

## SPORT AS SPEECH

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*Sports play a tremendously important role in American public culture, yet games of spectator sport are not generally recognized as expression protected by the First Amendment. This is notwithstanding the extension in recent years of First Amendment protection to a wide variety of other kinds of nonverbal art and entertainment. This Article argues that the denial of free speech protection to spectator sport is wrong both doctrinally and when considered in light of the aims and purposes of the First Amendment. Drawing upon an extensive body of social scientific research examining the practice and cultural significance of spectator sports, it argues that games communicate the sorts of messages to which First Amendment protection extends. In providing viewers dramatic spectacles of victory and defeat, and in offering fans a symbol around which to rally around, spectator sports also reflect and help shape public attitudes and beliefs about individual excellence, political community and identity, race, gender, and sexuality—even competition itself. The Article argues that the same justifications that support the extension of First Amendment protection to art and entertainment therefore support extending protection to spectator sport, and that the exclusion of spectator sports from the category of expressive conduct furthers none of the purposes of the First Amendment. Instead, it merely distorts the doctrine, by relying on an ultimately unjustifiable distinction between artistic and athletic performance, and live and mediated speech.*

“Whoever wants to know the heart and mind of America had better learn  
baseball.”  
Jacques Barzun<sup>1</sup>

### INTRODUCTION

Americans love sports. We love to play sports, we love to talk about sports, but mostly, we love to watch them. While fewer than 16% of Americans over the age of fifteen play sports on a regular basis,<sup>2</sup> a recent poll found that over half of all Americans regularly watch football on

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<sup>1</sup> GOD'S COUNTRY AND MINE 159 (Harper and Row, 1954).

<sup>2</sup> BUREAU OF LABOR STATISTICS, AMERICAN TIME USE SURVEY 2008, <http://www.bls.gov/spotlight/2008/sports/>.

television.<sup>3</sup> Meanwhile, over 74 million people attended a Major League Baseball game in 2005, and 15.6 million attended a minor league baseball game.<sup>4</sup> In 2011, over 111 million people watched the television broadcast of the Super Bowl—making it the most watched network event in twenty years.<sup>5</sup> Super Bowl viewership in 2012 was higher still.<sup>6</sup> The tremendous popularity that spectator sports enjoy in the United States is a consequence of the pleasure and meaning that viewers find in the activity. Watching games offer their audiences an excitement that may be otherwise missing from daily life in a complex, industrialized society.<sup>7</sup> They also provide important symbols of national identity. As President Bill Clinton noted in 1988: “America, rightly or wrongly, is a sports crazy country...and we often see games as a metaphor or a symbol of what we are as a people.”<sup>8</sup> For individuals, supporting the home team can also provide a powerful means of expressing and forging membership in the community.<sup>9</sup> For many, it may also be a deeply emotional experience.

Nevertheless, despite extensive evidence of the personal, cultural, even political significance that the act of watching sports can possess, courts have largely rejected the possibility that sport might represent the kind of expressive activity that the First Amendment protects. Few commentators have disagreed.<sup>10</sup> This is despite the fact that, over the past

<sup>3</sup> HARRIS INTERACTIVE, TIME SPENT WATCHING FOOTBALL IN THE U.S. 2011, <http://www.statista.com/statistics/205941/nfl-football-tv-viewing-time-of-us-adults/>.

<sup>4</sup> Brad Humphreys and Jane Ruseski, The Size and Scope of the Sports Industry in the United States 11 (Int’l Assoc. Sports Economists Working Paper No. 08-11 2008).

<sup>5</sup> Ben Klayman, *Super Bowl Packs in Record U.S. TV Viewer Total*, REUTERS, Feb. 7, 2011, <http://www.reuters.com/article/2011/02/07/us-superbowl-ratingsidUSTRE7163GS20110207>.

<sup>6</sup> Mason Levinson, *Super Bowl Sets TV Record: 111.3M Viewers*, BLOOMBERG NEWS, Feb. 6, 2012, <http://www.bloomberg.com/news/2012-02-06/giants-21-17-super-bowl-victory-over-new-england-misses-tv-ratings-record.html>

<sup>7</sup> NORBERT ELIAS AND ERIC DUNNING, *QUEST FOR EXCITEMENT: SPORT AND LEISURE IN THE CIVILIZING PROCESS* (1988) (asserting that sports provide a “mimetic excitement” otherwise missing from life in industrialized society)

<sup>8</sup> Quoted in KATHRYN JAY, *MORE THAN JUST A GAME: GAMES IN AMERICAN LIFE SINCE 1945* 2 (2004).

<sup>9</sup> See *infra*, notes 88-91, and accompanying text.

<sup>10</sup> In a 2004 article, Howard Wasserman argued that “sport carries social and political messages” and is a “proper vehicle through which a message or meaning may be presented or expressed.” Howard M. Wasserman, *Symbolic Counter-Speech*, 12 WM. & MARY BILL RTS. J. 367, 374–75 (2004). Wasserman is alone among legal academics in suggesting that spectator sports deserve categorical First Amendment protection. Other scholars have reached a similar conclusion with respect to particular spectator sports. See also Joshua A. Stein, *Hitting Below the Belt: Florida’s Taxation of Pay-Per-View Boxing Programming is a Content-Based Violation of the First Amendment*, 14 J.L. & POL’Y 999, 1002 (2006) (arguing that boxing “deserves the First Amendment protections that have been granted to other physical, yet expressive, conduct”); Charles Schachter, *Selfridge v. Carey: The First Amendment’s Applicability to Sporting Events*, 46 ALB. L. REV. 937, 977-78 (1982) (arguing that a particular rugby match satisfied the test for expressive conduct and deserved constitutional protection). Others have reached the opposite conclusion. See, e.g., Jack M. Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*, 90 VA. L. REV. 2043, 2057 (2004) (asserting that the “free

several decades, courts have recognized an increasing array of expressive conduct to fall within the protection of the First Amendment. Today, nude dancing, begging, marching in a parade, and making a movie or violent video game are all activities that trigger First Amendment scrutiny.<sup>11</sup> Yet playing football or baseball, or performing an artistic, non-team sport like gymnastics or figure skating, are not. This means that watching sports, at least in person, is *also* not granted First Amendment protection, because audience rights typically derive from and depend upon the rights of performers.<sup>12</sup>

This Article argues that the denial of free speech protection to spectator sport—that is, to sport performed in front of and with the intention of being seen by an audience—is wrong, both doctrinally and when considered in light of the aims and purposes of the First Amendment. Doctrinally it is wrong because games of spectator sport express, and effectively communicate, the “particularized messages” that the Supreme Court has held to be the prerequisite for constitutional protection.<sup>13</sup> Philosophically, it is wrong because spectator sport contribute

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speech claims” of spectator sports like boxing and hockey “are tenuous”); Michael T. Morley, *Exceedingly Vexed and Difficult”: Games and the First Amendment*, Weigand v. Village of Tinley Park, 112 YALE L.J. 361, 368 (2002) (concluding that “athletes in only a few sports, such as diving, gymnastics, and figure skating, are sufficiently close to being theatrical performers or dancers to merit constitutional protection”). For the most part, however, legal academics have simply ignored the question of the First Amendment status of sports themselves. The bulk of the legal scholarship exploring First Amendment issues as they relate to sports has instead tended to focus on the constitutional status of activities associated with the playing, watching and business of sports rather than the games themselves. *See, e.g.*, Christopher J. Kaufman, *Unsportsmanlike Conduct: 15-Yard Penalty and Loss of Free Speech in Public University Sports Stadiums*, 57 U. Kansas L. Rev. 1235 (2009) (examining the First Amendment rights of spectators at university sporting events); Louis M. Benedict & John D. McMillen, *Free Expression versus Prohibited Speech: The First Amendment and College Student Sports Fans*, 15 J. LEGAL ASPECTS SPORT 5 (2005) (examining the First Amendment rights of student sports fans).

<sup>11</sup> *Brown v. Entertainment Merchants Ass’n*, 131 S. Ct. 2729, 2731 (2011) (“[V]ideo games qualify for First Amendment protection”); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 569-70 (1995) (noting that “[p]arades are ... a form of expression, not just motion” and acknowledging “the inherent expressiveness of marching”); *Barnes v. Glen Theatre*, 501 U.S. 560, 566 (1991) (recognizing nude dancing to be “expressive conduct within the outer perimeters of the First Amendment”); *Joseph Burstyn v. Wilson*, 343 U.S. 495, 502 (1952) (concluding that “expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments”); *Loper v. City of New York Police Dep’t*, 999 F.2d 699, 704 (2d Cir. 1993) (holding that begging is expressive conduct because, although it “does not always involve the transmission of a particularized social or political message, . . . the presence of an unkempt and disheveled person holding out his or her hand or a cup to receive a donation itself conveys a message of need for support and assistance”).

<sup>12</sup> *See, e.g.*, *Bd. of Educ. v. Pico*, 457 U.S. 853, 866-867 (1982) (noting that “the right to receive ideas follows ineluctably from the sender’s First Amendment right to send them”).

<sup>13</sup> *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we

to the democratic public sphere in much the same way as do the other genres of mass entertainment that the First Amendment protects. Like movies and other forms of artistic entertainment, spectator sports not only entertain; they also help shape public attitudes and beliefs by providing audiences dramatic images of triumph and defeat, of virtue and excellence. In this respect, sports demonstrate the tremendous power that even lowbrow and highly commercialized forms of mass entertainment can have to influence democratic public attitudes and commitments. The same justifications that led the Court to recognize movies and other forms of artistic entertainment as protected by the First Amendment thus apply also to spectator sport, despite the formal differences that distinguish artistic and athletic performance.

What follows thus makes the case for recognizing spectator sport as expressive conduct, worthy of First Amendment protection. Part I examines the exceptional status of spectator sport in First Amendment doctrine, and explores the various reasons given by courts that decline to accord spectator sports the First Amendment protection provided other genres of entertainment. It argues that none of the reasons provide a satisfactory justification for denying spectator sport First Amendment protection while at the same time extending it to all other genres of what we might call “audience-oriented entertainment.”

Part II examines what the social scientific literature on sports reveals about the expressiveness of athletic performance. The case law dealing with the First Amendment status of sport has tended to ignore the extensive body of social scientific research examining the practice, and the cultural significance, of spectator sport in contemporary society. This is problematic because it leaves courts at the mercy of their pretheoretical assumptions about the value and significance of spectator sport—assumptions that the scholarly literature suggests are entirely incorrect. In fact, when we turn to the social scientific literature, what we find is tremendous evidence that, rather than the relatively meaningless acts of entertainment that the case law makes them out to be, games of spectator sport are in fact dense symbolic performances—performances that communicate messages about, among other things, individual excellence and virtue, political identity, race, gender, and sexuality, even beauty. It is because of its ability to communicate these kinds of messages to its audience, it argues, that spectator sport possesses the cultural and political significance that it does, not only in the United States, but around the world.

Part III argues that the rich evidence of sports’ expressiveness means that neither doctrine nor philosophy justifies denying First Amendment protection to spectator sport while extending it to other genres of mass entertainment, such as movies, plays, and dance performances. It

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. . . ask[] whether “[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.” (quoting *Spence v. Washington*, 418 U.S. 405, 410-411 (1974)).

argues that, in fact, there are no justifications for denying First Amendment protection to spectator sport. Instead, the denial of First Amendment protection to spectator sport only needlessly complicates the doctrine, by establishing an ultimately unjustifiable distinction between artistic and athletic expression and between live and mediated athletic performance.

### PART I: THE PROBLEM WITH SPORTS

In his now-famous paean to the glories of baseball in *Flood v. Kuhn*, Justice Blackmun quoted a poem published in the *New York Herald Tribune* in 1926. The poem commented pungently on the relative importance of sports and literature to popular culture in the United States at the time. It noted that:

Ten million never heard of Keats, or Shelley, Burns or Poe;  
But they know 'the air was shattered by the force of Casey's  
blow';  
They never heard of Shakespeare, nor of Dickens, like as  
not,  
But they know the somber drama from old Mudville's  
haunted lot.<sup>14</sup>

Eight-five years later, the subtext of that poem—that sports play a far more vital role in American popular culture than does poetry, or art—remains as true as when it was written. It is sports, not art (or, as the poem suggests, when it is art, it is art about sports), that for many Americans provides the tragic and/or comedic narrative of their collective existence. Americans spend hours every week watching sports on television; and for many, the sports pages are the first, perhaps only, section of the newspaper they read. Sports metaphors pervade the American idiolect; sports imagery pervades the American marketplace; and sports news and narratives pervade the American media.<sup>15</sup> Sports thus provide many in the United States, as the sports historian Kathryn Jay notes, with a “central lens through which we view the world.”<sup>16</sup>

Despite the importance of sports as a cultural institution—and despite Justice Blackmun’s explicit acknowledgement of this importance (at least with respect to baseball)—few courts have even hinted at the possibility that the act of participating in, or performing, athletic competition might be a protected First Amendment activity. Most instead conclude that games of sport—even when performed in front of and with the intention of being seen by, an audience—are not capable of conveying the kinds of “particularized message[s]” that the Supreme Court, in *Spence*

<sup>14</sup> *Flood v. Kuhn*, 407 U.S. 258, 263 n.4 (1972).

<sup>15</sup> DANIEL WANN, MERILL J. MELNICK, GORDON W. RUSSELL & DALE G. PEASE, *SPORTS FANS: THE PSYCHOLOGY AND SOCIAL IMPACT OF SPECTATORS* 13-17 (2001).

<sup>16</sup> JAY, *supra* note 8, at 2.

*v. Washington*, held that nonlinguistic conduct must communicate in order to receive First Amendment protection.<sup>17</sup> Courts find this to be true notwithstanding the Supreme Court’s subsequent clarification in *Hurley v. Irish-American, Gay, Lesbian and Bisexual Group* that messages need not be “succinctly articulable” in order to merit First Amendment protection and therefore even such amorphous messages as those conveyed by the “abstract “painting[s] of Jackson Pollock, . . . or Jabberwocky verse of Lewis Carroll” are “unquestionably shielded.”<sup>18</sup> Even under this more relaxed articulation of the particularized message requirement, courts tend to reject First Amendment claims arising out of athletic performance either because they find that games do not reflect the requisite “intent to express a particularized message” that the first part of the *Spence* test for expressive conduct requires,<sup>19</sup> or because they find that even when athletes do possess the requisite intent, the medium of the sports game is unable to communicate this message in a form in which the audience is likely to understand it.<sup>20</sup>

What this means is that art and sport enjoy a very different status under the contemporary First Amendment. Whereas art, including the nonpolitical abstract art and music referred to in *Hurley*, is generally considered high value speech and therefore receives the same degree of protection as the expressly political speech that has historically been the primary concern of free speech jurisprudence, sport—even spectator sport—usually receives no First Amendment protection whatsoever. Although several courts have suggested that, under the right circumstances, the “exposition of an athletic exercise” might be entitled to some degree of First Amendment protection,<sup>21</sup> in only two cases have

<sup>17</sup> *Spence*, 418 U.S. at 411.

<sup>18</sup> *Hurley v. Irish-American, Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 569 (1995).

