded institution. The University is organized and operated pursuant to provisions of Nevada's State Constitution, statutes, and regulations." *Id.*

82. *See id.* at 182.

suspension of Coach Tarkanian, in compliance with NCAA rules, rendered the NCAA's actions that of the state.

A five-member majority of the U.S. Supreme Court held that the NCAA was not a state actor.⁸³ The Court reasoned that UNLV was not forced to act by the NCAA's rules because the university could have withdrawn from the NCAA and established its own standards.⁸⁴ Further, UNLV did not delegate power to the NCAA.⁸⁵ Additionally, UNLV and the NCAA were adversaries during the investigation and were not acting together.⁸⁶ Consequently, UNLV had a choice in its actions and the NCAA was not responsible for the final suspension of Coach Tarkanian.⁸⁷

However, in dissent, Justice White determined that the NCAA was indeed a state actor.⁸⁸ Justice White maintained that the NCAA acted jointly with UNLV for many reasons.⁸⁹ First, Coach Tarkanian was suspended according to NCAA rules.⁹⁰ Second, the NCAA and UNLV agreed that the NCAA would conduct the hearings concerning the alleged violations.⁹¹ Third, the NCAA and UNLV agreed that the findings made by the NCAA would be binding on UNLV.⁹² The NCAA then determined, at NCAA-conducted hearings, that Coach Tarkanian violated NCAA rules.⁹³ Furthermore, UNLV acquiesced to these rules in its membership agreement with the NCAA.⁹⁴ Therefore, Justice White argued, the NCAA was "jointly engaged with UNLV officials" and was thus a state actor.⁹⁵ UNLV was the party who suspended Coach Tarkanian, but only because the NCAA required it.⁹⁶

Tarkanian was a narrow 5-4 majority and perhaps the Court will overturn it if presented with a compelling reason. The NCAA should have been held to be a state actor for the very reasons the dissent named. A professional athlete could very well challenge this decision and persuade the Supreme Court that the NBA is a state actor in a case with compelling facts.

83. See *id.* at 199.

84. See *id.* at 194-95.

85. See *id.* at 195-96.

86. See *id.* at 196.

87. See *id.* at 194-95, 197.

88. See *id.* at 202 (White, J., dissenting).

89. See *id.* at 200-01.

90. See *id.* at 200.

91. See *id.* at 201.

92. See *id.*

93. See *id.* at 202.

94. See *id.*

95. *Id.* (citing *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980)).

96. See *id.* at 203.

3. The NBA Meets the Symbiotic Relationship Test

The NBA has sufficient connections with local and state governments to meet the symbiotic relationship test. As stated above, the test requires that the "State has so far insinuated itself into a position of interdependence with [the private entity] that it must be recognized as a joint participant in the challenged activity."⁹⁷ Because the government and the NBA have such a relationship, the NBA is a state actor.

"With rare exceptions, facilities for professional sports are heavily subsidized. State and local governments frequently contribute to the capital cost of stadiums and forgive their owners some taxes."⁹⁸ This is certainly the case in the NBA. Fourteen of the twenty-nine NBA teams lease their stadiums from the government.⁹⁹ Two teams, the Milwaukee Bucks and the Atlanta Hawks, play in arenas owned by an individual "Authority" that is difficult to define as either private or public.¹⁰⁰ The remaining thirteen NBA teams have stadiums that are owned by the team, the owner, or an independent business.¹⁰¹ However, even these thirteen have substantial governmental subsidies.¹⁰² For example, the Delta Center,¹⁰³ home of the Utah Jazz, is owned by team owner Larry H. Miller.¹⁰⁴ Yet the Delta Center was "built by [Mr. Miller] with cooperation and subsidy of state, county and city government."¹⁰⁵ Furthermore, the County Commission "agreed not to compete with the [Delta Center], rendering the Salt Palace Arena practically useless. . . . [T]he county ceded to [Mr. Miller] first pick of all major events coming to Salt Lake City."¹⁰⁶ The Utah Department of Alcoholic Beverage Control even ratified a special provision to allow guests in the private suites in the Delta Center to have liquor, which created a "new type of package agency" in the Delta Center.¹⁰⁷ As a result, there are many beneficial connections between the

97. *Burton*, 365 U.S. at 725.

