PERSONAL FOUL, ROUGHING THE SPEAKER: THE ILLUSORY WAR BETWEEN THE ESTABLISHMENT CLAUSE & COLLEGE FOOTBALL

INTRODUCTION

On a hot Sunday morning in Oxford, Mississippi, Hugh Freeze sits with his family gathered beside him in the back of the Manning Center.[1] Players begin to file in around 11 A.M.[2] However, this is no ordinary player meeting.[3] The music blasting through the loud speaker is not meant to get the players ready for film study or a run-down of the positives and negatives from previous games; the songs are Christian hymns.[4] This is a Fellowship of Christian Athletes (FCA) worship service held every Sunday for players, coaches, and others who wish to attend.[5] Freeze believes the merger between his coaching duties and his religious beliefs is not only practical, but also beneficial.[6] Freeze stated, "The most important thing we have is the platform we have to impact the lives of the people in our program . . . . When my life comes to an end, how much does that scoreboard really matter?"[7] Players are not required to attend the FCA worship services or join in team prayers, but Freeze encourages them to do so.[8] Freeze sincerely believes having some foundational religious faith will better prepare the young men he coaches not only for their tasks on the football field, but also in their everyday lives as human beings.[9]

The Freedom From Religion Foundation (FFRF) strongly disagrees with Freeze's practices regarding FCA worship services.

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[1] *See* Kent Babb, *Where College Football Is a Religion, and Religion Shapes College Football*, WASH. POST (Aug. 29, 2014), http://www.washingtonpost.com/sports/colleges/where-college-football-is-a-religion-and-religion-shapes-college-football/2014/08/29/8d03de32-2dfa-11e4-bb9b-997ae96fad33_story.html. Hugh Freeze is the head coach of the University of Mississippi's football team, known as the Rebels. *See Hugh Freeze*, OLEMISSSPORTS.COM, http://www.olemisssports.com/sports/m-footbl/mtt/freeze_hugh00.html (last visited Aug. 10, 2015). The Manning Center is a state-of-the-art indoor practice facility/meeting area for the Ole Miss football team. *See Manning Center*, OLEMISSSPORTS.COM, http://www.olemisssports.com/facilities/ole-facilities-indoor-practice.html (last visited Aug. 10, 2015). The center contains team meeting rooms, the coaches' offices, training facilities, and a student cafeteria. *Id.*

[2] This is based on the author's personal attendance at one of these FCA services.

[3] *See* Babb, *supra* note 1.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

FFRF thinks Freeze's "encouragement" would be more aptly described as "coercion."[10] A staff attorney for the FFRF wrote, "This practice coerces players, of varying faiths or none at all, to enter a Christian house of worship, lest they speak up against their superiors."[11] FFRF sees Freeze's actions as tantamount to state-sponsored religion through the University of Mississippi, which would violate the Establishment Clause of the United States Constitution.[12] The Establishment Clause appears to be at war with college football.

The limits of a governmental employee's freedom of speech rights are outlined by the *Pickering* test.[13] However, the issue of religious speech by coaches or teachers at the university level has yet to be decided by the Supreme Court, and, outside of the requirements announced in *Pickering* and its progeny, it is unclear how the Court would evaluate, say, a football coach's or professor's claim of freedom to speak on religious matters in a university setting.

In Part I of this paper, I will examine the background law involving government employees' free speech rights, religious speech in the university context, and the current landscape of Establishment Clause jurisprudence. Part II will focus on how several circuit courts have handled the issue. In Part III, I will argue that religious speech should be treated as a matter of public concern, bringing it within the scope of protected employee speech. I will show that, in light of the Court's decision in *Town of Greece v. Galloway*,[14] university officials/employees do not violate the Establishment Clause by merely speaking about their religious beliefs or *encouraging* students to attend church services, given the differing legal and policy concerns between coaches/teachers at high schools and those same individuals at universities. Further, the coercion test announced in *Town of Greece* represents the best method of analyzing the government's interests as an employer. In Part IV, I will separately examine the issue of prayer. Finally, in

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[10] *Id.*

[11] *Id.*

[12] *See generally* Lemon v. Kurtzman, 403 U.S. 602 (1971); Lynch v. Donnelly, 465 U.S. 668 (1984); Lee v. Weisman, 505 U.S. 577 (1992); Town of Greece v. Galloway, 134 S. Ct. 1811 (2014).

[13] *See infra* notes 15-26 and accompanying text.

[14] 134 S. Ct. 1811 (2014).

Part V, I will apply my test to several real life situations, including the issue currently facing Hugh Freeze and the University of Mississippi.

I. FOUNDATIONAL DOCTRINE

A. Free Speech Clause: Employee Speech and Coercive Speech

1. *Pickering v. Board of Education*[15]

In *Pickering*, the Court confronted the issue of what free speech rights, if any, a high school teacher enjoyed as a public employee.[16] Marvin Pickering was dismissed from his job at an Illinois school district for sending a letter to the editor of a local paper that was critical of a proposed tax increase, which the school board supported.[17] The board dismissed Pickering for authoring the letter.[18] His dismissal was reviewed by the Illinois courts, which affirmed.[19] On appeal, the Supreme Court reversed.[20]

The Court first noted the idea that a public school teacher had relinquished his or her free speech rights "to comment on matters of public interest," simply by working for the government, had been uniformly rejected by prior opinions.[21] A balance must be achieved between the teacher's right, as a citizen, to speak on matters of public concern and the government's need as an employer to promote efficiency in the workplace.[22] Freedom of

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[15] 391 U.S. 563 (1968).

[16] *Id.* at 565.

[17] *Id.* at 564. The school board had itself had several letters published in the same newspaper urging voters to pass the tax increase. *Id.* at 566. The letter sent by Pickering, which ultimately resulted in his dismissal, was in response to the letters from the school board. *Id.* In his letter, Pickering was critical of the allocation of funding, specifically the allocation between educational programs and athletic programs. *Id.* The letter also alleged the school board was trying to silence any potential dissidents amongst the teachers. *Id.*

[18] *Id.* at 566.

[19] *Id.* at 567.

[20] *Id.* at 575.

[21] *Id.* at 568. *See generally* Keyishian v. Bd. of Regents, 385 U.S. 598 (1967); Shelton v. Tucker, 364 U.S. 479 (1960).

[22] *Pickering*, 391 U.S. at 568. The Court noted that Pickering's relationship to his superiors would not have been negatively impacted as a result of his letter, since the majority of criticism was directed toward the board itself, and any conflict that would

speech regarding matters of public concern lie at the heart of the First Amendment's Free Speech Clause, and the Court noted that it had denied "recovery of damages by a public official" in a libel action absent a showing of "knowledge of the[] falsity or . . . reckless disregard [of the] truth or falsity" of statements, even when those statements "[we]re directed at their nominal superiors."[23] The famed standard announced in *New York Times v. Sullivan*[24] was applied to Pickering's case, and the Court found the standard was not met.[25] Thus, the firing of Pickering by the district was improper and in violation of his free speech rights as a public employee.[26]

2. *NAACP v. Claiborne Hardware Co.*[27]

In Port Gibson, Mississippi, local members of the National Association for the Advancement of Colored People (NAACP) organized a boycott against local merchants to stop their discriminatory practices.[28] The boycott was strictly enforced

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arise from interaction with the superintendent would be minimal in degree. *Id.* at 569-70. The standard for what constitutes a matter of public concern would be further clarified in *Connick v. Myers*, 461 U.S. 138 (1983). In evaluating the public concern element of *Pickering*, the employee's speech must concern "any matter of political, social, or other concern to the community." *Id.* at 146. Unless one of these elements is present in the speech, it is not the place of the courts to second-guess the decisions of managers regarding maintaining a productive work environment. *Id.* In determining if the speech relates to a matter of public concern, courts should look at "the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48. In evaluating the government's interest portion of the balancing test, courts must look at the government's need as an employer to promote "the effective and efficient fulfillment of its responsibilities to the public." *Id.* at 150.

[23] *Pickering*, 391 U.S. at 573-74.

[24] 376 U.S. 254, 279-80 (1964).

