Volume 20 | Issue 1 Article 2

1-1-2013

What's All the Noise About: Did the New York Yankees Violate Fans' First Amendment Rights by Banning Vuvulezas in Yankee Stadium?

Shane Kotlarsky

Follow this and additional works at: http://digitalcommons.law.villanova.edu/mslj

Part of the Entertainment and Sports Law Commons, and the First Amendment Commons

Recommended Citation

Kotlarsky, Shane (2013) "What's All the Noise About: Did the New York Yankees Violate Fans' First Amendment Rights by Banning Vuvulezas in Yankee Stadium?," *Jeffrey S. Moorad Sports Law Journal*: Vol. 20: Iss. 1, Article 2.
Available at: http://digitalcommons.law.villanova.edu/mslj/vol20/iss1/2

This Article is brought to you for free and open access by Villanova University School of Law Digital Repository. It has been accepted for inclusion in Jeffrey S. Moorad Sports Law Journal by an authorized administrator of Villanova University School of Law Digital Repository. For more information, please contact Benjamin.Carlson@law.villanova.edu.

WHAT'S ALL THE NOISE ABOUT: DID THE NEW YORK YANKEES VIOLATE FANS' FIRST AMENDMENT RIGHTS BY BANNING VUVUZELAS IN YANKEE STADIUM?

SHANE KOTLARSKY*

I. INTRODUCTION

When Anthony Zachariadis attended a New York Yankees game at Yankee Stadium on June 17, 2010, all he wanted to do was to cheer on his hometown Yankees, and maybe heckle the visiting Philadelphia Phillies and their fans a little bit too.[1] Zachariadis brought a vuvuzela with him to the stadium, and, after he allegedly used it a few times to celebrate Yankees plays and to jeer at the Phillies and their fans, Yankees security gave Zachariadis a choice: either stop blowing the vuvuzela or leave.[2] Zachariadis opted to leave Yankee Stadium.[3] The Yankees have since banned the horns from the stadium.[4]

A vuvuzela is a plastic air horn that was first introduced to the world on a large scale during the 2010 World Cup in South Africa.[5] While the horns had been popular with soccer fans in Africa and South and Central America for some time, their prevalence during the 2010 World Cup was a rude introduction for many.[6] The horn, capable of reaching 127 decibels, became the unofficial soundtrack of the World Cup.[7] Its noise was heard unceasingly during

* Thank you to my family and to Brooke Childers for all their love and support. Special thanks to Professor Gabe Feldman for his guidance throughout the duration of this project. B.A. Rice University, Houston, Texas; J.D. Tulane University Law School, New Orleans, Louisiana.

1. *See* Jeremy Olshan, *Yanks Ban Vuvuzela Pests' Instrument of Torture*, N.Y. POST, June 17, 2010, at 3, *available at* http://www.nypost.com/p/news/local/bronx/bronx_blowhards_v3yRWOSPKLLHaIUNFaus1I (describing why Zachariadis brought vuvuzela to Yankee Stadium).

2. *See id.*

3. *See id.*

4. *See* David Weiner, *Vuvuzelas Banned From Yankee Stadium*, HUFFINGTON POST (June 17, 2010, 3:40 PM), http://www.huffingtonpost.com/2010/06/17/vuvuzelas-banned-from-yan_n_616282.html (describing policy banning vuvuzelas from Yankee Stadium).

5. *See World Cup 2010: Organisers Will Not Ban Vuvuzelas*, BBC (June 14, 2010, 1:23 PM) http://news.bbc.co.uk/sport2/hi/football/world_cup_2010/8737455.stm (describing prevalence of vuvuzelas at 2010 World Cup).

6. *See id.*

7. *See id.* By comparison, a drum can reach 122 decibels, and a whistle can reach 121.8 decibels. *See id.* Both a jet engine and a gunshot are 140 decibels, and

Published by Villanova University School of Law Digital Repository, 2013

matches, even blocking out the sound of the television commentators at times.[8] The constant stream of vuvuzela noise from fans has been compared to "the drone of a thousand bees or a herd of stampeding elephants."[9] While many fans and players called for the vuvuzelas' removal from the World Cup, the organizers decided against it, wanting to maintain the authenticity of the event.[10] Since the end of the World Cup, vuvuzelas have made their way to other continents, earning bans at Wimbledon and at the stadiums of several English Premier League teams.[11] The Yankees were simply the next in line to ban the horns.[12]

While Zachariadis has not filed suit against the Yankees, one has to wonder whether the Yankees may have violated his and fellow Yankees fans' First Amendment rights by banning vuvuzelas from Yankee Stadium. The scope of this Article may be limited to examining a narrow example of a restraint on a fan's First Amendment rights, but the problem of fans' speech being restricted in private stadiums is not confined to just one type of speech or one team.[13] This Article seeks to bring to light the prevalence of and

hearing loss begins at 180 decibels. *See Decibel (Loudness) Comparison Chart*, GALEN CAROL AUDIO, http://www.gcaudio.com/resources/howtos/loudness.html (last visited Jan. 29, 2012) (listing volume levels of different sounds). While the difference between 127 and 122 decibels may not seem like much, a sound that is ten decibels more is ten times louder, so a vuvuzela is five times louder than a drum or whistle. *See What is a Decibel, and How is it Measured?*, HOWSTUFFWORKS, http://www.howstuffworks.com/question124.htm (last visited Jan. 29, 2012) (defining decibel and providing examples of decibel levels for common noises); *see also World Cup 2010*, *supra* note 5.

8. *See id.*

9. *See id.*

10. *See id.* ("[A] World Cup spokesman insisted vuvuzelas are 'ingrained in the history of South Africa' and will remain.").

11. *See* Weiner, *supra* note 4; *see also Horn Scorn: Teams Ban Vuvuzelas*, ESPN (July 20, 2010, 2:14 PM) http://espn.go.com/sports/soccer/news/_/id/5394238/tottenham-hotspur-other-teams-ban-vuvuzelas-stadiums (noting that English Premier League clubs have also banned vuvuzelas).

12. *See* Weiner, *supra* note 4.

13. *See, e.g.*, Michael David Smith, *Fan Sues Over NFL Conduct Policy, Says He Has a Right To Swear*, NBCSPORTS (Feb. 3, 2012, 3:38 PM), http://profootballtalk.nbcsports.com/2012/02/03/fan-sues-over-nfl-stadium-conduct-policy-says-he-has-a-right-to-swear/ (describing case of Arizona Cardinals fan who recently filed suit against San Diego Chargers for being removed from stadium for "saying 'F— you' to two Chargers fans who challenged him to a fight"); Dan Steinberg, *Redskins Ban Signs at FedEx Field*, WASH. POST (Oct. 27, 2009, 2:03 PM), http://voices.washingtonpost.com/dcsportsbog/2009/10/signs_banned_at_fedex_field.html (discussing how Washington Redskins banned all signs and banners from FedEx Field, allegedly for safety reasons, but also in effort to suppress negative speech about owner, Dan Snyder); Mike Suggs, *Octopus Trials: NHL Continues to Fight the Tradition in Detroit*, BLEACHER REPORT (Apr. 15, 2011), http://bleacherreport.com/articles/667399-octopus-trials-nhl-continues-to-fight-the-tradition-in-detroit (detailing how Detroit Red Wings fan was removed from arena and fined by Detroit Police for

issues with prohibition on fan speech in private stadiums by examining the possible success of a claim, were Zachariadis to bring one.

Part II looks at whether vuvuzela noise should be protected by the First Amendment to the U.S. Constitution as cheering speech or as expressive conduct. Because a vuvuzela is obviously not speech as it is typically defined, Part II addresses courts' protection of conduct and of non-verbal or non-written speech.

Part III focuses on the type of scrutiny with which a court would analyze the Yankees' decision to ban vuvuzelas from Yankee Stadium. Whether the court analyzes the speech-prohibiting rule under strict or intermediate scrutiny depends on whether the restriction is viewed as a content-neutral restriction and whether the Yankees have a substantial governmental interest in restricting vuvuzelas at their stadium.

The public forum doctrine divides government-owned property into three categories: traditional public fora, limited public fora, and nonpublic fora. Part IV of this Article examines the public forum doctrine and the extent to which speech can be regulated in each forum, and looks at how the situation in Yankee Stadium, as a potential nonpublic forum, would be analyzed by a court.

Part V looks at what seems to represent the biggest roadblock to a case of First Amendment speech in a professional sports arena: the teams are not state or governmental actors. As is the case with all constitutional provisions, the First Amendment only protects against laws made by Congress.[14] However, private entities may still be subject to these laws if they are deemed to be state actors via either a symbiotic relationship or entwinement. Part V will examine the possibility that the Yankees are state actors under both of these theories. This Article concludes by determining that vuvuzelas are protected as speech under the First Amendment, and that fans should have standing to bring a Constitutional claim against a privately owned professional sports team because of the team's relationship with the government.

II. SPEECH PROTECTED BY THE FIRST AMENDMENT: IS A VUVUZELA CONSTITUTIONALLY PROTECTED SPEECH?

The first issue in any First Amendment case is determining whether the speech or actions are of the type protected by the First

throwing octopus onto ice— long-standing tradition in Detroit—during Red Wings' playoff game).

14. *See* U.S. CONST. amend. I (explaining right to free speech).