98. Michael H. Armacost, *Foreword* to *SPORTS, JOBS, AND TAXES* vii, ix (Roger G. Noll & Andrew Zimbalist eds., 1997).

99. *See* *SPORTS, JOBS, AND TAXES* 37-42 (Roger G. Noll & Andrew Zimbalist eds., 1997).

100. *See id.* at 37, 40.

101. *See id.* at 37-42.

102. *See id.*

103. This is the stadium in which Dennis Rodman made his remarks. *See supra* note 2 and accompanying text.

104. *See NBA All-Star Game to Boost S.L. Economy*, SALT LAKE TRIB., Dec. 15, 1991, at B15.

105. *Id.*

106. Christopher Smart, *Palace Arena May Fall To Wrecking Ball*, SALT LAKE TRIB., Aug. 13, 1991, at A1.

107. Vic Garcia, *Ruling Will Allow Liquor Delivery to New Jazz-Arena Suites*, SALT LAKE TRIB., July 27, 1991, at A1.

State and the Utah Jazz. Indeed, they create enough of a connection between the NBA and the government to render the NBA a state actor under the symbiotic relationship test. In the Utah Jazz example, as with other teams, the NBA and various governmental bodies are plainly interdependent.

A logical extension of the state action doctrine is to professional athletic associations; *Ludtke*¹⁰⁸ and *Hertel*¹⁰⁹ have already taken that step, albeit in lower courts. Their analysis should be expanded to encompass all professional athletic associations across the country. Frequently, these associations receive great benefits from their respective states and yet remain free to trample the constitutional rights of their players. The NBA must be held responsible for its actions regarding Dennis Rodman. The connections between the NBA and various state governments are too strong to ignore. The courts must recognize that the NBA is a state actor, bound by the First Amendment under the symbiotic relationship test.

II. THE FIRST AMENDMENT

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.¹¹⁰

Despite this language, the First Amendment's guarantee of free speech "is not absolute,"¹¹¹ and thus, categories of unprotected speech have emerged. As previously mentioned, if the speech contains fighting words,¹¹² libelous words,¹¹³ advocacy directed to or likely to produce imminent unlawful activity,¹¹⁴ or obscenity (pornography),¹¹⁵ it may not be protected by the First Amendment. Consequently, once a court determines that the NBA is a state actor, it must next determine whether the regulated speech is protected.

Once the Court finds the speech to be protected, the proponent of the regulation must meet the strict scrutiny standard to prevail.¹¹⁶ However, the

108. See *Ludtke*, 461 F. Supp. at 96; *supra* notes 64-69 and accompanying text.

109. See *Hertel*, 470 F. Supp. at 605; *supra* notes 70-75 and accompanying text.

110. U.S. CONST. amend. I.

111. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942).

112. See *id.* at 572; *Gooding v. Wilson*, 405 U.S. 518, 523 (1972).

113. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 264 (1964) (requiring actual malice standard in libel suits against public officials).

114. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

115. See *Miller v. California*, 413 U.S. 15, 23 (1973).

116. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (requiring restrictions on protected speech to be necessary to achieve a compelling state purpose and to be narrowly

regulator does have some defenses depending on the forum in which the words were spoken because speech may be regulated in different ways in different forums.¹¹⁷ There are three types of forums: traditional public forums, public forums opened for communication, and public forums not opened for communication.¹¹⁸ As this Note will demonstrate, NBA arenas are most accurately characterized as forums open for communication.

A. Dennis Rodman's Speech Is Protected Because It Does Not Fall into an "Unprotected" Category

Because the NBA is most accurately labeled a state actor, Dennis Rodman has a constitutional claim under the First Amendment. Further, his speech deserves protection because it does not fall into any of the above-mentioned unprotected categories. While Rodman "used profanity several times . . . during the Bulls' three-game stay in Salt Lake City,"¹¹⁹ and specifically called the Mormon people "assholes,"¹²⁰ these words are protected because they do not fit into any of the unprotected categories: fighting words,¹²¹ libel,¹²² advocacy that is directed to or likely to produce imminent unlawful activity,¹²³ or obscenity.¹²⁴ Rodman's words could potentially fit into the fighting words category, but closer examination suggests his words indeed fall beyond the ambit of that exception.