[25] *Pickering*, 391 U.S. at 574-75. The school district argued the standard should be whether the statements were factually accurate and related to the actual experiences of the employee because, due to his employment in the public sector, Pickering had "a duty of loyalty to support his superiors in attaining the generally accepted goals of education." *Id.* at 568-69. The Court rejected the notion that Pickering could be fired for commenting on matters of public concern that were "substantially correct." *Id.* at 570.

[26] *Id.* at 574-75.

[27] 458 U.S. 886 (1982).

[28] *Id.* at 889. African American citizens of the community had previously voiced their concerns regarding racial integration and equality to the county government to no avail. *Id.* at 902. The leader of the boycott, a local pastor, stated that "violators would

amongst members of the black community, and those who did not comply were ostracized and rebuked by their peers.[29] The boycott was successful, white merchants in the town filed a suit in chancery court to recover damages on a common law tort theory, and the chancery court held the boycott illegal under Mississippi law as a "secondary boycott."[30] On appeal, the Mississippi Supreme Court held that the boycott was illegal in light of the coercive elements, such as ostracizing those who broke the boycott and other threats for those not in compliance.[31] The Supreme Court of the United States reversed, holding the boycott was protected speech.[32]

"Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action."[33] Calls to action are a central tenet of many forms of speech.[34] Speech regarding matters of political, social, or economic concern necessarily involves calls to action because the purpose of the speech is to gain adherents to a particular belief.[35] The fact that certain speech involving these issues, central to the First Amendment, represents an individual's attempt to persuade others, even given coercive elements, does not in itself cause the speech to lose its First Amendment protection.[36] The Court went on to note this country's dedication to "the principle that 'debate on public issues should be uninhibited, robust, and wide-open.'"[37]

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be 'disciplined' by their own people." *Id.* The pastor was later quoted as saying violators would have their necks broken. *Id.*

[29] *Id.* at 894. Watchmen were placed outside stores owned by white merchants to ensure compliance with the measures, and the names of individuals who did not comply were posted weekly at the local black church. *Id.* at 903-04. Some violence even occurred against those who still did business with the white merchants, from shots being fired outside a house and a brick being thrown through the windshield. *Id.* at 904.

[30] *Id.* at 891-92.

[31] *Id.* at 895.

[32] *Id.* at 933.

[33] *Id.* at 910.

[34] *Id.* at 911.

[35] *Id.* at 911-12.

[36] *Id.*

[37] *Id.* at 913 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

3. *Widmar v. Vincent*: The Intersection of Free Speech and Establishment[38]

The University of Missouri at Kansas City had an established practice of allowing registered student groups to use university facilities for group meetings.[39] Cornerstone, "a registered religious [student] group," was barred from accessing school facilities, and eleven members brought suit.[40] The university stated, as its purpose behind the policy, that it was concerned about potential Establishment Clause violations stemming from the religious group's use of the facilities.[41] The district court found against Cornerstone, but the Eighth Circuit reversed.[42] The Supreme Court then affirmed the decision of the Eighth Circuit.[43]

The Court began by determining the university had created a designated public forum by allowing student groups to utilize its facilities, and noted the Court had, in numerous instances, extended First Amendment protections to college campuses.[44] In addition, religious worship and discussion are types of speech that garner protection under the First Amendment.[45] Thus, the university's decision had to withstand strict scrutiny,[46] the test for content-based restrictions.[47] While the Court noted avoidance of an Establishment Clause violation was a compelling state interest, it went on to state, "The University's argument misconceives the nature of this case. The question is not whether the creation of a religious forum would violate the Establishment

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[38] 454 U.S. 263 (1981).

[39] *Id.* at 265.

[40] *Id.* at 265-66.

[41] *Id.* at 270-71.

[42] *Id.* at 266-67.

[43] *Id.* at 267.

[44] *Id.* at 267-69 (citing Healy v. James, 408 U.S. 169, 180 (1972); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

[45] *Id.* at 269.

[46] Strict scrutiny requires the government to show it has an actual compelling state interest that is served by the alleged discrimination. Few government interests have been deemed compelling enough for the government to overcome the high hurdle of strict scrutiny.

[47] *Id.* at 267. In later cases involving religious expression, the Court has said that, where a designated public forum has been created, the government's restrictions must be reasonable and content neutral. *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993). Discrimination against religious groups in this context has been held by the Court to equate to viewpoint discrimination. *Id.*

Clause. . . . [T]he question is whether it can now exclude groups because of the content of their speech."[48]

The primary effect of allowing religious groups to use university facilities would not result in the advancement of religion.[49] In addition, the university students were mature adults who could easily separate the university from any religious message promoted by the religious group.[50] The Court finished by concluding that, since the students' free speech and free exercise rights were implicated against the state's competing assertion of avoiding an Establishment Clause issue, the state's interest was not compelling enough to justify the suppression of their speech.[51]

B. Establishment Clause: Coercion

1. *Lee v. Weisman*[52]

In *Lee*, Justice Kennedy, writing for the Court, applied the "coercion test"[53] to prayer at high school and middle school graduation ceremonies.[54] Deborah Weisman, a middle school

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[48] *Widmar*, 454 U.S. at 273.

[49] *Id.* The Court acknowledged the potential "incidental benefits" the religious group may receive from the use of the facilities. *Id.* However, these benefits, such as exposure of the faith to non-religious individuals and their potential conversion, would be similar to those enjoyed by any student group that was granted access to university facilities. *Id.* at 274.

[50] *Id.* at 274 n.14. "University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion." *Id.*

[51] *Id.* at 276.

> On one hand, respondents' First Amendment rights are entitled to special constitutional solicitude. Our cases have required the most exacting scrutiny in cases in which a State undertakes to regulate speech on the basis of its content. On the other hand, the state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well. In this constitutional context, we are unable to recognize the State's interest as sufficiently "compelling" to justify content-based discrimination against respondents' religious speech.

Id. (citations omitted).

[52] 505 U.S. 577 (1992).

[53] Justice Kennedy formulated the coercion test in his concurring opinion in *County of Allegheny v. ACLU*, 492 U.S. 573, 660 (1989) (Kennedy, J., concurring).

[54] *See Lee*, 505 U.S. at 580.

student in Providence, Rhode Island, challenged the practice of her Rhode Island school district of having prayer at high and middle school graduations.[55] The district court found the practice violated the *Lemon* test,[56] and the First Circuit affirmed the decision.[57] The Supreme Court then affirmed.[58]

In beginning its analysis, the Court noted the principal, a state official, directed a "formal religious exercise" and that, although the schools did not make attendance at graduation mandatory for receiving a diploma, attendance at one's high school graduation is, for all intents and purposes, mandatory in our society.[59] Because the principal, in his capacity as a state-employed director of the school, chose the prayer giver and advised the prayer giver as to what the content of the prayers should be, these choices were "attributable to the State."[60] The potential divisiveness that could result from allowing such a religious exercise as prayer was especially relevant to secondary schools.[61]

The overall social climate present at public high schools and middle schools, combined with the high degree of state involvement in the day-to-day administration of the schools, creates "subtle coercive pressure[s]" on the minds of middle and secondary school children.[62] Thus, high school aged children are particularly susceptible to being coerced into the performance of a

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[55] *Id.* at 581. Deborah's father, Daniel Weisman, was the individual who brought the suit on behalf of his daughter. *Id.* The principal, Robert Lee, had invited a Jewish rabbi to give the prayer. *Id.* Lee provided the rabbi with a copy of "Guidelines for Civic Occasions," which stated prayers should be inclusive and mindful of various individual sensitivities, and instructed the rabbi that any prayer given should be nonsectarian, meaning devoid of any references to a particular religion. *Id.*

[56] The *Lemon* test can be summarized as follows: "First, the [state action] must have a secular . . . purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the [state action] must not foster an excessive government entanglement with religion." Chaudhuri v. Tennessee, 130 F.3d 232, 236 (6th Cir. 1997) (quoting Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)).

[57] *Lee*, 505 U.S. at 584-85.

[58] *Id.* at 586.

[59] *Id.*

[60] *Id.* at 587.

[61] *Id.* However, "[d]ivisiveness, of course, can attend any state decision respecting religions, and neither its existence nor its potential necessarily invalidates the State's attempts to accommodate religion in all cases." *Id.* at 587-88.