Amendment.[15] The First Amendment prohibits Congress from making any law that "abridg[es] the freedom of speech."[16] However, the First Amendment does not provide protection for all speech.[17] In defining the limits of First Amendment protection, the Supreme Court of the United States has held against laws that protect obscenity, libelous or defamatory language, fighting words, and incitement of imminent illegal action.[18] Other than these defined groups of speech not afforded protection, all speech is presumed to be deserving of protection under the First Amendment.[19]

The Court has also recognized in many decisions that First Amendment-protected "speech" is not limited to just written or spoken words.[20] Conduct that expresses the same idea as the spoken or written word may be deserving of the same Constitutional protection.[21] Because vuvuzela noise is clearly not spoken or written words, it could fall into two possible categories of constitutionally protected actions: "cheering speech," a term used to describe the expressive speech of fans at sporting events;[22] or conduct that is protected as speech.[23]

---

15. *See* Texas v. Johnson, 491 U.S. 397, 403 (1989) (determining whether flag burning constitutes expressive conduct that is protected by First Amendment); U.S. CONST. amend. I.

16. *See* U.S. CONST. amend. I. The Due Process Clause of the Fourteenth Amendment extends this prohibition, like other constitutional provisions, to states and state actors. *See* U.S. CONST. amend. XIV, § 1 (imposing limits on state action); Christopher J. Kaufman, *Unsportsmanlike Conduct: 15-Yard Penalty and Loss of Free Speech in Public University Sports Stadiums*, 57 U. KAN. L. REV. 1235, 1242 (2009) (citing Rochin v. California, 342 U.S. 165, 169 (1952)).

17. *See* Beauharnais v. Illinois, 343 U.S. 250, 255-56 (1952) (noting classes of speech that may be constitutionally prohibited).

18. *See id.* at 256-257 ("It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.").

19. *See Johnson*, 491 U.S. at 403.

20. *See id.* at 404 ("The First Amendment literally forbids the abridgment only of 'speech,' but we have long recognized that its protection does not end at the spoken or written word.").

21. *See id.* at 420 (holding, *inter alia*, that burning of American flag is expressive conduct); Spence v. Washington, 418 U.S. 405, 406 (1974) (holding, *inter alia*, that hanging flag upside down with peace sign sewn onto it is expressive conduct); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505 (1969) ("[R]ecogniz[ing] the expressive nature of students' wearing of black armbands to protest American military involvement in Vietnam."); United States v. O'Brien, 391 U.S. 367, 376 (1968) (holding that burning of draft card is expressive conduct).

22. *See* Howard M. Wasserman, *Cheers, Profanity, and Free Speech*, 31 J.C. & U.L. 377, 378 (2005) (describing expressive speech of sports fans as "cheering speech").

23. *See, e.g.*, *Johnson*, 491 U.S. at 420; *Spence*, 418 U.S. at 406; *Tinker*, 393 U.S. at 505.

A. Cheering Speech

"Cheering speech" is a term used by scholars to categorize the "expression by fans related to a sporting event, to all aspects of the game, all the participants in the game, and all the circumstances surrounding the game."[24] It is not limited to oral statements made by fans, but also includes written and symbolic messages and even "throaty booing."[25] The Supreme Court has proclaimed the importance of allowing citizens to express their views on what they consider important political and social issues in several cases.[26] Scholars argue that cheering speech should undoubtedly be constitutionally protected because it provides a platform for political and social commentary.[27]

The link between sports and political commentary may not be as readily apparent as the burning of an American flag was in *Texas v. Johnson*,[28] but many important issues still arise in the context of sports.[29] Arenas and stadiums provide an opportunity for expression on these issues by both fans and athletes.[30] For example, when then-President George W. Bush threw out the first pitch of the 2001 World Series, only a few weeks after the tragedies of September 11, it was seen as a symbol of the strength of the United States.[31] The indelible image of Tommie Smith and John Carlos standing on the podium of the 1968 Summer Olympics in Mexico City, heads bowed and black-glove-enclosed fists raised in the universal sign for Black Power similarly addressed important issues in the sports con-

---

24. *See* Wasserman, *Cheers*, *supra* note 22, at 378.

25. *See* Howard M. Wasserman, *Fans, Free Expression, and the Wide World of Sports*, 67 U. PITT. L. REV. 525, 528-29 (2006) (including written and symbolic messages in definition of "cheering speech"); *see also* Clay Calvert & Robert D. Richards, *Fans and the First Amendment: Cheering and Jeering in College Sports*, 4 VA. SPORTS & ENT. L.J. 1, 16 (2004) (including booing in definition of "cheering speech").

26. *See Johnson*, 491 U.S. at 399; N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (recognizing "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

27. *See* Wasserman, *Fans*, *supra* note 25, at 528-29.

28. *See Johnson*, 491 U.S. at 403.

29. *See* Wasserman, *Fans*, *supra* note 25, at 528-29.

30. *See id.*

31. *See* Hal Bodley, *President's First Pitch Provided Healing Image: Bush's Strike Reaffirmed Influence of Baseball in Troubled Times*, MLB.COM (Sept. 6, 2011, 10:00 AM), http://mlb.mlb.com/news/article.jsp?ymd=20110906&content_id=24295806&vkey=09112011 (explaining symbolic significance of President Bush's first pitch at 2001 World Series).

text.[32] The pervasiveness of sports in our society gives further weight to the idea that cheering speech should be protected as expressive First Amendment speech, regardless of connection to political or social issues, just as it is in the areas of entertainment and performance.[33]

B. Expressive Conduct

As previously mentioned, the Supreme Court has held that in some instances conduct may be deserving of the same constitutional protection as written or oral speech.[34] The test for deciding when expressive conduct is protected as First Amendment speech was first set out in *Spence v. Washington*.[35] The Court then solidified the application and meaning of this test in its decision in *Texas v. Johnson*.[36] Because not all conduct meant by the actor to convey a message is protected as expressive conduct, the test set out by the Court looks at whether the actor intended to "convey a particularized message," and whether the message is likely to be understood by the audience.[37]

The party's intent can be inferred from the context of the situation and the conduct of the actor.[38] For example, in *Tinker v. Des Moines Independent Community School District*, the Court found it appropriate to take into consideration the context of the situation when determining whether the action of students wearing black armbands was sufficiently demonstrative of the message they intended to convey.[39] According to the Court, it was necessary to keep in mind that the "protest" occurred in the middle of the Vietnam War in order to see wearing the armbands as evidence of the students' message.[40]

---

32. *See Tommie's Bio*, TOMMIESMITH.COM, http://www.tommiesmith.com/bio.html (last visited Jan. 18, 2012) (explaining symbolism and significance of Tommie Smith's gesture at 1968 Olympics).

33. *See* Wasserman, *Fans*, *supra* note 25, at 528-29.

34. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 406 (1989); Spence v. Washington, 418 U.S. 405, 409-10 (1974); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505-06 (1969); United States v. O'Brien, 391 U.S. 367, 376-77 (1968).

35. *See Spence*, 418 U.S. at 409-11.

36. *See Johnson*, 491 U.S. at 403.

37. *See O'Brien*, 391 U.S. at 376 ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."); *see also* Spence, 418 U.S. at 410-11.

38. *See id.*

39. *See Tinker*, 393 U.S. at 505.

40. *See Spence*, 418 U.S. at 410 (citing *Tinker*, 393 U.S. at 505).

However, in the interest of protecting various types of possible expressive conduct, the Court has made it a low burden to show that one conveyed a "particularized message" through his or her expressive conduct.[41] In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, the Court looked at other examples of expressive conduct in which the message was less-than-clear, but nonetheless a sufficient message.[42] This included "saluting a flag (and refusing to do so), . . . displaying a red flag, and even '[m]arching, walking or parading' in uniforms displaying the swastika."[43] Similarly, the Court lamented that if conduct were limited to those situations in which the message of the "speech" was obvious to its audience, the test "would never reach the questionably shielded painting of Jackson Pollock . . . or Jabberwocky verse of Lewis Carroll."[44] The impossibility that an audience is certain to understand the exact message one is trying to convey necessitates the Court's test that the audience only be "likely" to understand the message.

However, the United States Court of Appeals for the Sixth Circuit found no particularized message in a middle school student's desire to express herself through her clothing.[45] Unlike the student in *Tinker*, there was no context to which the plaintiff's clothing choice in *Blau v. Fort Thomas Public School District* was a particularized message that its audience could understand.[46] The Sixth Circuit similarly failed to find a particularized message that the specific audience would understand in the blowing of one's car horn to protest the inauguration of a mayor.[47] Like *Blau*, the court in *Meaney v. Dever* found that even in the context of protesting a

41. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos., 515 U.S. 557, 569 (1995) (explaining that expressive conduct does not need "a narrow, succinctly articulable message" to receive constitutional protection).

42. *See id.*

43. *Id.* (citing W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (saluting or refusing to salute flag); Stromberg v. California, 283 U.S. 359 (1931) (displaying red flags); Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43 (1977) (internal citations omitted) (wearing uniform displaying swastika)).

44. *Id.*

45. *See* Blau v. Fort Thomas Public Sch. Dist., 401 F.3d 381, 389 (6th Cir. 2005) ("[T]he Blaus have not met their burden of showing that the First Amendment protects Amanda's conduct-which in this instance amounts to nothing more than a generalized and vague desire to express her middle-school individuality.").

