Symbolic speech as a form of protest, like taking a knee at a football game while others stand for the National Anthem, enjoys a long history in America. It’s been a powerful form of political expression going back to the protests in the colonies in the 1760s against British oppression.

The NFL protests—players taking a knee during the playing of the National Anthem before NFL games—provides an extraordinary opportunity for teaching about the law and history of the First Amendment.

Learning Objectives

1. **Government vs. private**: to learn the difference, for purposes of the First Amendment, between government restrictions and private restrictions on speech.
2. **Broad definition of expression**: to learn that the First Amendment protects not only verbal and printed
expression, but also nonverbal expression that we call “expressive conduct” or “symbolic speech.”

3. **Compelled flag salutes**: to learn why the government cannot compel people to salute the flag or otherwise engage in patriotic activities.

4. **Historical support for symbolic expression**: to learn the historical support for symbolic expression in America’s founding period.

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**Government vs. Private**

One principle to emphasize to students is the difference, for purposes of the First Amendment, between government restrictions and private restrictions on speech. The First Amendment only applies to actions by government and government officials to restrict speech. Actions restricting speech by private individuals and private institutions, including corporations, do not typically raise First Amendment concerns. The NFL, of course, is a private organization and not a governmental actor. It can then set rules and restrictions, even if controversial.

**Questions for Discussion**

1. For purposes of the First Amendment, is there a difference between a football player at a public high school taking a knee for the National Anthem and a player for an NFL team doing the same? Explain.

2. Suppose the President threatened the NFL with economic sanctions if it did not discipline players for taking a knee. If an NFL team responded by fining a player, can you make an argument that the team’s action is subject to First Amendment limitations?

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**Broad Definition of Expression**

The First Amendment protects the freedom of speech, which in its classic form is the spoken word. But the Supreme Court has expanded the definition of speech so that it encompasses additional forms such as artistic and symbolic speech, and thus the idea of speech has evolved beyond the spoken word to a larger conception involving expression. Symbolic expression is all around us in such things as flags, emblems, banners, uniforms, robes, armbands, crests, seals, logos, trademarks, effigies, and playacting. Religious iconography includes the Cross, the Crucifix and much more. Actions may also convey ideas and be symbolic, as in taking a knee at a football game. Sometimes, people use these symbols as a means of protest, often causing controversy by denigrating or even destroying venerated symbols. No words may be exchanged, but people are nonetheless conveying ideas when they burn a flag, take a knee during the playing of the National Anthem, or hang a public official in effigy. As the Supreme Court said in *West Virginia State Board of Education v. Barnette*, “Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind.”
Read more on Symbolic Speech: From Liberty Tree to Taking a Knee: America’s Founding Era Sheds Light on the NFL Controversy

Questions for Discussion

1. How is taking a knee different from other forms of protest, like speeches and newspaper editorials?

2. Make a list of symbols that you’ve noticed in your daily life. They may come from the worlds of government, religion, private organizations, and more.

3. Provide examples of how some of these symbols have been used in protest.

Compelled Flag Salutes

The First Amendment does not permit governmental institutions, including public schools, to stifle dissent by compelling people to participate in patriotic activities such as flag salutes and recitation of the National Anthem. This was settled in 1943 in the case of West Virginia Board of Education v. Barnette, in which a public school required students to pledge allegiance to the flag. The Court ruled that the flag salute is a form of symbolic expression and that “the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind.” The Court said that no public official “can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.” It “invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”

Questions for Discussion

1. Why is it important that the First Amendment protect those who dissent from official policies?

2. Even though the First Amendment protects dissenters, including those who use symbols, should an exception be made for dissent that involves national symbols like the flag and the National Anthem?

3. Under the First Amendment, should we take account of the fact those who dissent by refusing to participate in patriotic activities deeply offend many Americans?

4. Suppose a public high school disciplined a student for taking a knee for the National Anthem or for refusing to join in the Pledge of Allegiance. How would you argue that the school’s action violated the First Amendment?
Symbolic speech as a form of political protest has a long history in America, and was a popular form of expression during the founding period. Colonial protests against the British included liberty trees, liberty poles, and effigies, images that attracted large crowds with a clear and powerful message.

Read more on Symbolic Speech: From Liberty Tree to Taking a Knee: America’s Founding Era Sheds Light on the NFL Controversy

Questions for Discussion

1. What were the advantages of symbolic speech as a form of political protest during the American founding period?

2. Compare the effectiveness of hanging of effigies with essays that argued against British policy by invoking Magna Carta and other documents from English legal history.

3. How was symbolic speech linked to large public gatherings and political demonstrations?

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