[62] *Id.* at 592.

religious exercise, especially when that exercise is directed or undertaken on school grounds in the approving presence of a state official.[63]

The fact that attendance at these events is, for all practical purposes, mandatory for students played an important part in the analysis.[64] While such actions in other contexts may be viewed simply as a sign of respect for another's beliefs or practices, in the secondary school environment the actions could lead to some particularly disturbing results.[65] However, the Court declined to address whether adults would face the same type of pressures present for adolescents in the school context.[66]

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[63] *Id.* "What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy." *Id.*

[64] *Id.* at 594-95. The Court would address the issue of whether an exercise was voluntary or mandatory again in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 311-12 (2000). The case revolved around the school district's practice of allowing prayer at high school football games. *Id.* at 294. The district eventually settled on a policy of allowing the students to vote, through a secret ballot, whether they wished to have prayer at football games and, if so, which student should lead the prayers. *Id.* at 296-97. Regarding the coercion analysis, the Court found the divisiveness created amongst the student body is exactly the type of divisiveness the Establishment Clause is meant to foreclose. *Id.* at 311. The Court went on to address the argument that attendance at high school football games was voluntary, and thus distinguishable from *Lee*. *Id.* at 311-12. Although "the informal pressure to attend an athletic event is not as strong as a senior's desire to attend her own graduation ceremony," for some students, "such as cheerleaders, members of the band, and, of course, the team members themselves," attendance was mandatory. *Id.* at 311. Many students will wish to attend football games because they consider "participating in extracurricular activities as part of a complete educational experience." *Id.* The Court went on to find that, even if a student's decision of whether or not to attend football games was voluntary, the practice would still fail the coercion analysis. *Id.* at 312.

[65] *Lee*, 505 U.S. at 593. Justice Kennedy placed emphasis on the fact that, in the high school context, what might be viewed as a matter of social convention in another setting could be viewed here as an overt act of participation in the religious exercise. *Id.* "It is of little comfort to a dissenter, then, to be told that for her the act of standing or remaining in silence signifies mere respect, rather than participation." *Id.*

[66] *Id.* "We do not address whether that choice is acceptable if the affected citizens are mature adults . . . ." *Id.* The facts of this case were also easily distinguishable from those of *Marsh v. Chambers*, 463 U.S. 783 (1983), an earlier case involving the issue of legislative prayer, in which the court upheld the practice. *Lee*, 505 U.S. at 596-97.

2. *Town of Greece v. Galloway*[67]

The town of Greece[68] had the practice of opening town board meetings with prayer.[69] The town supervisor would invite a local clergyman to give the benedictions, and town officials in no way directed the clergy as to the content, form, or substance of the prayers.[70] Thus, many of the prayers were sectarian in nature.[71] Susan Galloway and Linda Stephens attended a meeting "to speak about issues of local concern, and they objected that the prayers violated their religious or philosophical views."[72] Galloway voiced her objection to the sectarian nature of the prayers and their patently Christian message.[73]

The district court granted summary judgment for the town, noting that *Marsh* allowed prayers that were sectarian so long as they were not "exploited to proselytize or advance any one, or to disparage any other, faith or belief."[74] On appeal, the Second Circuit reversed, holding that under the reasonable observer standard the town's failure to bring in clergy of different faiths from outside the town "ensured a Christian viewpoint."[75] The Supreme Court reversed the judgment of the Second Circuit, finding the prayers given at the beginning of town meetings,

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[67] 134 S. Ct. 1811 (2014).

[68] Greece is a town "in upstate New York." *Id.* at 1816. The town has a population of approximately 94,000 people, many of whom practice Christianity. *Id.*

[69] *Id.* The town had previously opened its meetings with a moment of silence. *Id.* However, when John Auberger, "the newly elected town supervisor," took office in 1999, he changed the practice to begin the meetings with prayer. *Id.* Auberger had previously found the practice "meaningful while serving in the county legislature." *Id.*

[70] *Id.* While the town did select a clergyman to participate, no faith or creed was excluded from giving the benediction, although most were of Christian faith. *Id.* ("The town at no point excluded or denied an opportunity to a would-be prayer giver. Its leaders maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation.").

[71] *Id.* Many of the prayers contained references to a specific religious deity, specifically "Jesus Christ." *Id.*

[72] *Id.* at 1817.

[73] *Id.* Galloway went so far as to "admonish[] board members that she found the prayers 'offensive,' 'intolerable,' and an affront to a 'diverse community.'" *Id.* In response, the town asked a Jewish rabbi to come deliver the prayers. *Id.* The request of a Wiccan priestess to give the invocation was also granted by the town board. *Id.*

[74] *Id.* (quoting Marsh v. Chambers, 463 U.S. 783, 794-95 (1983)).

[75] *Id.* at 1818 (quoting Galloway v. Town of Greece, 681 F.3d 20, 30-31 (2d Cir. 2012)).

although sectarian in nature, did not violate the Establishment Clause.[76]

The Court attributed a special significance to the fact that the practice of prayer in a legislative setting had been present since the founding of America.[77] The challenge to the sectarian nature of prayers cannot be sustained in light of the longstanding tradition of allowing sectarian prayers in the legislative arena.[78] In fact, government involvement in the preparation and censorship of prayers to ensure they are nonsectarian in nature would cause a greater degree of government involvement in the religious sphere than the town's current practice of no supervision.[79] "Once [the government] invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian."[80]

Galloway also challenged that the prayer coerced her participation.[81] However, the Court rejected the challenge, finding that, given the setting and audience, the coercive pressure present in earlier cases did not manifest themselves here.[82] The principal audience for the prayer was the lawmakers themselves, not the town citizenry, and legislatures may find the practice of prayer to be a solemn reminder of the serious nature of their duties.[83] If the town had forced the public attending the meetings to participate in the prayers or if the town had singled out dissidents for their

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[76] *Id.* at 1828.

[77] *Id.* at 1818. "*Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted." *Id.* at 1819.

[78] *Id.* at 1820.

[79] *Id.* at 1822.

[80] *Id.* at 1822-23.

[81] *Id.* at 1824. Galloway argued that town meetings are routinely attended by many members of the community to voice their political and social concerns regarding the town, and thus this situation differs from legislative prayer, where typically only the legislators themselves were present. *Id.* at 1824-25.

[82] *Id.* at 1825. "The inquiry remains a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed." *Id.*

[83] *Id.*

nonparticipation, the case would require a different analysis.[84] However, such concerns were not present here.[85]

The Court also rejected the contention that the practice violated the Constitution because it offended the petitioners and caused them to "feel excluded and disrespected."[86] The fact that the prayers may prove offensive to a non-adherent of the particular faith invoked was irrelevant because "[o]ffense . . . does not equate to coercion."[87]

The circumstances found in *Lee* were not present here, since individuals who did not wish to participate could freely exit during the prayer; in fact, they were free to leave for any reason.[88] If an individual chose to remain, his or her respect for others' beliefs would not equate to an acknowledgement of the particular faith in the eyes of others.[89] "Neither choice represents an unconstitutional imposition as to mature adults, who 'presumably' are 'not readily susceptible to religious indoctrination or peer pressure.'"[90] In conclusion, Justice Kennedy noted that the practice of some form of ceremonial prayer merely acknowledges that, for many Americans, such exercise serves as a simple reminder of the presence of a higher power beyond the government.[91]

Justice Thomas filed a concurrence, in which Justice Scalia joined as to the part applicable here, stating that the true meaning behind the Establishment Clause notion of "coercion" was actual legal coercion.[92] This type of coercion results when some penalty at law, be it through the imposition of taxes, fines,

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[84] *Id.* at 1826.

[85] *Id.* Any request for participation, such as standing or bowing of one's head, came from the ministers themselves, who were used to asking for such a showing at their local congregations, not the town leadership. *Id.* Further, no evidence existed to suggest the town gave preferential treatment to those who participated in the prayers over those who chose not to participate. *Id.* Such a showing would violate the Establishment Clause. *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.* at 1827.

[89] *Id.*

[90] *Id.* (quoting Marsh v. Chambers, 463 U.S. 783, 792 (1983)).

[91] *Id.* at 1827-28.