46. *See id.*

47. *See* Meaney v. Dever, 326 F.3d 283, 286-88 (1st Cir. 2003) ("Blasting an air horn is qualitatively different from more readily understood expressive conduct of inherent First Amendment significance, such as picketing, boycotting, canvassing, and distributing pamphlets. It is not an expressive act a fortiori, and thus does not implicate the First Amendment unless context establishes it as such.").

mayor's inauguration, the conduct was insufficient to show a particularized message.[48]

In addition to the scenarios mentioned in which courts found the action taken to be expressive conduct, and those where it has not, the Supreme Court has recognized expressive conduct in various types of entertainment.[49] The Court has found that there is a "particularized message" and the likelihood that the audience will understand that message – and therefore the need to afford constitutional protection – in music generally, nude dancing, and even "low-grade" entertainment.[50] In the context of a sporting event, and with the Court's protection of other forms entertainment with less-particularized messages, fans' cheering and jeering is likely to fall within Constitutionally protected speech. After all, there are only so many teams to cheer for at any given game.

Looking at the hypothetical case at issue in this Article, blowing a vuvuzela could arguably fall into either category of non-speech protected as speech by the First Amendment: cheering speech or expressive conduct. If booing or whistling can be considered cheering speech, then a vuvuzela must be similarly protected under the Constitution, because it communicates the same message in an almost identical manner. Additionally, fans are often encouraged to simply make noise in support of their team; "make some noise" and "get loud" are frequently seen flashing across the jumbotron of any stadium in America. If a team were to say that one type of noise is permitted in the stadium while another that also has the purpose of supporting the team is not, this would seem to be contrary to the intention of the law. Despite opponents' arguments that the vuvuzela noise is devoid of an expressive element – that it is merely a deafening distraction in the arena – it must fall

48. *See id.* at 288.

49. For cases where the court found actions to constitute expressive conduct, see Texas v. Johnson, 491 U.S. 397, 420 (1989); Spence v. Washington, 418 U.S. 405, 406 (1974); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505 (1969); United States v. O'Brien, 391 U.S. 367, 376 (1968). For further discussion of these expressive conduct cases, see *supra* notes 34-48 and accompanying text. For cases where the Court found that actions did not amount to expressive conduct, see *Blau*, 401 F.3d at 389-90; *Meaney*, 326 F.3d at 287-88. For further discussion of these expressive conduct cases, see *supra* notes 34-48 and accompanying text.

50. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) ("Music, as a form of expression and communication, is protected under the First Amendment."); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565-66 (1991) (holding that nude dancing is expressive conduct within First Amendment); *see also* IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386, 391 (4th Cir. 1993) (holding that fraternity's "ugly woman contest" qualified as expressive conduct under Johnson test).

into the same category of "cheering speech" as booing and whistling.

Alternatively, a vuvuzela could be seen as expressive conduct under the *Johnson* test, which looks at whether the action conveys a particularized message likely to be understood by its audience. When looking at the context of the situation to analyze whether a particularized message exists, most blowing of a vuvuzela is done in response to an event on the field. While this is likely true for Zachariadis' situation, many complained about the non-stop chorus of vuvuzelas during World Cup matches.[51] Despite this counter-argument, the hypothetical case at issue in this Article is not analogous to *Meaney*, in which the Sixth Circuit held that the multitude of reasons for blowing one's car horn was not sufficient for a finding that the audience understood the message. In a sports arena, there are a limited number of reasons to make noise and they are all generally understood by the other spectators. Therefore, vuvuzela noise likely passes the first part of First Amendment scrutiny under either the cheering speech or the expressive conduct tests.

III. FIRST AMENDMENT SCRUTINY UNDER THE CONTENT-DISTINCTION PRINCIPLE

After determining whether the action is likely to be constitutionally protected as expressive speech or conduct, the next step in First Amendment scrutiny is to look at the validity of the rule prohibiting the speech.[52] Because the First Amendment prohibits Congress from making these types of rules, the rules are referred to as governmental actions.[53] In the situation hypothetically at issue in this Article, if a vuvuzela is afforded protection under the First Amendment, either as "cheering speech" or expressive conduct, the next step is to look at whether the Yankees' ban on vuvuzelas is a violation of fans' First Amendment rights. Courts use the content-distinction principle to determine whether the government has justified its restriction of a constitutional right.[54] The content-distinction principle dictates that the court must analyze the complained-of regulation under either strict or intermediate scrutiny, depend-

51. *Compare* Olshan, *supra* note 1, *with World Cup 2010*, *supra* note 5.

52. *See O'Brien*, 391 U.S. at 376-77.

53. *See id.*

54. *See* Renton v. Playtime Theaters, Inc., 475 U.S. 41, 46-47 (1986) ("This Court has long held that regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment.").

ing on whether the regulation restrains the speech based on its content.[55] The content-distinction principle, therefore, divides speech regulations into two categories: content-based and content-neutral.[56]

Content-based restrictions focus on either the subject matter or viewpoint of the speech.[57] Because this is the most direct means of restricting speech, it is the most at odds with the letter and intent of the First Amendment.[58] Therefore, the courts apply a strict scrutiny test to determine the constitutionality of a content-based restriction.[59] Under a strict scrutiny test, the government has the burden of showing that the regulation was necessary to serve a compelling governmental interest.[60] In other words, they must prove that there were no less restrictive alternative means to achieving the intended goal.[61] If the government can show that there was a compelling interest for restricting speech, the court must uphold the constitutionality of the regulation.[62] Because the restriction by the Yankees on vuvuzelas is not based on the subject matter or viewpoint of the person blowing the vuvuzela, this Article will focus on the second type of restrictions: content-neutral.

A. Content-neutral Restrictions.

A content-neutral, or "time, place, or manner," restriction attempts to curtail speech by regulating when, where, or how a person may engage in speech (oral, written, or expressive conduct) rather than restricting the message of the speech.[63] The Court has further identified two subcategories of content-neutral restrictions: direct and incidental.[64] In general, direct regulations restrict activities that are directly related to expressive activity protected by the First Amendment, such as leafleting or picketing.[65]

---

55. *See* KEITH WERHAN, FREEDOM OF SPEECH: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 72-74 (2004) (explaining effect of applying content-distinction principle).

56. *See Renton*, 475 U.S. at 46-47.

57. *See id.* (citing Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972)).

58. *See* WERHAN, *supra* note 55, at 73.

59. *See id.*

60. *See id.*

61. *See id.* at 73-74.

62. *See id.* at 74.

63. *See id.*

64. *See id.*

65. *See id.*; Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992) (analyzing restriction that prohibited members of religious group from handing out religious literature and soliciting donations in several New York area

Incidental regulations, on the other hand, restrict activities that are not normally associated with expressive activity but which may curtail First Amendment speech.[66] However, incidental regulations only trigger First Amendment scrutiny if they operate similarly to direct regulations.[67] An incidental restriction can act like a direct regulation when it is not aimed at the significant expressive element associated with the restricted activity, but has the effect of limiting that element.[68] For example, in *Clark v. Community for Creative Non-Violence*, demonstrators were prohibited from sleeping in tents on the National Mall, because the United States Park Service regulations permit sleeping only in designated camping areas, which the National Mall was not.[69] The Supreme Court held, "[T]he prohibition on camping, and on sleeping specifically, is content-neutral and is not being applied because of disagreement with the message presented."[70] While the demonstrators' claim was ultimately unsuccessful, *Clark* shows how a regulation prohibiting camping in non-designated areas can have the incidental effect of limiting speech and consequently how an incidental regulation can act to directly affect someone's First Amendment-protected speech or conduct.[71]

Another example of a situation in which an incidental restriction acts as a direct restriction, is when the regulation has the "inevitable effect of singling out those engaged in expressive activity."[72] In *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, the Court held that by imposing a significant tax on the purchase of large quantities of ink and newspaper, the restriction put in place by the Minnesota government had the incidental effect of restricting newspaper companies' ability to purchase supplies,

---

airports); *see also* Police Dep't of Chi. v. Mosley, 408 U.S. 92 (1972) (analyzing law prohibiting picketing within 150 feet of school buildings).

66. *See* WERHAN, *supra* note 55, at 74-75.

67. *See id.* at 75. *See, e.g.*, Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 585 (1983) (ruling that tax on paper and ink violated First Amendment by imposing significant burden on freedom of press).

68. *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 299 (1984) ("[R]easonable time, place, or manner regulations normally have the purpose and direct effect of limiting expression but are nevertheless valid.").

69. *See id.* at 290-91. The demonstrators were planning to sleep in tents on the National Mall as part of their protest to bring light to the plight of the homeless in our country. *See id.*

70. *Id.* at 295.

71. *Id.* at 292.

72. WERHAN, *supra* note 55, at 74-75; *see also Minneapolis Star & Tribune Co.*, 460 U.S. at 591-93.

and therefore, restricted their "freedom of the press."[73] Both *Clark* and *Minneapolis Star & Tribune Co.* provide excellent examples of ways in which a rule or law that is not intended to restrict one's First Amendment rights can act in a way that prevents exercise of Constitutional guarantees.

Unlike content-based restrictions which – deservedly so – are reviewed under a standard of strict scrutiny, content-neutral restrictions are subject to intermediate scrutiny.[74] This applies to both direct and incidental regulations, but as mentioned above, only in situations that an incidental regulation acts as a direct regulation.[75] Because content-neutral regulations do not directly limit the content of the speech, as do direct regulations, the Supreme Court determined that the strict scrutiny standard was unduly burdensome to the governmental entities making the rules.[76] Instead, the regulations are subject to intermediate scrutiny, which asks whether the regulation furthers "an important or substantial governmental interest," is narrowly tailored to advance that interest, and leaves open ample alternative avenues of communication.[77]

B. Substantial Governmental Interests: Fan Safety and Noise Restrictions

The difference between requiring the government to prove the existence of a "compelling" interest versus a "substantial" interest is significant in the effect on the government's ability to prove the permissibility of its challenged regulation. Not only does the lower burden placed on governments under the intermediate scrutiny standard allow more opportunity to show the necessity for the restriction on peoples' speech, but it also allows the government to show that it did not intend to limit First Amendment speech or

73. *Minneapolis Star & Tribune Co.*, 460 U.S. at 592-93.

