SPORT AS SPEECH

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"Whoever wants to know the heart and mind of America had better learn baseball . . . ."

Jacques Barzun[1]

INTRODUCTION

Americans love sports. We love to play sports, we love to talk about sports, but mostly we love to watch them. While only roughly sixteen percent of people in the United States age fifteen and older play sports and exercise on a regular basis,[2] a recent poll found that over half of all Americans regularly watch football on television.[3] In 2005, over seventy-four million people attended a Major League Baseball game.[4] In 2011, over 111 million people watched the television broadcast of the Super Bowl—making it the most watched network event in twenty years.[5] Super Bowl viewership in 2012 was higher still.[6] 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 offers audiences an excitement that may be otherwise missing from daily life in a com-

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1 GOD'S COUNTRY AND MINE: A DECLRATION OF LOVE SPICED WITH A FEW HARSH WORDS 159 (1954).

2 Bureau of Labor Statistics, *Sports and Exercise*, in BLS SPOTLIGHT ON STATISTICS 1 (2008), http://www.bls.gov/spotlight/2008/sports/pdf/sports_bls_spotlight.pdf.

3 Harris Interactive, Inc., *America's Sport—A Majority of Americans Watch NFL Football*, THE HARRIS POLL 1, 2 (Oct. 14, 2011), http://www.harrisinteractive.com/vault/ HI-Harris-Poll- Adweek-Football-2011-10-14.pdf.

4 Brad R. Humphreys & Jane E. Ruseski, *The Size and Scope of the Sports Industry in the United States* 11 (Int'l Assoc. of Sports Economists, Working Paper No. 08-11, 2008).

5 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-ratings-idUSTRE7163GS20110207.

6 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.

plex, industrialized society.[7] 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."[8] For individuals, supporting the home team can provide a powerful means of expressing and forging membership in the community.[9] 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 spectator sports are expressive acts and therefore entitled to First Amendment protection. Few commentators have disagreed.[10] This is despite the fact that, over the past several decades, courts have recognized an increasing array of expressive conduct to fall within the protection of the First

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7 NORBERT ELIAS & 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).

8 Kathryn Jay, MORE THAN JUST A GAME: SPORTS IN AMERICAN LIFE SINCE 1945, at 2 (2004). (internal quotation marks omitted).

9 *See infra* notes 98–101 and accompanying text.

10 In a 2004 article, Howard Wasserman argued that "sport carries political and social messages" and "is a proper vehicle through which a message or meaning may be presented and expressed." Howard M. Wasserman, *Symbolic Counter-Speech*, 12 WM. & MARY BILL RTS. J. 367, 374–76 (2004). Wasserman is alone among legal academics in suggesting that all spectator sports deserve categorical First Amendment protection. Other scholars have reached a similar conclusion with respect to particular spectator sports. Charles I. 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); 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) ("Boxing deserves the First Amendment protections that have been granted to other physical, yet expressive, conduct."). Others have reached the opposite conclusion. 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 speech claims" of spectator sports like boxing and hockey "are tenuous"); Michael T. Morley, "*Exceedingly Vexed and Difficult": Games and the First Amendment,* 112 YALE L.J. 361, 368 (2002) ("It seems 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.*, 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); Christopher J. Kaufman, *Unsportsmanlike Conduct: 15-Yard Penalty and Loss of Free Speech in Public University Sports Stadiums*, 57 U. KAN. L. REV. 1235 (2009) (examining the First Amendment rights of expression of spectators at university sporting events).

Amendment. Today, nude dancing, begging, and making a movie or violent video game are all activities that trigger First Amendment scrutiny.[11] Yet, playing football or baseball, or performing an artistic, non-team sport like gymnastics or figure skating, is 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.[12]

This Article argues that the denial of free speech protection to spectator sports—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 sports express, and effectively communicate, the "particularized messages" that the Supreme Court has held to be the prerequisite for constitutional protection.[13] Philosophically, it is wrong because spectator sports contribute 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 kinds 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 influence that even lowbrow and highly commercialized genres of mass entertainment can have on 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 sports, despite the formal differences that distinguish artistic and athletic performances. For this reason, the

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11 Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2733 (2011) ("[V]ideo games qualify for First Amendment protection."); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991) ("[N]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so."); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952) ("[E]xpression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments."); Loper v. N.Y.C. Police Dep't, 999 F.2d 699, 704 (2d Cir. 1993) (holding that begging is expressive conduct because, although beggars do not transmit or express social or political messages, their presence, appearance, and conduct express their need for help).

12 *See, e.g.*, Bd. of Educ. v. Pico, 457 U.S. 853, 867 (1982) ("[T]he right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them[.]").

13 *See generally* Texas v. Johnson, 491 U.S. 397, 404 (1989) ("In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked 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, 410–11 (1974)).

government should not be able to ban the performance of spectator sports, or the training such performance requires, because it dislikes the messages that the sport conveys. While the popularity of sports like football and baseball works, as a kind of prophylactic against censorhip, the same is not true of all sports. Less widely popular sports, such as boxing and mixed martial arts, remain vulnerable to efforts to prohibit their performance because of distaste for the violent and hyper-masculine messages they send. This offends, or should be recognized to offend, the First Amendment as much as similar efforts to censor artistic or political performance do.

What follows thus makes the case for recognizing spectator sports as expressive conduct, worthy of First Amendment protection. Part I examines the exceptional status of spectator sports in First Amendment doctrine and the justifications that courts provide to explain them. It argues that none of the justifications provide a satisfactory reason for denying spectator sports the First Amendment protection afforded 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 sports in contemporary society. This is problematic because it leaves courts at the mercy of their pretheoretical assumptions about the value and significance of spectator sports—assumptions that the scholarly literature suggests are simply wrong. Indeed, 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 sports are in fact dense symbolic performances—performances that communicate messages about, among other things, individual excellence and virtue, political identity, race, gender, sexuality, and even beauty. It is because of the ability of spectator sports to communicate these kinds of messages to their audiences that they possesses the cultural and political significance that they do, 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 sports while extending it to other genres of mass entertainment such as movies, plays, and dance performances. It argues that, in fact, there are no justifications for denying First Amendment protection to spectator sports. Instead,

the denial of First Amendment protection to spectator sports only needlessly complicates the doctrine, by establishing an ultimately unjustifiable distinction between artistic and athletic expression and between live and televised athletic performance.

I. THE PROBLEM WITH SPORTS

In his now-famous paean to the glories of baseball in *Flood v. Kuhn*, Justice Blackmun quoted a poem that had been published in the *New York Herald Tribune* in 1926. The poem commented pungently on the relative importance of sports and literature in American popular culture 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.[14]

Eighty-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 provide 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 dialect; sports imagery pervades the American marketplace; and sports news and narratives pervade the American media.[15] 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[.]"[16]

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 athletic competition might be a protected First Amendment activity. Most instead conclude that sports games, even when performed in front of and with the intention of being seen by an audience, are not capable

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14 Flood v. Kuhn, 407 U.S. 258, 263 n.4 (1972) (quoting Grantland Rice, *He Never Heard of Casey*, N.Y. HERALD TRIB., June 1, 1926, at 23).