[92] *Id.* at 1837 (Thomas, J., concurring in part and in the judgment).

or other criminal punishment, is imposed.[93] Thus, the correct test for whether a violation of the Establishment Clause has occurred, in Justice Thomas's mind, involves an individual being deprived of some legal right or being forced to bear some legal burden.[94] If none of these situations are present, especially in cases involving adults, no violation should be found.[95]

II. CIRCUIT COURTS

A. Tucker v. California Department of Education

In *Tucker v. California Department of Education*,[96] Monte Tucker, a "deeply religious man" and computer analyst for the California Department of Education, was instructed to discontinue his practice of placing "Servant of the Lord Jesus Christ," or the acronym "SOTLJC," on his work files, which would then be distributed throughout the office.[97] Tucker sued the department in federal district court for a violation of his free speech rights.[98] The district court found the state's asserted interest of not running afoul of the Establishment Clause persuasive and granted summary judgment.[99] The Ninth Circuit reversed, holding the interest was not sufficient.[100]

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[93] *Id.*

[94] *Id.* Justice Thomas quoted Justice Scalia's dissent in *Lee*: "The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." *Id.* (quoting Lee v. Weisman, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting)). Justice Thomas also referenced his concurrence in *Newdow*. *Id.* at 1838 ("Peer pressure, unpleasant as it may be, is not coercion." (quoting Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 49 (2004) (Thomas, J., concurring in judgment))). In *Newdow*, the Court was asked to assess the constitutionality of the pledge of allegiance with the phrase "under God." *Newdow*, 542 U.S. at 5 (majority opinion). In his concurrence, Justice Thomas concluded that, as a matter of precedent, the pledge violated the Establishment Clause. *Id.* at 49 (Thomas, J., concurring in judgment). However, Justice Thomas believed the principles of coercion announced in *Lee* should be less expansive and more in line with the Framer's original understanding of what the Establishment Clause meant: a prohibition against laws requiring church attendance or the imposition of some other legal burden (such as taxes, fines, or criminal punishments). *Id.* at 52.

[95] *Town of Greece*, 134 S. Ct. at 1838.

[96] 97 F.3d 1204 (9th Cir. 1996).

[97] *Id.* at 1208.

[98] *Id.* at 1209.

[99] *Id.* at 1209, 1212.

[100] *Id.* at 1208.

The court rejected the notion that such activity should be considered under the doctrine of "time, place and manner restrictions" since the prohibition was directed specifically at the content, i.e. the religious nature, of the speech.[101] Further, the Ninth Circuit rejected California's assertion that religious speech does not constitute a "matter[] of public concern and thus is not protected workplace speech."[102] The notion of what is a matter of public concern should be construed "broadly to include almost *any* matter other than speech that relates to internal power struggles within the workplace."[103]

The court then went on to analyze the issue through the *Pickering* analysis, finding the state's interest in avoiding an Establishment Clause violation to be their primary objection to the speech.[104] This interest was not enough, however, in light of the Supreme Court's decision "[i]n a far more difficult case."[105] "'[P]lausible fear'" must exist "that the speech in question would be attributed to the state," or the Establishment Clause violation will be rejected, since the views will not attributed to the state.[106] In addition, while the teacher can normally be viewed as a speaker for the state, the court noted "speech by a public employee, even a teacher, does not always represent, or even appear to represent, the views of the state."[107] The court also overruled the district court's order regarding the regulations on overbreadth grounds.[108]

B. Tanford *and* Chaudhuri

Three circuits have considered the issue of non-sectarian prayer at the university level.[109] In both *Tanford v. Brand*[110] and

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[101] *Id.* at 1209-10.
[102] *Id.* at 1210.
[103] *Id.*
[104] *Id.* at 1212.
[105] *Id.*
[106] *Id.* (citing Rosenberger v. Univ. of Va., 515 U.S. 819, 841-42 (1995)).
[107] *Id.* at 1213.
[108] *Id.* at 1217.
[109] *See* Tanford v. Brand, 104 F.3d 982 (7th Cir. 1997); Chaudhuri v. Tennessee, 130 F.3d 232 (6th Cir. 1997); Mellen v. Bunting, 327 F.3d 355 (4th Cir. 2003).
[110] 104 F.3d 982 (7th Cir. 1997).

Chaudhuri v. Tennessee,[111] a faculty member challenged the state university's policy of having prayer at graduation ceremonies.[112] In both cases, the courts summarily rejected any notion that the practice violated the coercion test.[113] Citing *Widmar*, the courts found that university students were not, in any sense of the word, faced with coercive pressures.[114] In fact, university students and other adults present could easily distinguish between the individual speaker's message and the state's, manifested through the university.[115] Concerns of coercion or endorsement were simply not present in these cases.[116]

C. Mellen v. Bunting

The Fourth Circuit reached the opposite conclusion in a case involving the practice of "supper prayer"[117] at the Virginia Military Institute (VMI).[118] The first year cadets, called "rats," heard the supper prayer every day.[119] The Fourth Circuit began

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[111] 130 F.3d 232 (6th Cir. 1997).

[112] *Tanford*, 104 F.3d at 983; *Chaudhuri*, 130 F.3d at 233. Tanford was a law professor at the University of Indiana and challenged the practice, along with two law students and an undergraduate. *Tanford*, 104 F.3d at 983-84. Dr. Chaudhuri was a Hindu professor at Tennessee State University, a member school of the state university system of Tennessee. *Chaudhuri*, 130 F.3d at 233-34. In the case of Chaudhuri, the policy was a university system policy and not simply used at one school. *Id.* at 234. The Tennessee university system changed the practice to a moment of silence, believing such a practice would be well within the boundaries of the Constitution. *Id.* The Sixth Circuit ruled on both issues. *Id.* at 235.

[113] *Tanford*, 104 F.3d at 985; *Chaudhuri*, 130 F.3d at 239. Both courts also applied the *Lemon* test, finding the prayers did not violate that test as well. *Tanford*, 104 F.3d at 986; *Chaudhuri*, 130 F.3d at 236-38.

[114] *Tanford*, 104 F.3d at 986; *Chaudhuri*, 130 F.3d at 239.

[115] *Tanford*, 104 F.3d at 986; *Chaudhuri*, 130 F.3d at 239.

[116] *Tanford*, 104 F.3d at 986; *Chaudhuri*, 130 F.3d at 239.

[117] Mellen v. Bunting, 327 F.3d 355, 360 (4th Cir. 2003). First, students are called to formation in front of the barracks for "supper roll call." *Id.* at 362. Next, the corps would march to the mess hall, and upperclassmen would be allowed to fall out at various parts of the march. *Id.* However, the "rats," or first year students, had to continue and eat in the first seating. *Id.* Before entering the mess hall, the cadets present themselves before a higher officer and are read daily announcements while the students are at "rest," but still standing. *Id.* After this, the cadets are read the supper prayer composed by the chaplain each day. *Id.* "The Corps must remain standing and silent while the supper prayer is read, but cadets are not obliged to recite the prayer, close their eyes, or bow their heads." *Id.*

[118] *Id.* at 360.

[119] *Id.* at 362.

by applying the coercion test in light of the Supreme Court's emphasis on coercion in the high school prayer cases, but rejected the coercion analysis of the Sixth and Seventh Circuits' decisions regarding non-sectarian prayer at the university level.[120]

Instead, the Fourth Circuit stated "[a]lthough VMI's cadets are not children, in VMI's educational system they are uniquely susceptible to coercion."[121] Because upperclassmen were allowed to "torment and berate new students" and the system was more akin to military education involving regimented training and a controlled environment, younger students were particularly susceptible to the coercive pressures present in *Lee* and *Santa Fe*.[122] The court went on to apply the *Lemon* test and found the practice in violation of this test as well.[123]

III. RELIGIOUS SPEECH BY UNIVERSITY EMPLOYEES SHOULD BE PROTECTED SO LONG AS THEY DO NOT VIOLATE THE COERCION TEST

A. University Employees Have the Right to Speak on Religion, and the Coercion Test Is the Proper Tool for Evaluating Their Speech

A government employee's right to speak on matters of public concern, unfettered by fear of hostile actions on the part of his or her superiors, is guaranteed under the Constitution.[124] Thus, the starting point with any analysis on whether a university employee, such as a football coach or law professor, has the right to free speech lies in whether the content of the speech is a matter of public concern.[125] In determining whether the matter is one of

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[120] *Id.* at 371-72.