74. WERHAN, *supra* note 55, at 74-75.

75. *Id.*

76. *Id.*; *see, e.g.*, United States v. O'Brien, 391 U.S. 367, 377 (1968).

77. *O'Brien*, 391 U.S. at 376-77. The Supreme Court defines intermediate scrutiny in *O'Brien*:

> To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id.; *see also* WERHAN, *supra* note 55, at 75 (quoting *O'Brien*, 391 U.S. at 377).

conduct and that the rule should not be deemed unconstitutional based on unintended consequences.[78]

For example, in *Simon & Schuster, Inc. v. N.Y. State Crime Victims Board*, the Supreme Court found that providing victims of crimes with monetary compensation was an example of a compelling interest that justified New York's content-based "Son of Sam" laws.[79] Under the "Son of Sam" laws, if an entity entered into a contract with a person "accused or convicted of a crime" for a book or other work describing the crime of which they were convicted or accused, whatever money was due to the convicted or accused person must instead be paid to the Crime Victims Board.[80] The Crime Victims Board held the money in an escrow account "for the benefit of and payable to any victim."[81] The Supreme Court found that this was a content-based restriction because it imposed a financial burden on a party based on the content of their speech.[82] Therefore the government restriction was analyzed under strict scrutiny, and it was New York's burden to prove that this remuneration for victims of crimes was a "compelling" governmental interest in justification of restricting authors' and publishers' First Amendment rights.[83] While the Court ultimately held that the law was not sufficiently narrowly drawn to meet the purpose of compensation for victims, it also held that, "[t]here can be little doubt . . . that the State has a compelling interest in ensuring that victims of crime are compensated by those who harm them . . . . The State likewise has an undisputed interest in ensuring that criminals do not profit from their crimes."[84] While this quote may not seem illustrative or useful in defining a "compelling interest," the fact is that the Court goes no further in defining a compelling interest than to say, "[t]here can be little doubt." Perhaps the Court merely applies in this situation what Justice Stewart famously said about obscenity in *Jacobellis v. Ohio*, "I know it when I see it."[85]

The Supreme Court tends to rely on its own precedent in creating a scale between "compelling" and "substantial" governmental interests rather than creating a bright-line rule to define the

78. *See, e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984).

79. 502 U.S. 105, 118-119 (1991) (recognizing state's interest in compensating crime victims).

80. *Id.* at 108-09.

81. *Id.*

82. *See id.* at 115.

83. *See id.* at 125 (Kennedy, J., concurring).

84. *Id.* at 118-19.

85. 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

terms.[86] The Court has even used the terms interchangeably in the same opinion.[87] However, the case law provides examples of governmental interests that would most likely not stand up to a strict scrutiny analysis, but which the court has found to be substantial under intermediate scrutiny.[88] In the context of limiting the rights of sports fans, there are some governmental interests that courts have found to be more convincing than others, but still not sufficiently compelling to stand up under strict scrutiny analysis.[89] These include protecting minors from vulgar language,[90] protecting fans from obstructions and dangerous objects,[91] and a desire to control noise levels.[92]

In *Barrett v. Khayat*, a case was brought against the University of Mississippi complaining that their policy banning, among other things, flags larger than twelve by fourteen inches at football games was a violation of fans' constitutional right to wave a flag in support of their Ole Miss Rebels.[93] The United States District Court for the Northern District of Mississippi held in favor of the University, recognizing the University of Mississippi's argument that it had a legitimate interest in creating a safe and enjoyable stadium atmosphere for its fans by eliminating the potential hazard of flagsticks and the obstruction of other fans' view caused by the flags.[94] While the

86. *See* Kaufman, *supra* note 16, at 1259 (citing U.S. v. Grace, 461 U.S. 171, 177 (1983)).

87. *See* United States v. O'Brien, 391 U.S. 367, 376-77 (1968) ("To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong.").

88. *See* Kaufman, *supra* note 16, at 1259-67; *see, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781 (1989); FCC v. Pacifica Found., 438 U.S. 726 (1978) (recognizing governmental interest in protecting children from exposure to indecent language); Barrett v. Khayat, No. CIV.A. 397CV211BA, 1999 WL 33537194 (N.D. Miss. Nov. 12, 1999) (recognizing governmental interest in "providing game management and control and a safe and pleasant environment for thousands of people").

89. *See* Kaufman, *supra* note 16, at 1259.

90. *See Pacifica*, 438 U.S. at 741.

91. *See Barrett*, 1999 WL 33537194, at *4.

92. *See Ward*, 491 U.S. at 796.

93. *See Barrett*, 1999 WL 33537194, at *1.

94. *Id.* at *4. While "[t]he University officials have stated that because they feared possible injuries caused by flag sticks and had received complaints from spectators that flags obstructed their view," it was well-known and widely understood that a significant reason for the University's decision was an effort to limit the presence of Confederate battle flags at games and to limit the pervasive sentiment of racism that surrounded the University's athletic program. *See id.*; Brian Cabell, *Flag Ban Tugs on Ole Miss Traditions: Confederate Banner Impedes Athletic Recruiting*, CNN (Oct. 25, 1997, 10:44 PM), http://www.cnn.com/US/9710/25/ole.miss ("[The ban on wooden sticks is] ostensibly for safety reasons, but no one is

court did not get into the issue of whether creating a safer environment and eliminating obstructions to the view was a compelling governmental interest (because the restriction was not content-based and there was therefore no need to delve into strict scrutiny analysis), it is not likely that these "substantial" interests would survive strict scrutiny as "compelling" interests.

In *Ward v. Rock Against Racism*, New York City attempted to regulate the volume of rock concerts in Central Park after numerous complaints "about excessive sound amplification" from other park users and residents in the areas around the park.[95] In response to the complaints, the City required concert promoters to use a sound technician and amplification system provided by the City for all of the performers.[96] The Court held that the City had an "undeniable" governmental interest in limiting the volume of the concerts;[97] it "ha[s] a substantial interest in protecting its citizens from unwelcome noise."[98]

Looking at the other factors of the intermediate scrutiny test in this case, the Court found that the restriction was narrowly tailored to the governmental interest without unduly restraining the performers' First Amendment expression, because the City-provided sound technician could control the volume of the concert while still allowing the performer complete control over the sound mix.[99] The Court found that neither the time nor the place of the concerts was restricted and therefore there were sufficient remaining avenues of communication, fulfilling the third prong of the intermediate scrutiny test.[100] Additionally, while the volume restriction may potentially limit the size of the audience capable of hearing the music, it does not affect First Amendment issues, and therefore is not taken into serious consideration during intermediate scrutiny analysis.[101]

---

fooled – it is clearly an attempt to keep out the Confederate flags attached to those sticks."); *see also* JB Clark, *Ole Miss Faces Loss of "From Dixie with Love" if Controversial Chant Continues*, DAILY MISSISSIPPIAN (Nov. 2, 2009, 3:08 AM), http://archive.thedmonline.com/article/ole-miss-band-faces-loss-dixie-love-if-controversial-chant-continues (discussing University Chancellor's request to marching band to stop playing school's fight song, "From Dixie with Love," because students were chanting "the South will rise again" at end of song).

95. 491 U.S. at 784-85.

96. *See id.* at 787.

97. *See id.* at 800.

98. *Id.* at 796 (quoting City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 806 (1984)).

99. *See id.* at 802.

100. *See id.*

101. *See id.*

C. Captive Audience Doctrine

In addition to protecting the safety of spectators, and providing them with unobstructed views and entertainment at a reasonable volume, a governmental entity may have a substantial interest in protecting people from unwilling and unavoidable exposure to "objectionable speech."[102] To decide the constitutionality of restrictions on unwanted speech in enclosed places, the Supreme Court created a standard in *Cohen v. California* that would become known as the captive audience doctrine.[103] Under the captive audience doctrine, governments may make laws that restrict otherwise Constitutionally protected speech in certain places where the listener may not leave or avoid the expression. The doctrine is not universally applicable, however:

> [G]overnment may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas . . . , [but] we have at the same time consistently stressed that "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech."[104]

The Court has sought to protect invasions of unwanted speech into the home, but to attempt to protect everybody from all unwanted speech "would effectively empower a majority to silence dissidents simply as a matter of personal predilections."[105] Therefore, the Court held that where the unwilling recipient can avoid the message by "averting their eyes," or making the "short, though regular, journey from mail box to trash can," they are not a captive audience.[106]

Additionally, the extent to which someone is deserving of protection from unwanted speech depends on where they are and other parties' First Amendment Rights in those places. The *Cohen*

---

102. Cohen v. California, 403 U.S. 15, 21 (1971) (quoting Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 738 (1970)).

103. *See* Gregory Matthew Jacobs, *Curbing Their Enthusiasm: A Proposal to Regulate Offensive Speech at Public University Basketball Games*, 55 CATH. U.L. REV. 547, 555 (2006) ("[T]he Court emphasized that the portion of the statute upon which Cohen's conviction rests evinces no concern . . . with the special plight of the captive auditor. Due to this explanation, the principle has since been labeled the captive audience doctrine.") (internal quotation marks omitted).