15 DANIEL L. WANN, ET AL. SPORTS FANS: THE PSYCHOLOGY AND SOCIAL IMPACT OF SPECTATORS 2, 13–17 (2001) (discussing the pervasiveness of sports as demonstrated through various media sources, including cinema, television, radio, print, and Internet).

16 JAY, *supra* note 8.

of conveying the kinds of "particularized message[s]" that the Supreme Court, in *Spence v. Washington*, held that nonlinguistic conduct must communicate in order to receive First Amendment protection.[17] 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."[18] 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,[19] 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.[20]

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, sports—even spectator sports—usually receives no First Amendment protection whatsoever. Although several courts have suggested that, under the right circumstances, the "exposition of an athletic exercise" might

17 418 U.S. 405, 411 (1974).

18 515 U.S. 557, 569 (1995).

19 *See, e.g.*, Justice v. NCAA, 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. City of 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").

20 Interactive Digital Software Ass'n v. St. Louis Cnty., Mo., 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, 195–96 (S.D.N.Y. 1995) (dismissing the First Amendment claim of 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").

be entitled to some degree of First Amendment protection,[21] in only two cases have 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.[22]

From a purely institutional perspective, this distinction between spectator sports 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 Super Bowl, 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.

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21 Post Newsweek Stations-Conn., 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" First Amendment protection). *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 because the martial arts are historically and culturally significant to many, there could be circumstances in which an individual's practice of martial arts would merit First Amendment protection); Sunset Amusement Co. v. Bd. of Police Comm'rs of L.A., 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)).

22 In the first case, the court granted the plaintiffs a preliminary injunction enjoining the 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, inter alia, it found the statute overbroad in prohibiting even games performed with an expressly political intent. Weigand v. Vill. of Tinley Park, 114 F. Supp. 2d 734, 736–37 (N.D. Ill. 2000). 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 not by discriminating against certain kinds of speakers on the basis of the content of their speech, but by placing burdensome restrictions on particular indigent groups while allowing other favored groups more freedom. Sullivan v. City of Augusta, 406 F. Supp. 2d 92, 107–08, 114, 126 (D. Me. 2005), *aff'd in part, vacated in part, rev'd in part*, 511 F.3d 16 (1st Cir. 2007). 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.* at 107–08 n.13 (internal citations and quotation marks omitted). 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.

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 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 also may be dispositive of the expressiveness question altogether. In *Barnes v. Glen Theatre*,[23] for example, the Supreme Court extended protection to nude dancing despite having denied protection only two years earlier, in *City of Dallas v. Stanglin*,[24] 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 second case, 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.[25]

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.[26] The plaintiffs claimed that the decision violated the free speech and assembly rights of their patrons.[27] 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 essen-

23 Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991).
24 City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989).
25 Barnes, 501 U.S. at 581 (Souter, J., concurring) (emphasis added).
26 Sunset Amusement, 496 P.2d at 843–44.
27 Id. at 845.

> tial 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.[28]

Although not stated as explicitly elsewhere, the idea that it is the presence of an audience-performer relationship that distinguishes expressive conduct from that which is not expressive informs, and helps make sense of, much of the First Amendment case law dealing with art and entertainment. This idea 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* test for expressive conduct.[29] 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.[30] 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 was expressed, likely to be understood.

Courts' willingness to extend First Amendment protection to all activities that involve a recognizable performer-audience relationship means that today, the category of spectator sports is the only genre of 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 denied First Amendment protec-

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28 *Id.* at 845–46.

29 *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) (extending categorical First Amendment protection to musical performance without invoking the *Spence* test); Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 557–58 (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, as required by the *Spence* test); Boring v. Buncombe Cnty. 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)).

30 Hurley v. Irish-Am., Gay, Lesbian and Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995) (interpreting the "particularized message" requirement in *Spence* as not requiring linquistic expression in light of the extension of First Amendment protection to art).

tion. Gambling, for example, is generally not considered expressive activity.[31] Nor is recreational dancing, as *Stanglin* made clear.[32] 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 sports do involve an audience-performer relationship, but nevertheless are 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, namely, what it is about spectator sports that make them—or that makes courts perceive them to be—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 provide generally three explanations for the denial of First Amendment protection to spectator sports, but none provide an ultimately convincing explanation of the distinction between sports and art.

Some courts argue that games of spectator sports 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 audiences. 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.[33] 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.[34] 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.[35] The court pointed to a colloquy between the plaintiff and defense counsel in which the plaintiff admitted that

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31 *See, e.g.*, Allendale Leasing, Inc. v. Stone, 614 F. Supp. 1440, 1454–55 (D.R.I. 1985)_*aff'd*, 788 F.2d 830 (1st Cir. 1986) (rejecting the plaintiffs' argument that playing and conducting Bingo games is a form of expression and association that is protected by the First Amendment); United States v. Borgese, 235 F. Supp. 286, 296 (S.D.N.Y. 1964) ("The First Amendment is not applicable where criminal conduct is involved.").

32 *See Stanglin*, 490 U.S. at 24-25 ("The Dallas ordinance restricts attendance at Class E dance halls. . . . These opportunities . . . simply do not involve the sort of expressive association that the First Amendment has been held to protect.")

33 Murdock v. City of Jacksonville, 361 F. Supp. 1083, 1094–95 (M.D. Fla. 1973) (emphasizing that wrestlers do not participate in wrestling matches for the purpose of publibly expressing political statements or philosophies or addressing the public through speeches).

34 *Id.* at 1096.

35 *Id.*

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 . . . .[36]

The court concluded, in other words, that wrestling constituted a "purely entertainment pastime," rather than "speech or symbolic acts," 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 concluded that baseball games do not deserve First Amendment protection because they provide "pure entertainment with no informational element."[37]

Other courts argue that there is something 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 . . . ."[38] It nevertheless concluded that whatever messages the boxers intended to convey via their performance in the ring would not be likely be understood by their audiences. "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."[39] 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, which were

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36 *Id.* at 1095–96.

37 America's Best Family Showplace Corp. v. City of New York, Dep't of Bldgs., 536 F. Supp. 170, 174 (E.D.N.Y 1982).

38 Fighting Finest, Inc. v. Bratton, 898 F. Supp. 192, 195 (S.D.N.Y. 1995).

39 *Id.* (internal citation omitted).

entitled to First Amendment protection.[40] 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 aesthetic orientation of music and dance.[41] 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 baseball video games are entitled to First Amendment protection. The court wrote

> [T]he game of baseball is not a form of expression entitled to free speech protection. It is often times surrounded by 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. [42]

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.).

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40 Justice v. NCAA, 577 F. Supp. 356, 374 (D. Ariz. 1983).

41 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.