[121] *Id.* at 371.

[122] *Id.*

[123] *Id.* at 372.

[124] *See supra* notes 21-25, 46-49 and accompanying text.

[125] *See supra* notes 21-25, 46-49 and accompanying text. It should be noted that the *Pickering* test is normally applied in contexts where the university or public employer seeks to silence the speech. *See generally* Connick v. Myers, 461 U.S. 138 (1983). The universities involved in the real-life scenarios discussed in this Comment are not seeking to restrict the speech yet, and thus the key question is whether the practices violate the Establishment Clause. *See infra* note 190 and accompanying text. However, given that public employee speech rights are at issue, *Pickering* represents the proper starting point for the analysis.

public concern, the Supreme Court has cautioned that the notion of what constitutes public concern should be interpreted broadly to prevent a chilling effect on speech.[126]

To take away a person's right to speak freely on religious matters would place a most serious burden on their religious expression, which is why speech on religion is a matter of public concern in and of itself.[127] Religious views are not limited only to those notions of a divine deity, some form of a spiritual heaven or hell, or even the procedural rules of worship. Religion, of any form, sets out a moral code by which the adherent seeks to live his or her life. The moral concepts and teachings contained within the belief system give the believer a resolute perspective on a particular facet of life, causing them to take a stand. These beliefs also often intersect with various issues of government, business, and social customs.[128] Such matters are often at the heart of what constitutes "public concern," and speech that constitutes a matter of public concern is protected even in light of public employment.[129]

The presence of an element of persuasion cannot deprive speech of its First Amendment protection solely on that ground.[130] Admittedly some, if not many, forms of religious speech may seek to persuade the audience to take a particular action, such as encouraging an individual to attend a church service or asking someone if they would like to take part in a Bible study. A central tenet to many, if not all, religions is that the ideas, beliefs, and

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[126] *See supra* note 37 and accompanying text; *see also* Gillette v. Delmore, 886 F.2d 1194, 1197 (9th Cir. 1989) ("Speech that can fairly be considered as relating to any matter of political, social, or other concern to the community is constitutionally protected."); Nat'l Treasury Emp. Union v. United States, 990 F.2d 1271, 1273 (D.C. Cir. 1993), *aff'd in part, rev'd in part on other grounds*, 513 U.S. 454 (1995).

[127] Tucker v. Cal. Dep't of Educ., 97 F.3d 1204, 1210 (9th Cir. 1996). For further discussion of the doctrine surrounding religious speech, see Lisa Shaw Roy, *Inculcation, Bias, and Viewpoint Discrimination in Public* Schools, 32 PEPP. L. REV. 647, 662-63 (2005).

[128] The Quran, the holy book of Islamic teachings, says that usury, or charging interest, is an immoral and forbidden practice. QURAN 2:276. Consider Jewish teachings against the consumption of certain forms of meat or a Christian's views against homosexuality. *See Leviticus* 11:2-12, 18:22 (King James). In each instance a person's religious beliefs are fatefully intertwined with their actions.

[129] *See supra* notes 21-25, 46-49 and accompanying text.

[130] *See supra* notes 49-50 and accompanying text.

customs contained in that particular belief system should be spread throughout the world to nonbelievers.[131]

However, courts must be careful not to limit notions of what speech is protected to only those words that simply comment on an issue.[132] The very essence of communication, and the speech the Founders sought to protect when they designed the First Amendment, is communication of ideals in an effort to promote their general acceptance to the greater audience.[133] Practically all forms of political and social speech, such as instituting a boycott to redress discrimination, involve some call to action.[134] Even rather active encouragement, like that seen in *Claiborne Hardware*, does not necessitate speech being cast out of the realm of First Amendment protection.[135]

The religious speech at issue in the cases presented later is, no doubt, a far cry from the type that was held to be protected speech in *Claiborne Hardware*.[136] Professors and football coaches will not be ostracizing players because they refuse to accept the opportunity to take up a religious cause. The names of those who disagree are not being plastered on PowerPoints or bulletin boards in the locker room.[137] Similar activity was held to be protected speech, so speech that is less coercive is undoubtedly protected.[138]

University officials are simply seeking to exercise their right to disseminate information about ideals they hold close and seek to enjoin others in their cause.[139] "'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts."[140] If First Amendment speech lost its protection simply because that speech represented a call to action, the First

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131 *See, e.g.*, *Mark* 16:15 (King James) ("And he said unto them, Go ye into all the world, and preach the gospel to every creature."); QURAN 41:33 ("[W]ho is better in speech than one who calls to Allah, does righteous deeds and says indeed I am among the Muslims.").

132 *See supra* notes 33-37 and accompanying text.

133 *See supra* notes 33-37 and accompanying text.

134 *See supra* notes 33-37 and accompanying text.

135 *See supra* notes 33-37 and accompanying text.

136 *See supra* notes 33-37 and accompanying text.

137 *See infra* notes 207-08 and accompanying text.

138 *See infra* notes 207-08 and accompanying text.

139 *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

140 Thomas v. Collins, 323 U.S. 516, 537 (1945).

Amendment would be a hollow one indeed.[141] This right should not be taken away or restricted merely because the speech is religious in nature and may cause those for whom its message is intended to adopt a particular religious belief.[142] Religious speech should be afforded no less protection because it seeks to persuade individuals to take up a certain faith or belief system.[143]

The coercion test as understood in *Town of Greece* represents the most appropriate approach for assessing the validity of Establishment Clause violations at the university level. The most important reason for the application of the coercion test in this setting is that it best addresses the concerns that the Establishment Clause was meant to protect against: forced participation or presence in unduly religious and highly pressured environments or customs and the imposition of negative consequences on an individual for refusing to take part in or speaking out against a particular religion and the exercise thereof.[144] In cases of university employee religious speech, the coercion test represents the best tool for evaluating the governmental interest prong of the *Pickering* analysis.

Further, the *Lemon* test has been employed in a haphazard and spastic manner by the Court since its formulation.[145] In

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[141] *See* Abrams v. United States, 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting).

[142] *See* Rosenberger v. Univ. of Va., 515 U.S. 819, 831 (1995).

> If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint.

Id.

[143] *Id.*

[144] Town of Greece v. Galloway, 134 S. Ct. 1811, 1837-38 (2014) (Thomas, J., concurring).

[145] *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia, J., concurring in the judgment). Justice Scalia was particularly critical of the *Lemon* test in his concurring opinion from *Lamb's Chapel*:

> The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely. Sometimes, we take a middle course, calling its three prongs "no more than helpful signposts." Such a docile and useful monster is

recent cases involving religious speech in the public sphere, the Court has refused to apply *Lemon* entirely, instead applying Justice Kennedy's coercion test.[146] Given the critical tone of Justice Scalia's dissent in the denial of certiorari of *Elmbrook School District v. Doe*, Justices on the Court are prepared to move away from *Lemon* as well.[147]

University students can easily perceive that ideas espoused by a particular group or individual are not the same as if they were being "endorsed" by the university.[148] Therefore, any notions of endorsement of a particular religion or "government entanglement" are irrelevant.[149] Instead, the concerns should revolve around making sure adult students are not subjected to situations where they are punished for expressing their own opinions regarding a religion or religious belief, for their non-

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> worth keeping around, at least in a somnolent state; one never knows when one might need him.

Id. (citations omitted).

[146] *See* Lee v. Weisman, 505 U.S. 577, 587 (1992); Town of Greece v. Galloway, 134 S. Ct. 1811 (2014).