104. *Cohen*, 403 U.S. at 21 (quoting *Rowan*, 397 U.S. at 738).

105. *See id.*

106. *See id.*; Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 72 (1983) (reasoning that recipients of mailed contraceptive advertisements were not captive audience because the recipients could simply throw away the advertisements).

Court creates a spectrum of privacy, with the home being the place where people are most deserving of protection from unwanted speech and others have the lowest right to express themselves, to a public space, in which one has a stronger interest in his right to free speech and less of an interest in avoidance of others' expression.[107] The unwilling party is required to take more action to avoid contact with unwanted speech in places outside the home.[108]

Another consideration when applying the captive audience doctrine is that there may be situations in which any contact with certain types of speech cannot be avoided regardless of affirmative action taken towards that goal.[109] When this is the case, the government will always have a substantial interest to justify a restriction on speech. For example, in *FCC v. Pacifica Foundation*, the Court held that the effect of the vulgar language of George Carlin's "Seven Dirty Words" performance could not be negated by turning off the radio.[110] The Court reasoned that holding that a person could successfully avoid the unwanted language by turning off the radio is "like saying the remedy for an assault is to run away after the first blow."[111] The FCC's restriction on Carlin's act was upheld as constitutional, because one's car is not a place easily escaped and apparently neither can one escape Carlin's foul language once it has been heard.[112] This decision may seem strange considering the Court's opinion in *Cohen*, in which it held that people could avoid the plaintiff's obscenity by averting their eyes despite having seen the curse-word once.[113] While one could easily argue that the difference in the facts of each case created the disagreeing opinions, it is moot; the *Pacifica* decision is still good law and any challenger to a restriction on speech must consider the nature of speech and the environ of its audience to decide if they may be a captive audience incapable of escaping the message.

---

107. *Cohen*, 402 U.S. at 21-22. The courthouse where the defendant in Cohen wore his obscenity-laced jacket falls somewhere in between the home and "Central Park." *Id.*

108. *See id.*

109. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 748-49 (1978).

110. *See id.* Vulgar language must be distinguished from obscene language, which is not protected under the First Amendment. *See* Beauharnais v. Illinois, 343 U.S. 250, 255-56 (1952).

111. *Pacifica*, 438 U.S. at 748-49.

112. *See id.* at 749.

113. *See Cohen*, 403 U.S. at 21.

D. The Yankees' Situation Under the Content-Distinction Principle

The Yankees' ban of vuvuzelas is a content-neutral restriction, which would trigger intermediate scrutiny. That test looks at whether the regulation furthers a substantial governmental interest, is narrowly tailored to advance that interest, and leaves open ample alternative avenues of communication.[114] This Part of the Article examines whether the Yankees had a substantial interest in restricting the use of vuvuzelas based on the case law of the content-distinction principle and captive audience doctrine.

Like the University of Mississippi in *Barrett*, the Yankees could claim that there is in an interest in protecting their fans from potential dangers or obstructions to their view. It is unlikely that a court would agree with the Yankees that vuvuzelas present a safety problem or obstruct fans' view. Alternatively, and extending the rationale supplied by the court in that case, the Yankees have a substantial interest in ensuring their fans enjoy their experience in the stadium and constant vuvuzela noise is not exactly conducive to that. This is a losing argument in the hypothetical case. Not only was the court in *Barrett* searching for justification to meet the end goal they sought – elimination of Ole Miss's racist reputation – but fan enjoyment does not seem to reach the level of a compelling interest that the Supreme Court upheld in cases like *Simon & Schuster*.

Use of vuvuzelas as noisemakers in the past may mean the most substantial governmental interest would be in restricting the noise in the stadium. *Ward v. Rock Against Racism* upheld a noise restriction in the interest of other park users and people in the surrounding areas.[115] While many people may live around Yankee Stadium, it is not certain that the noise from the stadium filters out to the surrounding streets, or that it would be any louder than a game normally is or any louder than the normal noise of Bronx streets. However, it may be in the interest of other fans in the stadium that the Yankees enacted the policy, in an attempt to limit the potential noise created by an instrument that can reach 127 decibels.[116]

Despite the strong argument presented by noise-reduction as a substantial governmental interest, the Yankees likely would not be able to overcome the fact that under the captive audience doctrine,

114. *See* WERHAN, *supra* note 55, at 75.

115. 491 U.S. at 803.

116. *See World Cup 2010*, *supra* note 5.

fans are deserving of a lower degree of protection inside the stadium. While opponents of this restriction would argue that unwilling listeners could avoid the vuvuzelas by not entering the stadium in the first place or leaving if they do not like the noise,[117] this is a substantial burden being placed on the unwilling listener.[118] Additionally, vuvuzela noise is not comparable to Carlin's Seven Dirty Words act in *Pacifica Foundation* that the Supreme Court held could not be unlistened-to.

IV. PUBLIC FORUM DOCTRINE

The next step of First Amendment scrutiny looks at "the public forum doctrine," which dictates that the extent to which government actors may regulate speech depends on the type of forum in which the speech is being regulated.[119] The other part of the equation with regards to this doctrine is a person's right to free speech in each type of place, which depends in part on the intended purpose of the forum.[120] The three categories, identified by the Supreme Court in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, are traditional public fora, limited public fora, and nonpublic fora.[121] The Court in *Perry* did more than just name the types of fora and the level of permissible government restriction; it also analyzed the level of scrutiny attached to restrictions on those fora.[122]

A. Traditional Public Fora

As the Supreme Court in *Perry* stated, traditional public fora are those "which by long tradition or by government fiat have been devoted to assembly and debate."[123] Examples of these typically outdoor and wide-open areas include sidewalks, streets, and parks; places where people tend to congregate for the purpose of expressing themselves.[124] Because traditional public fora were used for

117. *See Cohen*, 402 U.S. at 21.

118. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 72 (1983).

119. *See* Kaufman, *supra* note 16, at 1254.

120. *Id. See also* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983) ("The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue.").

121. *See Perry*, 460 U.S. at 45-48; Kaufman, *supra* note 16, at 1254-57.

122. *See Perry*, 460 U.S. at 45-46.

123. *Id.* at 45.

124. *See* United States v. Grace, 461 U.S. 171, 183-84 (1983) ("Sidewalks, of course, are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be

the purpose of public expression, government power to implement restrictions on speech is limited in those areas.[125] The general test of the content-distinction principle is applied: content-based restrictions are examined under strict scrutiny; content-neutral under intermediate scrutiny.[126]

While outdoor venues like parks and streets were assumed to be traditional public fora by the Supreme Court in *Perry* and in other decisions,[127] the analysis should not be so summarily decided. In *United States v. Grace*, the Court stated, "Publicly owned or operated property does not become a 'public forum' simply because members of the public are permitted to come and go at will."[128] In that case, a man brought suit to defend his right to hand out leaflets on the sidewalk in front of the Supreme Court building after being removed pursuant to a statute prohibiting leaflet activity on Supreme Court property including the sidewalk.[129] One of the issues was whether the government made the sidewalk a space available for people to use for "communicative purposes," not simply whether it had traditionally been used for assembly and public expression.[130] While the traditional use of the space is certainly part of the consideration for courts, public spaces are not open to free expression in all situations regardless of government interest.[131]

---

public forum property."); *Perry*, 460 U.S. at 45; *see also* Hague v. Comm. Indus. Org., 307 U.S. 496, 515 (1939):

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Id.

125. *See Perry*, 460 U.S. at 45.

126. *See supra* Part III (explaining circumstances in which government may use content-based restrictions). Strict scrutiny requires the government show the regulation was necessary to serve a compelling governmental interest. *See* WERHAN, *supra* note 55, at 73. "[The government actor] must show . . . that it is narrowly drawn to achieve that end." *Perry*, 460 U.S. at 45 (citing Carey v. Brown, 447 U.S. 455, 461 (1980)); see *supra* Part III(a) (explaining circumstances in which government may use content-neutral restrictions); *see also Perry*, 460 U.S. at 45 (stating that regulation can pass intermediate scrutiny if it is narrowly tailored to serve substantial or significant government interest and "leave[s] open ample alternative channels of communication").

127. *See, e.g.*, *Perry*, 460 U.S. at 45.

128. 461 U.S. 171, 177 (1983).

129. *Id.* at 172-73 (citing 40 U.S.C. § 6135 (2006)) (formerly 40 U.S.C. § 13(k)).

130. *Id.* at 177.

131. *Id.* at 177-78. ("We have regularly rejected the assertion that people who wish 'to propagandize protests or views have a constitutional right to do so when-

The government actor has the ability to control access to the public property – having park hours, for example – and must be able to ban people from the premises who do not have any legitimate purpose in being there.[132] Therefore, the Court held that the government was permitted to regulate access to an area normally thought of as a traditional public forum, and that – before reaching consideration of the governmental interest – it could restrict pamphleting in front of the Supreme Court in *Grace*.[133]

B. Limited Public Fora

Limited public fora are those that the government has opened to the public to use as places of expressive speech, but that are not traditionally used for public expression.[134] While a limited public forum does not need to "indefinitely retain the open character," to the extent that it does, government restrictions upon it are analyzed as if it was a traditional public forum.[135] For example, the University of Missouri at Kansas City made University space (which is public space because the University is a public institution) available for student groups to meet in *Widmar v. Vincent*.[136] However, the University refused to allow a religious student group to meet in University rooms.[137] The Supreme Court held that where the University (or other public or governmental entity) is not required to open a forum for public expression, but chooses to do so, exclusions from that area or restrictions within that area "bear a heavy burden of justification."[138]

---

ever and however and wherever they please.'" (quoting Adderly v. Florida, 385 U.S. 39, 47-48 (1966))).