<sup>19</sup> See, e.g., *Justice v. National Collegiate Athletic Assoc.*, 577 F. Supp. 356, 374 (D. Ariz. 1983) (dismissing the First Amendment claim of college football players on the ground that college football, “like other sports, is primarily a conduct-oriented” rather than a “communicative” activity); *Murdock v. Jacksonville*, 361 F. Supp. 1083, 1096 (M.D. Fla. 1973) (dismissing the First Amendment claim of a wrestling promoter on the grounds that “[t]he promotion of wrestling matches . . . is not a symbolic act, nor is the wrestling match itself a symbolic act” but instead constitutes a “purely entertainment pastime”).

<sup>20</sup> *Interactive Digital Software Ass’n v. St. Louis County*, 200 F. Supp. 2d 1126, 1134 (E.D. Mo. 2002) (denying First Amendment protection to video games because, like baseball games, they fail to express any “ideas, impressions, feelings, or information unrelated to the game itself.”); *Fighting Finest v. Bratton*, 898 F. Supp. 192, 195-196 (S.D.N.Y. 1995) (dismissing the First Amendment claim of an amateur police boxers because “[w]hile we recognize that dance, when combined with nudity, can inexorably convey a message of eroticism . . . we are not convinced that a boxing match, in which police officers participate, inexorably conveys any message other than that police officers can be pugilists”).

<sup>21</sup> *Post Newsweek Stations-Connecticut, Inc. v. Travelers Ins. Co.*, 510 F. Supp. 81, 86 (D. Conn. 1981) (asserting that the broadcast of a skating competition is protected speech, albeit “on the periphery of” the First Amendment). See also *Maloney v. Cuomo*, 470 F. Supp. 2d 205, 213 (E.D.N.Y. 2007) (denying First Amendment protection to the private, at home, practice of martial arts but recognizing that “the martial arts generally . . . have a

courts actually struck down regulations of athletic competition on First Amendment grounds and in neither case did the court squarely hold that sport was protected expression.<sup>22</sup>

From a purely institutional perspective, this distinction between spectator sport and art is puzzling. Like plays, concerts, ballets and movies, spectator sports provide what we can call “audience-oriented entertainment.” A football game, like a rock concert or art show, is an event that is performed in order to entertain and amuse an audience and that, in the absence of an audience, would not exist—or at least, would only exist in radically altered form. (Think of the Superbowl, for example, with nobody watching). Economically, as well, the spectator sports industry depends upon the willingness of spectators to watch its performances, just as the motion picture industry depends upon the willingness of the public to buy tickets to shows.

The explicit orientation of spectator sports toward an audience establishes a strong presumption that something expressive is taking place. After all, why else would individuals address themselves to an audience if they did not wish to thereby communicate a message of some sort? And why would the audience pay good money to watch them if they received no messages from the act?

In other contexts, courts have suggested that the presence of an audience orientation in fact establishes not only a presumption that something expressive is taking place but may be dispositive of the

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rich history and are culturally significant to many people in many parts of the world” and arguing that “[u]nder some circumstances an individual's participation in martial arts...warrant some degree of First Amendment protection.”); *Sunset Amusement Co. Board of Police Comm'rs of Los Angeles*, 496 P.2d 840, 845-46 (Cal. 1972) (“[N]o case has ever held or suggested that simple physical activity falls within the ambit of the First Amendment, *at least in the absence of some element of communicating or advancing ideas or beliefs*”) (emphasis added).

<sup>22</sup> In the first case, the court granted plaintiffs a preliminary injunction enjoining enforcement of a village ordinance that made it unlawful “to play any games upon any street, alley, or sidewalk, or other public places except when a block party permit has been issued by the President and the Board of Trustees” because it found the statute overbroad in prohibiting even games performed with an expressly political intent. *Sullivan v. City of Augusta*, 406 F. Supp. 2d 92, 111 (D. Maine 2005), *vacated on other grounds*, 511 F.3d 16 (1<sup>st</sup> Cir. 2007). In the second case, a Maine district court held that a city parade regulation that exempted all “athletic events conducted by the Board of Education, Little League or other organizations” from the arduous registration requirements otherwise imposed on large-scale gatherings violated the First Amendment by discriminating against certain kinds of speakers on the basis of the content of their speech. *Weigand v. Village of Tinley Park*, 114 F. Supp. 2d 734, 737 (N.D. Ill. 2000). The court acknowledged that other courts “have hesitated to declare that restraints on athletic activity violate the First Amendment” but concluded that, even if “pure athletic activities and games may not be protected by the First Amendment....free speech activities are quite foreseeable at the broader category of an athletic event.” *Id.* The court struck down the regulation, in other words, because of its discriminatory effect on the expressive rights of those who attended athletic and non-athletic events, rather than because it found the athletic events themselves to be expressive acts.

expressiveness question altogether. In *Barnes v. Glen Theatre*,<sup>23</sup> for example, the Supreme Court extended protection to nude dancing despite having denied it only two years earlier, in *Dallas v. Stanglin*,<sup>24</sup> to recreational ballroom dancers. In his concurrence in *Barnes*, Justice Souter reconciled the two decisions by pointing to the presence, in the first case, and the absence, in the latter, of an audience-orientation. Souter argued: Not all dancing is entitled to First Amendment protection as expressive activity. This Court has previously categorized ballroom dancing as beyond the Amendment's protection . . . and dancing as aerobic exercise would likewise be outside the First Amendment's concern. But dancing as a performance directed to an actual or hypothetical audience gives expression at least to generalized emotion or feeling, and where the dancer is nude or nearly so the feeling expressed, in the absence of some contrary clue, is eroticism, carrying an endorsement of erotic experience.<sup>25</sup>

Two decades earlier, the California Supreme Court similarly suggested that the presence or absence of an audience-performer relationship could be decisive in distinguishing protected from unprotected conduct when it rejected a First Amendment challenge brought by owners of a Los Angeles roller skating rink to a city agency's decision denying them a permit to continue operating the rink the following year. The plaintiffs claimed that the decision violated the free speech and assembly rights of their patrons.<sup>26</sup> The court disagreed because it found no evidence that those who skated at the rink intended their skating to be seen by others.

[N]o case has ever held or suggested that simple physical activity falls within the ambit of the First Amendment, at least in the absence of some element of communicating or advancing ideas or beliefs .... The key element is, of course, communication. We have difficulty finding that essential element to exist in the context of a roller skating rink. True, it is inevitable that some patrons of the rink watch the other skaters and are, perhaps, entertained or amused by their activities. And yet it seems inescapable that petitioners' patrons primarily use the facilities for physical exercise and personal pleasure; [the] element of communication between an artist or performer and his audience seems entirely lacking.<sup>27</sup>

Although not stated as explicitly elsewhere, the idea that it is the presence of an audience-performer relationship that distinguishes conduct

<sup>23</sup> *Barnes v. Glen Theatre*, 501 U.S. 560 (1991).

<sup>24</sup> *Dallas v. Stanglin*, 490 U.S. 19 (1989).

<sup>25</sup> *Barnes*, 501 U.S. at 581 (Souter, J., concurring).

<sup>26</sup> *Sunset Amusement Co. Board of Police Comm'rs of Los Angeles*, 496 P.2d 840 (Cal. 1972).

<sup>27</sup> *Id.* at 845-46.

as expressive informs, and helps make sense of, much of the First Amendment case law dealing with art and entertainment. It explains, for example, why—when confronted with an activity involving an audience-performer relationship—courts tend to extend First Amendment protection without requiring first any proof that the conduct actually satisfies both elements of the *Spence v. Washington* test for expressive conduct.<sup>28</sup> This is notwithstanding the general recognition that, in theory, the *Spence* principles apply to art and entertainment, as to other forms of non-linguistic expression.<sup>29</sup> The audience-orientation appears to obviate any need to demonstrate that the actor, dancer, or musician actually intended to convey a particularized message to the audience, or that this message was, in the circumstances in which it occurred, likely to be understood.

Courts' willingness to extend First Amendment protection to all activities that involve a recognizable performer-audience relationship means that today spectator sport is the only genre of what we might call "audience-oriented entertainment" that is not categorically protected by the First Amendment. There are a number of other popular genres of entertainment that are also generally denied First Amendment protection. Gambling for example is generally not considered expressive activity.<sup>30</sup> Nor is recreational dancing, as *Stanglin* made clear. However, these activities typically do not involve the kind of audience-performer relationship that characterizes movies and musical performances, and all of the other kinds of art and entertainment that the First Amendment protects. Spectator sport does, but nevertheless is generally denied any recognition as expressive activity. This makes its status under the First Amendment an exceptional one. As such, it raises as an obvious question what it is about spectator sport that makes it—or that makes courts perceive it to be—

<sup>28</sup> See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (extending categorical protection to musical performance without invoking the *Spence* test); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975) (recognizing live theatre as protected speech without requiring any evidence that actors intended to convey particularized messages or that these messages were likely to be understood); *Boring v. Buncombe County Bd. of Educ.*, 98 F.3d 1474, 1477 (4th Cir. 1996) ("Films, plays, and even crude street skits constitute inherently expressive communicative vehicles and, as such, warrant First Amendment protection even if the speaker cannot establish an intent to convey a particularized message."). See also Amy Adler, *Girls! Girls! Girls!: The Supreme Court Confronts the G-String*, 80 N.Y.U. L. Rev. 1108, 1114 n. 19 (2005) (noting that, when deciding whether nude dancing is entitled to First Amendment protection, the Supreme Court "[o]ddly" did not invoke the *Spence* test in either *Barnes* or a subsequent case, *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000)). The analysis provided here suggests that it is not in fact so odd that the Supreme Court did not rely upon *Spence* but that this is a common feature of the art and entertainment case law.

<sup>29</sup> *Hurley v. Irish-American, Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 569 (1995) (interpreting the "particularized message" requirement in *Spence* in light of the extension of First Amendment protection to art).

<sup>30</sup> See, e.g., *Allendale Leasing, Inc. v. Stone*, 614 F. Supp. 1440, 1454-55 (D.R.I. 1985) (rejecting plaintiffs' argument that 'playing and conducting Bingo games is a form of expression and association that is protected activity under the Constitution'); *United States v. Borgese*, 235 F. Supp. 286, 296 (S.D.N.Y. 1964) (same).

inexpressive in a way that all other genres of audience-oriented entertainment are not.

The sports case law provides little assistance in answering this question. Courts provides generally three explanations for the denial of First Amendment protection to spectator sport but none provides an ultimately convincing explanation of the distinction between sport and art.

First, some courts argue that games of spectator sport are not expressive acts because those who take part in them do not do so in order to communicate any ideas or information to their audience. In *Murdock v. Jacksonville*, for example, a Florida district court made this argument to justify its dismissal of a wrestling promoter's First Amendment challenge to a city lease agreement that granted his competitor exclusive access to the only facility in town capable of hosting public wrestling matches. The promoter argued that the lease agreement violated his First Amendment rights by preventing him from expressing himself through the promotion of the wrestling matches. The court disagreed because it found no evidence that the promoter intended to use the matches as a vehicle for advancing his own political or social views, or for allowing the wrestlers to advance their own.<sup>31</sup> The court pointed to a colloquy between the plaintiff and defense counsel in which the plaintiff admitted that he did not intend to make his wrestlers "stop wrestling and make speeches to the crowd" and concluded that:

There can be no serious contention, and none has been advanced by plaintiff, that . . . wrestling is an activity "akin to free speech" as that phrase was used in *Tinker v. Des Moines Community School District* [to refer to] the symbolic act of wearing politically significant armbands to protest the Vietnam war.... This case does not involve a speech by a public figure or anything of that nature, but only concerns the right to promote wrestling, a purely entertainment pastime. There is no evidence which could conceivably support the idea that the promotion of professional wrestling involves speech or symbolic acts equivalent to speech.<sup>32</sup>

The court concluded, in other words, that the wrestling constituted a "purely entertainment pastime," rather than "speech or symbolic speech," because it was not intended to convey political messages like those the schoolchildren in *Tinker* intended to convey by wearing black armbands to school. In 1982, a New York district court similarly argued that spectator sports like baseball do not deserve First Amendment

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<sup>31</sup> *Murdock v. Jacksonville*, 361 F. Supp. 1083, 1096 (M.D. Fla. 1973).

<sup>32</sup> *Id.* at 1095-96.

protection because they provide “pure entertainment with no informational element.”<sup>33</sup>

Other courts argue that there is something simply inherent in the nature of athletic performance that distinguishes sport from art. A New York district court, for example, accepted, for purposes of argument, that members of an amateur police boxing team took part in public boxing matches because they wanted to convey the “particularized message” that they were “individuals of character pursuing excellence and adhering to ethical standards of fair play and sportsmanship.”<sup>34</sup> It nevertheless concluded that whatever messages the boxers intended to convey via their performance in the ring would not be likely to be understood by their audience. “While we recognize that dance, when combined with nudity, can inexorably convey a message of eroticism,” the court wrote, “we are not convinced that a boxing match, in which police officers participate, inexorably conveys any message other than that police officers can be pugilists.”<sup>35</sup> An Arizona district court made a similar distinction between sport and art when it called college football a “conduct-oriented activity” and on this basis distinguished it from the more “communicative” genres of artistic performance, such as jazz music and nude dance, that were entitled to First Amendment protection.<sup>36</sup> The court did not explain what it is about college football that makes it, unlike jazz music or nude dancing, insufficiently communicative to justify First Amendment protection. One could speculate, however, that it has something to do with the violence and physicality of the sport, when compared to the more obviously and self-consciously aesthetic orientation of music and dance.<sup>37</sup> Alternatively, it may have something to do with the fact that football is a competitive activity, whereas jazz music and dance are not.

This distinction is what underpins the third, and perhaps most persuasive, justification courts provide for denying First Amendment protection to sport: namely, that because sport typically involves competition, it is incapable of expressing the kinds of messages that the First Amendment protects. A Missouri district court made this argument, for example, in *Interactive Digital Software Association v. St. Louis County*, to explain why neither baseball nor video baseball games are entitled to First Amendment protection.

[T]he game of baseball is not a form of expression entitled to free speech protection. It is often times surrounded by

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<sup>33</sup> *America’s Best Family Showplace Corp. v. City of New York*, 561 F. Supp. 170, 174 (E.D.N.Y. 1982).

<sup>34</sup> *Id.* at 195.

<sup>35</sup> *Id.*

<sup>36</sup> *Justice v. National Collegiate Athletic Assoc.*, 577 F. Supp. 356, 374 (D. Ariz. 1983).

<sup>37</sup> Indeed, at least one commentator has argued that while First Amendment protection should be denied to sports such as football and wrestling, it should be extended to other sports—ice skating, gymnastics, diving—which more closely resemble music and dance and in which athletes’ participation is guided by more self-evidently aesthetic concerns. Morley, *supra* note 10, at 368.

speech and expressive ideas—music between innings, fans carrying signs with expressive messages—however, these expressive elements do not transform the game of baseball into “speech.” Rather it remains, just what it is—a game. Nor does the Court think there is some magical transformation when this game of baseball appears in video form. The objectives are still the same—to score runs—and the only difference is a player pushes a button or swings a “computer bat,” rather than swinging a wooden bat.... [T]he Court fails to see how video games express ideas, impressions, feelings, or information unrelated to the game itself.<sup>38</sup>

The court suggests here that it is because those who play baseball do so with the objective of winning the game—rather than for some other, presumably more expressive reason—they fail to communicate by their performance in the game any messages, or at least any messages that the First Amendment protects, even when the performance itself is surrounded by other kinds of expressive activity (fans waving signs, music before and in the middle of the game, etc.).