[147] Elmbrook Sch. Dist. v. Doe, 134 S. Ct. 2283 (2014) (Scalia, J., dissenting in the denial of cert.). The *Elmbrook* case involved a school that held graduation ceremonies at a local church. Doe v. Elmbrook Sch. Dist., 687 F.3d 840, 842 (7th Cir. 2012) (en banc). The district had held graduation at the church because of the size of the auditorium, and it was voted on by the senior class. *Id.* at 844. The church refused to remove a cross and other Christian symbols. *Id.* at 846. The Seventh Circuit held the practice violated the coercion test from *Lee*, as well as the *Lemon* test. *Id.* at 853-54. Justice Scalia dissented from the denial of certiorari, believing the Court should reverse the Seventh Circuit's ruling in light of *Town of Greece*. *Elmbroo*k, 134 S. Ct. at 2283-84. The principle thrust of Justice Scalia's argument was that we all encounter situations that we may find offensive, but that such dislike of a particular situation does not allow one to ban the situation under the guise of the Constitution. *Id.*

> Some there are—many, perhaps—who are offended by public displays of religion. Religion, they believe, is a personal matter; if it must be given external manifestation, that should not occur in public places where others may be offended. I can understand that attitude: It parallels my own toward the playing in public of rock music or Stravinsky. And I too am especially annoyed when the intrusion upon my inner peace occurs while I am part of a captive audience, as on a municipal bus or in the waiting room of a public agency.
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> My own aversion cannot be imposed by law because of the First Amendment.

Id. at 2283. Scalia noted *Town of Greece* had effectively "abandoned the antiquated 'endorsement test.'" *Id.* at 2284.

[148] Widmar v. Vincent, 454 U.S. 263, 274 n.14 (1981).

[149] *See supra* note 56 and accompanying text.

attendance at a religious event, or situations where an individual seeks to indoctrinate students with a particular religious belief or code in a mandatory or "captive" setting.[150] Offense, amongst adults, does not equate to coercion.[151] Young adults, as they get older, will have to face any number of situations they find uncomfortable or obnoxious. However, such offense does not allow them to thwart a particular brand of speech through the Constitution.[152]

Thus, religious speech by university employees that is either a simple manifestation of their faith, such as having prayer before a game, or an attempt to expose students to a particular faith, such as asking them if they would like to attend church, should not be seen as an overtly coercive pressure on the minds of young adults so as to violate the Establishment Clause.[153] Such speech represents a topic that is a vital and extremely important aspect of the lives of millions of people across this country.[154] The religion that the speech either acknowledges or advocates provides a moral code, a backdrop lens which gives guidance on one's beliefs regarding any number of important societal issues.[155] Given that such speech constitutes a matter of public concern and the university as an employer's need to stay away from running afoul of the Establishment Clause, the coercion test represents the best means for evaluating the government's interest against the speech or practice.

B. The University as the Marketplace of Ideas

The university has, since time immemorial, been the home of discourse and discussion over thoughts of the day.[156] The

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[150] *See generally* Lee v. Weisman, 505 U.S. 577 (1992); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

[151] *See supra* note 87 and accompanying text.

[152] *See supra* notes 87, 147 and accompanying text.

[153] *Widmar*, 454 U.S. at 274 n.14.

[154] *See generally* PEW FORUM ON RELIGION & PUB. LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY (2008), *available at* http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf.

[155] United States v. Macintosh, 283 U.S. 605, 633-34 (1931) (Hughes, C.J., dissenting) ("The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation.").

[156] *See* JOHN W. H. WALDEN, THE UNIVERSITIES OF ANCIENT GREECE 5-6 (1909).

university serves as a bastion of expression.[157] The Supreme Court has declared the university to be the embodiment of the famed "marketplace of ideas."[158] Students are sent to universities around the country with the understanding that they will be exposed to the full spectrum and gambit of different viewpoints; in fact, "a university's mission is education and the search for knowledge."[159] The exposure to and consideration of these varying opinions are what educates students about the variety of viewpoints present in American society, which allows them to be an informed citizenry.[160] In addition, the exposure to a number of different ways of thinking allows the student to exercise the ultimate right guaranteed by our various freedoms: the right to make a choice.[161] The informed decision, made after exposure to the differing viewpoints and time has been given for proper consideration of the merits, is the embodiment of the American system.[162]

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[157] *See generally* Clay Calvert, *Where the Right Went Wrong in* Southworth*: Underestimating the Power of the Marketplace*, 53 ME. L. REV. 53 (2001); Frederick Schauer, *The Permutations of Academic Freedom*, 65 ARK. L. REV. 193 (2012); Kelly Sarabyn, *The Twenty-Sixth Amendment: Resolving the Federal Circuit Split Over College Students' First Amendment Rights*, 14 TEX. J. C.L. & C.R. 27 (2008); Michael R. Denton, Comment, *The Need for Religious Groups to Be Exempt from the Diversity Policies of Universities in Light of* Christian Legal Society v. Martinez, 72 LA. L. REV. 1055 (2012).

[158] Healy v. James, 408 U.S. 169, 180-81 (1972).

[159] Bowman v. White, 444 F.3d 967, 978 (8th Cir. 2006).

[160] Carroll v. Blinken, 957 F.2d 991, 999-1000 (2d Cir. 1992).

> [A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. As a wise graduate of ours observed in commenting on this aspect of the educational process, "People do not learn very much when they are surrounded only by the likes of themselves."

Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 n.48 (1978) (quoting a president of Princeton University).

[161] Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("Those who won our independence believed that the final end of the state was to make men free to develop their faculties . . . .").

[162] Pickering v. Bd. of Educ., 391 U.S. 563, 571-72 (1968) ("[F]ree and open debate is vital to informed decision-making by the electorate.").

In order for the student to accomplish this task, few, if any, ideas should be suppressed.[163] Religious ideas provide students with a moral code and viewpoint by which they can choose to live.[164] They are free to take certain elements of religion, such as going the extra mile to help someone[165] or a disbelief in murder and adultery,[166] and incorporate them into their lives without importing the concepts of Jesus's death or Buddha's trials. The exposure to these ideas, and the ultimate informed decision such exposure helps create, is the paramount example of what a university should and is meant to accomplish.[167]

IV. PRAYER: DIFFERENT SUBJECT, SAME OUTCOME

The situation of prayer at a university graduation and other university events is much more akin to the facts of *Town of Greece* than those found in *Lee*, and a similar analysis should apply.[168] Although prayer cannot necessarily be shoehorned into a particular category such as "speech" or "worship," the cases show the distinction matters little to the Court; prayer is included in religious speech, and a discrimination against speech based solely on the religious content of the speech amounts to viewpoint discrimination.[169] In a case involving prayer by a university employee, the religious speech should not violate the

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[163] Some authors have suggested the divisiveness that may accompany public religious speech would best be solved by promoting an atmosphere of inclusion and, in essence, some sort of sensitivity training. For a more thorough discussion of this topic, see Lisa Shaw Roy, *The Establishment Clause and the Concept of Inclusion*, 83 OR. L. REV. 1, 32-33 (2004).

[164] *See supra* note 154 and accompanying text.

[165] *Matthew* 5:41 (King James) ("And whosoever shall compel thee to go a mile, go with him twain.").

[166] *Exodus* 20:13-14 (King James) ("Thou shalt not kill. Thou shalt not commit adultery.").

[167] *See supra* notes 159-61 and accompanying text.

[168] It should also be noted that attendance at one's undergraduate graduation is a less common practice than attendance at one's high school graduation, and thus it is not the same instance as that presented to the Court in *Lee*.

[169] Good News Club v. Milford Cent. Sch., 533 U.S. 98, 111-12 (2001); *see also* Town of Greece v. Galloway, 134 S. Ct. 1811, 1822 (2014) ("The First Amendment is not a majority rule, and government may not seek to define permissible categories of religious speech.").

Establishment Clause so long as the coercion test, as understood in light of *Widmar* and *Town of Greece*, is met.[170]

In a university setting, the concerns of hidden coercive pressures addressed in *Lee* are not present.[171] Offense simply does not equal coercion amongst adults.[172] At the university level, society should be more concerned about the implications of violating the Free Speech Clause, due to the university's special place as the ultimate marketplace of ideas, than any potential Establishment Clause violations.[173] Because students at the university level can easily differentiate between the "state," represented by the university, and the individual speaker, the spirit of the Establishment Clause is not violated.[174]

Prayer at major events such as graduations should also be permitted at the university level if the school chooses to allow it.[175] Two of the circuit courts of appeal have already found such practices did not violate the coercion test set forth in *Lee* and did so even before *Town of Greece*, which is arguably more analogous to such a situation than are the facts of *Lee*.[176] In fact, the Court in *Lee* specifically declined to address the situation where only adults were present, which foreshadows that a different analysis

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[170] *See supra* notes 81-85 and accompanying text.