132. *Id.* at 178.

133. *Id.*

134. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

135. *See id.*; *see also* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (holding that school open for use on weekends and after-school hours by non-school groups is limited public forum and that all restrictions on public use during non-school hours are subject to same scrutiny as if facility were traditional public forum); *see also* S.E. Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (holding that city municipal theater can be limited public forum if held out as place for public expression at times).

136. *See* Widmar v. Vincent, 454 U.S. 263, 265 (1981) (describing university's policy on student group meetings on university property).

137. *See id.*

138. *See id.* at 267-68 (citing City of Madison, Joint Sch. Dist. #8 v. Wis. Employment Relations Comm'n, 429 U.S. 167, 175 (1976)).

C. Nonpublic Fora

The last category of government-owned spaces under the public forum doctrine is nonpublic fora. A nonpublic forum is government property maintained for its intended use rather than public property that has traditionally been held out as a place for public communication (like traditional public fora) and which has not been made available to the public for this purpose (limited public fora).[139] Examples include government offices and airports.[140] "[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government."[141] Whether a place is a nonpublic or other forum depends on the "normal and intended function" of the space.[142] A public high school, and different parts of the school, can be both a limited public forum and a nonpublic forum depending on how it is used.[143] However, the Court has given governments leeway in these fora by only requiring that a regulation on speech be reasonable and not with the intent of eliminating contrary speech.[144]

Determining in which category of the public forum doctrine sports stadiums fall, and specifically Yankee Stadium, is essential to proper analysis of restrictions on expression therein. It is almost certain that sports arenas are not traditional public fora. Yankee Stadium is not part of a public university, and its sole purpose is for the presentation of baseball games and the enjoyment of fans, so it is not likely to be considered a nonpublic forum.

Yankee Stadium, therefore, would likely be considered a limited public forum. It is open to the paying public only for baseball games and other events, not at all times like parks or sidewalks, which are quintessential traditional public fora. Much like a school, Yankee Stadium is also designated as a public forum for expression during those times, and closed for these purposes the rest

139. *See Perry*, 460 U.S. at 46; *see also* Kaufman, *supra* note 16, at 1256-57.

140. *See* Kaufman, *supra* note 16, at 1256 (citing Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992)).

141. *Perry*, 460 U.S. at 46 (quoting U.S. Postal Serv. v. Council of Greenburg Civic Ass'n, 453 U.S. 114, 129 (1981) (quotations omitted)).

142. *See id.* at 46-47.

143. *Compare Perry*, 460 U.S. at 46-47 (holding that school mailroom is nonpublic forum because its intended purpose is to facilitate internal school mail, not as place for public expression on which teachers' union is preferred), *with* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (holding that school open for use during weekends and after-school hours by non-school groups is limited public forum).

144. *See Perry*, 460 U.S. at 46.

of the time.[145] If the stadium is a limited public forum, regulations on speech during the times it is open for expression are subject to the same First Amendment scrutiny as in traditional public fora.[146]

V. THE STATE ACTOR PROBLEM

The First Amendment prohibits Congress from placing restrictions on free speech.[147] States are bound by the Constitution and its Amendments by way of the Equal Protection Clause of the Fourteenth Amendment.[148] The Supreme Court has held that the Fourteenth Amendment also applies to state and local governments, school districts, public universities, and many other entities.[149] Subsequently, private actors are generally not bound by the Constitutional limitations of the First Amendment.[150] This would seem to present a problem with Zachariadis' hypothetical situation at issue in this Article because the Yankees are clearly not a state or local government, and do not seem to fit into any of the other categories of public entities mentioned. Unlike public universities, such as the University of Mississippi in *Barrett*, which are subject to Constitutional scrutiny because they are considered subsets of the state government, all but one professional sports team are privately-owned and -operated, and therefore seemingly immune.[151] However, sports teams have been held to be state actors in the past based on the financial relationship the team has with the City.[152] It is possi-

145. *See Lamb's Chapel*, 508 U.S. 384.

146. *See* Perry, 460 U.S. at 45.

147. *See* U.S. CONST. amend. I. Congress includes all members of the federal government, not just members of the Legislature; *see also* Barron ex rel Tiernon v. Mayor of Balt., 32 U.S. 243 (1833) (holding Fifth Amendment to be applicable to all members of federal government).

148. U.S. CONST. amend. XIV, § 1.

149. *See, e.g.*, Avery v. Midland Cty., Tex., 390 U.S. 474, 480 (1968) ("The actions of local government are the actions of the State."); Carlson v. California, 310 U.S. 106 (1943) (striking down local ordinance as violative of Fourteenth Amendment); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943); Duke v. N. Tex. State Univ., 469 F.2d 829, 837 (5th Cir. 1972) (analyzing termination of state university faculty member under Fourteenth Amendment); Horvath v. Westport Library Ass'n, 362 F.3d 147 (2d Cir. 2004) (applying Fourteenth Amendment to public library); Chi. Area Military Project v. City of Chi., 508 F.2d 921 (7th Cir. 1975) (applying Fourteenth Amendment to government-owned airport).

150. *See* Wasserman, *Fans, supra* note 25, at 538; *see, e.g.*, Gilmore v. City of Montgomery, 417 U.S. 556, 565 (1974) (stating that Fourteenth Amendment does not apply to private actions).

151. *See* Shareholders, PACKERS.COM, http://www.packers.com/community/shareholders.html (last visited Jan. 25, 2012) (noting that Green Bay Packers, Inc. "has been a publicly owned, nonprofit corporation since Aug. 18, 1923.").

152. *See* Ludtke v. Kuhn, 461 F. Supp. 86, 93 (S.D.N.Y. 1978) (holding that Yankees are public actor because Yankee Stadium was leased to team by New York

ble that the current complicated financial relationships between professional sports franchises and the cities in which they play – intended to remove the team from the situation that led to the Yankees' state actor determination in *Ludtke v. Kuhn* – could place them within the realm of state actor.

There are certain situations in which a private entity can be held to be a state actor.[153] This is generally referred to as the public-private relationship.[154] The two seminal cases in which private entities were found to be state actors offer two differing theories on how the public-private relationship occurs: symbiotic relationship in *Burton v. Wilmington Parking Authority*, and the entwinement theory in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*.[155] The difference between the two theories is slight, and courts and scholars often have difficulty distinguishing between the suggested tests in the cases.[156] A brief look at the Supreme Court's decision in the *Burton* and *Brentwood Academy* cases can help distinguish between the two theories, and demonstrate ways in which the Yankees and other sports franchises could be considered state actors.

A. Symbiotic Relationship

The symbiotic relationship test emerges from *Burton* and looks to see whether the private party and State actor have conferred benefits upon each other within the scope of their relationship such

City and because stadium is "maintained and improved with the use of public funds").

153. *See* Wasserman, *Fans*, *supra* note 25, at 538 (citing Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001)); *see also* Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (holding that exclusion of African American from privately-owned restaurant violated Fourteenth Amendment due to restaurant's entwinement with government).

154. *See Burton*, 365 U.S. at 718.

155. *See* Wasserman, *Fans*, *supra* note 25, at 538. There are two other tests that can be used to find a private entity to be a state actor that will not be examined by this Article because they do not apply to the instant hypothetical situation: the joint activity test and traditional powers test. *See* Sw. Cmty. Res., Inc. v. Simon Prop. Group, LP, 108 F. Supp. 2d 1239, 1252 (D.N.M. 2000) (listing state actor tests). Private persons jointly engaged with state officials in the challenged action are acting as state actors. *See* Dennis v. Sparks, 449 U.S. 24, 27-28 (1980) (applying joint activity test). Courts may also find state action "in the exercise by a private entity of powers traditionally exclusively reserved to the State." Jackson v. Metro Co., 419 U.S. 345, 352 (1974) (applying traditional powers test).

156. *See* Ludtke v. Kuhn, 461 F. Supp. 86 (S.D.N.Y. 1978) (misapplying entwinement theory). The *Ludtke* court looked at the entwinement aspect of the public-private relationship in *Burton*, which actually espoused the symbiotic relationship theory. *See id.* The Ludtke court took the phrase "so entwined" out of the context of Burton and inappropriately applied it. *See id.; see also* Wasserman, *Fans*, *supra* note 25, at 538 (discussing confusion among other scholars on the issue of public-private relationships).

that they become "joint participant[s] in the challenged activity . . . ."[157] In *Burton*, the Supreme Court found that when the lease agreement between a private entity (a restaurant) and the State (which owned the parking garage in which the restaurant was located) provided for significant funding from the State, it created a position of interdependence between the parties.[158] When there is an interdependent relationship manifesting from State responsibility and a reward for the private party as a result of that relationship, any action must be seen as state action even when taken by the private entity.[159] Therefore, the restaurant's refusal to serve an African American customer was held to be state action.[160]

After the *Burton* decision, however, the Supreme Court began to narrow situations in which a private actor can be held to be a state actor based on its public-private symbiotic relationship.[161] "Where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discrimination' in order for the discriminatory action to fall within the ambit of the constitutional prohibition."[162] The Court was seeking to dispel the common understanding of *Burton* that renting from the government was equivalent to being a state actor.