In a 2002 article in the *Yale Law Journal*, Michael T. Morley similarly argued that the fact that they involve competition means that most sports do not deserve First Amendment protection, notwithstanding the “inconsisten[cy]” created by “deny[ing] constitutional protection to sporting events, while extending it to other forms of live entertainment performed before audiences.”<sup>39</sup> The fact that sports involves competition, Morley argued, means that “unlike most theatrical performances, just about everything an athlete does can be explained by something *other* than an attempt to convey an idea to the audience.”<sup>40</sup> It also means that, when athletes participate in spectator sports, their performance is primarily guided by “functional, non-expressive concerns such as catching a pass or kicking a goal.”<sup>41</sup> For this reason, he concluded that the only spectator sports that deserve First Amendment protection are those in which the competition itself depends upon the ability of the athletes to effectively express messages of grace and beauty through their performance. In these sports only, Morley suggests, the fact of competition will not blur or undermine the expressive desires that athletes may bring to the sport.

None of these explanations provide a persuasive explanation for why art is entitled to First Amendment protection but spectator sport is not. The first idea—that spectator sports are not expressive acts because they function to entertain rather than to educate or politicize—is deeply

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<sup>38</sup> Interactive Digital Software Ass’n v. St. Louis County, 200 F. Supp. 2d 1126, 1134 (E.D. Mo. 2002).

<sup>39</sup> Morley, *supra* note 10, at 368.

<sup>40</sup> *Id.* at 367.

<sup>41</sup> *Id.* at 368.

unsatisfying as a justification for denying First Amendment protection to spectator sports, given the extension of First Amendment protection to other genres of expression—movies, music, dance, even video games—that similarly function primarily to entertain. Indeed, the First Amendment protects more than merely the “exposition of ideas”—as the Supreme Court noted over fifty years ago, in *Winters v. New York*,<sup>42</sup> when it struck down the conviction of a bookseller convicted of selling magazines “principally made up of . . . stories of deeds of bloodshed, lust or crime” and disavowed any attempt to distinguish between protected and unprotected expression on the basis of whether it educates or merely entertains. “The line between the informing and the entertaining is too elusive,” the Court argued, “for the protection of that basic right [of a free press]. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine.”<sup>43</sup> Because it recognized that even non-political and non-didactic expression can have a political effect on its audience's beliefs and opinions, the Court refused to sustain the prosecution of even “vulgar literature” like the true crime magazines, and in subsequent decades, extended First Amendment protection to many other kinds of merely entertaining speech. It cannot therefore simply be the fact that athletes do not communicate in speeches, or seek by their performance to advance a particular set of social or political ideas that precludes First Amendment protection because the same would obviously be true of many varieties of non-political art and entertainment that the Court, in the decades since *Winters*, has recognized to be “unquestionably” protected by the First Amendment.<sup>44</sup>

The second idea—that there is something inherent in athletic activity that renders it inexpressive—is also unpersuasive as a justification for the denial of First Amendment protection to sport. Under *Spence*, it is not the form of the activity but instead the context in which it takes place, and the intent with which it is performed, that determines its status under the First Amendment. Hence, activities that share many of the same formal properties may possess a very different constitutional status. Although recreational ballroom dancing and nude dancing share many of the same formal properties, only nude dancing is entitled to First Amendment protection because—as Justice Souter noted in his *Barnes* concurrence—it is only nude dancing that is addressed to, and performed in front of, an audience. Without more elaboration of what it is about the context in which, or the intent with which, boxing matches—or football games—are performed, this justification for denying those who participate in these games First Amendment protection is deeply unsatisfying.

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<sup>42</sup> *Winters v. People of State of N.Y.*, 333 U.S. 507, 510 (1948).

<sup>43</sup> *Id.*

<sup>44</sup> *Hurley v. Irish-American, Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 569 (1995). See Mark Tushnet, *Art and the First Amendment*, 35 COLUMBIA J. LAW ARTS 169, 188 (2012) (noting that art receives First Amendment protection notwithstanding the absence, in many cases, of any intent by the artist to communicate ideas).

Nor can the distinction between art and sport be justified on the basis of their purportedly aesthetic versus non-aesthetic orientations. For one thing, it is not at all clear that athletes, even in non-aesthetic sports such as boxing and baseball, do not seek by their performance in the ring or on the field to communicate messages of grace and beauty.<sup>45</sup> Even assuming for purposes of argument that they do not, there is nothing in the case law that suggests that messages of beauty are the only kinds of messages to which constitutional protection extends. To the contrary: it is a fundamental principle of the First Amendment that, except with respect to a few limited categories of speech, the guarantee of freedom of expression applies equally to all speakers, irrespective of the content of their speech.<sup>46</sup> The fact that athletes, and others associated with spectator sports, may not intentionally communicate by their performance on the field the kinds of aesthetic messages that dancers or musicians communicate does not justify denying them First Amendment protection if they communicate other kinds of messages (as I argue in the next Part that they do).

The claim that spectator sport is not entitled to First Amendment protection because it is a competitive activity is also not ultimately persuasive as an explanation of the difference in the constitutional status afforded sport and art. Intuitively, the argument has a great deal of appeal. It identifies what appears to be a fundamentally distinguishing feature of sport and the artistic genres of entertainment that the First Amendment protects. Art does not, after all, tend to be organized as a competition, whereas sport is, by definition, a competitive activity.<sup>47</sup> This fact in turn has important implications for how the different kinds of performances operate. A football game will be structured very differently than a ballet performance, for example, and this is not simply because in one performance the performers dance and in another performance they hit one another and run and catch balls. Instead, it is because, in one performance, the dynamism of the performance derives from the competitive struggle of the players to win, and in the other it does not. We experience the two

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<sup>45</sup> See *infra* notes 68-70.

<sup>46</sup> *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002) (“[A]s a general matter, . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”). *United States v. Playboy Entm’t Group*, 529 U.S. 803, 818 (2000) (“esthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority”).

<sup>47</sup> There is some debate about how to define sport and specifically, whether the term refers to all “competitive, rule-governed activity that human beings freely choose to engage [in],” or only to competitive activities that require physical exertion on the part of the competitors. Compare CRAIG CLIFFORD AND RANDOLPH FEEZELL, *COACHING FOR CHARACTER: RECLAIMING THE PRINCIPLES OF SPORTSMANSHIP* 11 (1997) with COAKLEY, *SPORTS IN SOCIETY*; 21 (2006) (defining sports as “institutionalized competitive activities that involve rigorous physical exertion or the use of relatively complex physical skills by participants motivated by internal and external rewards.”). What neither side of the debate disputes, however, is that sports involves competition.

performances differently, as a result. We might call a really exciting football game a nail-biter, for example, but we would never describe an exciting ballet in this way. This is because we watch the football game in order to see who wins the competition, whereas this is not why we watch a ballet, nor a reason to give it praise.

The fact that sport involves competition, and art typically does not, thus helps explain many of the formal differences between sport and art as genres of performance. It also may affect our judgment about the relative cultural value that the two genres of activity possess.<sup>48</sup> What it does not do, however, is justify the legal conclusion that courts draw from it: namely, that sport, and other competitive activities, are not entitled to First Amendment protection even when performed before, and addressed to, an audience. This is because, under *Spence*, the form that an activity takes is irrelevant to the question of whether the First Amendment applies. Instead, the only question that matters constitutionally is whether games of spectator sport convey particularized messages that audiences can understand.

This is an empirical question but one courts have not turned to the empirical, or even the popular, writing on sports to address. This is problematic, because when we do turn to the relatively extensive body of social scientific literature on sports, what becomes clear is that the empirical assumptions that underpin the courts rely upon are simply wrong. It is not true, in other words, that because athletes play games in order to win them, they neither intend nor are capable of communicating by their performance in the game any messages worth protecting. To the contrary: what the social scientific sports literature suggests is that it is in many respects *because* sports involves competition that games possess the important cultural, even sometimes political, significance that they do—the next Part explores.

## PART TWO: SPORT AS AN EXPRESSIVE ACTIVITY

Under *Spence*, two things must be true for games of spectator sport to merit the protection of the First Amendment. First, it must be the case that an individual associated with the performance of the game—be

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<sup>48</sup> The philosopher Graham Gordon argues, for example, that one of the implications of the formal differences between sport and art is that, while there may be “sporting equivalents” of great artistic performers, such as the opera singer Maria Callas and the actor, Lawrence Olivier—he suggests, as equivalents for these figures the tennis singer Martina Navratilova, and Muhammed Ali—there will be “no sporting equivalents of Shakespeare and Mozart.” GRAHAM, GORDON. *PHILOSOPHY OF THE ARTS: AN INTRODUCTION TO AESTHETICS* 27–28 (2005). This leads him to conclude, that while sport may be a tremendously important and creative human endeavor, it is nevertheless of lesser cultural significance than the arts. *Id.* at 28. Other philosophers, however, disagree. For a strong articulation of an opposing point of view, see Peter J. Arnold, *Sport, the Aesthetic and Art: Further Thoughts*, 38 *BRIT. J. EDUC. STUDIES* 160 (1990).

he or she an athlete, coach, promoter, funder or the like—seeks to convey, by his or her participation in the event, particularized, even if not succinctly articulable, messages. Second, it must be the case that the messages that athletes, coaches, promoters and the like seek to convey are likely to be understood by the audiences who watch the game. The particularized messages that games express must, in other words, be not only intended, but intelligible.

This is in some respects a high bar, and in some respects a low one. On the one hand, the fact that under *Spence* an expressive act must be both intentional and intelligible excludes from constitutional protection many things that we may find entertaining or meaningful to watch but that are not the product of an expressive intention. As Judge Posner noted in *Miller v. City of South Bend*, a display of the northern lights might be both entertaining and personally meaningful to those who watch it, but under *Spence* it would not qualify as constitutionally protected because it would not reflect the right kind of expressive intent.<sup>49</sup> *Spence* also fails to protect idiosyncratic expression that an audience is unlikely to understand, no matter how deeply an individual may intend it.

On the other hand, *Spence* establishes no limits on the kinds of messages that expressive conduct may communicate. Nor does the test restrict in any way the form in which these messages may be conveyed. Instead, as Robert Post argues, because the *Spence* test focuses solely on the speaker's intent, the message, and the likelihood that an audience will understand that message, and pays no attention to the social context in which the conduct takes place or the values that it fosters, the test may in principle extend free speech protection to acts that, in practice, courts will be very unwilling to recognize as protected speech, given their preexisting commitments to the norms and purposes of the First Amendment.<sup>50</sup> Post cites as an example of this phenomenon a racially motivated hate crime that successfully communicates a message of racial prejudice.<sup>51</sup>

One can see hints of a similar phenomenon in the sports case law, and specifically in courts' unwillingness to even consider the possibility that the messages that surely all sports games send—namely, messages about the outcome and progress of the game, such as the message that Team A won or Team B lost—might be sufficient to entitle spectator sports to First Amendment protection. In theory, it is difficult to understand why these messages don't satisfy the two elements of the *Spence* test. The message, for example, that "Team A won," seems very directly a reflection of the arduous efforts of Team A to communicate, by its performance in the game, this message. It also seems unlikely that a

<sup>49</sup> *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1096 (7th Cir. 1990) (Posner, J. concurring) ("Anything that gives pleasure can be counted as entertainment, yet not everything that gives pleasure is expressive. I might find a display of northern lights entertaining; this would not make that display an expressive activity.").

<sup>50</sup> Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1252 (1995).

<sup>51</sup> *Id.*

clear and explicit message of this sort would not be intelligible to the audience to the game. Yet, courts refuse to extend protection to spectator sport on the basis of message of this kind—as the *Interactive Digital Software Association* court made clear when it acknowledged, albeit implicitly, that games might communicate to their audiences messages “related to the game itself”—that is, messages that relate to the outcome and progress of the competition—but nevertheless denied that sport constitutes a “form of expression entitled to free speech protection.”<sup>52</sup>

This refusal to entertain the possibility that messages of this sort are sufficient to trigger First Amendment protection may reflect courts’ commitment to their conception of the normative values of the First Amendment. As Part III explores, the First Amendment has traditionally been interpreted to protect above all speech on matters of public concern—that is, speech that relates, in some fashion, to questions of social or political order or meaning. Messages that relate solely to the outcome or progress of a formal contest like a game may simply be too far removed from this core concern to justify constitutional protection. Even if we take into account this limitation, however, and consider as grounds for extending First Amendment protection to sport only messages that relate in some fashion to the larger concerns of the social and political world, what the social scientific sports literature makes abundantly clear is that even non-aesthetic sports satisfy both *Spence’s* intent and intelligibility requirements.

#### A. *The Expressive Intent of the Athlete—and Others*

First, it is not true, as the *Interactive Software Digital Association* court assumed, that, because athletes are motivated to take part in games of spectator sport by the non-expressive desire to win, they are not *also* motivated by other, more properly expressive desires. In fact, there is considerable evidence that athletes take part in public competition not only because they want to win but also because they want to *show* that they *can* win. Sports journalism is replete, for example, with instances of athletes vowing to “put on a good show” or to “show what they do.”<sup>53</sup> Indeed, like the professional entertainers to whom they are frequently compared, professional athletes can earn tremendous fame and money by putting on a good show. Michael Jordan’s exceptional performances on the basketball court, for example, “not only transformed the game of basketball” but turned Jordan into a “global superstar, celebrity figure and commercial

<sup>52</sup> *Interactive Digital Software Ass’n v. St. Louis County*, 200 F. Supp. 2d 1126, 1134 (E.D. Mo. 2002).

<sup>53</sup> See, e.g., Rick Maese, Washington Post, Sports Insider Blog, “Donte Stallworth: ‘I just want to show what I can do’ with Redskins”, August 27, 2011, [http://www.washingtonpost.com/blogs/football-insider/post/donte-stallworth-i-just-want-to-show-what-i-can-do-with-redskins/2011/07/27/gIQA1CjrcI\\_blog.html](http://www.washingtonpost.com/blogs/football-insider/post/donte-stallworth-i-just-want-to-show-what-i-can-do-with-redskins/2011/07/27/gIQA1CjrcI_blog.html). Sports Illustrated stories about basketball: Iam Thomsen, Cleveland Cavaliers. *Sports Illustrated* Oct 26 2009: 80.

brand.”<sup>54</sup> Other sports stars earn tens of millions of dollars each year in salary and endorsement deals; like actors and other kinds of entertainers, their skill as performers can make them not only extremely rich but famous on an almost global scale.<sup>55</sup> In this respect, athletes are like other kinds of performing artists, whose career success depends upon the excitement and interest they generate by their performance.

Athletes take part in spectator sports not only for the fame, but also the glory of it. The link between athletic performance and glory is an old and well-established one. In ancient Greece, for example, participation in public athletics was considered a “deadly serious [means] to attract glory to one’s name and honour to oneself and family”<sup>56</sup> and to “establish social status and individual preeminence.”<sup>57</sup> Athletes did so by showing “especial skill and excellence” on the playing field, and thereby demonstrating the manly virtues associated with both sport and war.<sup>58</sup> Notwithstanding the significant differences between contemporary and ancient athletics and the contemporary United States and ancient Greece, the sports literature suggests that athletes continue to take part in public athletic competition for glory: or in other words, because they want to demonstrate to an audience their especial skill and excellence on the playing field—and the moral (and often still, “manly”) virtues it takes to acquire and to perform those skills—and in so doing earn the praise, honor and validation of those who watch them play.