[171] *See supra* notes 62-63 and accompanying text.

[172] *See supra* note 87 and accompanying text.

[173] *See supra* note 158 and accompanying text.

[174] *See supra* note 148 and accompanying text.

[175] *See* Tanford v. Brand, 104 F.3d 982, 986 (7th Cir. 1997); Chaudhuri v. Tennessee, 130 F.3d 232, 239 (6th Cir. 1997). As for the selection of the prayer giver at a school that has chosen to have prayer at graduation, it is hard to say exactly what approach the Supreme Court would condone. However, certain similarities exist between the cases to at least identify that, subject to space and time limitations, the opportunity to give a prayer should be open to all faiths, creeds, and believers who wish to participate. *See* Town of Greece v. Galloway, 134 S. Ct. 1811, 1824 (2014). Any discrimination against a particular religion or in favor of a specific religion, such as favoring only Christian speakers over Muslims, Hindus, or all other religions, would be struck down. *Id.* For example, a prayer or benediction could be given by a Christian minister one year and a Muslim imam the next. However, at least in *Town of Greece*, despite the fact that the vast majority of individuals who said the prayers were Christian, there was no violation. *Id.* The Court relied on the fact that nearly all of the town's population was Christian, along with the fact that the board never turned down an individual who asked to participate. *Id.* at 1817, 1824. Therefore, if the benediction and invocation at a university graduation ceremony were given by a Christian minister the majority of the time, it would not violate the Establishment Clause so long as the university was committed to an all comers policy. *Id.* at 1824.

[176] *See supra* note 114 and accompanying text.

would apply and, potentially, a different result. Further, in these instances, university students face, as the Seventh Circuit stated in *Tanford*, "no coercion—real or otherwise—to participate."[177]

Finally, sectarian prayers should be allowed once the government has decided to invite prayer into the public arena.[178] In *Lee*, the Court found the principal's guidance and oversight in the composition of the non-sectarian prayer to be particularly evident of the state's supposed approval of the message contained therein.[179] On the other hand, the town of Greece had no such practice, allowing the individual chosen to give prayers to speak freely.[180] The fact that the prayers were sectarian in nature did not concern the Court, given the lack of government involvement in fashioning the prayers.[181] In fact, language from Justice Kennedy's opinion in *Town of Greece* suggests that, once the government chooses to allow prayer in a public setting, it cannot then limit the content of the speaker.[182] Such censorship elevates the level of state involvement from that of a bystander to an active participant in the religious exercise, which would be cause for even greater concern under the Establishment Clause.[183]

The Court in *Marsh v. Chambers* explicitly stated that "[t]he content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief."[184] *Town of Greece* further solidified the notion that the government is not allowed to pick and choose what types of religious speech are acceptable through the removal of all faith-specific references.[185] Given the precedent, it appears as though universities and their officials would do well to avoid running afoul of the Establishment Clause by simply remaining

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177 *Tanford*, 104 F.3d at 985.
178 *Town of Greece*, 134 S. Ct. at 1822-23.
179 *See supra* note 60 and accompanying text.
180 *Town of Greece*, 134 S. Ct. at 1816.
181 *Id.* at 1822-23.
182 *See supra* notes 79-80 and accompanying text.
183 *Town of Greece*, 134 S. Ct. at 1822.
184 Marsh v. Chambers, 463 U.S. 783, 794-95 (1983).
185 *Town of Greece*, 134 S. Ct. at 1822.

on the sidelines, taking no part in the prayer exercise, rather than through the administrative selection of the prayer giver.[186]

Furthermore, if religion is in itself a viewpoint under the First Amendment, one's particular religious belief or creed is an even greater manifestation and expression of one's viewpoint than religion over non-religion. Religion provides a lens through which one may choose to view the world, a sort of moral code for analyzing the validity of certain practices. Thus, the logic continues that, if religion itself is a viewpoint, one's particular religious creed, such as Sunni Islam or Church of Christ, is an even deeper manifestation for the individual of his or her "viewpoint" than a generic term such as "Christianity."

Once the choice to have prayer has been made, the government should not attempt to silence the particular views of the speaker in the name of the Establishment Clause.[187] Silencing an individual's expression through censorship of prayer is an even deeper violation, stabbing at the very heart of the First Amendment.[188]

V. TEST AND APPLICATION

Given that religion undoubtedly constitutes a matter of public concern, courts must ask whether the need to protect the university employee's speech is outweighed by any government interest.[189] The most compelling interest the state could assert against religious speech would be a violation of the Establishment Clause.[190] For the reasons outlined above, the coercion test, where

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[186] As noted above, universities should be wary of perceived signs of favoritism or bias toward one religion when choosing a minister to give the prayer. An all-inclusive policy, allowing members from every religion that wished to participate on, perhaps, some sort of week-by-week or "round-robin" basis would be best. Any discrimination against one religious group or favoritism of a particular group over another would incur the wrath of both the Establishment Clause and free speech doctrines.

[187] *See supra* notes 79-80 and accompanying text.

[188] Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 72 (1963) (Douglas, J., concurring) ("[I]n my view the censor[ship] and First Amendment rights are incompatible.").

[189] *See supra* note 22 and accompanying text.

[190] Widmar v. Vincent, 454 U.S. 263, 270-71 (1981).

> The University first argues that it cannot offer its facilities to religious groups and speakers on the terms available to other groups without violating the Establishment Clause of the Constitution of the United States. We agree that the interest of the University in complying with its constitutional

coercion is defined as either mandatory presence at an event, religious service, or some other instance that represents a blatant and clear violation of the Establishment Clause, or the imposition of harmful punishments or consequences for disagreement or non-participation, represents the proper test governing employee religious speech in a university setting. By combining the plurality's analysis from *Town of Greece* and Justice Thomas's views on coercion through the imposition of some sort of burden or the deprivation of some right from the individual's perspective, the needs of university students are adequately protected.

The student's right against mandatory attendance at an event that constitutes a serious violation of the Establishment Clause, combined with the assurance that individuals who voluntarily choose an alternative to participation in a religious exercise or express criticism will not suffer as a result, achieves the proper balancing between the employee's speech, the university's unique position as the quintessential marketplace of ideas, and the state's interest of remaining on the legal side of the Establishment Clause. I will now apply this modified coercion test to several real-life examples occurring in the world of college football.

A. Hugh Freeze and Ole Miss

Ole Miss's head football coach Hugh Freeze considers his Christian faith to be an integral part of his life.[191] Freeze's faith is so intertwined with all aspects of his personality he feels the need to tell recruits and their families that he is a Christian.[192] When Freeze was asked about the impact his religious views have on his life, he stated, "[These] things are shaping every facet of who I am."[193]

> obligations may be characterized as compelling. It does not follow, however, that an "equal access" policy would be incompatible with this Court's Establishment Clause cases.

Id. (footnote omitted).

[191] *See* Babb, *supra* note 1.

[192] *Id.*

[193] Interview with Hugh Freeze, Head Football Coach, Ole Miss Rebels, in the Manning Ctr., Univ. of Miss. (Jan. 8, 2015).

Freeze plays Christian music over the loudspeakers, prays with the team, and, during the season, encourages his players to attend a weekly church service led by the chaplain of the FCA.[194] The services are held in the Manning Center, and Freeze attends every service.[195] The ultimate choice of whether to attend or not to attend the meeting lies in the hands of the players themselves.[196] Players are not punished in any way if they choose not to attend, and players who do choose to attend are not given preferential treatment.[197] Freeze evaluates players based on their talent and on-the-field performance, not whether a player attends a non-team sponsored event on a Sunday.[198]

Although Freeze hopes the players attend and see the impact religion has on his life, he does not pressure players to attend or supervise attendance at FCA meetings.[199] Freeze sees his position as a vehicle through which he can impact the lives of the young men he coaches.[200] In fact, Freeze places greater importance on positively impacting the players' lives than winning football games.[201]

Freeze's practices and policies surrounding prayer, encouraging players to attend FCA worship services, and other

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[194] *See* Babb, *supra* note 1. The FCA services are not unlike any other Christian service. Christian hymns are sung, after which the chaplain delivers a sermon. This is based on the author's personal attendance at an FCA service. When asked about what spurred him to start partnering with FCA to make the services available to players, Freeze spoke of the fact that incoming players who have a religious background are often far away from their homes, lack transportation, and are unaware of or averse to taking opportunities to attend church in strange new environments, in addition to the convenience of attending church on campus in a familiar setting. *See* Interview with Hugh Freeze, *supra* note 193.