The U.S. Supreme Court defined fighting words in *Chaplinsky v. New Hampshire* as words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace."¹²⁵ Thirty years later, in another "fighting words" case, the Court in *Gooding v. Wilson* dropped the first part of the *Chaplinsky* test with no explanation.¹²⁶ Thus, the definition of fighting words is now "words 'which by their very utterance . . . tend to incite an immediate breach of the peace.'"¹²⁷ Therefore, while Rodman's words may arguably fit under the *Chaplinsky* test, they certainly do not fit under the *Gooding* test. Although Rodman's words could potentially have inflicted injury on those

tailored to suit that purpose).

117. See *id.* at 44.

118. See *id.* at 45-46.

119. *Carl's Jr. to Drop Rodman*, *supra* note 2, at 14.

120. Slezak, *supra* note 3, at 136 (referencing "assholes" as "a-----s").

121. See *Chaplinsky*, 315 U.S. at 572; *Gooding*, 405 U.S. at 523.

122. See *New York Times*, 376 U.S. at 264 (requiring actual malice standard in libel suits against public officials).

123. See *Brandenburg*, 395 U.S. at 447 (1969).

124. See *Miller*, 413 U.S. at 23.

125. *Chaplinsky*, 315 U.S. at 572.

126. See *Gooding*, 405 U.S. at 525.

127. *Id.* (quoting *Chaplinsky*, 315 U.S. at 572).

easily offended, they certainly were not the type that would tend to incite a breach of the peace. Dennis Rodman's words were not shouted at a group of people, as in *Chaplinsky*,¹²⁸ but rather were said to a reporter following a game.¹²⁹ Indeed, no reasonable person would react to such words in a manner constituting a breach of the peace. This is evidenced by the fact that no such breach occurred after his remarks. Therefore, Dennis Rodman's remarks do not fit under the fighting words category.

Additionally, even offensive remarks are protected by the First Amendment. "[T]he public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."¹³⁰ Although Dennis Rodman's remarks probably offended most of the listeners, they do not fit into an unprotected category. Therefore, his remarks are protected by the First Amendment.

B. Forum In Which The Words Were Spoken

Protected speech may still be regulated in some forums. As noted above, the constitutionality of the regulations depends on the forum in which the words were spoken.¹³¹

1. Traditional Public Forum

Dennis Rodman's speech did not take place in a traditional forum. Traditional forums are places that have typically been used for expressive conduct, such as streets,¹³² parks,¹³³ and sidewalks.¹³⁴ If the speech takes place in a traditional forum, the scrutiny depends on whether the regulation is content-based or content-neutral.¹³⁵ If the regulation is content-based, the regulation must be "necessary to serve a compelling state interest" and "narrowly drawn to achieve that end."¹³⁶ If the regulation is content-neutral, the state may enforce time, place, and manner restrictions that are "narrowly tailored to serve a significant government interest, and leave open ample

128. See *Chaplinsky*, 315 U.S. at 569. Mr. Chaplinsky reportedly said to the Rochester City Marshall, "'You are a God damned racketeer' and 'a damned Fascist and the whole government of Rochester are Fascists . . .'" *Id.*

129. See *Carl's Jr. to Drop Rodman*, *supra* note 2, at 14.

130. *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970).

131. See *Perry Educ. Ass'n*, 460 U.S. at 45-46.

132. See *Hague v. C.I.O.*, 307 U.S. 496, 515-16 (1939).

133. See *id.*

134. See *United States v. Grace*, 461 U.S. 171, 177 (1983).

135. See *Perry Educ. Ass'n*, 460 U.S. at 45.

136. *Id.*

alternative channels of communication."¹³⁷ Dennis Rodman did not state his words on a public sidewalk, park, or street. He spoke in the Delta Center in Salt Lake City, Utah.¹³⁸ Basketball arenas, unlike public streets, sidewalks, and parks, are not places that have traditionally been protected for political expression. Rodman was not in a traditional public forum when he spoke in the Delta Center.