Sport provides an excellent venue for the demonstration of these virtues because of its formalism. The simplicity and transparency of the rules that govern athletic competition, and the fact that when individuals compete on the playing field, they do so from a position of equality, lends games an appearance of fairness that may be missing from ordinary social life, where individuals compete armed with highly unequal material and social resources, and according to a complex, and in many cases, highly ambiguous, set of rules. It also creates the impression that athletic victory is a consequence of the skill of the players—and the skill of the players alone. It is because, as Michael Mandelbaum puts it, “[e]very game begins with the team equal on the dimension that matters most: The score is always zero to zero” that the “outcome of each game [appears to] depend[] entirely on what the players do during the contest” that “sports . . . express the principle of merit.”<sup>59</sup>

<sup>54</sup> BARRY SMART, *THE SPORTS STAR: MODERN SPORT AND THE CULTURAL ECONOMY OF SPORTING CELEBRITY* 10 (2005).

<sup>55</sup> *Id.* at 78 (noting Tiger Woods’ \$40 million dollar contract with Nike and basketball prodigy LeBron James’ \$90 million dollar sponsorship contract, among others); *id.* at 144-190 (discussing the phenomenon of the “global sports star” as represented in the figures of David Beckham and Anna Kournikova).

<sup>56</sup> MIKE MCNAMEE, *SPORTS, VIRTUES AND VICIS: MORALITY PLAYS* 16 (2008).

<sup>57</sup> DONALD G. KYLE, *SPORT AND SPECTACLE IN THE ANCIENT WORLD* 7 (2007).

<sup>58</sup> *Id.*

<sup>59</sup> MICHAEL MANDELBAUM, *THE MEANING OF SPORTS* 20-21 (2004). Mandelbaum makes this claim specifically about team sports, but there is no reason why the same would not

In practice, of course, sports games do not provide as even a playing field as they appear. Economic inequalities impact which players and which teams win the games, and racial and gender inequalities have in the past, and continue to some degree today, to bar certain kinds of individuals from the field.<sup>60</sup> Nevertheless, the idea that what is displayed on the field of athletic competition is individual excellence, freed from social and political constraints and inequalities, continues to attract athletes to sport. Indeed, sociological studies of athletes in a variety of sport suggest that one of the most important reasons why individuals choose to take part in public competition is because of the opportunity it gives them to demonstrate that they possess the physical and psychological virtues associated with success in that sport.

In a recent study of professional prizefighters on the South Side of Chicago, the sociologist, Loïc Wacquant noted, for example, that one of the primary reasons the men he studied chose the physical dangerous and financially uncertain profession of prizefighting was because of the opportunity it gave them to “publicly establish... [their] fortitude and valor.”<sup>61</sup> By boxing well, fighters attempted to demonstrate that they possessed the “virile values” commonly associated with success in boxing, such as “hardness, pugnacity, and physical bravery.”<sup>62</sup> At the same time, by appearing fit and well-prepared for their fights, boxers showed that they possessed the self-discipline and commitment that it took to stick to the arduous training regimen and ascetic lifestyle that success as a boxer was believed to require.<sup>63</sup> They boxed in other words for expressive reasons: because they wanted to demonstrate to the watching crowd that they were

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be true of individual sports as well. See Heather L. Reid, *Sport, Education and the Meaning of Victory*, presented at Twentieth World Congress of Philosophy (August 10-15, 1998), <http://www.bu.edu/wcp/Papers/Spor/SporReid.htm> (noting that we tend to view the victory of one player over another as “the manifestation of certain virtues inherent in the athlete in a given performance.”).

<sup>60</sup> For more discussion of these points see Robert E. Washington and David Karen, *Sport and Society*, 27 ANN. REV. SOCIOLOGY 187-212 (2001) (reviewing the literature exploring the racial, gender and class inequities involved in professional sports); D. Stanley Eitzen, *Upward Mobility Through Sport? The Myths and the Realities*, in SPORT IN CONTEMPORARY SOCIETY 256, 256 (D. Stanley Eitzen ed. 2001) (noting that “Americans typically believe sport is a vehicle for upward mobility” but calling this into question); JOHN HOBERMAN, *DARWIN’S ATHLETES: HOW SPORT HAS DAMAGED BLACK AMERICA AND PRESERVED THE MYTH OF RACE* (1997) (discussing, and critiquing, the myth of sport as a space of equal opportunity and a mechanism for racial integration).

<sup>61</sup> Loïc J. D. Wacquant, *The Pugilistic Point of View: How Boxers Think and Feel about Their Trade*, 24 THEORY & SOCIETY 489, 513 (1995).

<sup>62</sup> *Id.* at 504-05.

<sup>63</sup> *Id.* at 514 (noting the homology “set up in and by the ring between physical excellence and moral standing” and its dependence on the idea that success in the ring “hinges on the adoption of proper personal habits and conduct outside of it” and that it was widely believed among boxers that “an ordinary boxer who conscientiously abides by the commandments of the pugilistic catechism, as they apply in particular to nutrition, social life, and sexual activity, stands every chance of toppling a more talented but dissipated foe.”)

“m[e]n of strength” as well as “m[e]n of virtue” and thereby earn its admiration and respect.<sup>64</sup>

Studies of athletes in other sports suggest they also participate in public competition in order to demonstrate their virtue and their valor. In an article examining the phenomenon of pickup or “schoolyard” basketball, Jeff Greenfield noted, for example, that many kids in the inner city played basketball because it provided them a perhaps unique opportunity to demonstrate, both to the other players and to those who might watch the game, what Greenfield called their “measure as a man:”

For many young men in the slums, the school yard is the only place they can feel true pride in what they do, where can move free of inhibitions and where they can, by being spectacular, rise for a moment against the drabness and anonymity of their lives. Thus, when a player develops extraordinary ‘school yard’ moves and shots... [they] become his measure as a man. So the moves that begin as tactics for scoring soon become calling cards. You don’t just lay the ball in for an uncontested basket; you take the ball in both hands, leap as high as you can and slam the ball through the hoop. When you jump in the air, fake a shot, bring the ball back to your body, and throw up a shot, all without coming back down, you have proven your worth in uncontested fashion.<sup>65</sup>

Subsequent studies have found that basketball players who play the game in more formal arenas similarly compete to demonstrate their manliness by demonstrating, on the court, particular, gendered virtues, such as aggression, creativity, and physical strength. Hence, a recent study of African-American college basketball players found that they considered the basketball court a prime location in which to “flaunt their manhood” by demonstrating that they had game.<sup>66</sup>

A recent study of middle-class practitioners of the sport of mixed martial art (MMA) found that these athletes also participated in public fights because they wished to demonstrate their mental and physical virtue.<sup>67</sup> By remaining “steady in the face of [the] sudden pressure [of the fight], the researchers noted, fighters “show themselves and their peers who they really are by reaffirming collectively recognized virtues such as gameness, heart courage, and asceticism.” It was because of the

<sup>64</sup> *Id.* at 513.

<sup>65</sup> Jeff Greenfield, *The Black and White Truth about Basketball*, in SIGNIFYIN(G), SANCTIFYIN’, AND SLAM DUNKING 375 (Gena Caponi ed. 1999).

<sup>66</sup> Shaun R. Harper, *The measure of a man: Conceptualizations of masculinity among high-achieving African American male college students*, 48 BERKELEY J. SOCIOLOGY 89, 97-98 (2004).

<sup>67</sup> Corey M. Abramson & Darren Modzelewski, *Caged Morality: Moral Worlds, Subculture, and Stratification Among Middle-Class Cage-Fighters*, J. QUALIT. SOCIOLOGY (2010).

opportunity it provided to demonstrate these valued qualities that fighters believed cage fighting accomplished things that no amount of training could. As the researchers note: “Fighters believe training in the gym is about becoming the sort of person you want to be, and fighting in front of an audience is about revealing who you are and who you have become, both to yourself and to everyone watching.”<sup>68</sup> A survey of professional, college and amateur male athletes in a wide variety of sports similarly concluded that for many of the athletes surveyed, their performance on the sports field, and the relationship they established with the crowd during the game, was “the most emotionally salient relationship through which their positional identities [were] constructed and affirmed.”<sup>69</sup> In other words, for these athletes also, it was on the playing field that they showed who they were and what they were made of.

It is not the case, therefore, that because athletes play games to win them, they are not motivated by other, more properly expressive ends. What the studies quoted above suggest in fact is that it may be difficult in many cases to distinguish an athlete’s competitive motivations from his or her expressive desires: that athletes play spectator sport because they want to demonstrate *by winning*, or at least by struggling valiantly to win, that they possess the particular physical and psychological virtues associated with success in that sport—and thereby deserve the audience’s admiration and respect, its honor and its glory.

Nor is it only athletes who seek to communicate particularized messages through their participation in spectator sports. Those who fund and promote spectator sports also do so, in many cases, for expressive ends. National governments, for example, provide both economic and non-economic support to local teams or sports programs to ensure that when athletes compete in international competition, they demonstrate through their performance the strength and power of the political community they represent or with whom they are associated. As James Frey and Stanley Eitzen note: “[S]tatus in the community of nations is ultimately related to success in athletic events. The gold medal count in the Olympics is important precisely because that count becomes a measure of political legitimacy, of modernization, or of a people’s resolve.”<sup>70</sup> Municipal governments support local teams for many of the same reasons. Michael Danielson notes, for example, that in the United States, “[a]lmost every stadium and most arenas built over the last half century have been financed with public funds; and these facilities have been offered to teams under

<sup>68</sup> Id. at 23-24. See also MICHAEL MESSNER, *POWER AT PLAY* 49-50 (1992). A survey of professional, college and amateur male athletes in a wide variety of sports similarly concluded that for many of the athletes surveyed, their performance on the sports field was “the most emotionally salient relationship through which their positional identities [were] constructed and affirmed.”

<sup>69</sup> MICHAEL MESSNER, *POWER AT PLAY* 49-50 (1992).

<sup>70</sup> James H. Frey and D. Stanley Eitzen, *Sport and Society*, 17 ANN. REV. SOC. 503, 512 (1991).

ever more favorable terms.”<sup>71</sup> Governments support local teams—and provide generous financial incentives to ensure they state local—because of the boost, not only to tourism and tax revenues but also to the city’s image and sense of well-being, associated with a successful local sports franchise.<sup>72</sup> This is an expressive desire—albeit a risky one. Danielson notes, for example, that “Cleveland’s image as a failed city was reinforced by a long string of losing seasons by the Indians, who played in a dingy stadium tabbed the ‘mistake by the lake.’”<sup>73</sup>

Corporations also fund teams, athletes, or stadia, for expressive reasons: namely because they wish to associate their brand with the positive virtues displayed on the field during the game.<sup>74</sup> When athletes take to the field, it is not merely their own expressive intent that they communicate via their performance but that of the governments, corporations or other groups that fund and promote them—and whose symbols they often wear on their bodies as they play.

Even those who regulate sports demonstrate an expressive interest in the messages that games communicate. The recent decision by the National Football League (“NFL”) to ban what it called “excessive touchdown celebrations,” for example, was prompted by a concern that the touchdown celebrations communicated the wrong message—and specifically, communicated a message of macho individualism rather than teamwork and sportsmanship.<sup>75</sup> Efforts by both the NFL and the National Basketball Association (“NBA”) to enforce a strict on-court and on-field dress code similarly reflect the organizations’ concern that athletes were sending the wrong messages by playing the game in the way they did.<sup>76</sup> These attempts to influence the messages that games communicate by changing the rules are only the latest in a long series of attempts by the

<sup>71</sup> MICHAEL N. DANIELSON, *HOME TEAM: PROFESSIONAL SPORTS AND THE AMERICAN METROPOLIS* 104 (2001).

<sup>72</sup> *Id.* at 7-11 (exploring the symbolic importance of the team to the cities they represent, and their importance as a symbol of the cities they represent).

<sup>73</sup> *Id.* at 104.

<sup>74</sup> See Matthew P. McAllister, *College bowl sponsorship and the increased commercialization of amateur sports*, 15 *CRITICAL STUDIES MASS COMM.* 357, 360 (1998) (exploring the impacts of the increasing corporate sponsorship of amateur sports and arguing that corporations seek to sponsor sports competitions in order to associate themselves with the relatively “risk-free, apolitical messages of struggle and triumph” sports events communicate); SMART, *supra* note 54, at 17, 65–102 (noting the increasing commercialization of spectator sport and the powerful impact of corporate sponsorship on the cultural significance of spectator sport); *SPORT AND CORPORATE NATIONALISMS* (Michael L. Silk, David L. Andrews & C.L. Cole eds. 2005) (exploring how corporations seek to identify themselves with the nationalist messages that games promote).

<sup>75</sup> Phillip Lamarr Cunningham, *Please Don’t Fine Me Again!!! Black Athletic Defiance in the NBA and NFL*, 33 *J. SPORT & SOCIAL ISSUES* 39 (2009).

<sup>76</sup> *Id.* (arguing that what motivated the new dress code was an anxiety, by primarily white owners, about black players’ adoption of “hip-hop” and “gang” dress styles, which they feared sent messages of criminality and disrespect for the law which threatened the respectability of both sports). Cunningham also notes the significant resistance on the part of many athletes to obeying these rules.

NFL, NBA, and other professional sports leagues to shape the expressive meaning of their sport in order to ensure its profitability and, in some cases, also respectability.<sup>77</sup>

Rather than the product of a singular expressive intent, the sociological literature reveals sports games to be instead the product of multiple—sometimes conflicting—expressive desires on the part of those who play, those who promote, those who fund, and those who regulate spectator sports. This in turn points to the cultural, sometimes overtly political, significance, that games of spectator sport can possess. It is because of the symbolic power of what takes place on the playing field that governments, corporations, leagues, as well as players, care so much about what happens during the game.

### *B. The Messages that Games Communicate*

Just as it is not true that the only motivations that drive athletes to participate in spectator sport is the competitive and non-expressive desire to win, it is also not true that because games are competitions they communicate no messages worthy of First Amendment protection. To the contrary: it is *because* they are competitions that games of spectator sport provide a perhaps uniquely powerful medium for communicating messages of virtue. This is because of the aura of authenticity that games possess as competitions. The fact that what audiences see when they watch a sports game is the genuine struggle of the competitors to win, rather than a scripted simulacrum of this struggle, gives sport an aura of authenticity that narrative art, no matter how gripping, cannot match. This is not to say that narrative art—Shakespeare’s plays, for example—do not provide audiences a kind of psychological truth that sport does not. Nevertheless, the idea that what happens on the playing field is not only real but also somehow true is an important source of sport’s appeal, both to athletes and to spectators. As the football historian, Michael Oriard, argues with respect to football, the fact that “behind the spectacle of football, real persons are performing real acts” means that “football is grounded in a reality absent from the popular romance or adventure plot.” For this reason, Oriard argues against attempts to equate athletes to entertainers and to analogize sports like football to other genres of mass entertainment. Instead, he argues that the reality of sport provides the activity a specific kind of

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<sup>77</sup> See, e.g., MICHAEL ORIARD, *READING FOOTBALL* 25-56 (1993) (exploring how early football regulators altered the rules of the sport in order to attract spectators and to make the game more exciting by emphasizing the achievements of individual players—and the resistance this generated amongst those committed to a more collectivist conception of football); Greg Downey, *Producing Pain: Techniques and Technologies in No-Holds-Barred Fighting*, 37 *SOC. STUDIES SCIENCE* 201, 213–16 (2007) (examining how promoters of mixed martial arts structured contests in order to ensure a quick flow of action and to maintain audience excitement).