42 Interactive Digital Software Ass'n v. St. Louis Cnty., 200 F. Supp. 2d 1126, 1134 (E.D. Mo. 2002).

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."[43] The fact that sport 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."[44] It also means that, when athletes participate in spectator sports, their performance is primarily guided by "functional, nonexpressive concerns such as catching a pass or kicking a goal."[45] 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.[46]

None of these arguments 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 unsatisfying as a justification for denying free speech 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*, 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.[47] "The line between the informing and the entertaining is too elusive," the Court stated, "for the protection of that basic right [of a free press].

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43 Morley, *supra* note 10, at 367.

44 *Id.*

45 *Id.* at 368.

46 *Id.* (suggesting that athletes in sports such as ice skating, gymnastics, and diving are entitled to protection under the First Amendment because these sports are "permeate[d]" with creative, artistic expression rather than being "primarily controlled by functional, nonexpressive concerns").

47 333 U.S. 507, 508, 510 (1948).

Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine."[48] 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.[49] 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.[50]

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. For example, recreational ballroom dancing and nude dancing share many of the same formal properties. Nevertheless, only nude dancing is entitled to First Amendment protection because—as Justice Daniel Souter noted in his *Barnes* concurrence[51]—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.

Nor can the distinction between art and sport be justified on the basis of their purportedly aesthetic versus non-aesthetic orientations.

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48 *Id.* at 510.

49 See *supra* note 29.

50 Hurley v. Irish-Am., Gay, Lesbian and Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995) ("[I]f confined to expressions conveying a 'particularized message,' . . . [constitutional protection] would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." (internal citation omitted)); *see* Mark Tushnet, *Art and the First Amendment*, 35 COLUM. J.L. & ARTS 169, 170, 188 (2012) (noting that art receives First Amendment protection notwithstanding the absence, in many cases, of any intent by the artist to communicate ideas).

51 Barnes v. Glen Theatre, 501 U.S. 560, 581 (1991) (Souter, J., concurring).

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.[52] 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.[53] 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 third idea, that spectator sports are not entitled to First Amendment protection because they involve 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 competitive.[54] This fact in turn has important implications

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52 *See infra* notes 76–78 (demonstrating examples of purposes that some athletes may have and messages that they may seek to communicate through their athletic performances).

53 Ashcroft v. ACLU, 535 U.S. 564, 573 (2002) ("[A]s a general matter, 'the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'") (quoting Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65 (1983)); *see also* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 818 (2000) ("[E]sthetic 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.").

54 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 & RANDOLPH FEEZELL, COACHING FOR CHARACTER: RECLAIMING THE PRINCIPLES OF SPORTSMANSHIP, 11 (1997) *with* JAY 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 sport involves competition. *Cf. Sport Definition* MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/sport (last visited Feb. 28, 2014) (defining sport as "a contest or game in which people do certain physical activities according to a specific set of rules and compete against each other").

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 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.[55] What that fact 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 sports 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 on are wrong. It is simply not the case that, because

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55 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 player, Martina Navratilova, and the boxer, Muhammed Ali, respectively—there will be "no sporting equivalents of Shakespeare and Mozart." GORDON GRAHAM, 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) (arguing that some sports have aesthetic significance and merit and that all sports can usually be classified as either non-aesthetic or partially aesthetic while some sports may be correctly classified as art).

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, as the social scientific literature on sports demonstrates, it is in many respects *because* sport involves competition that games possess the important cultural, even sometimes political, significance that they do—as the next Part explores.

II: SPORT AS AN EXPRESSIVE ACTIVITY

Under *Spence*, two things must be true for games of spectator sports to merit the protection of the First Amendment. First, individuals associated with the performance of the game—be they athletes, coaches, promoters, funders, or the like—must seek to convey, by their participation in the event, particularized, even if not succinctly articulable, messages.[56] Second, the messages that athletes, coaches, promoters and the like seek to convey through their participation in the activity must be likely to be understood by the audience watching the game.[57] 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. Civil 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.[58] *Spence* also fails to protect idiosyncratic expression that an audience is unlikely to understand, no matter how deeply an individual may intend to convey it.[59]

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56 Spence v. Washington, 418 U.S. 405, 411 (1974).

57 *Id.* at 415.

58 Miller v. Civil City of S. 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.").

59 Hence the Second Circuit dismissed a First Amendment challenge to a county regulation that prohibited van drivers from wearing skirts while on duty because it found that, even if the plaintiff sought to communicate a "deeply held cultural value" by the wearing of a skirt, this message was unlikely to be understood by those who saw her wearing it. Zalewska v. Cnty. of Sullivan, N.Y., 316 F.3d 314, 318–20 (2d Cir. 2003). The Third Circuit dismissed, for similar reasons, a corrections officer's challenge to a regulation that

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 in principle extends 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.[60] Post cites as an example of this phenomenon a racially motivated hate crime that successfully communicates a message of racial prejudice.[61]

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—might be sufficient to entitle spectator sports to First Amendment protection. In theory, it is difficult to understand why these messages do not 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 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 sports on the basis of messages of this kind. The *Interactive Digital Software Ass'n* court made this clear when it acknowledged that video games might communicate to their audiences messages "[]related to the game itself"—that is, messages that relate to the outcome and progress of the competi-

required him to wear a flag patch on his uniform. Since the court found it unlikely that the flag patch would "relay any *message* (ideological or otherwise) to anyone," the court concluded that the regulation raised no issue of compelled speech. Troster v. Pa. State Dep't. of Corr., 65 F.3d 1086, 1091 (3d Cir. 1995).

60 Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1252 (1995) (pointing out that the *Spence* test's flawed, limited focus on "a speaker's intent, a specific message, and an audience's potential reception of that message" theoretically brings instances of defacement of public property under the protection of the First Amendment even though no courts would permit such an outcome).

61 *Id.* ("Think of the racist who commits a violent crime successfully to communicate a message of racial prejudice and hate. In such a case we do not say that the state's interest in prohibiting violence outweighs the defendant's interest in communication, but rather that the First Amendment does not come into the case at all." (internal citation omitted)).

tion—but nevertheless denied that sport constitutes a "form of expression entitled to free speech protection."[62]

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 Athletes and Others

First, it is not true, as the *Interactive Software Digital Ass'n* court assumed, that because athletes are motivated to take part in games of spectator sports 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 can do.[63] 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 also turned Jordan into a

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62 Interactive Digital Software Ass'n v. St. Louis Cnty., Mo., 200 F. Supp. 2d 1126, 1134 (E.D. Mo. 2002).

63 *See, e.g.*, Rick Maese, *Donte Stallworth: 'I just want to show what I can do' with Redskins*, WASHINGTON POST SPORTS INSIDER BLOG (July 27, 2011, 10:37 AM ET), 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; Ian Thomsen, *1 Cleveland Cavaliers*, SPORTS ILLUSTRATED, Oct. 26, 2009, at 80 (Anthony Parker stating that "[he] was given an opportunity to show what [he] can do" in the NBA).