2. Forum Open to Communication

Dennis Rodman's speech took place in a forum open to communication. This type of forum is "public property which the state has opened for use by the public as a place for expressive activity."¹³⁹ While the state is not bound to keep the forum open to expressive activity, as long as it does so it is bound by the same constitutional restraints applicable to traditional public forums.¹⁴⁰ "The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place."¹⁴¹ Thus, if the regulation on speech is content-based, the regulation must be "necessary to serve a compelling state interest" and "narrowly drawn to achieve that end."¹⁴² If the regulation is content-neutral, the state may enforce time, place, and manner restrictions that are "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."¹⁴³

Dennis Rodman's remarks were made in a basketball arena where other people were free to express their ideas.¹⁴⁴ It is likely that opinions dealing with uncontroversial matters are allowed by the league. If that was indeed the case, the forum was open to communication. Once the forum has been opened for communication, restraints on speech must satisfy the same tests applicable to similar restraints within traditional public forums. Thus, the regulation must meet a higher standard if it is content-based.

The sanction on Rodman was clearly content-based. He was fined for repeatedly using profanity to describe Mormons.¹⁴⁵ NBA Commissioner

137. *Id.*

138. See *Carl's Jr. to Drop Rodman*, *supra* note 2, at 14.

139. *Perry Educ. Ass'n*, 460 U.S. at 45.

140. See *id.* at 46.

141. *Widmar v. Vincent*, 454 U.S. 263, 267-68 (1981).

142. *Perry Educ. Ass'n*, 460 U.S. at 45.

143. *Id.*

144. See, e.g., Jeffrey Denberg & Ailene Voisin, *NBA Finals Notebook: Commissioner's Office May Discipline Rodman*, ATLANTA J. & ATLANTA CONST., June 12, 1997, at F6 (identifying signs held by Utah Jazz supporters in Delta Center that read "All My Wives Think You Dress Funny" and "Rodman. I'd Rather Be a Mormon than a Moron.").

145. See *Carl's Jr. to Drop Rodman Ads*, *supra* note 2, at 14.

David Stern announced that "insensitive or derogatory comments involving race or other classifications are unacceptable in the NBA" and that "Dennis Rodman's comments were exactly the kind of offensive remarks that cannot be tolerated or excused."¹⁴⁶ This makes the restraint on speech content-based.

To survive judicial scrutiny, a content-based regulation must be "necessary to serve a compelling state interest" and "narrowly drawn to achieve that end."¹⁴⁷ Commissioner Stern's actions are not necessary to serve a compelling interest. He fined Dennis Rodman because of the content of his speech. He did not like what Rodman said about the Mormon religion. Commissioner Stern's only potential argument that his restrictions are not content-based is that the NBA would be financially ruined if certain people were offended by Rodman's remarks. It is doubtful that such an argument is valid, especially when one considers Rodman's popularity. Dennis Rodman probably attracts people to the games when he says outrageous things. His personality could make the NBA richer because people like to be entertained. Dennis Rodman is nothing if not entertaining.

The NBA fined Dennis Rodman based on the content of his speech in a public forum open to communication. The restraint on speech did not serve a compelling interest. The restraint upon Rodman's speech was therefore impermissible under the First Amendment guarantee of free speech.

3. Forum Not Open to Communication

If the Delta Center is designated as a forum not open to communication, then speech in the Delta Center is subject to more restrictions than speech in either traditional public forums or public forums which have been opened to communication.¹⁴⁸ However, even with these extra restrictions, Dennis Rodman's speech is still protected.

Forums that are not open to communication are defined as "public property which is not by tradition or designation a forum for public communication."¹⁴⁹ In forums that are not open to communication, the state may regulate time, place, and manner of speech.¹⁵⁰ Furthermore, "the state may reserve the forum for its intended purposes . . . as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."¹⁵¹

146. Slezak, *supra* note 3, at 136.

147. *Perry Educ. Ass'n*, 460 U.S. at 45.

148. *See id.*

149. *Id.* at 46.

150. *See id.*

151. *Id.*

The constraints on Dennis Rodman's speech are not related to reasonable time, place, or manner restrictions. Again, Rodman was fined because his speech contained "insensitive or derogatory comments involving race or other classifications," which "are unacceptable in the NBA."¹⁵² NBA Commissioner Stern explained further that "Dennis Rodman's comments were exactly the kind of offensive remarks that cannot be tolerated or excused."¹⁵³ Hence, Commissioner Stern did not fine Dennis Rodman because he spoke in the Delta Center, or after a game, but rather because of the content of his speech. Thus, the restraint on speech is not related to legitimate time, place, or manner concerns.