“cultural power” that art cannot replicate: namely, the power “to tell stories [that] in a way that no movie and novel can be... are ‘real’.”<sup>78</sup>

Other commentators have noted the peculiar “cultural power” that sports, and those who play sports, possess because of the aura of authenticity that attaches to their performance in the game. Michael Mandelbaum argues, for example, that the fact that “[a]ctors who appear to do dangerous, difficult things on the screen almost never actually do them [whereas]... baseball, football, and basketball players really do what spectators see them do” is one reason why athletes have historically been favored over actors as product pitchmen. “Because the spectator could be confident in the authenticity of their deeds,” advertisers believed that consumers would more willingly “believe in the sincerity of their words” when they promoted the product.<sup>79</sup>

The writer Joseph Epstein suggests, similarly, that a great part of sports’ appeal to its spectators is the authenticity which attaches to it: the fact that what happens on the field is “beyond the aid of public relations,” and for that reason “fraud-free and fakeproof.”<sup>80</sup> “Sport may be the toy department of life,” Epstein writes, “but one of its abiding compensations is that, at least on the field, it is the real thing.

With a full count, two men on, his team down by one run in the last of the eighth, a batter (as well as a pitcher) is beyond the aid of public relations. At match point at Forest Hills a player’s press clippings are of no help.... In all these situations, and hundreds of others, a man either comes through or he doesn’t. He is alone out there, naked but for his ability, which counts for everything. Something there is that is elemental about this, and something greatly satisfying.<sup>81</sup>

It is also because what happens on the field is “real” in this way that spectator sport provides, as the sociologist Barry Smart notes, “one of the most significant . . . institutional sites for popular cultural recognition and acclaim of exceptional performance and prowess, if not the most prominent context in which the deeds of participants continue to retain authenticity.”<sup>82</sup> Nor is it simply athletes’ physical prowess that audiences recognize and acclaim. This is demonstrated by the fact that athletes tend to get celebrated as heroes and role models, not just celebrities. The difference between a celebrity and a hero, of course, is the moral value that attaches to the latter, but not the former. Whereas celebrities are individuals who are “well-known for [their] well-knownness,”<sup>83</sup> sports

<sup>78</sup> ORIARD, *supra* note 77, at 9.

<sup>79</sup> MANDELBAUM, *supra* note 59, at 16.

<sup>80</sup> Joseph Epstein, *Obsessed With Sport*, HARPER’S MAGAZINE 67, 71 (1976)

<sup>81</sup> *Id.* at 71.

<sup>82</sup> BARRY SMART, *supra* note 54, at 9.

<sup>83</sup> DANIEL BOORSTIN, *THE IMAGE: A GUIDE TO PSEUDO-EVENTS IN AMERICA* 57 (1961).

heroes are “individuals who gain honor” through the “public display[ of] their personal prowess, moral character, and social worth in [a] competition evaluated by their peers and the broader society.”<sup>84</sup>

Of course, athletes frequently fail to live up to their status as heroes and role models—in part because the virtues that they display when on the field are not necessarily easily translatable into everyday life.<sup>85</sup> Yet the intense criticism leveled against athletes when they fail in their personal lives to live up to their role model status only emphasizes the strength of the association between superior athletic performance and moral, as well as physical, excellence. We would not be so disappointed in athletes when they fail to demonstrate exemplary behavior off the field if we did not believe what they told us by their performance on the field: namely, that they are not simply superior physical specimens but also embody the sporting virtues—among these, “courage ... perseverance, assertiveness, generosity,...., dependability, honesty and character.”<sup>86</sup>

For many of the same reasons that it provides a powerful medium for the expression of messages of individual excellence and virtue, spectator sport also provides an important vehicle for communicating messages about political community. The strong association that tends to be made between athletes and the towns, regions, or nations where they live or on whose behalf they play means that what athletes demonstrate by their performance in the game is not only their own strength and valor but that of the political community with whom they are metonymically identified. It is for this reason, of course, that governments provide so much economic and in many cases non-economic support to local teams and sports programs.<sup>87</sup> By funding sport, they also, in many cases, seek to promote a sense of national, or local, identity.

<sup>84</sup> John W. Loy and Graham L. Hesketh, *The Agon Motif: A Prolegomenon for the Study of Agonetic Behavior*, in CONTRIBUTION OF SOCIOLOGY TO THE STUDY OF SPORT (Kalevi Olin ed. 1984), See also Gill Lines, *Villians, Fools or Heroes? Sports Stars as Role Models for Young People*, 20 LEISURE STUDIES 285, 285 (2001) (“The sporting hero has traditionally been perceived of as epitomizing social ideals and masculine virtues, and as embodying values that learnt on the playing fields will readily transfer into everyday life.”).

<sup>85</sup> See, e.g., Lines, *supra* note 84, at 285 (noting the contemporary construction of the sport hero as “damaged”); STANLEY TEITELBAUM SPORTS HEROES, FALLEN IDOLS (2005).

<sup>86</sup> LAWRENCE WENNER, MEDIASPORT 138-139 (1998).

<sup>87</sup> For an informative account of the expressive, and more specifically nationalist motivations behind early efforts to establish a U.S. Olympic team, see MICHAEL DYRESON, MAKING THE AMERICAN TEAM: SPORT, CULTURE AND THE AMERICAN EXPERIENCE (1998). Dyreson notes that one of the primary objectives of those who promoted the development of the Olympic program was a desire to demonstrate that “modern American civilization did indeed produce... the strongest and boldest people.” *Id.* at 5. This desire, to demonstrate, via the number of medals won at the Olympic Games, the strength and power of the nation, and its people, remains a common theme in the promotion of the U.S. Olympic team and is replicated by similarly nationalist efforts in other countries. See, e.g., NATIONAL IDENTITY AND GLOBAL SPORTS EVENTS: CULTURE, POLITICS, AND SPECTACLE IN THE OLYMPICS AND THE FOOTBALL WORLD CUP

Indeed, sport has long been used as a powerful vehicle of collective identification, be it at the local or national level. Games provide an important vehicle for the expression of collective belonging because they provide a shared object—the local team, or player—around which citizens can collectively identify. As the anthropologist Joseph Adjaye notes:

Sports provide a unique medium for articulating national sentiments in a highly symbolic way. The sports arena makes more real the nation or imagined community. It incites the national psyche as no other activity, often acting as a surrogate for politics... For third-world nations, in particular, sports often carries a special political function that goes beyond national pride; it can evoke a deep national consciousness that superficially masks internal divisions and forge a façade of unity. Thus in countries where internal tensions exist, international sports can provide a stimulant to apparent harmony, for throughout history, sports has been employed not only as a tool in nation building, but also as a means of transcending internal strife.<sup>88</sup>

In the act of collectively cheering “their” team or athlete to victory, fans experience, and reinforce, bind them to one another.<sup>89</sup> In so doing, as Adjaye notes, they make the “imagined community” of the nation—or the political community of the city or region that the athletes represent—“more real.” For this reason, the geographer John Bale argues that “[s]port has become perhaps the main medium of collective identification in an era where bonding is more frequently a result of achievement.”<sup>90</sup> When athletes take to the field, what they communicate is not only a message of individual or even collective virtue and valor; what they communicate is something about collective identity itself: about “what sort of identities

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(Alan Tomlinson & Christopher Young eds. 2006); ALAN BAIRNER, *SPORT, NATIONALISM, AND GLOBALIZATION* (2001).

<sup>88</sup> Joseph K. Adjaye, *Reimagining Sports: African Athletes, Defection, and Ambiguous Citizenship*, 57 *AFRICA TODAY* 26, 32-33 (2010)

<sup>89</sup> Scholarship exploring spectator identification with teams is vast. For some good examples, see GARRY CRAWFORD, *CONSUMING SPORT: FANS, SPORT AND CULTURE* 66 (2004) (noting the important role that sport spectatorship plays in “creat[ing a] sense of community and belonging” among fans); JOSEPH A. MAGUIRE, *POWER AND GLOBAL SPORT : ZONES OF PRESTIGE, EMULATION AND RESISTANCE* 109 (2005) (arguing that “[s]port provides an important arena for the construction, maintenance and challenging of identities and has the capacity to bind together individuals, local communities, nations and the world – but also to fragment them”); ALAN TOMLINSON & CHRISTOPHER YOUNG, *NATIONAL IDENTITY AND GLOBAL SPORTS EVENTS: CULTURE, POLITICS, AND SPECTACLE IN THE OLYMPICS AND THE FOOTBALL WORLD CUP* (2005) (exploring how national identities come to be constructed through representations of international sport competitions).

<sup>90</sup> JOHN BALE, *SPORTS GEOGRAPHY* 14 (1989) (“Apart from war, sport is one of the few things that binds people to place simply through ascription.”)

constitute our countries and nations and other people's countries and nations."<sup>91</sup>

Games also express other messages that may not be as expressly intended by those who play, support or fund spectator sports. Sports philosophers point, for example, to the aesthetic messages that are expressed by what we might call a "virtuous" or "courageous" performance. As the philosophers Teresa Lacerda and Stephen Mumford note:

Sport's aesthetic value derives frequently from situations where athletes are confronted by their limits.... A victory can seem beautiful or dramatic because of the maximum effort and focus of the athlete, even though they have no desire to produce beauty or drama... Examples come to mind of Bernard Hinault, finishing a stage of the *Tour de France* with blood streaming down his face and of Gabriela Andersen-Schiess, who entered the Los Angeles Olympic stadium at the end of the 1984 marathon staggering and struggling to finish the competition. Such cases show the ability of sport to turn the ugly into the beautiful and profound.<sup>92</sup>

It is not only the spectacle of human beings in prime condition performing skills that in many cases, they have spent a lifetime acquiring and perfecting that makes sport beautiful to watch, Mumford and Lacerda suggest here—although the grace and beauty of the performance *is* one of the attractions that draws viewers to sport.<sup>93</sup> Sports' aesthetic value, they suggest, also lies in its ability to render the human struggle against adversity visible, in stark tableau.

Athletes may not specifically mean to convey messages of beauty of this kind. Indeed, the moments of intense effort to which Mumford and Lacerda refer may in fact be moments where the athlete is insensible to the audience; and lost, like an actor or a musician, in the flow of the

<sup>91</sup> GARRY WHANNEL, *BLOWING THE WHISTLE: CULTURE, POLITICS AND SPORT, REVISITED* 187 (2008).

<sup>92</sup> Teresa Lacerda and Stephen Mumford, *The Genius in Art and in Sport: A Contribution to the Investigation of Aesthetics of Sport*, 37 *J. PHILOS. SPORT*, 182, 186 (2010).

<sup>93</sup> See WANN et al., *supra* note 15, at 34 (Noting that one of the factors that leads individuals to become sports fans is an appreciation of "the artistic beauty and grace of sport movements" and that the aesthetic motivate "is not limited to fans of stylistic sports" such as figure skating or gymnastics but that fans of other sports "may also express a high level of aesthetic motivation. For instance, football fans who remember Lynn Swann...often describe the artistic nature of his leaping catches. Similarly, track and field fans often speak of the beauty and grace of such events as the discus, pole vault, and hurdles."); Smith, *The Noble Sports Fan*, 12 *J. SPORT & SOCIAL ISSUES* 54, 58 (1988) (noting that "[c]ommitted sport fans say that one of the reasons they follow sport is that they are fascinated by the excellence, beauty, and creativity in an athlete's performance" and that "[d]evotees will speak rapturously, years later, of great moments they witnessed; a Gretzky goal, a Dr. J move, or a Nadia Comaneci perfect routine").

performance. Nevertheless, the aesthetic messages that they convey by their performance are hard to disentangle from the messages of virtue, character, and courage that athletes more self-consciously intend. It is, after all, the bravery and determination that the athlete displays, Lacerda and Mumford suggest, that makes his or her performance beautiful even when it is not pretty, graceful, or easy but instead blood-spattered and arduous. These aesthetic messages therefore add complexity to what it means for athletes to demonstrate, via public competition, their virtue, skill, and character.

Games communicate messages about individual identity as well. It is because of the importance of spectator sport as a site for the demonstration of individual excellence and achievement that what happens on the playing field, and who populates it, can have a powerful influence on popular conceptions of what kinds of persons have value, and what values matter. Hence, feminists argue that the male-dominated nature of the major spectator sports, and the violent and aggressive virtues they celebrate, plays a key role in the articulation and reinforcement of a notion of “hegemonic masculinity” that, they argue, harms both women and non-normative men.<sup>94</sup> For the same reason, critics argue that modern spectator sport play a powerful role in reproducing racial inequalities and stereotypes.<sup>95</sup> Others point, however, to the tremendous importance that the entrance of female or minority athletes into the major spectator sports has had on the struggle for racial and gender equality, by reshaping the popular conception of what minorities, or women, can do or achieve.<sup>96</sup> In

<sup>94</sup> Raewenn Connell, *An iron man: The body and some contradictions of hegemonic masculinity*, in *SPORT, MEN, AND THE GENDER ORDER: CRITICAL FEMINIST PERSPECTIVES* 83-96 (Messner & Sabo eds. 1990) (arguing that sports helps construct a “culturally idealized form of masculine character” that “connect[s]...masculinity to toughness and competitiveness” and which she calls “hegemonic masculinity”); Marie Hardin, Kathleen M. Kuehn, Hillary Jones, Jason Genovese & Murali Balaji, *Have You Got Game? Hegemonic Masculinity and Neo-Homophobia in U.S. Newspaper Sports Columns*, 2 *COMM. CULTURE & CRITIQUE* 182, 183 (2009) (“The most powerful institution for ‘shoring up’ hegemonic masculinity in the United States has been the sports/media complex . . . and men who participate in sports that most exemplify the qualities of hegemonic masculinity are constructed as embodiments of the ideal).

<sup>95</sup> HOBBERMAN, *supra* note 60 (arguing that the astronomical social mobility of many black athletes, who represent, obviously, only a small percentage of the population, distort public perceptions of the opportunity structure for blacks, causing many whites to assume that blacks no longer face discrimination); D. Stanley Eitzen, *FAIR AND FOUL: BEYOND THE MYTHS AND PARADOXES OF SPORT* (1999) (exploring how sport promotes a perception of equal opportunity that occludes pervasive racial inequalities).

<sup>96</sup> Michael Eric Dyson, for example, argues that Michael Jordan’s success on the basketball court made him a powerful symbol of “racial and cultural desires to fly beyond limits and obstacles,” an embodiment of perhaps a post-racial America. Michael Eric Dyson, *Be like Mike?: Michael Jordan and the pedagogy of desire*, 7 *CULTURAL STUDIES* 64, 71 (1993). Others point to the importance that Jackie Robinson’s entrance into the major league held for the struggle for racial equality in the United States. See, e.g., John Kelly, *Integrating America: Jackie Robinson, critical events and baseball black and white*, 22 *INT’L J. HIST. SPORT* 1011, 1012 (2005) (noting that Jackie Robinson’s entrance into Major League Baseball garnered more attention at the time than the integration of the

either case, what is clear is that sport provides a powerful medium for the expression, and contestation, of dominant notions of gender, race, and sexuality. Of course, like the aesthetic messages discussed earlier, athletes or others associated with the game may not specifically intend to communicate messages of this sort—although in some cases they clearly do intend to.<sup>97</sup> Nevertheless, the fact that games frequently do communicate messages of this sort only provides further evidence of the sometimes profound cultural, even political, significance that spectator sport can possess, not despite but *because* it is a competitive activity that is able to communicate, as a result, messages that are both densely symbolic and also somehow true.