"global superstar, celebrity figure and commercial brand."[64] 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.[65] 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 fame, but also for glory. 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"[66] and to "establish social status and individual preeminence . . . ."[67] Athletes did so by showing "especial skill and excellence" on the playing field, thereby demonstrating the manly virtues associated with both sport and war.[68] Notwithstanding the significant differences between contemporary and ancient athletics and contemporary United States and ancient Greece, the sports literature suggests that athletes continue to take part in public athletic competition for glory. In other words, 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 materials 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 Mi-

64 BARRY SMART, THE SPORT STAR: MODERN SPORT AND THE CULTURAL ECONOMY OF SPORTING CELEBRITY 10 (2005) (internal citations omitted).

65 *Id.* at 78 (noting Tiger Woods's forty million dollar endorsement contract with Nike and LeBron James's ninety million dollar sponsorship contract with Nike, among others); *id.* at 144–90 (discussing the cultural phenomenon of the global sports star as represented in the figures of David Beckham and Anna Kournikova).

66 MIKE MCNAMEE, SPORTS, VIRTUES AND VICES: MORALITY PLAYS 16 (2008).

67 DONALD G. KYLE, SPORT AND SPECTACLE IN THE ANCIENT WORLD 7 (2007).

68 *Id.*

chael Mandelbaum puts it, "[e]very game begins with the teams equal on the dimension that matters most: The score is always zero to zero. The outcome of each game [appears to] depend . . . entirely on what the players do during the contest[,]" so "sports . . . express the principle of merit."[69]

In practice, of course, sports games do not provide as even of 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.[70] 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 sports. Indeed, sociological studies of athletes in a variety of sports 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 physically dangerous and financially uncertain profession of prizefighting was because of the opportunity it gave them to "publicly establish . . . [their] fortitude and valor."[71] By boxing well, fighters demonstrated that they possessed the "virile values" commonly associated with success in boxing, "such as hardness, pugnacity, and physical bravery."[72] 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

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69 MICHAEL MANDELBAUM, THE MEANING OF SPORTS: WHY AMERICANS WATCH BASEBALL, FOOTBALL, AND BASKETBALL AND WHAT THEY SEE WHEN THEY DO 20–21 (2004). Mandelbaum makes this claim specifically about team sports, but the same is true of individual sports as well.

70 For more discussion of these points, see D. Stanley Eitzen, *Upward Mobility Through Sport? The Myths and Realities*, *in* SPORT IN CONTEMP. SOC'Y 249, 249 (D. Stanley Eitzen ed., 7th ed. 2005) (noting that "[t]ypically, Americans believe that sport is a path to upward mobility" but questioning the truth of this assumption); JOHN HOBERMAN, DARWIN'S ATHLETES: HOW SPORT HAS DAMAGED BLACK AMERICA AND PRESERVED THE MYTH OF RACE (1997) (critiquing the myth of sport as a space of equal opportunity and a mechanism for racial integration); Robert E. Washington and David Karen, *Sport and Society*, 27 ANN. REV. SOCIOL. 187 (2001) (reviewing the literature exploring the racial, gender, and class inequities involved in professional sports).

71 Loïc J. D. Wacquant, *The Pugilistic Point of View: How Boxers Think and Feel about Their Trade*, 24 THEORY & SOC'Y 489, 513 (1995).

72 *Id.* at 505.

took to stick to the arduous training regimen and ascetic lifestyle that success as a boxer was believed to require.[73] They boxed, in other words, for expressive reasons: because they wanted to demonstrate to the watching crowd that they were "m[e]n of strength" as well as "m[e]n of virtue" and thereby earn its admiration and respect.[74]

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, their manliness and value:

> 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 uncontestable fashion.[75]

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.[76]

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73 *Id.* at 513 (noting "the homology set up in and by the ring between physical excellence and moral standing," 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 . . . .")

74 *Id.*

75 Jeff Greenfield, *The Black and White Truth About Basketball*, *in* SIGNIFYIN(G), SANCTIFYIN', AND SLAM DUNKING 375 (Gena Caponi ed., 1999) (citation omitted).

76 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).

A recent study of middle-class practitioners of the sport of mixed martial arts ("MMA") found that these athletes also participated in public fights because they wished to demonstrate their mental and physical virtues.[77] 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."[78] It was because of the 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."[79] 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."[80] 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 sports 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 that they 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 pro-

77 Corey M. Abramson & Darren Modzelewski, *Caged Morality: Moral Worlds, Subculture, and Stratification Among Middle-Class Cage-Fighters*, 34 QUALITATIVE SOCIOL. 143, 165–66 (2011).

78 *Id.* (internal citations omitted).

79 *Id.* at 166.

80 MICHAEL A. MESSNER, POWER AT PLAY: SPORTS AND THE PROBLEM OF MASCULINITY 50 (1992).

grams to ensure that when athletes compete in international competitions, 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."[81] 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 past half century have been financed with public funds; and these facilities have been offered to teams under ever more favorable terms."[82] Governments support local teams—and provide generous financial incentives to ensure they stay 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.[83] 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.'"[84]

Corporations also fund teams, athletes, and/or stadia for expressive reasons: namely, because they wish to associate their brand with the positive virtues displayed on the field during the game.[85] 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

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81 James H. Frey & D. Stanley Eitzen, *Sport and Society*, 17 ANN. REV. SOC. 503, 512 (1991) (internal citations omitted).

82 MICHAEL N. DANIELSON, HOME TEAM: PROFESSIONAL SPORTS AND THE AMERICAN METROPOLIS 14 (1997).

83 *Id.* at 7–11, 105–12 (exploring the symbolic importance of teams to the cities they represent and discussing the economic and social benefits to cities of having home teams).

84 *Id.* at 104.

85 *See* Matthew P. McAllister, *College Bowl Sponsorship and the Increased Commercialization of Amateur Sports*, 15 CRITICAL STUD. MASS COMM. 357, 360 (1998) (exploring the impact 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 message of struggle and triumph" sporting events communicate); SMART, *supra* note 64, at 17, 65–102 (noting the increasing commercialization of spectator sports and the powerful impact of corporate sponsorship on the cultural significance of spectator sports); 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).

them—and whose symbols they often wear on their clothing 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, celebrated macho individualism, rather than the teamwork and good sportsmanship that the NFL wished to promote instead.[86] 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.[87] 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 NFL, NBA, and other professional sports leagues to shape the expressive meaning of their sports in order to ensure their leagues' profitability and respectability.[88]

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 the sports. This in turn points to the cultural and sometimes overtly political significance that games of spectator sports 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.

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86 Phillip Lamarr Cunningham, "*Please Don't Fine Me Again!!!!!": Black Athletic Defiance in the NBA and NFL*, 33 J. SPORT & SOC. ISSUES 39, 45 (2009) (discussing the NFL's decision to penalize athletes and their teams for " 'excessive celebrations' after touchdowns").

87 *Id.* at 41–43 (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. *Id.* at 39–40.

88 *See, e.g.*, MICHAEL ORIARD, READING FOOTBALL 25–56 (Alan Trachtenberg ed., 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 noting 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. STUD. SCI. 201, 213–16 (2007) (examining how promoters of mixed martial arts structured contests in order to ensure a quick flow of action, maintain audience excitement, and increase profitability).