In *Gallagher v. Neil Young Freedom Concert*, the United States Court of Appeals for the Tenth Circuit took this advice beyond what was necessary while examining and applying the Supreme

157. *See Burton*, 365 U.S. at 725; Moose Lodge No. 17 v. Irvis, 407 U.S. 163 (1972) (referring to test applied in Burton as "symbiotic relationship" test); Nick DeSiato, *Silencing the Crowd: Regulating Free Speech in Professional Sports Facilities*, 20 MARQ. SPORTS L. REV. 411, 418 n.40 (2010) (explaining that Moose Lodge court coined new name for test applied in *Burton*).

158. *See Burton*, 365 U.S. at 717. "The costs of land acquisition, construction, and maintenance are defrayed entirely from donations by the City of Wilmington, from loans and revenue bonds and from the proceeds of rentals and parking services out of which the loans and bonds were payable." *Id.* at 723. The Court also mentioned the tax benefits for the restaurant and the convenient parking for its customers. *See id.*

159. *See id.* at 716.

160. *See id.* at 725-26.

161. *See, e.g.*, Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442 (10th Cir. 1995) (noting that Court has tended to read *Burton* narrowly). Subsequent Supreme Court decisions have read *Burton* narrowly:

> The present Supreme Court . . . has not found state action in any case that has relied upon *Burton*. In each case in which the applicability of *Burton* has arisen, the Court has distinguished *Burton* on its facts as part of its justification for not finding state action.

Id. at 1451 (quoting MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES, §§ 5.10 to 5.15 (2d ed. 1991)).

162. *Moose Lodge No. 17*, 407 U.S. at 173 (finding no state action on part of private club enjoying benefits of state liquor license) (quoting Reitman v. Mulkey, 387 U.S. 369, 380 (1967)).

Court's decision in *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee.*[163] The court held that evidence of receipt of state funds is not enough to create a public-private symbiotic relationship, placing further distance from the Supreme Court's decision in *Burton.*[164] This simplifies and misconstrues the Court's decision in *San Francisco Arts & Athletics, Inc.* and should not be used to diminish the impact of *Burton* on subsequent cases and, more importantly for this Article, on Zacharaidis' hypothetical situation. In *San Francisco Arts & Athletics, Inc.*, the U.S. Olympic Committee (USOC) did not receive funding, but instead Congress sought to assist the USOC with its applications for grants.[165] Furthermore, funding was not the deciding factor in the Court's decision that the USOC is not a government actor.[166]

> The fact that Congress granted it a corporate charter does not render the USOC a Government agent. All corporations act under charters granted by a government, usually by a State. They do not thereby lose their essentially private character. Even extensive regulation by the government does not transform the actions of the regulated entity into those of the government.[167]

Despite the Tenth Circuit's holding otherwise in *Gallagher*, the *Burton* decision does not explicitly stand for the notion that the act of receiving money from the government transforms the private actor into a government entity. Receiving a benefit from the government does not automatically create a symbiotic relationship between the State and private entity.[168] There are too many government services that companies receive for this to be the case.[169] Instead, *Burton* is more appropriately read – and the *Burton* symbiotic relationship test more appropriately understood – to look at the benefit received by each side as a facts-and-circumstances analy-

163. 483 U.S. 522 (1987) (holding USOC to be private actor for Fifth Amendment purposes).

164. *See Gallagher*, 49 F.3d at 1451.

165. *See* S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 543-44 (1987).

166. *See id.*

167. *See id.*

168. *See Moose Lodge No. 17*, 407 U.S. at 173 ("The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever.").

169. *See id.*

sis of whether the private company should be held to be a state actor.

B. Alternative Types of Stadium Financing: Which Did the Yankees Use and Which Give Rise to Constitutional Scrutiny?

The most noteworthy case of a professional sports franchise subject to constitutional scrutiny by way of a symbiotic relationship is *Ludtke*.[170] In *Ludtke*, the United States District Court for the Southern District of New York found that the Yankees were a public actor in violation of the Fourteenth Amendment for banning women from their locker room immediately following games.[171] The court reasoned that the stadium was leased to the team by New York City, it was "maintained and improved with the use of public funds," and the Yankees were able to thrive in the stadium.[172] The court held that under the *Burton* standard, there was a symbiotic relationship between public and private actors.[173]

The *Ludtke* case is a clear example of an interdependent relationship in which the private actor receives a financial benefit from the city. In exchange, the city reaped the benefits of having a sports franchise, which include a boost to the local economy, revitalization of urban areas, and "an intangible benefit—the psychic, symbolic, and cultural benefit to the community of being a 'major league city' and the civic pride and unity created[.]"[174] In the past, teams often received favorable long-term leases from the state or city either for the stadium, which was built and paid for by the city, for the land to build a stadium, or both.[175] However, since the decision in *Ludtke*, teams are wary of being held as public actors and have looked to other methods of financing to fund their billion-dollar projects.[176]

Some of the more recently popular ways that teams have sought to finance stadium projects are through tax-exempt bonds, creating stadium authorities to fund the project (paid for by taxpayers), and by increasing taxes on hotels and other amenities. Tax-exempt bonds are essentially promissory notes issued to the

170. 461 F. Supp. 86 (S.D.N.Y. 1978).

171. *See id.* at 93.

172. *See id.*

173. *See id.*

174. *See* Wasserman, *Fans*, *supra* note 25, at 543-45.

175. *See id.* at 544-45.

176. *See id.* at 545; *see also* Matt Mosley, *Jones Building a Legacy with $1.3 Billion Cowboys Stadium*, ESPN (Sept. 15, 2008), http://sports.espn.go.com/nfl/columns/story?columnist=mosley_matt&page=hotread1/mosley (interviewing Jerry Jones, owner of the Dallas Cowboys, about $1.3 billion Cowboys Stadium).

franchise by the city for a specific purpose, free of federal income tax on the interest for the city, and to be repaid by either the franchise or constituent taxpayers.[177] The Yankees "received a total of $1.2 billion in tax-exempt bonds and $136 million in taxable bonds," with the estimated cost to New York City at $4 billion.[178] While courts have not explicitly held that any private entity is a state actor in the situation in which it or its facilities are funded by tax-exempt municipal bonds, it must still be considered a factor in the balancing test applied by the courts. In *Greco v. Orange Memorial Hospital Corp.*, the United States Court of Appeals for the Fifth Circuit conflated the nexus and symbiotic relationship tests in holding that tax-exempt bond financing for a hospital does not make it a state actor constitutionally liable for its decision to not perform abortions because the abortions could not be viewed as an act of the state.[179] The type of funding is not a factor to be considered in the entwinement (or nexus) test – as will be discussed in the next Part – and was incorrectly incorporated, arguably leading to an inappropriate holding.

When the Arizona Cardinals built the University of Phoenix stadium in 2006, the State created a stadium authority to receive state financing to pay for and operate the stadium.[180] While Ari-

177. *See* James L. Musselman, *Recent Federal Income Tax Issues Regarding Professional and Amateur Sports*, 13 MARQ. SPORTS L. REV. 195, 196-99 (2003) (explaining sports teams' use of tax-exempt bonds to build sports facilities). This Article does not discuss the merits of using tax-exempt bonds or any other type of financing for professional sports stadium construction; it focuses solely on whether these provide sufficient benefit from the City to the franchise to create a public-private relationship. For more discussion on the merits and tax consequences of tax-exempt bond financing, see Gregory W. Fox, Note, *Public Finance and the West Side Stadium: The Future of Stadium Subsidies in New York*, 71 BROOK. L. REV. 477 (2005) (studying failed construction of West Side Stadium in New York); Laurie C. Frey, Note, *How the Smallest Market in Professional Sports Had the Easiest Financial Journey: The Renovation of Lambeau Field*, 18 SPORTS LAW. J. 259 (2011) (studying use of public financing for Lambeau Field); Scott A. Jenson, *Financing Professional Sports Facilities with Federal Tax Subsidies: Is It Sound Tax Policy?*, 10 MARQ. SPORTS L.J. 425 (2000) (concluding that arguments supporting professional sports tax have failed).

178. *See* Mike Dodd, *Baseball's New Palaces: Yankee Stadium and Mets' Citi Field*, USA TODAY, (Apr. 2, 2009, 10:39 PM), http://www.usatoday.com/sports/baseball/2009-04-02-baseball-palaces_N.htm (citing owner of Yankees for proposition that city owns Yankee stadium).

179. *See* Greco v. Orange Mem'l Hosp. Corp., 513 F.2d 873 (5th Cir. 1975) (finding hospital to be private actor even though hospital had been financed with tax-exempt bonds).

180. *See* Paul Munsey & Corey Suppes, *University of Phoenix Stadium*, BALLPARKS.COM, http://football.ballparks.com/NFL/ArizonaCardinals/newindex.htm (last visited Jan. 28, 2012) (noting contributions from Arizona Sports and Tourism Authority and Glendale); *About Us*, AZ. SPORTS & TOURISM AUTH., http://www.az-sta.com/about_us.htm (last visited Jan. 28, 2012) (stating responsibilities and organization of Arizona Sports and Tourism Authority).

zona was not directly funding the construction of the stadium or providing the franchise with accessible financing, an intermediate state-controlled agency providing funding should be seen by the courts as analogous to government financing. It may even be advisable for the court to consider the fact that the private actor is attempting to escape exposure to constitutional scrutiny by going through the stadium authority for its funding.