### III. IMPLICATIONS

The political and cultural significance of what takes place on the field during a game of spectator sport has obvious doctrinal and philosophical implications.

#### *A. Doctrinal Implications*

Doctrinally what it means is that spectator sports satisfy both elements of the *Spence* test for expressive conduct. As the first element of the *Spence* test requires, games reflect the expressive desires of those who play, fund, promote, or regulate sport to communicate via their performance “particularized messages” of individual or collective virtue—and perhaps other messages as well (messages of national pride, of racial equality, of beauty, etc.). As the second element of the *Spence* test requires, these messages are intelligible. The conventionality of sport as a genre of performance makes it in fact an especially intelligible medium for the communication of symbolic messages, when compared to highbrow genres of artistic performance, which favor the subversion or transformation of existing symbolic conventions.<sup>98</sup> In spectator sports, in contrast to these more elite genres of entertainment, the performance works only if actors follow the rules—and following the rules is in fact

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U.S.. military under Truman); JOSEPH DORINSON, JORAM WARMUND, CHARLES E. SCHUMER, JACKIE ROBINSON: RACE, SPORTS AND THE AMERICAN DREAM (1995) (“On April 15, 1947, Jack Roosevelt Robinson changed America forever”).

<sup>97</sup> A particularly famous example of an athlete who specifically intended to convey a message about gender by her participation in a game of spectator sport is Billie Jean King who, in 1973, took part in the a highly-publicized tennis match—entitled the “Battle of the Sexes”—in order to demonstrate that women could not only compete against men, but could triumph over them in competition. See Nancy E. Spencer, *Reading Between the Lines: A Discursive Analysis of the Billie Jean King vs. Bobby Riggs “Battle of the Sexes,”* 17 SOC. SPORT J. 386, 386 (2000).

<sup>98</sup> See ANDREAS HUYSSSEN, *AFTER THE GREAT DIVIDE: MODERNISM, MASS CULTURE, POSTMODERNISM* (chronicling the twentieth century concept of the avant-garde and its general opposition to bourgeois conformism).

one of the virtues that sports express and display.<sup>99</sup> This makes the messages that games express particularly easy to understand—a fact that may in turn be one reason for sports’ mass appeal.<sup>100</sup>

There is thus no doctrinal justification for denying spectator sport First Amendment protection. This conclusion is buttressed by the 2010 decision, *Brown v Entertainment Merchants Association*, in which the Supreme Court recognized video games as a form of expression entitled to First Amendment protection.<sup>101</sup> In recognizing video games as First Amendment protected expression, the Court expressly rejected arguments—similar to those made by the *Interactive Digital Software Association* court—that because video games, like other kinds of games, are “interactive” activities whose ending is not fixed in advance but determined by the actions of the players, they do not merit the constitutional protection afforded other, less-interactive, genres of expression, such as movies, books, and art.<sup>102</sup> Justice Scalia, who wrote the majority opinion in *Brown*, acknowledged that the experience of playing a video game is, as Justice Alito argued in dissent, “different in kind” from the experience of reading a book.<sup>103</sup> He nevertheless rejected the claim that this difference was constitutionally significant. Because he found that “video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player’s interaction with the virtual world),” Scalia concluded that video games were, “like the protected books, plays and movies that preceded them,” fully protected by the First Amendment.<sup>104</sup>

What was true of the video games in *Brown* is true of spectator sport. Although most games of spectator sport lack at least some of the “familiar literary devices,” such as music and dialogue, that Scalia highlighted in *Brown*, they clearly possess others. They provide for example larger-than-life characters that audiences can adore or revile. In the movement from the beginning to the end of the performance, they also narrate a story—though a story whose meaning might depend, to a great degree, upon which team one is rooting for. The fact that the end of the game’s narrative is not known in advance but depends upon what happens on the field during the performance—as is not true of most kinds of artistic

<sup>99</sup> WILLIAM J. MORGAN, WHY SPORTS MORALLY MATTER 145–46 (2006).

<sup>100</sup> Mandelbaum, *supra* note 59, at 7–8 (“The modern age brought incoherence to the traditional forms of artistic expression... The highest value of a work of art came to be regarded as originality; but what was original was also obscure... [Sports in contrast] offer entertainment to the masses, and the principal reason for this is that they are supremely coherent... At the end of each game, the spectators and the participants know which side has won. While the news section of the daily newspaper may report the baffling and the unintelligible, the sports section features succinct histories that everyone can understand, with a clear-cut beginning, middle and end.”).

<sup>101</sup> *Brown v. Entertainment Merchants Ass’n*, 131 S. Ct. 2729 (2011).

<sup>102</sup> *Id.* at 2737–38.

<sup>103</sup> *Id.* at 2737 n. 4.

<sup>104</sup> *Id.* at 2733.

performance, but *is* true of video games—does not make sport necessarily any less expressive than other, less-interactive genres of entertainment, as *Brown* makes clear. Instead, it may only add to the power and urgency of the dramatic narrative of the game, and in some cases also, the season. As Michael Mandelbaum argues:

[S]ports offer a particularly compelling form of drama. The outcome of a game, unlike that of a scripted drama, is unknown. Few people watch the same play or motion picture repeatedly because after they have seen it once they know the ending. The tension is gone. But tension suffuses each and every game of baseball, football and basketball. Moreover, in organized sports the tension carries beyond each individual game and tends to increase over time. Each game is part of a designated sequence—a season—the goal of which is to produce a champion.... Suspense mounts because, as the end of the season approaches, games tend to become more important to the determination of the champion. In this way, baseball, football and basketball resemble the oldest of literary forms, the epic. Like the greatest of them, the *Odyssey*, the protagonist—in the case of sports, the team—encounters a series of challenges that it must meet to achieve its ultimate goal.<sup>105</sup>

Mandelbaum is not the only writer to compare the spectator sports to art. Indeed, comparisons to poetry, drama and theatre abound. A. Bartlett Giamatti, former commissioner of Major League Baseball, described baseball as “a narrative, an epic of exile and return, a vast, communal poem about separation, loss, and the hope for reunion” and the “Romance Epic of homecoming America sings to itself.”<sup>106</sup> Saul Steinberg argues that “[b]aseball is an allegorical play about America, a poetic, complex and subtle play of courage, fear, good luck, mistakes, patience about fate and sober self-esteem....”<sup>107</sup> Joyce Carol Oates writes that “[e]ach boxing match is a story—a unique and highly condensed drama without words.”<sup>108</sup>

In truth, sports games are only metaphorically similar to epic dramas, poems, or ballets. They may possess many of the same dramatic and symbolic elements as these kinds of artistic performance, but the fact that they are competitions means that they communicate and express cultural meaning differently than does a drama, a poem, or a play. The analogy with art arises nonetheless because of the deeply expressive character of both art and spectator sport. What theorists mean when they

<sup>105</sup> MANDELBAUM, *supra* note 59, at 5.

<sup>106</sup> A. BARTLETT GIAMATTI, TAKE TIME FOR PARADISE: AMERICANS AND THEIR GAMES 95 (1989 [2011]).

<sup>107</sup> Quoted in HAROLD ROSENBERG, SAUL STEINBERG (1978).

<sup>108</sup> JOYCE CAROL OATES, ON BOXING 8 (1995).

say sport is an epic drama, a poem, or a play is that sports games convey, in a similarly dramatic and densely symbolic form, important cultural themes or messages. For this reason, although sport may be “different in kind” than other kinds of expression that the First Amendment protects, it is no less deserving of protection under *Spence* than movies, dance performances—or, for that matter, video games.

### B. Philosophical Implications

The cultural and political significance of what takes place during a game of spectator sport also means that there is no philosophical justification for denying protection to sport but extending it to art and audience-oriented entertainment. By philosophical justification, I mean a justification grounded in the aims and purposes that First Amendment doctrine is intended to advance.

A notion of constitutional purpose has traditionally played an important role in modern First Amendment jurisprudence. When Justices Holmes and Brandeis reimagined the First Amendment in the early twentieth century as a powerful justiciable check on governmental power, they did so by turning away from the rather restrictive notion of what it meant to abridge “the freedom of speech” available at the Founding.<sup>109</sup> Since then, the Court has persistently refused to define the scope of First Amendment protection with reference to the precise intentions of the Framers.<sup>110</sup> But it has also refused to extend First Amendment protection to all activities that, in ordinary language, would constitute speech, or that we might consider, in one way or another, to be expressive.<sup>111</sup> Instead, the

<sup>109</sup> See, e.g., Jack Balkin, *Nine Perspectives on Living Originalism*, 2012 U. Ill. L. Rev. 815, 835 (2012) (“When the First Amendment was adopted in 1791, the standard legal view . . . was that the guarantee of freedom of the press banned prior restraints on publication but did not prevent subsequent punishments for libel or seditious advocacy.”); Cass Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255 (1992) (“[I]t seems clear that during the founding period, much of what we now consider “speech” was thought to be unprotected, and speech could be regulated if it could be shown to cause injury or offense.”). See generally David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205 (1983) (describing the early twentieth-century transformation in the meaning of “freedom of speech and the invention of a new libertarian tradition); MARK GRABER, *TRANSFORMING FREE SPEECH* (1991) (same).

<sup>110</sup> Sunstein, *supra* note 109, at 256 (“The current state of free speech in America owes a great deal to extremely aggressive interpretations by the Supreme Court... These decisions cannot be justified by reference to the original understanding of the First Amendment”).

<sup>111</sup> *Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) (“Although it is possible to find some kernel of expression in almost every activity a person undertakes, such a kernel is not sufficient by itself to bring the activity within the protection of the Federal Constitution’s First Amendment.”). See also Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARVARD L. REV. 1765, 1784, 1773 (2004) (noting that “the speech with which the First Amendment is even slightly concerned is but a small subset of the speech that pervades every part of our lives” and concluding that the notion “[t]hat the boundaries of the First Amendment

Court has tended to justify the doctrinal rules it has established to distinguish protected speech from unprotected conduct in terms of the broad purposes that the First Amendment was intended to serve. Hence, in the famous early-twentieth century concurrences and dissents in which they laid out the framework of the modern doctrine, Justices Holmes and Brandeis justified extending protection to even politically unpopular speech as necessary to further the core purpose of the First Amendment, which Holmes identified as the protection of the “free trade in ideas,” and which Brandeis identified instead as the protection of democracy against “the occasional tyrannies of governing majorities.”<sup>112</sup> Several decades later, a majority of the Court again invoked the democracy-promoting purpose of the First Amendment to justify (among other things) the extension of free speech protection to labor picketing, and the imposition of sharp limits on the government’s ability to prosecute libel.<sup>113</sup>

Scholars have also invoked (sometimes divergent conceptions of) First Amendment purpose to explain, as well as challenge, the doctrinal rules.<sup>114</sup> Given what Robert Post has identified as the over-expansiveness of the *Spence* test, it is conceivable that, even if spectator sports satisfy the doctrinal test for expressive conduct, there may be other, philosophical reasons for denying sport First Amendment protection—reasons that are not fully captured by the *Spence* test but that nevertheless influence how courts interpret it. Yet it is very difficult to see what these reasons may be.

Certainly if we consider the question of spectator sports’ First Amendment status in light of the most commonly-invoked of the amendment’s purposes—namely, the protection and facilitation of democracy in the United States—there is no justification for extending protection to art and entertainment and denying it to spectator sport. This may seem a counter-intuitive claim to make, given the at best highly-attenuated relationship between spectator sport and democratic political processes and debates. Indeed, some scholars—most notably, Robert Bork—have argued that, if the purpose of the First Amendment is to

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are delineated by the ordinary language meaning of the word ‘speech’ is simply implausible”).

<sup>112</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *Whitney v. California*, 274 U.S. 357, 375-376 (1927) (Brandeis, J., concurring).

<sup>113</sup> *Thornhill v. Alabama*, 310 U.S. 88, 103 (1940) (concluding that, because “[f]ree discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society,” labor picketing is entitled to First Amendment protection); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-276 (1964).

<sup>114</sup> The literature analyzing, and critiquing, First Amendment doctrine from one or another purposive-perspective is extensive. For a good survey, see Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989) (“Arguments from democracy have been said in a comparative study to be the “most influential...in the development of twentieth-century free speech law” and noting the importance of free speech to liberal democracy). See also Schauer, *supra* note 111, at 1785-86 (critiquing the notion that any one purpose can make sense of First Amendment boundary questions).

protect democracy in the United States by protecting the free and open political debate necessary to sustain it (as many have argued that it is<sup>115</sup>), then the only kind of speech to which free speech protection should extend is speech that is “explicitly political.”<sup>116</sup> On this view of what it means for the First Amendment to safeguard democracy, the vast majority of works of art would not be protected by the First Amendment—and neither would all spectator sports.

The Supreme Court has, however, embraced a much broader conception of what speech must be protected in order to ensure that it is, as Madison put it, the “People, not the Government, [that] possess the absolute sovereignty.”<sup>117</sup> In *Winters*, it recognized that “true crime magazines,” although not expressly political, had the capacity to both educate and politicize their audience through their depiction of the social world and for that reason were entitled to First Amendment protection.<sup>118</sup> Four years later, in *Joseph Burstyn v. Wilson*, the Court found the same to be true of motion pictures. Because films have the capacity to “affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression,” the Court held that even non-political movies were entitled to the same degree of constitutional

<sup>115</sup> See, e.g., Martin H. Redish and Abby Marie Mollen, *Understanding Post’s and Meiklejohn’s Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression*, 103 NW. L. REV. 1303, 1366 (2009) (Because “[d]emocracy could not exist, in any meaningful sense, absent a societal commitment to basic notions of free expression, nor could free expression flourish in a society uncommitted to democracy... [i]t is . . . not surprising that among the most prominent and widely accepted theories of the First Amendment are those that explain the Free Speech Clause as either a catalyst for or a protection of democracy itself.”); Post, *supra* note 50, at 1275 (“The most prominent and important form of social order for First Amendment jurisprudence is what I have elsewhere called “democracy.” ...[L]arge patches of core First Amendment doctrine in fact express the normative aspirations of this specific kind of social order, which seeks to sustain the value of self-government by reconciling individual and collective autonomy through the medium of public discourse.”); Greenawalt, *supra* note 114, at 145 (“Arguments from democracy have been said in a comparative study to be the “most influential ... in the development of twentieth-century free speech law” and noting the importance of free speech to liberal democracy).

<sup>116</sup> Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). Bork defines the term to refer to “speech concerned with governmental behavior, policy or personnel, whether the governmental unit involved is executive, legislative, judicial or administrative. *Id.* at 27-28. Bork notes that the category “includes a wide range of evaluation, criticism, electioneering and propaganda” but “does not cover scientific, educational, commercial, or literary expression as such.” *Id.* at 28. See also Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978) (arguing that in principle First Amendment protection extends only to political speech, although acknowledging the possibility that in practice pragmatic and institutional concerns might justify the extension of First Amendment protection of some kinds of art).

<sup>117</sup> Sunstein, *supra* note 109, at 256 (quoting James Madison, *Report on the Virginia Resolution* (Jan 1800), in 6 THE WRITINGS OF JAMES MADISON 386 (Gaillard Hunt ed. 1906)).