B. The Messages that Games Communicate

Just as it is not true that the only motivations that drive athletes to participate in spectator sports 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 sports 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 simulacram of that 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—does not provide audiences a kind of psychological or artistic 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."[89] 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 "cultural power" that art cannot replicate: namely, the power "to tell [real] stories . . . in a way that no movie or novel can."[90]

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 games and to those who participate in them. 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.[91] "Because the spectator could be confident of the authenticity of their deeds," advertisers believed that consumers would more

89 ORIARD, *supra* note 88, at 9.

90 *Id.*

91 MANDELBAUM, *supra* note 69, at 11.

willingly "believe in the sincerity of their words" when they promoted a product.[92]

The writer Joseph Epstein suggests, similarly, that a great part of sports' appeal to 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, is "fraud-free and fakeproof."[93]

> Sport may be the toy department of life, 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.[94]

It is also because what happens on the field is real in this way that spectator sports provide, 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."[95] 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 as celebrities. The difference between a celebrity and a hero, of course, is the moral value that attaches to the latter but not to the former. Whereas celebrities are individuals who are "known for [their] well-knownness,"[96] sports 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."[97]

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92 *Id.* at 16.

93 Joseph Epstein, *Obsessed With Sport*: *On the Interpretation of a Fan's Dreams*, HARPER'S MAG., July 1976, at 71.

94 *Id.*

95 SMART, *supra* note 64, at 9.

96 DANIEL J. BOORSTIN, THE IMAGE: A GUIDE TO PSEUDO-EVENTS IN AMERICA 57 (1961) (emphasis omitted).

97 MEDIASPORT 138 ((Lawrence A. Wenner, ed., 1998) (citing 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 STUD. 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.").

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.[98] 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 they also embody the sporting virtues—among these, "courage, . . . perseverance, assertiveness, generosity, . . . dependability, honesty, and character."[99]

For many of the same reasons that it provides a powerful medium for the expression of messages of individual excellence and virtue, spectator sports also provide 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 as well as non-economic support to local teams and sports programs.[100] By funding sport, they

98 *See, e.g.*, Lines, *supra* note 97, at 285 (noting the contemporary construction of the sport hero as "damaged"); STANLEY H. TEITLEBAUM, SPORTS HEROES, FALLEN IDOLS (2005) (discussing how the pressure to succeed and the sense of entitlement that comes with being a sports icon create circumstances that are ripe for sports stars to make bad decisions and lose everything).

99 MEDIASPORT 138 (Lawrence A. Wenner, ed., 1998) (citation omitted).

100 For an informative account of the expressive, and more specifically nationalist motivations behind early efforts to establish a U.S. Olympic team, see MARK DYRESON, MAKING THE AMERICAN TEAM: SPORT, CULTURE, AND THE OLYMPIC 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 59 (quoting Theodore Roosevelt). The 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. For a discussion of nationalism displayed by various countries through participation in the Olympics and other international sporting events, see generally NATIONAL IDENTITY AND GLOBAL SPORTS EVENTS: CULTURE, POLITICS, AND SPECTACLE IN THE OLYMPICS AND THE FOOTBALL WORLD CUP (Alan Tomlinson & Christopher Young eds., 2006); ALAN BAIRNER, SPORT, NATIONALISM, AND GLOBALIZATION: EUROPEAN AND NORTH AMERICAN PERSPECTIVES (2001).

also, in many cases, seek to promote a sense of national, or local, identity.

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

> [S]ports 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.[101]

In the act of collectively cheering their team or athlete to victory, fans experience, and reinforce, the ties that bind them to one another.[102] 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."[103] For this reason, the geographer John Bale argues that "[s]port has become perhaps the main medium of collective identification in an era when bonding is more frequently a result of achievement."[104] 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 consti-

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101 Joseph K. Adjaye, *Reimagining Sports: African Athletes, Defection, and Ambiguous Citizenship*, 57 AFR. TODAY 26, 32–33 (2010).

102 Scholarship exploring spectator identification with teams is vast. For some good examples, see GARRY CRAWFORD, CONSUMING SPORT: FANS, SPORT AND CULTURE 53 (2004) (noting the important role that sport spectatorship plays in "creat[ing a] sense of community and belonging" among fans); JOSEPH 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"); NATIONAL IDENTITY AND GLOBAL SPORTS EVENTS: CULTURE, POLITICS, AND SPECTACLE IN THE OLYMPICS AND THE FOOTBALL WORLD CUP (Alan Tomlinson & Christopher Young eds., 2006) (exploring how national identities come to be constructed through international sport competitions).

103 Adjaye, *supra* note 101.

104 JOHN BALE, SPORTS GEOGRAPHY 14 (1989).

tute our countries and nations and other people's countries and nations."[105]

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

> 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. Sport's aesthetic value derives frequently from situations where athletes are confronted by their limits, and their attempts to surpass themselves is one of the most appreciated aspects of the sport. . . . 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.[106]

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.[107] The aesthetic value, they suggest, also lies in sports' 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

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105 GARRY WHANNEL, CULTURE, POLITICS AND SPORT: *BLOWING THE WHISTLE*, REVISITED 170 (2008).

106 Teresa Lacerda & Stephen Mumford, *The Genius in Art and in Sport: A Contribution to the Investigation of Aesthetics of Sport*, 37 J. PHIL. SPORT 182, 186 (2010).

107 *See* WANN ET AL., *supra* note15, 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 motive 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 (a wide receiver for the Pittsburgh Steelers) 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."); Garry J. Smith, *The Noble Sports Fan*, 12 J. SPORT & SOC. ISSUES 54, 58 (1988) ("Comitted 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. . . . Devotees will speak rapturously, years later, of great moments they witnessed: a Gretzky goal, a Dr. J move, or a Nadia Comaneci perfect routine.").

of the 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 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 sports 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, play a key role in the articulation and reinforcement of a notion of "hegemonic masculinity" that, they argue, harms both women and non-normative men.[108] For the same reason, critics argue that modern spectator sports play a powerful role in reproducing racial inequalities and stereotypes.[109] Others point, however, to the tremendous importance that the entrance of female and 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 and

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108 R.W. Connell, *An Iron Man: The Body and Some Contradictions of Hegemonic Masculinity*, *in* SPORT, MEN, AND THE GENDER ORDER: CRITICAL FEMINIST PERSPECTIVES 83, 94 (Michael A. Messner & Donald F. Sabo eds., 1990) (arguing that sports help construct a culturally idealized form of masculine character that "connect[s] . . . masculinity to toughness and competitiveness" and which she calls "hegemonic masculinity"); Marie Hardin et. al., '*Have You Got Game?*' *Hegemonic Masculinity and Neo-Homophobia in U.S. Newspaper Sports Columns*, 2 COMM., CULTURE & CRITIQUE 182, 185 (2009) ("The most powerful institution for 'shoring up' hegemonic masculinity in the United States has been the sports/media complex. . . . [M]en who participate in sports that most exemplify the qualities of hegemonic masculinity are constructed as embodiments of the ideal." (internal citation omitted)).