The Reliant Stadium complex in Houston, Texas was paid for by a combination of tax-exempt bonds, stadium authority funding, and through lobbying for Harris County (where Houston is located) to increase certain taxes to provide for further funding.[181] The Harris County-Houston Sports Authority is funded primarily by taxes on hotel rooms and car rentals, which then go to support repayment of the financing for Reliant Stadium.[182] Other teams, like the Baltimore Ravens and Cincinnati Bengals, have similarly received funding for their stadiums via sales and other tourist taxes.[183]

The fact that teams no longer use standard government funding, like the favorable lease terms the Yankees received in *Ludtke*, to finance their extravagant stadiums and complexes should not be the single factor in precluding them from constitutional scrutiny as government actors under the *Burton* symbiotic relationship test. Even if the funding is less direct, the complex financial relationships still provide the franchises with a significant benefit. *Burton*, despite being limited by other decisions by the Supreme Court, still applies and should still be applied to the Yankees' and other situations. The City still receives the benefit of having a professional sports franchise and the Yankees are still receiving a benefit similar to that in *Ludtke*, where they were found to be state actors.

1. *Entwinement*

Scholars argue that the entwinement test is more appropriate for First Amendment concerns, because the symbiotic relationship test was developed during Civil Rights cases in the 1960s and was

181. *See* FUNDING AGREEMENT BY AND AMONG HARRIS COUNTY-HOUSTON SPORTS AUTHORITY AND HOUSTON LIVESTOCK SHOW AND RODEO, INC. 18-19, HARRIS CO.-HOUS. SPORTS AUTHORITY, *available at* http://www.houstonsports.org/downloads/1346707649.55788100_21c84c0e48/funding_agreement.pdf (last visited Dec. 1, 2012) (enumerating various sources of funding).

182. Mike Morris, *Sports Authority at Risk of Debt Default*, HOU. CHRONICLE, Apr. 20, 2011, at B1, *available at* http://www.chron.com/news/houston-texas/article/Sports-Authority-in-Harris-Co-runs-risk-of-debt-1686079.php (explaining funding of sports authority).

183. *See* Frey, *supra* note 177, at 266.

used to attach the Equal Protection clause to private race discrimination.[184] While this Article argues that the symbiotic relationship test would create a stronger argument for the Yankees as state actors because of the financial interdependence found in stadium financing today, entwinement is an often-used measure to determine whether a private party is a state actor. The entwinement test, derived from the decision in *Brentwood*, focuses more on the situations in which a private entity is essentially acting as a public actor.[185] In *Brentwood*, the Court found that the athletic association that regulated interscholastic sports in Tennessee was a government actor subject to constitutional scrutiny because its actions and employees were so entwined with that of the school systems it regulated that it acted as though it were the school system itself.[186] The crux of the test examines the degree of management and control the government has within the private entity.[187] This test, also described as the "close nexus" test, looks at many factors, including whether "the organization is mostly comprised of state institutions," whether state officials are the primary decision-makers in the organization, whether the private actor is state-funded, and whether it is doing a job usually done by a state actor, like the athletic association.[188] In light of these factors, the Court found that the Tennessee Secondary School Athletic Association was a state actor because it "includes most public schools located within the State, acts through their representatives, draws its officers from them, is largely funded by their dues and income received in their stead, and has historically been seen to regulate in lieu of the State Board of Education's exercise of its own authority."[189]

One scholar looks at the example of the Cleveland Indians to demonstrate how the entwinement test may apply to professional sports franchises.[190] In that case, the team was owned in a 50-50 split between the City of Cleveland and private investors.[191] Additionally, the City provided 50 police officers for every game to en-

184. *See* Wasserman, *Fans, supra* note 25, at 538-39.

185. *See id.* at 548.

186. *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001).

187. *See id.* at 297 (citing Evans v. Newton, 382 U.S. 296, 301 (1966)).

188. *See* Villegas v. Gilroy Garlic Festival Ass'n, 541 F.3d 950, 955 (9th Cir. 2008) (citing Brentwood, 531 U.S. at 295-99) (explaining factors of "close nexus" test).

189. *Brentwood*, 531 U.S. at 290-91.

190. *See* Wasserman, *Fans, supra* note 25, at 549.

191. *See id.*

force the fan-conduct policies developed by the team.[192] It is not an unusual occurrence for the city to provide police officers to help control the crowds and provide a greater semblance of authority than the security guards wearing yellow jackets.[193] That scholar argues that because of the continuing relationship in which the City provides police officers at the stadium, privately owned sports teams should be considered state actors.[194]

However, case law disagrees with this scholar's interpretation.[195] In *Villegas v. Gilroy Garlic Festival Ass'n*, the United States Court of Appeals for the Ninth Circuit held that a motorcycle club could not bring a constitutional claim against the Garlic Festival Association because the Association was not a state actor under the entwinement test.[196] The court reached such a conclusion despite the fact that the City of Gilroy had provided police officers for the festival that was located in a city-owned public park.[197] Similarly, the Fifth Circuit recently held that the private group that runs the State Fair of Texas was not a state actor even though the City of Dallas owns the Fair Grounds and provides police officers to patrol the fair.[198] Simply because the Fair runs a private event on public property with government officials (the Dallas police), it does not mean that a person can bring a Constitutional claim for being thwarted from handing out Bible tracts.[199] A closer relationship is required of the parties in order to meet the "close nexus" requirement, especially when the private actor must be considered to be

192. *See id.*

193. *See* DeSiato, *supra* note 157, at 411-12 (citing Complaint at 1, Campeau-Laurion v. Kelly (S.D.N.Y Apr. 15, 2009) (Case No. 09CV3790)).

194. *See* Wasserman, *Fans*, *supra* note 25, at 549.

195. *See generally* Villegas v. Gilroy Garlic Festival Ass'n, 541 F.3d 950, 955 (9th Cir. 2008); Rundus v. City of Dall., Texas, 634 F.3d 309 (5th Cir. 2011) (declining to find private company that ran state fair to be state actor); Lansing v. City of Memphis, 202 F.3d 821, 829-30 (6th Cir. 2000) (finding that "Memphis in May" festival was not state actor when Memphis police officers removed "street preacher"); Forbes v. City of New York, No. 05 CV 7331(NRB), 2008 WL 3539936, at *10 (S.D.N.Y. Aug. 12, 2008) (holding, in response to motion for summary judgment, that police officers assisting Lincoln Center security did not create a sufficient nexus to make Lincoln Center state actor). *See also* DeSiato, *supra* note 157, at 421 ("[B]ecause most clubs tend to maintain exclusive title of their facility, have nearly complete autonomy over the facility's operations, free speech regulation, and in-facility security during games, it appears as though few, if any, facilities would be considered state actors under this test.").

196. *See Villegas*, 541 F.3d at 954-55.

197. *See id.* at 955.

198. *See Rundus*, 634 F.3d at 314-15.

199. *See id.*

acting as the state, or that they are working so closely together the two parties cannot be separated from one another.[200]

2. *The Yankees as State Actors*

Proving that a professional sports franchise is a state actor is generally the most difficult aspect of a potential plaintiff's prima facie case. Zacharaidis would probably strike out on this aspect if he were to claim the Yankees are a state actor under the entwinement theory. The presence of police officers at the games, absent other evidence of state involvement like in *Wickersham v. City of Columbia*, does not create a sufficiently close nexus to permit a court to find in the plaintiff's favor on this issue. However, the symbiotic relationship test provides a more fruitful avenue of argument for Zacharaidis in the hypothetical issue in this Article. While the Yankees no longer directly lease the stadium or the land on which it is built from New York City (as was the case at the time of *Ludtke*), their current interdependent financial relationship should lead to a finding of the Yankees as state actors regardless. It is hard to deny the billions of dollars that cities sacrifice to bring teams and to help finance their mammoth construction projects, or to deny the financial return the cities receive. This is a symbiotic relationship that should lead to a finding of a private-public entity and Constitutional scrutiny for the team.

IV. CONCLUSION

When the Yankees decided to remove Anthony Zachariadis from Yankee Stadium and to subsequently ban vuvuzelas from the Stadium, it was unclear whether the Yankees had violated the First Amendment rights of Zachariadis and their fans. Vuvuzela noise is not traditional First Amendment speech, but still could fall into either "cheering speech" or expressive conduct, both of which are Constitutionally protected. Based on the symbiotic relationship test, the Yankees' implicit financial partnership with New York City likely makes them a state actor. Furthermore, Yankee Stadium is likely considered a limited public forum (assuming of course that

200. It is the latter scenario in Wickersham v. City of Columbia, in which the United States Court of Appeals for the Eighth Circuit held that "the city's role was far more than 'mere acquiescence.'" 481 F.3d 591, 598 (8th Cir. 2007). The city played a critical role in planning and executing the air show at issue in this case, and it "played an active role in enforcing the particular speech restrictions challenged in this action . . . as part of 'the agreement that's in place' with [the private entity at issue]." *Id.* This direct action to be taken by the police, and agreed upon by the private company, led to the court's finding of entwinement. *Id.*

the Yankees are state actors), because it is open to fans for expression during games but closed at other times. Therefore, the restrictions on vuvuzelas would have to be analyzed under intermediate scrutiny. The Yankees' "governmental" interest in protecting fans' enjoyment of the game, as in *Barrett*, or in restricting noise, as in *Rock Against Racism*, cannot hold muster to the interest that fans have to express themselves in such an environment. Zachariadis would likely be able to prove all of the elements of his prima facie case against the Yankees for violating his First Amendment right to blow the vuvuzela in jeer of the opposing Phillies. Allowing a plaintiff like Zachariadis to have standing and to be able to establish the basis of a case against a professional sports franchise could have a significant and much-needed impact on the sporting world. Fans are in need of some kind of recourse against teams; especially considering the extravagant ticket and merchandising costs teams impose. Completely limiting fan speech is just too much.