<sup>118</sup> *Id.*

protection as that afforded more explicitly political speech.<sup>119</sup> In the years since *Joseph Burstyn*, the Court has continued to affirm that art and entertainment are entitled to the highest degree of First Amendment protection because of their ability to express and in turn shape public attitudes and beliefs.<sup>120</sup> It has continued to recognize, in other words, that artistic expression must be protected because of its capacity to influence, even if only indirectly, democratic political debates by influencing how members of the polity understand and imagine the world around them.

Under this, more capacious, conception of what it means for the First Amendment to safeguard democracy in the United States, there is no justification for denying protection to spectator sports. This is because, like movies and other kinds of audience-oriented entertainment, spectator sports have the capacity to “affect public attitudes and behavior in a variety of ways,”—as the previous Part should already have made clear. By providing a forum for the demonstration and valorization of individual virtue, games help shape ideas of what virtues matter, and who possesses them. They influence popular notions of gender, sexuality, and race. They reinforce, and make more affectively powerful, collective identities, including national ones. By providing a venue in which individuals appear to compete on a truly even playing field, sports may also help to reinforce popular faith in the meritocratic ideal so important to American democracy.<sup>121</sup> In all these ways, games of spectator sport help shape our conceptions of the normative social order and, by implication, the rules that should govern it. As such, games of they are political, or at least politically relevant, in the same way that the *Burstyn* court recognized movies could be, and later decisions recognized to be true of music, drama, poetry, and dance as well.

Even if one accepts the narrower, Borkian view of what speech must be protected in order to safeguard democracy in the United States, there is little reason to believe that art should receive protection and

<sup>119</sup> *Joseph Burstyn v. Wilson*, 343 U.S. 495, 501 (1952).

<sup>120</sup> *See Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 602 (1998) (arguing that because art “ ‘may affect public attitudes and behavior in a variety of ways....[i]t goes without saying that artistic expression lies within this First Amendment protection” and citing cases) (quoting *Burstyn*, 343 U.S. at 501–02) (citing cases).

<sup>121</sup> *See, e.g.,* Mandelbaum, *supra* note 59, at 21 (noting that team sport in the United States express the principle of “merit” and the democratic ideal that we all have to play by the same rules); Gerald Early, *Baseball, Boxing and the Charisma of Sports and Race*, in *The Charisma of Sport and Race* 5 (Townsend Occasional Papers Series 1996) (“Sport is about meritocracy. People are attracted to sport often because it is pure meritocracy. You have to be excellent at sport, and that excellence supposedly transcends any social construction except the social construction of “athlete” which, ideally, is just reified merit, actualized desire and ambition, or apolitical excellence. Of course, sport has practiced race and gender exclusion, but in the rational liberalism that sport represents, this exclusion has been seen as a form of corruption of sport’s “truth.”); D. Stanley Eitzen, *Upward Mobility Through Sport? The Myths and the Realities*, in *SPORT IN CONTEMPORARY SOCIETY* 256, 256 (D. Stanley Eitzen ed. 2001) (noting that “Americans typically believe sport is a vehicle for upward mobility”);

spectator sport should not. Most art is, after all, not explicitly political, in the sense that Bork uses the term, to refer to “speech about governmental behavior, policy or personnel.” The Borkian interpretation of what it means for the First Amendment to safeguard democracy does not, therefore, justify the current doctrinal arrangement any more than the more expansive interpretation adopted by the Court in *Winters* and *Joseph Burstyn* does. Nor does Cass Sunstein’s recent effort to carve out a somewhat broader category of “political speech” than that which Bork proposes. Sunstein defines the category of speech he thinks must be protected in order to safeguard democracy in the United States as “speech intended and received as a contribution to public deliberation.”<sup>122</sup> In this category, he includes some but not all art. Sunstein argues, for example, that Charles Dickens’s novel *Bleak House* and the photographs of Robert Mapplethorpe, should be considered political speech because, in both cases, they engage, and were intended to engage, with pressing social issues of their time (the exploitation of the worker, in the first case, and questions of privacy and sexuality in the second case).<sup>123</sup> Sunstein’s argument therefore clearly would extend protection to some art and deny protection to some games of spectator sport (namely, those that are intended to fulfill a purely entertainment function). What it would not do, however, is establish the kind of categorical distinction between art and spectator sport that exists in the case law. Indeed, one could easily argue that, under Sunstein’s definition of political speech, at least some games of spectator sport should receive First Amendment protection. Billie Jean King’s battle against Bobby Riggs in the 1973 tennis match entitled the “Battle of the Sexes” was, after all, clearly intended and received as a contribution to public deliberation, as was Jackie Robinson’s participation in Major League Baseball.<sup>124</sup>

None of the conflicting views of what it means for the First Amendment to protect democracy—and what speech must be protected in order to do so—thus justify the current doctrinal arrangement. Nor can the different status afforded spectator sport and art in the case law be justified under the other purposes that jurists and scholars invoke to justify or explain First Amendment doctrine. Neither sport nor art provide the kind of objective truth whose discovery Justice Holmes, in *Abrams v. United States* famously argued it was the purpose of the First Amendment to foster, although both genres of expression may provide their own kinds of truth—what we might call aesthetic or psychological truth in the case of

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<sup>122</sup> Sunstein, *supra* note 109.

<sup>123</sup> *Id.* at 308.

<sup>124</sup> Spencer, *supra* note 97, at 391-93 (noting that King participated in the match because she recognized the “broader social implications of the match”); Kelly, *supra* note 96, at 1018-23 (describing the extensive deliberation and planning involved in Jackie Robinson’s signing with the Brooklyn Dodgers, and the explicitly political terms in which both Robinson and others viewed his entrance into Major League Baseball).

art, and what we could call moral truth in the case of sports.<sup>125</sup> Were we to conceive the search for truth fostered by the First Amendment as a search for subjective, rather than purely objective, truth, both art and sport would therefore have a plausible claim to protection.<sup>126</sup> It would, in other words, be difficult to argue that art contributes in any more significant way to the discovery of “subjective truth” than sport.

It is similarly unclear why art would receive protection under a First Amendment conceived primarily as a guarantee of individual liberty or autonomy, but sport would not. If “the significance of free expression rests on the central human capacity to create and express symbolic systems, such as speech, writing, pictures, and music, intended to communicate in determinate, complex, and subtle ways,” as David Richards argues that it does,<sup>127</sup> then surely the values are fostered equally well when an athlete exercises these capacities on the playing field rather than the concert hall. Of course one could argue that sport provides a less “complex and subtle” vocabulary for the exercise and development of human creativity, but here we enter the thickets of subjective opinion. In fact, athletes are careful to emphasize the complexity and subtlety of their art in the face of pervasive assumptions that at least certain kinds of sports—combative sports such as boxing, for example—involve nothing more than the exercise of brute force.<sup>128</sup> Sports fans also tend to celebrate the subtlety

<sup>125</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution....”). See also William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 Ga. L. Rev. 1 (1995), and for a classic articulation of the “search for truth” rationale of freedom of speech, see JOHN STUART MILL, *ON LIBERTY* (1869).

<sup>126</sup> See Greenawalt, *supra* note 114, at 132 (suggesting this as a plausible interpretation of the search for truth rationale). But see Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 Duke L.J. 1, 15 (1984) (critiquing the search for truth rationale of the First Amendment because of its belief in the existence, and knowability, of objective truth.)

<sup>127</sup> David Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974).

<sup>128</sup> See Wacquant, *supra* note 61, at 501 (“Fighters conceive of boxing not as a springboard for aggression and an exercise in violence but as a skilled bodily trade, a competitive performance craft requiring sophisticated technical know-how and an abiding moral commitment that will enable them not only to improve their material lot but also, and more urgently, to construct a publicly recognized, heroic self.”). Scholars of MMA note a similar resistance among fighters to the idea that the sport involves violence. See, e.g., Abramson & Modzelewski, *supra* note 67, at 21 (“When we looked at the “collective dispositions” and espoused understandings of this activity, it became impossible to sustain the argument that the subcultural world of the cage-fighter is about celebrating and supporting violence. To the contrary, fighters downplay the violence and highlight the difficulty, competition, strategy, and challenge of fighting, often referring to it as a game of chess. As Mark, a 30-year-old man working in the entertainment industry, noted,

and complexity of the moves that great players demonstrate on the playing field and the creativity they display in negotiating, and ultimately, transcending, the constraints of the game.<sup>129</sup> The argument that spectator sport do not deserve free speech protection thus seems as difficult to make under a liberty or autonomy rationale as it is to make under the democratic rationale of the First Amendment. Indeed, it is hard to think of another genre of performance in which the themes of individual autonomy and self-mastery are more pronounced than is true of sport.

Despite general agreement in the cases that sport is not a mode of expression entitled to free speech protection, it thus turns out to be just as difficult to justify the constitutional distinction between spectator sport and art by reference to the aims and purposes of the First Amendment as it to justify the distinction doctrinally—that is, if we accept what courts have been loath to accept but that the social scientific literature on sports suggests we must: namely, that games are expressive acts, which viewers watch not just because they are “exciting” but because of what they signify and represent. Moreover, although it is certainly possible to justify the claim that First Amendment protection should extend to only political speech—and therefore should include neither sport nor art—there are good reasons to reject this argument, however broadly or narrowly the category “political” is defined. As Sunstein himself acknowledges, “[o]ften the deepest political challenges to the existing order can be found in art, literature, music, or sexual expression.”<sup>130</sup> Spectator sport also, as we have seen, provides an important arena for challenging the existing social order and, more particularly, for dominant conventions of gender and race. For this reason, even if athletes, unlike artists such as Robert Mapplethorpe, may not intend their performance to “contribute to public deliberation,” they may in fact quite powerfully do so. For this reason, even if plausible arguments can be made that spectator sport, like art, should receive *lesser* protection than other forms of speech, it is difficult to justify the categorical denial of First Amendment protection to either genre of expression—at least it is if we believe, as Jack Balkin recently argued, that “true democracy means allowing people not only to have a say about who represents them in a legislature, or what laws are passed, but also to have a say about the shape and growth of the culture that they live in.”<sup>131</sup>

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‘You have to set up all of your moves in advance. You can’t just play a move at a time; you can’t say I’m just going to knock this guy out...I think that it [MMA] is a chess match and the guys that can set up those moves win.’’).

<sup>129</sup> Epstein, *supra* note 80, at 71 (noting that one of the great pleasures that sport provides is the opportunity to watch “craft of a very high order, which is intrinsically interesting”); Smith, *supra* note 93, at 58.

<sup>130</sup> Sunstein, *supra* note 109, at 308.

<sup>131</sup> Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression For the Information Society*, 79 N.Y.U. L. Rev. 1, 39 (2004).

### C. Pragmatic Implications

There are, in addition, no other, more pragmatic reasons to deny First Amendment protection to spectator sport but extend it to art and other genres of audience-oriented entertainment. The recognition of spectator sport as speech would not, for example, threaten the fundamental First Amendment distinction between “speech” and “conduct” by allowing “an apparently limitless variety of conduct [would] be labeled ‘speech.’”<sup>132</sup> This is a common concern in the expressive conduct context, where courts are frequently forced to wrestle with the implications of extending First Amendment protection to conduct that is not only not-linguistic—and therefore which does not fit our conventional understanding of speech as “the communication ... of thoughts in spoken words”—but which may also be conventional and hence widespread.<sup>133</sup> At least one court has suggested that fear of an all-encompassing First Amendment—of a First Amendment in which everything is protected, and hence nothing is—influenced its deliberations regarding the constitutional status of spectator sport.<sup>134</sup>

This fear is unfounded. Just as extending First Amendment protection to dance performances does not mean that all kinds of dance are necessarily protected, extending First Amendment protection to spectator sport would not mean that the First Amendment would be “applicable to all athletic endeavors.”<sup>135</sup> Recreational sports would remain unprotected—at least as a categorical matter. Of course, there may be occasions in which recreational athletes, like recreational dancers, may be able to invoke the protections of the First Amendment. Think for example of an anti-war protestor who jogs around town wearing a sign that says something like “End the War Now.” His act would obviously receive protection for the same reason that the schoolchildren in *Tinker* did: because in the particular context in which it was performed, it both expressed and appeared likely to convey a “particularized message.” But recreational athletics, like going to school, would not be presumed categorically to be an expressive act. It is only spectator sport which is entitled to categorical First Amendment protection for the same reason that art and other forms of entertainment are: because, by addressing a public audience, it participates in the formation of democratic public attitudes and beliefs.

Nor should it be terribly difficult to distinguish recreational from spectator sports. Spectator sports are sports that are intended to be seen by an audience; to use Souter’s language from his *Barnes* concurrence, they

<sup>132</sup> United States v. O’Brien, 391 U.S. 367, 369 (1968)

<sup>133</sup> *Speech*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/speech>.

<sup>134</sup> Top Rank, Inc. v. Fla. State Boxing Comm’n, 837 So. 2d 496, 502 (Fla. Dist. Ct. App. 2003) (“I am in fact an enthusiastic sports fan, but I do not believe we should dilute the significance of First Amendment protection by making it applicable to all athletic endeavors.”).

<sup>135</sup> *Id.*

are sports that are “directed towards an actual or hypothetical audience.” While there may be some cases in which it is difficult to determine whether a given athletic performance is or is not “directed at an actual or hypothetical audience”—think for example of the pickup basketball games discussed in Part II—in most cases, the distinction between recreational and spectator sports should be relatively easy to draw. All sports whose performance fans or family members typically watch, either from the stands or on their television should be included in the category of spectator sports. Activities that individuals engage in purely for pleasure, or fitness, are not. Although obviously these acts have expressive meaning for those who engage in them, they do not have the kind of expressive meaning that the First Amendment has historically privileged and therefore, like the recreational ballroom dancing in *Stanglin*, are not entitled to First Amendment protection in the absence of a showing of specific intent.

Recognizing spectator sport as an expressive activity would also not impede the effective governmental regulation of the public sphere—another worry that is frequently raised when questions of expanding the category of speech occur.<sup>136</sup> Governmental actors would be able to regulate the “time, place, and manner” in which games of spectator sport occurred in just the same way as they currently regulate the time, place and manner in which concerts, plays and dance performances take place.<sup>137</sup> They could even ban particularly dangerous sports, if the ban left open ample alternative channels for the communication of that sport’s message—and was genuinely directed at the sports’ physical dangers.<sup>138</sup>

<sup>136</sup> For a particularly forceful articulation of this concern, see Justice Breyer’s dissent in *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011), critiquing the Court’s recognition of “speech in aid of pharmaceutical marketing” as a form of protected expression on the grounds because of the difficulties it places on governmental regulation of the economic sphere. *Id.* at 2675 (“To apply a ‘heightened’ standard of review in such cases as a matter of course would risk what then-Justice Rehnquist . . . described as a ‘retur[n] to the bygone era of *Lochner v. New York* . . . in which it was common practice for this Court to strike down economic regulations adopted by a State based on the Court’s own notions of the most appropriate means for the State to implement its considered policies.”) (Breyer, J., dissenting).

<sup>137</sup> See, e.g., *Ward v. Rock against Racism*, 491 U.S. 781 (1989) (upholding a city regulation limiting the volume of amplified noise at a public concert band shell as a reasonable regulation of the time, place and manner in which public concerts took place on the grounds that it was content neutral and narrowly tailored to a legitimate purpose: namely, protecting citizens from unwelcome noise); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (“Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions. We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.”).