109 HOBERMAN, *supra* note 70 (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 7 (1999) (exploring how sport promotes a perception of equal opportunity that occludes pervasive racial inequalities and noting that while professional sports present an opportunity for social mobility, the odds of athletes ascending to professional leagues are slim).

women can do or achieve.[110] In 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.[111] 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 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 the games of spectator sports 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

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110 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 STUD. 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) ("Jackie Robinson was the first black American known by most of white America. His were the struggles observed, understood and embraced. His campaign reoriented public culture and the body politic. Maybe."); Charles E. Schumer, Foreword, *in* JACKIE ROBINSON: RACE, SPORTS AND THE AMERICAN DREAM ix (Joseph Dorison & Joram Warmund eds., 1995) ("On April 15, 1947, Jack Roosevelt Robinson changed America forever.").

111 A particularly famous example of an athlete who specifically intended to convey a message about gender by her participation in the game of a 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) (describing Billie Jean King's victory over Bobby Riggs in 1973 and classifying it as "perhaps the most important event in women's tennis history").

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 tend to favor the subversion or transformation of existing symbolic conventions.[112] In spectator sports, in contrast to more elite genres of entertainment, the performance works only if actors follow the rules. Following the rules is, in fact, one of the virtues that sports express and display.[113] This makes the messages that games express particularly easy to understand—a fact that may, in turn, be one reason for sports' mass appeal.[114]

There is thus no doctrinal justification for denying spectator sports First Amendment protection. This conclusion is buttressed by the 2011 decision, *Brown v. Entertainment Merchants Ass'n*, in which the Supreme Court recognized video games as a form of expression entitled to First Amendment protection.[115] In recognizing video games as First Amendment-protected expression, the Court expressly rejected arguments—similar to those made by the *Interactive Digital Software Ass'n* 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.[116] Justice Antonin Scalia, who wrote the majority opinion in *Brown*, acknowledged that the experi-

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112 *See* ANDREAS HUYSSEN, AFTER THE GREAT DIVIDE: MODERNISM, MASS CULTURE, Postmodernism 4-7 (1986) (chronicling the twentieth-century concept of the avant-garde and of art as a challenge to existing convention).

113 *See* WILLIAM J. MORGAN, WHY SPORTS MORALLY MATTER 146 (2006) ("[I]n sports, it is crucial that everyone start from the proverbial same starting line, so that no one enjoys a leg up on the competition. At the very least, this entails an impartial observance and application of the rules to ensure that similar cases are treated similarly.").

114 MANDELBAUM, *supra* note 69, 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 often obscure. . . . [Sports, in contrast,] offer entertainment to the masses, and a 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.").

115 Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2733 (2011) ("California correctly acknowledges that video games qualify for First Amendment protection.").

116 *Id.* at 2737–38.

ence of playing a video game is, as Justice Samuel Alito argued in dissent, "different in 'kind'" from the experience of reading a book.[117] He nevertheless rejected the claim that this difference was constitutionally significant. Since 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, "[l]ike the protected books, plays, and movies that preceded them," fully protected by the First Amendment.[118]

What was true of the video games in *Brown* is true of spectator sports. Although most games of spectator sports lack some of the "familiar literary devices" that Scalia highlighted in *Brown*, such as music and dialogue, 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 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 only adds 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.[119]

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117 *Id.* at 2737 n.4.

118 *Id.* at 2733.

119 MANDELBAUM, *supra* note 69, at 5.

Mandelbaum is not the only writer to compare 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."[120] 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. . . ."[121] Joyce Carol Oates writes that "[e]ach boxing match is a story—a unique and highly condensed drama without words."[122]

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 sports. What theorists mean when they 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 are movies, dance performances—or, for that matter, video games.

B. Philosophical Implications

The cultural and political significance of what takes place during the game of a spectator sport also means that there is no philosophical justification for denying protection to sports 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 Oliver Wendell Holmes and Louis Brandeis reimagined the First

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120 A. BARTLETT GIAMATTI, TAKE TIME FOR PARADISE: AMERICANS AND THEIR GAMES 95 (1989).

121 ALBERT THEODORE POWERS, THE BUSINESS OF BASEBALL 9 (2003); HAROLD ROSENBURG, SAUL STEINBERG (1978).

122 JOYCE CAROL OATES, ON BOXING 8 (1987).

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.[123] Since then, the Court has persistently refused to define the scope of First Amendment protection with reference to the precise intentions of the Framers.[124] However, 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.[125] Instead, the 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 Brandeis identified instead as the protection of democracy against "the occasional tyrannies of govern-

123 *See, e.g.*, Jack M. 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 R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 256 n.3 (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* MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM 7–9 (1991) (examining the basis of libertarian interpretations of the First Amendment); David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1207–09 (1983) (describing the early twentieth-century historical evolution of the meaning of "freedom of speech" and the invention of a new libertarian tradition).

124 Sunstein, *supra* note 123, 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.").

125 City of 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 First Amendment."). *See also* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1773–84 (2004) ("That the boundaries of the First Amendment are delineated by the ordinary language meaning of the word 'speech' is simply implausible. . . . [T]he 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.").

ing majorities."[126] 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 significant limits on the government's ability to prosecute libel.[127]

Scholars have also invoked sometimes divergent conceptions of the First Amendment's purpose to explain, as well as to challenge, the doctrinal rules.[128] 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 sports. This may seem a counterintuitive claim to make, given the, at best, highly attenuated relationship between spectator sports 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 protect democracy in the United States by protecting the free and open political debate necessary to sustain it, as

126 Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); Whitney v. California, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring).

127 New York Times Co. v. Sullivan, 376 U.S. 254, 272, 279–80 (1964) (holding that, in order to give First Amendment freedoms the "breathing space that they need to survive," public officials may not recover for defamation "relating to [their] official conduct unless [they] prove that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not" (internal citation and quotation marks omitted)); 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).

128 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, 145 (1989) (finding that "[a]rguments 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 125, at 1785–86 (critiquing the various purposive accounts of First Amendment boundaries that have been proposed).

many have argued that it is,[129] then the only kind of speech to which free speech protection should extend is speech that is "explicitly political."[130] 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 James Madison put it, the "People, not the Government, [that] possess the absolute sovereignty."[131] In *Winters*, the Supreme Court 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.[132] Four years later, in *Joseph Burstyn, Inc. v. Wilson*, the Court found the same to be true of motion pictures; since 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-

129 *See, e.g.*, Greenawalt, *supra* note 128 and accompanying text; Post, *supra* note 60, 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."); Martin H. Redish & Abby Marie Mollen, *Understanding Post's and Meiklejohn's Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression*, 103 NW. U. L. REV. 1303, 1303 (2009) ("Democracy 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. It is therefore 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.").

130 Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 27–28 (1971) ("The category of protected speech should consist of speech concerned with governmental behavior, policy or personnel, whether the governmental unit involved is executive, legislative, judicial or administrative. Explicitly political speech is speech about how we are governed . . . ."). 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, 300–01 (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 to some kinds of art).