The regulation on Dennis Rodman's speech was clearly an effort to suppress expression because of the NBA's disapproval of the message. Commissioner Stern did not like the message Dennis Rodman sent, and thus he punished Rodman for his speech. Commissioner Stern himself stated as much.¹⁵⁴ As Stern's regulation was "an effort to suppress expression merely because [he] oppose[d] the speaker's view,"¹⁵⁵ the fine he levied on Dennis Rodman for "improper" speech was unconstitutional under the First Amendment. Reasonable people would probably agree that Rodman's comments were offensive and derogatory, but that is not enough to censor them.

In censoring Dennis Rodman's speech, David Stern violated the Constitution of the United States. Under the circumstances, Dennis Rodman is guaranteed the right to free speech. It does not matter if people are offended by the message, or do not agree with the message, or are upset by the message. He is guaranteed the right to free speech in the U.S. Constitution and David Stern, a state actor, has very limited authority to deny Rodman the right to speak.

III. RAMIFICATIONS: DOES IT REALLY MATTER?

If a court fails to hold that the National Basketball Association's actions were ascribable to the state, it is leaving a dangerous system in place. There is a vast potential for arbitrary action in the NBA. While it is true that "a league commissioner cannot make up the rules as he goes—and cannot invoke

152. Slezak, *supra* note 3, at 136.

153. *Id.*

154. *See id.*; see also *supra* note 153 and accompanying text.

155. *Perry Educ. Ass'n*, 460 U.S. at 46.

the rules arbitrarily,¹⁵⁶ it appears to have happened in Dennis Rodman's case. A dangerous loophole has been left in First Amendment law.

Dennis Rodman can argue that the Commissioner abused his discretion because he was biased against him.¹⁵⁷ The Commissioner does seem to have acted arbitrarily in fining Rodman because not everyone has been fined for derogatory remarks. For example, the Commissioner did not fine Charles Barkley for "sexist comments about female sportscasters" in 1997.¹⁵⁸ Barkley, in a "tirade directed at [reporter Hannah] Storm after she allegedly took his comments out of context . . . said female reporters had no business covering men's sports."¹⁵⁹ The incident was forgotten after Barkley apologized on NBC.¹⁶⁰ Yet Dennis Rodman was fined for comments about Mormons, even though he apologized and left crying after an interview discussing the incident with Jim Gray.¹⁶¹ Was it because people failed to complain after Barkley's remarks? Rodman feels certain that the league "was pressured to take action" because of statements issued by the Anti-Defamation League and the Salt Lake City chapter of the NAACP.¹⁶²

The Commissioner's actions certainly appear to be arbitrary. Rodman made unpopular remarks off the court—and was fined more than anyone in NBA history has ever been fined for anything.¹⁶³ This type of arbitrary sanction allows the NBA to decide what speech is protected. For example, the NBA appears to have chosen to champion religious freedoms over the rights of women, as evidenced by its action towards Charles Barkley. This selective application of a basic freedom such as speech is exactly what the First Amendment is intended to protect against. Perhaps the Commissioner has forgotten his own words prior to the incident: "I want to make it clear that I'm not going to punish [Rodman] for what he does off the court. I'm going to let the media crucify him for that. . . . This is still America, and my jurisdiction is still the basketball court."¹⁶⁴

156. Eldon L. Ham, *NBA Throws a Brick with 'Mormon Doctrine,'* CHICAGO DAILY LAW BULL., June 20, 1997, at 1. While Mr. Ham asserts that there is a fundamental fairness doctrine that binds the Commissioner, I was not able to find specific cases backing up this assertion. The author cited *In re MLBPA and the Commissioner of Major League Baseball* (grievance arbitration, 1992), but I was not able to obtain this case. There is very little recorded case law on this topic.

157. See, e.g., *Rose v. Giamatti*, 721 F. Supp. 906, 915 (S.D. Ohio 1989) (addressing complaint in which former baseball player alleged that Major League Baseball Commissioner was guilty of "improper conduct and bias" in course of disciplinary proceedings).