<sup>138</sup> *Id.* at 294-295 (upholding a ban on sleeping in national parks as a “defensible . . . time, place or manner restriction on expression” given no evidence that the regulation targeted speech or attempted to ban sleeping altogether); *Barnes*, 501 U.S. at 571 (upholding ban on entirely nude dancing on the grounds that “the requirement that the dancers don pasties and G-strings does not deprive the dance of whatever erotic message it conveys”).

They simply would not be able to ban the performance of sport, or the training necessary to allow that performance, or otherwise target those who produce, promote or take part in the sport because of the messages that its performances convey. Under the principles that inform the contemporary First Amendment, this would obviously be a good thing. As Justice Brennan noted, in *Texas v. Johnson*, “if there is a bedrock principle underlying the first amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”<sup>139</sup>

Although the sheer popularity of sports works as a kind of prophylactic against repression—after all, who would want to vote for the politician who banned baseball? — spectator sports, like all other public sphere activities, are vulnerable to government censorship. Contemporary efforts in both the United Kingdom and the United States to ban the sport of boxing, and the successful efforts of opponents of mixed martial arts in the United States to get the sport banned in various states, demonstrate as much.<sup>140</sup> Serious health and safety concerns obviously played a role in the move to ban these sports, but so too did concerns with both the violent and hyper-masculine messages both sports were perceived to send. In the United Kingdom, for example, opponents of boxing compared the sport to pornography. Just as pornography, by valorizing the subjugation of women, depraves and corrupts those who consume it, so too, they argued, did boxing, by valorizing violence, deprave and corrupt its fans.<sup>141</sup> Similar concerns with the effect of the sports’ messages on its audience informed the anti-MMA movement in the United States. Sponsors of the bill to ban MMA in New York asserted, for example, that the ban was justified because the sport of MMA was “disgraceful, animalistic and disgusting” and “sets an abominable example for our youth.”<sup>142</sup> Whatever we may feel about either sport, arguments that they should be banned—and in the United States, the successful enactment of such bans—premised, at least in part, on the dangerous, disgusting or disgraceful messages that they communicate to their audiences clearly implicates a “bedrock principle” of First Amendment concern. Yet, under the precedents outlined in Part I of this Article, the First Amendment has no relevance to struggles over the status of these sports, and the government retains its power, in this arena of public life if no other, to act as moral censor.

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<sup>139</sup> *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

<sup>140</sup> For a discussion of the issues involved in the anti-boxing movement in the United States and the United Kingdom, see K. Jones, *A Key Moral Issue: Should Boxing be Banned?*, 4 *CULTURE, SPORT, SOCIETY* 63 (2001). A discussion of the anti-MMA movement in the United States see Geoff Varney, *Fighting for Respect: MMA's Struggle for Acceptance and How the Muhammad Ali Act Would Give it a Sporting Chance*, 112 *W. Va. L. Rev.* 269 (2010).

<sup>141</sup> Jones, *A Key Moral Issue*, *supra* note 140, at 69.

<sup>142</sup> James Dao, *Senate Chief in Albany, Reversing Himself, Says He Backs a Ban on Ultimate Fighting*, *N.Y. TIMES*, Feb. 11, 1997.

#### D. Indirect Benefits

Recognizing spectator sport as First Amendment protected expression would therefore help safeguard an important sphere of cultural expression in the United States from governmental repression and political control. It would have two other, more indirect, benefits as well.

First, it would help clarify what is at present the rather vexing case law governing art and entertainment. In 1981, Justice White declared, in *Schad v. Mt Ephraim*, that “[e]ntertainment, as well as political and ideological speech, is protected [by the First Amendment]; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee.”<sup>143</sup> The sports cases make clear that this is not in fact true. Nonetheless, courts continue to assert that entertainment in general is protected by the First Amendment<sup>144</sup>—even as others note that, in fact, it is not.<sup>145</sup>

The recognition of spectator sport as a constitutionally protected activity would help clarify matters, by bringing for the first time all genres of audience-oriented entertainment under the First Amendment’s purview. Non-audience oriented entertainments, such as gambling and recreational athletics, would remain outside the First Amendment guarantee. Strictly speaking, therefore, Justice White’s claim would still not be true—that is, if we define entertainment broadly, to include all activities designed to provide participants amusement and pleasure, rather than more narrowly, to refer only to “amusement or diversion provided especially by performers” (as Merriam-Webster, for example, defines the term).<sup>146</sup>

Nonetheless, the distinction between audience-directed and other forms of entertainment is—unlike the current distinction between athletic and artistic kinds of audience-directed entertainment acts—a justified one, well-grounded in the First Amendment’s traditional priorities and concerns, and specifically its core concern with speech about matters of “public concern.”<sup>147</sup> While gambling and mountain-biking are activities

<sup>143</sup> *Schad v. Mt. Ephraim*, 452 U.S. 61, 65-66 (1981).

<sup>144</sup> *Club Retro LLC v. Hilton*, 568 F.3d 181, 211 (5th Cir. 2009); *Willis v. Town of Marshall*, 426 F.3d 251, 260 (4th Cir. 2005); *Tacyne v. Philadelphia*, 687 F.2d 793, 796 (3d Cir. 1982);

<sup>145</sup> *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1096 (7th Cir. 1990) (noting that [t]he passage... from *Schad* cannot have been meant literally”).

<sup>146</sup> *Entertainment*, MERRIAM-WEBSTER ONLINE DICTIONARY. <http://www.merriam-webster.com/dictionary/entertainment> (definition 3a). Definition 3b (“something diverting or engaging”) references the alternative, broad definition of the term.

<sup>147</sup> *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 757-759 (1985) (“We have long recognized that not all speech is of equal First Amendment importance. It is speech on ‘matters of public concern’ that is “at the heart of the First Amendment’s protection.”) (quoting *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)). See also *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (Speech on public issues occupies the “highest rung of the hierarchy of First Amendment values”); *Garrison v.*

that take place in public, they are not activities that address themselves to a public audience. They do not as a result implicate the same First Amendment values as do audience-oriented performances like plays, books, and of course, spectator sports—all of which, by addressing a public audience, function to communicate and express matters of “public concern.”

Extending protection to spectator sports would therefore replace what I have suggested is ultimately an arbitrary distinction between different kinds of audience-oriented expressive acts (namely, artistic versus athletic performances) with a distinction that recognizes instead the different kinds of social relationships and constitutional interests involved in practices that address a public audience, and therefore have the power to broadly impact public attitudes and beliefs, and those that do not. Extending protection to all forms of audience-oriented entertainment would also finally expunge from the doctrine the troubling distinction between “entertainment” and “information” that the Court rejected as a plausible basis for distinguishing between protected and unprotected speech over sixty years ago—and yet which courts continue to invoke to justify their conclusion that spectator sports do not constitute a form of expression worthy of First Amendment protection.<sup>148</sup>

In addition to the clarity it would help bring to the case law governing entertainment, recognizing spectator sport as an expressive activity would clarify the doctrine in another way: by avoiding what we might call the “media fetishism” that currently besets the sports cases. As is true in other domains of the First Amendment, the sports case law treats live performance very differently than it treats the same performance when filmed or broadcast.<sup>149</sup> Under the precedents discussed in Part I, live athletic performance gets effectively no protection. And yet, courts generally agree that the broadcast of a sporting event is a fully protected expressive act.<sup>150</sup>

From either an audience-centric or a speaker-centric view of the First Amendment, however, there is little justification for treating the act

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Louisiana, 379 U.S. 64, 74-75 (1964) (“[Speech] concerning public affairs is more than self-expression; it is the essence of self-government.”).

<sup>148</sup> *Infra* note 31-33, and accompanying notes.

<sup>149</sup> For an argument about the unjustifiable distinction the First Amendment case law makes with respect to live and mediated performance in a very different part of First Amendment law, see Amy Adler, *Performance Anxiety: Medusa, Sex and the First Amendment*, 21 YALE J.L. & HUMAN. 227, 235 (2009) (pointing out that under current precedents, “sexual behavior caught on film has more speech protection than when it is live”).

<sup>150</sup> *United States Satellite Broadcasting Co. v. Lynch*, 41 F. Supp. 2d 1113, 1121 (E.D. Cal. 1999) (holding that sports broadcasters are entitled to First Amendment protection and that the argument “that telecasts of boxing do not enjoy First Amendment protection because boxing is somehow “less valuable” than other subjects, runs contrary to every principle of the Free Speech Clause itself”); *TVKO v. Howland*, 15 OTR 335 (Or. T.C. 2001) (striking down a state tax law imposed solely on broadcasters of boxing matches on First Amendment grounds).

of turning on the video camera as a constitutionally significant event when what is being filmed is itself an audience-oriented performance like a sports game. In other contexts, of course—where what is recorded is not something that was intended or performed in order to be seen—the act *is* constitutionally significant because what it does, in effect, is to transform a non-audience-directed act (the display of the northern lights, for example) into something that is addressed to an audience. This is not true, however, of the act of videotaping a football game because, in that case, an audience already exists. As a result, the act of videotaping a football game may enable more people to watch the game, thereby extending the size and scope of its audience, but it does not transform the game into something that is directed at a public audience.

Courts provide no justification for the distinction that the case law draws between live and broadcast sport. Nor does the commentary.<sup>151</sup> An obvious explanation for the different treatment of live and mediated expression might be the special solicitude due the press under the Press Clause of the First Amendment. And yet courts do not tend to invoke the Press Clause in these decisions; and most observers suggest it to be a largely dormant source of constitutional protection.<sup>152</sup> In fact, what courts' solicitude to the broadcasting of sports may reflect is their recognition that at least the act of *watching* sports is a constitutionally significant activity. But if this is the case, why does First Amendment protection extend only to those who watch sports on television, rather than in person?

Extending First Amendment protection to spectator sport would therefore get rid of another doctrinal distinction—in this case, the distinction between live and mediated representations of sport—that currently complicates the case law without appearing to further any of the purposes of the First Amendment. It would ensure that it is not only the expressive interests of those who broadcast sports or watch sports on television that receive constitutional protection but the expressive interests of those who play and promote sports, and those who watch sport in person as well. More broadly, it would ensure that First Amendment doctrine recognizes the expressive significance of spectator sport as performance, no matter the form in which it is performed, or received. If the act of watching sport on television is constitutionally protected, the act of watching sport live and in the stadium—and of playing it—should be as

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<sup>151</sup> In fact the only commentary I have been able to find that examines this question is a student note, Joshua A. Stein, *Hitting Below the Belt: Florida's Taxation of Pay-Per-View Boxing Programming is a Content-Based Violation of the First Amendment*, 14 J.L. & Pol'y 999, 1002 (2006).

<sup>152</sup> See, e.g., David A. Anderson, *Freedom of the Press* 80 TEX. L. REV. 429, 430 (2002) (“[A]s a matter of positive law, the Press Clause actually plays a rather minor role in protecting the freedom of the press.”); C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955, 956 (2007) (stating that “[t]he Court has never explicitly recognized that the Press Clause involves any significant content different from that provided to all individuals by the prohibition on abridging freedom of speech.”).

well. To do otherwise is to ignore all the expressive interests, other than those of the broadcasters, involved in the performance of a game of spectator sport.

#### IV. CONCLUSION

Sports sociologists frequently complain about the lack of interest that social scientists have historically demonstrated in the topic of sport. Indeed, for many decades, the study of sport was a topic of only marginal interest in the social sciences. As the sociologist Pierre Bourdieu noted in 1988, the sociology of sport faced “special difficulties . . . ; scorned by sociologists, it is despised by sportspersons.”<sup>153</sup> Sport appeared too inconsequential an activity to warrant serious study; something that was too divorced from the concerns of the everyday social world to matter. Indeed, sport comprises part of a broader category of human activities that philosophers call generally “play,” and that is defined by its separation from the everyday social world.<sup>154</sup> It is this, perhaps, that has led to the widespread perception—a perception that courts clearly share—that sport is a merely “trivial” activity, entertaining, perhaps, but unimportant.<sup>155</sup>

And yet, as the extensive body of social scientific research that has emerged over the two and a half decades since Bourdieu lamented the plight of the sport sociologist demonstrates, it is in fact because of its divorce from the everyday social world that sports can provide such a powerful vehicle for the expression of social ideals and values. By insulating participants from the complexity, and inequality, characteristic of the everyday social world, games provide an environment in which what athletes demonstrate, and what audiences watch, is the concentrated performance of individual skill, as revealed through the competitive struggle to win. What this allows, in turn, is the expression—in a particularly powerful form—of messages about individual virtue, beauty, identity, and political community.

Social scientists’ recognition of the cultural and political significance of the spectator sports has led, over the past two decades, to an explosion of research and writing devoted to the analysis of the practice and significance of sport in contemporary public culture.<sup>156</sup> There has not,

<sup>153</sup> Pierre Bourdieu, *Program for a Sociology of Sport*, 5 *SOCIOLOGY SPORT J.* 153, 153 (1988).

<sup>154</sup> The most famous definition of the category is that provided by Johan Huizinga in *Homo Ludens*. Huizinga defines play as: “a ‘free activity standing quite consciously outside ‘ordinary life’ . . . . It is an activity connected with no material interest, and no profit can be gained by it. It proceeds within its own proper boundaries of time and space according to fixed rules and in an orderly manner.” JOHAN HUIZINGA, *HOMO LUDENS* 13 (1955).

<sup>155</sup> See, e.g., Early, *supra* note 121, at 2-3 (making this point).

<sup>156</sup> For a good overview of only some of the recent scholarship on the topic see Robert E. Washington and David Karen, *Sport and Society*, 27 *ANN. REV. SOCIOLOGY* 187-212 (2001). See also Niko Besnier & Susan Brownell, *Sport, Modernity and the Body*, 41 *ANN. REV. ANTHROPOLOGY* 443 (2012).

however, been a similar reconceptualization of the value of sport in the First Amendment case law. This Article has argued that there should be: that, for some of the same reasons that led the Court recently to recognize video games as speech, spectator sports should also be recognized as expressive acts, and those who play in them, fund them or promote them entitled to First Amendment protection for their participation in the act. Indeed, to an only more profound degree than video games, spectator sport provides a powerful venue for the articulation, negotiation, and contestation of our popular attitudes and beliefs, including our attitudes and beliefs about that most central of American preoccupations—competition itself.<sup>157</sup>

Given the centrality of sport to American public culture, and the centrality of the idea of competition to American culture and ideology, the dismissal and general neglect of the question of the First Amendment status of sport is both unfortunate and unnecessary. It is certainly not required by the doctrinal rules that today set the boundaries of the First Amendment. Instead, as this Article has argued, denying First Amendment protection to spectator sport only distorts the doctrine, by maintaining in it distinctions—between information and entertainment, between athletic and artistic expression, and between live and mediated representations of sport—that have either been expressly rejected by the Supreme Court as a legitimate basis on which to distinguish between protect and unprotected speech or simply do not promote any of the purposes that the First Amendment is intended to advance.

It is widely recognized that America is a “sports-crazy” country. It is time for First Amendment doctrine to also recognize the expressive significance of spectator sport.

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<sup>157</sup> As Gerald Early has argued, spectator “[s]port is how human beings perform the art and craft of competition. . . . Trying to understand what sport is about” therefore means “trying to understand what winning and losing are all about.” Early, *supra* note 121, at 5.