131 Sunstein, *supra* note 123, at 256 (quoting James Madison, *Report on the Virginia Resolution, in* 6 THE WRITINGS OF JAMES MADISON 386 (Gaillard Hunt ed., 1906)).

132 Winters v. New York, 333 U.S. 507, 510 (1948).

political movies were entitled to the same degree of constitutional protection as was afforded more explicitly political speech.[133] In the years since *Joseph Burstyn*, members of the Court have 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.[134] The Court 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 effectively 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.[135] In these ways, games of spectator sports help shape our conceptions of the normative social order and, by implication, the rules that should govern it. As such, games of spectator sports are political, or at least politically relevant, in the same way that the *Burstyn* court recognized

133 Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952).

134 *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 602 (1998) (Souter, J., dissenting) (arguing that because art has the potential to affect public attitudes and behavior in various ways,, "[i]t goes without saying that artistic expression lies within this First Amendment protection" (quoting *Joseph Burstyn*, 343 U.S. at 501)).

135 *See, e.g.*, MANDELBAUM, *supra* note 62, at 20–21 (noting that team sports 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 et. al., *Baseball, Boxing and the Charisma of Sport and Race*, *in The Charisma of Sport and Race*, 8 DOREEN B. TOWNSEND CENTER OCCASIONAL PAPERS 5 (Christina M. Gillis ed., 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.'"); Eitzen, *supra* note 70, at 249 ("Typically, Americans believe that sport is a path to upward social mobility.").

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 spectator sports should not. Most art is, after all, not explicitly political, in the sense that Bork uses the term, to refer to "speech concerned with governmental behavior, policy or personnel."[136] 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."[137] In this category, he includes some but not all art. Sunstein argues, for example, that Charles Dicken'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).[138] Sunstein's argument, therefore, would clearly extend protection to some art and deny protection to some spectator sports that are intended to fulfill a purely entertainment function. What Sunstein's argument would not do, however, is establish the kind of categorical distinction between art and spectator sports that exists in the case law. Indeed, one could easily argue that, under Sunstein's definition of political speech, at least some spectator sports 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.[139]

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136 Bork, *supra* note 130, at 27.

137 Sunstein, *supra* note 123, at 306.

138 *Id.* at 308 ("Both *Ulysses* and *Bleak House* are unquestionably political for First Amendment purposes. The same is true of Robert Mapplethorpe's work . . . .").

139 Kelly, *supra* note 110, 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); Spencer, *supra* note 111, at 393 (noting that King participated in the match because

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 sports 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 art, and what we could call moral truth in the case of sports.[140] 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.[141] It would, in other words, be difficult to argue that art contributes in a 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[,]"

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she recognized the broader social implications of the match, especially on the fight for gender equality and the role of women in sports).

140 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, 1 (1995) ("The most influential argument supporting the constitutional commitment to freedom of speech is the contention that speech is valuable because it leads to the discovery of truth."); JOHN STUART MILL, ON LIBERTY 67-176 (David Bromwich & George Kateb eds., 2003) (offering a classic articulation of the "search for truth" rationale of freedom of speech).

141 *See* Greenawalt, *supra* note 128, at 132 (suggesting subjective truth 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) ("[I]f truth is to defeat falsity through robust debate in the marketplace, truth must be discoverable and susceptible of substantiation. If truth is not ascertainable or cannot be substantiated, the victory of truth in the marketplace is but an unprovable axiom. In order to be discoverable, however, truth must be an objective rather than a subjective, chosen concept.").

as David Richards argues that it does,[142] then surely the values are fostered equally well when an athlete exercises these capacities on the playing field rather than in 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.[143] Sports fans also tend to celebrate the subtlety 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.[144] The argument that spectator sports 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 they are in sport.

Despite general agreement in the cases that sports are 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 sports and art by reference to the aims and purposes of the

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142 David A. J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974).

143 *See* Wacquant, *supra* note 71, 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 who have studied MMA note a similar resistance among fighters to the idea that the sport only involves violence. *See, e.g.*, Abramson & Modzelewski, *supra* note 77, at 158, 160 ("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, '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.'" (internal citations omitted)).

144 Epstein, *supra* note 93 (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 107 , at 58 ("A splendid athletic performance rivals any great work of art; but, unlike 'a concert where the musician normally interprets the work of the composer, the athlete is an innovator, responding to each situation as it comes along.'" (internal citation omitted)).

First Amendment as it is to justify the distinction doctrinally. At least, it is difficult to justify the distinction if we accept what courts have been loath to accept but that the social scientific literature suggests we must accept—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."[145] Spectator sports also, as we have seen, provide an important arena for challenging the existing social order and, more particularly, dominant conventions of gender and race. For this reason, even if athletes, unlike artists such as Robert Mapplethorpe, may not intend for their performances to "contribute to public deliberation," [146] they may in fact quite powerfully do so. For this reason, even if plausible arguments can be made that spectator sports, 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 . . . ."[147]

C. Pragmatic Implications

There are, in addition, no other, more pragmatic reasons to deny First Amendment protection to spectator sports but to extend it to art and other genres of audience-oriented entertainment. The recognition of spectator sports as speech would not, for example, threaten the fundamental First Amendment distinction between speech and conduct by allowing "an apparently limitless variety of conduct [to] be labeled 'speech.'"[148] This is a common concern in the expressive conduct context when courts are frequently forced to wrestle with the

145 Sunstein, *supra* note 123, at 308.

146 *Id.* at 306.

147 Jack M. Balkin, Commentary, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 39 (2004).

148 United States v. O'Brien, 391 U.S. 367, 376 (1968).

implications of extending First Amendment protection to conduct that is not only non-linguistic—and therefore does not fit our conventional understanding of speech as "the communication . . . of thoughts in spoken words"[149]—but may also be conventional and hence widespread. At least one court has suggested that fear of an all-encompassing First Amendment—in which everything is protected, and hence nothing is protected—influenced its deliberations regarding the constitutional status of spectator sports.[150]

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 sports would not mean that the First Amendment would be "applicable to all athletic endeavors."[151] 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 those of 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." However, recreational athletics, like going to school, would not be categorically presumed to be an expressive act. It is only spectator sports which are entitled to categorical First Amendment protection for the same reason that art and other forms of entertainment are: because, by addressing a public audience, athletes participate 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 Justice Daniel Souter's language from his *Barnes* concurrence, they are sports that are "directed to an actual or hypothetical audience . . . .]"[152] 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"—

149 *Speech Definition*, MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/speech (last visited Feb. 28, 2014).

150 Top Rank, Inc. v. Fla. State Boxing Comm'n, 837 So. 2d 496, 502 n.1 (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.").