158. Terry Armour, *Parish Gets Good View of Great Series*, CHI. TRIB., June 14, 1997, § 3, at 6.

159. *Biggest Playoff Win for Bulls?*, SEATTLE TIMES, June 12, 1997, at C6.

160. See Armour, *supra* note 158, § 3, at 6.

161. See Larry Stewart, *Schenkel, Not Olbermann, Bowled Over*, LOS ANGELES TIMES, June 20, 1997, § C, at 6.

162. Armour, *supra* note 6, § 4, at 1.

163. See *id.*

164. Steve Aschburner, *Shootout in '67 Finals Lived Up to Lofty Billing*, STAR-TRIB. (Minneapolis-

Dennis Rodman would agree with the Commissioner's statement. This *is* America, and Commissioner Stern only has jurisdiction over professional basketball games. He does not have jurisdiction over the players' private lives. Dennis Rodman has the right to wear what he wants off the court, do what he wants off the court, and say what he wants off the court. If he refuses to wear his shoes during a game or shows up to play in a dress, Commissioner Stern has free rein. But Dennis Rodman did not and cannot waive his private First Amendment rights because he signed an NBA contract.¹⁶⁵

Dennis Rodman is a symbol for the First Amendment rights of all Americans. We all have the right to say what we want to say—within limits. Rodman did not use libelous speech, advocate illegal activity, or use fighting words. He made a stupid remark about a religious group after an NBA game. The NBA trampled upon Rodman's guarantee of free speech because the public did not like his message. Now the NBA would like to hide behind the private entity label—but the NBA is a state actor.

The state actor doctrine is not a popular one. Private entities do not want to be held to the same level of responsibility as the government. Yet, if a private entity is going to associate itself with, and receive great benefits from, the government, that private entity must accept the obligations that come with those benefits. The NBA has vast connections with city, county, and state governments,¹⁶⁶ and under the symbiotic relationship test, the NBA is a state actor. It is time for the NBA to accept its responsibility to uphold the Constitution.

While courts are reluctant to extend the state actor doctrine to encompass new "actors," sacred American ideals of justice and equality require this advancement. NBA Commissioner David Stern does not have the right to encroach upon the guarantee of free speech set out by the framers of the Constitution of the United States. Dennis Rodman was punished because of the content of his speech, and that is not acceptable. The market will determine the suitability of Rodman's behavior via endorsements, and that is acceptable. Indeed, this is the American way.

CONCLUSION

The NBA violated Dennis Rodman's First Amendment rights because it restrained his speech because of its content. The NBA is a state actor under

St. Paul), June 15, 1997, at 7C.

165: *Cf. Cole v. Richardson*, 405 U.S. 676, 680 (1972) (stating that "neither federal nor state government may condition employment on taking oaths that impinge on rights guaranteed by the First and Fourteenth Amendments").

166. *See supra* notes 98-107 and accompanying text.

the symbiotic relationship test because of its vast connections with various levels of government. The NBA benefits from the actions of the State, but it does not want to accept the duties that go along with those benefits. The state action doctrine must be advanced to encompass professional athletic associations. Lower courts in New York and Michigan have already made this move,¹⁶⁷ and it is time for an expansion of this doctrine so that athletes, fans, and coaches are not required to waive fundamental rights.

Dennis Rodman's speech was protected by the First Amendment because his speech did not fall into an unprotected category. He made his remarks in the Delta Center, a public forum that can be characterized as either open or closed to communication. He was fined due to the content of his speech, and regardless of the forum, the fine levied against him was therefore unconstitutional. Consequently, NBA Commissioner David Stern denied Dennis Rodman his guarantee to free speech under the First Amendment to the Constitution of the United States.

It was David Stern who said, "I want to make it clear that I'm not going to punish [Rodman] for what he does off the court . . . This is still America, and my jurisdiction is still the basketball court."¹⁶⁸ Commissioner Stern is right—this *is* still America, and under our Constitution, Dennis Rodman has the right to speak. In doing so, he exercises a right that we should all cherish—no matter what the message.

Karen Martin Dean

167. See *supra* notes 64-75 and accompanying text.

168. Aschburner, *supra* note 164, at 7C.