151 *Id.*

152 Barnes v. Glen Theatre, Inc., 501 U.S. 560, 581 (1991) (Souter, J., concurring).

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 should not. Although these acts obviously 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 sports 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.[153] Governmental actors would be able to regulate the time, place, and manner in which games of spectator sports occur in just the same way as they currently regulate the time, place and manner in which concerts, plays, and dance performances take place.[154] They could even ban a particularly dangerous sport if the ban left open ample alternative channels for the communication of that sport's message and was genuinely directed at the sport's physical dangers.[155] They simply would not be

153 For a particularly forceful articulation of this concern, see Justice Stephen Breyer's dissent in *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2675 (2011) (Breyer, J., dissenting) ("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.'" (citing Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 589 (1980) (Rehnquist, J., dissenting)).

154 *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 796 (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 serve a significant governmental interest[:]" namely, protecting citizens from unwelcome noise); Clark v. Cmty. 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.").

155 *Barnes*, 501 U.S. at 571 (upholding a ban on 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"); Clark, 486 U.S. at 294–95 (upholding a ban on sleeping in national parks as a "defensible . . . time, place, or manner restriction" on expression

able to ban the performance of a 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 view of the First Amendment, this would obviously be a good thing. As Justice Brennan noted in *Texas v. Johnson*, "[i]f 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."[156]

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. Recent 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.[157] 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, does boxing, by valorizing violence and depraving and corrupting its fans.[158] Similar concerns with the effect of sports' messages on its audiences 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."[159]

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given no evidence that the regulation targeted speech or attempted to ban sleeping altogether);.

156 491 U.S. 397, 414 (1989).

157 For a discussion of the issues involved in the anti-boxing movement in the United States and the United Kingdom, see Ken Jones, *A Key Moral Issue: Should Boxing be Banned?*, 4 CULTURE, SPORT, SOC'Y 63 (2001) (presenting safety, health, intentional harm, and violence-based arguments for banning boxing). For 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 (2009) (discussing the history of MMA in the United States and efforts to ban MMA).

158 Jones, *supra* note 157, at 69 (comparing and likening the harmful effects on citizens of viewing pornography to watching boxing matches).

159 James Dao, *Senate Chief in Albany, Reversing Himself, Says He Backs a Ban on Ultimate Fighting,* N.Y. TIMES, Feb. 11, 1997 at B7.

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 implicate 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 a moral censor.

D. Indirect Benefits

Recognizing spectator sports 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 Byron White declared, in *Schad v. Borough of Mount 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."[160] 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,[161] even as others note that, in fact, it is not.[162]

The recognition of spectator sports 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 entertainment, such as gam-

160 452 U.S. 61, 65 (1981).

161 Club Retro, L.L.C. v. Hilton, 568 F.3d 181, 211 (5th Cir. 2009) ("[L]ive musical entertainment . . . is unquestionably speech and expression subject to the guarantees of the First Amendment." (quoting Collins v. Ainsworth, 382 F.3d 529, 539 (5th Cir. 2004)); Willis v. Town of Marshall, N.C., 426 F.3d 251, 260 (4th Cir. 2005) (holding that musical performances are entitled to First Amendment protection); Tacynec v. City of Philadelphia, 687 F.2d 793, 796 (3d Cir. 1982) ("[T]he Supreme Court has made it clear that '[e]ntertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee.'" (quoting Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981)).

162 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").

bling 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).[163]

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, specifically its core concern with speech about matters of "public concern."[164] While gambling and mountain-biking are activities 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 instead recognizes 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 conclusions

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163 *Entertainment Definition*, MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam/webster.com/dictionary/entertainment (last visited Feb. 28, 2014).

164 Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (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 Na'l Bank of Bos. v. Bellotti, 435 U.S. 765, 776 (1978)). *See also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982) (stating that speech on public issues occupies the "highest rung of the hierarchy of First Amendment values"); *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) ("[Speech] concerning public affairs is more than self-expression; it is the essence of self-government.").

that spectator sports do not constitute a form of expression worthy of First Amendment protection.[165]

In addition to the clarity it would help bring to the case law governing entertainment, recognizing spectator sports 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 broadcasted.[166] Under the precedents discussed in Part I, live athletic performance gets effectively no protection. Yet, courts generally agree that the broadcast of a sporting event is a fully protected expressive act.[167]

From either an audience-centric or a speaker-centric view of the First Amendment, however, there is little justification for treating the act 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 transform a non-audience-directed act (the display of the northern lights, for example)[168] 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.

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165 *Supra* note 36–36, and accompanying notes.

166 For an argument about the unjustifiable distinction the First Amendment case law makes with respect to live and mediated performance, 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").

167 United States Satellite Broad. Co., Inc. 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).

168 *See* Miller v. Civil City of S. Bend, 904 F.2d 1081, 1096 (7th Cir. 1990) (Posner, J., concurring) (stating that although a "display of northern lights [may be] entertaining[,] this would not make that display an expressive activity" directed to an audience).

Courts provide no justification for the distinction that the case law draws between live and broadcast sport. Nor does the commentary.[169] An obvious explanation for the different treatment of live and mediated expression might be the special solicitude due to the press under the Press Clause of the First Amendment. 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.[170] 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 free speech protection to spectator sports would therefore get rid of another doctrinal distinction—in this case, the distinction between live and mediatized representations of sports—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 also the expressive interests of those who play and promote sports, and those who watch sports in person as well. More broadly, it would ensure that First Amendment doctrine recognizes the expressive significance of spectator sports 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 in the stadium, and of playing it, should be as 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 sports.

CONCLUSION

Sports sociologists frequently complain about the lack of interest that social scientists have historically demonstrated in the topic of

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169 In fact, the only commentary I have been able to find that examines this question is a student note. *See* Joshua A. Stein, Note, *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 First Amendment protection).

170 *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) ("[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.").

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."[171] 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.[172] 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.[173]

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 provides 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, sports 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 spectator sports has led, over the past two decades, to an explosion of research and writing devoted to the analysis of the practice and the significance of sports in contemporary public culture.[174] There has not, however, been a similar reconceptualization of the value of sport in the First Amendment case law. This Article has argued that, for some of the same reasons that led the Court recently to

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171 Pierre Bourdieu, *Program for a Sociology of Sport*, 5 SOC. SPORT J. 153, 153 (1988).

172 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).

173 *See, e.g.*, Early, *supra* note 135, at 2–3 ("They thought sport was a trivial subject and not worthy of scholarly attention. Many dismissed sport as a passive amusement or entertainment, which precluded its having any intellectual content.").

174 For a good overview of only some of the recent scholarship on the topic, see Robert E. Washington & David Karen, *Sport and Society*, 27 ANN. REV. SOC. 187,(2001); Niko Besnier & Susan Brownell, *Sport, Modernity, and the Body*, 41 ANN. REV. ANTHROPOL. 443 (2012).

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 as entitled to First Amendment protection for their participation in the act. Indeed, to a more profound degree than video games, spectator sports provide 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.[175]

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 sports 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 sports—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 sports.

175 As Gerald Early has argued, "[s]port is how human beings perform the art and craft of competition. . . . Trying to understand what sport is about is trying to understand what winning and losing are all about." Early, *supra* note 135, at 5.