[195] *See* Babb, *supra* note 1.

[196] *Id.* It is noted that a majority of the players attend the FCA services. *Id.*

[197] *Id.*

[198] *Id.* Missing an FCA service does not have any repercussions. It can in no cognizable way be compared to missing practice or a team meeting.

[199] *Id.* "I tell them . . . 'We have worship on Sunday,'" Freeze said. "I don't stand over them, make them do it; certainly they hopefully see that it's important to me and maybe the way I live . . . . Maybe it attracts them . . . ." *Id.*

[200] *Id.*

[201] *Id.* "'The most important thing we have is the platform we have to impact the lives of the people in our program,' says Freeze, 44. 'When my life comes to an end, how much does that scoreboard really matter?'" *Id.*

minor policies[202] pass under this modified coercion test. His religious speech touches on a matter of public concern. Thus, we must apply the coercion test. Freeze does not seek to directly indoctrinate players through his personal speech, and no other clear Establishment Clause violations are present.[203] Mandatory participation is not required at the FCA services; the only truly "mandatory" aspect involves the playing of Christian music at practice.[204] However, these situations do not rise to the level of patent violations, since offense and coercion are not the same amongst adults. In addition, there is virtually no risk the players will associate Freeze's speech as being the official endorsement of the University.[205]

Since none of the practices rise to the level of a clear Establishment Clause violation along with requiring mandatory participation, we must decide whether those who do not agree with Freeze's speech are forced to endure some type of incidence. Freeze does not display favoritism toward players who participate or attend the FCA services.[206] Further, there is no evidence to suggest that Freeze disciplines those who disagree with his beliefs or that an expression of dissidence would lead to some burden being placed on those who express such displeasure.[207] Players are not being moved down the depth chart or losing playing time as a result of any disagreement with Freeze's beliefs.[208] In fact, of the twenty-two starters on offense and defense, only nine regularly attend the FCA services.[209]

In light of Justice Kennedy's coercion test analysis in *Town of Greece* regarding mature adults, these practices, as they currently

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[202] An example of what I'm terming as a "minor policy" would be playing Christian music at practice.

[203] Interview with John Youngblood, Junior Defensive End, Ole Miss Rebels, in the Manning Ctr., Univ. of Miss. (Dec. 7, 2014). John's biography can be found at http://www.olemisssports.com/sports/m-footbl/mtt/john_youngblood_811447.html. A walk-on tight end at Ole Miss, who identified as a Muslim, did transfer, but the decision was based on tuition expenses. *See* Babb, *supra* note 1.

[204] *See* Babb, *supra* note 1.

[205] *See supra* note 50 and accompanying text.

[206] *See* Interview with John Youngblood, *supra* note 203.

[207] *Id.*

[208] *Id.*

[209] Interview with John Powell, FCA Chaplain, in the Manning Ctr., Univ. of Miss. (Dec. 7, 2014).

stand, pose no potential for an Establishment Clause violation. The practices are wholly within the bounds and limitations set forth in the Constitution. In fact, Hugh Freeze could easily serve as a model for other coaches who wish to speak about their religious beliefs without running afoul of the Establishment Clause.

B. Dabo Swinney and Clemson

Dabo Swinney is the head football coach at Clemson University in South Carolina.[210] Swinney's beliefs regarding the role of religion in both his personal and football life are similar to those held by Coach Freeze.[211] However, the implementation and process varies in a number of aspects.

When Swinney inherited the job at Clemson, the previous coach had a practice of busing players to various churches throughout the community during the preseason.[212] Swinney has continued the practice during his tenure.[213] In addition, Swinney scheduled FCA breakfasts and asked players to attend.[214]

One incident is of particular note. In September of 2012, DeAndre Hopkins, a junior wide receiver already having a standout career at Clemson and who would go on to put up even bigger numbers, informed one of the local pastors he wished to be

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[210] *See Dabo Swinney*, CLEMSON TIGERS (Aug. 5, 2015), http://www.clemsontigers.com/ViewArticle.dbml?ATCLID=205529394.

[211] *See* Babb, *supra* note 1.

[212] *Id.* Swinney was an assistant coach at Clemson under Tommy Bowden. Tommy had begun the practice of making rounds through the churches with his players early in his days at Clemson. *Id.* Swinney took over the program in 2008 and continued the practices of his mentor. *Id.* While Bowden did not make the event expressly mandatory, he was very vocal about attendance and only had one player miss in nine years, even saying one should "[m]ake [the event] as mandatory as you can." *Id.* The player that did miss the church service was a Jehovah's Witness, and Swinney himself, then Bowden's assistant, excused the player from attending. *Id.* If Bowden made attendance at the church service, for all practical intents and purposes, mandatory, this would fail my test under the mandatory attendance, combined with the existence of a clear Establishment Clause violation, prong. *See generally* Anderson v. Laird, 466 F.2d 283 (D.C. Cir. 1972).

[213] *See* Babb, *supra* note 1.

[214] *See Clemson Coach Accused of Pushing Religion on Football Team*, CBS NEWS (Apr. 23, 2014, 8:41 PM), http://www.cbsnews.com/news/clemson-coach-accused-of-pushing-religion-on-football-team/.

baptized.[215] Hopkins had one unusual stipulation: he wanted to be baptized "not in the church . . . but alongside his teammates."[216] After practice, Swinney had the players gather round to speak about the upcoming game.[217] Then, Swinney turned it over to the pastor, and, with Swinney's approval, a large ice tub filled with water was hauled out onto the practice field.[218] Surrounded by coaches and players, Hopkins was baptized.[219] Wide receivers coach and recruiting coordinator Jeff Scott tweeted a photo of the baptism noting his approval.[220]

Swinney's practice of busing player to churches on Sundays during the preseason would not run afoul of the test so long as the event was not truly mandatory.[221] Similarly, the practices of scheduling FCA breakfast meetings where players testify and allowing a chaplain access to the team for devotionals would not violate the test, so long as, once again, they were not mandatory or practically mandatory.[222] Since none of these instances are patent Establishment Clause violations where attendance is mandatory, we must ask if any negative consequences flow from a player's choosing not to attend or objecting to the religious nature of the speech.

In this case, no evidence exists that would lead one to believe violators were singled out or faced ill treatment for non-attendance.[223] The case is also devoid of some form of punishment

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[215] *See* Babb, *supra* note 1.

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] *Id.*

[220] *Id.* The text of the tweet appeared as follows: "Highlight of my week . . . was seeing DeAndre Hopkins get Baptized in front of his teammates on Thursday after practice." *See* Tim McGarry, *Clemson WR DeAndre Hopkins Baptized at Practice*, USA TODAY (Sept. 4, 2012, 2:28 AM), http://content.usatoday.com/communities/campusrivalry/post/2012/09/clemson-wr-deandre-hopkins-baptized-at-practiced/1#.VFj-S758Pww.

[221] If, in reality, attendance on the bus and at church was required of the players in the unofficial sense, meaning that attendance was, for all practical intents and purposes, mandatory, there would be a different outcome. In that case, the practice would violate the Establishment Clause, since mandating that university students attend some form of worship service is unconstitutional. *See generally* Anderson v. Laird, 466 F.2d 283 (D.C. Cir. 1972).

[222] It would also violate the test if a player was forced to give a testimonial or purposely singled out despite their objection to being asked to give a testimonial.

[223] *See* Babb, *supra* note 1.

being exacted on a player who expressed his disagreement or disfavor with the coach's beliefs.[224] Therefore, unless they were truly mandatory in nature, these practices should not be deemed to violate the Establishment Clause.

The incident regarding baptism is an entirely different matter. The fact that the baptism took place on the practice field immediately after practice (which undoubtedly qualifies as a mandatory team event) while the players were still forced to be present, and Swinney's acknowledgement of his approval, all point in favor of a patent Establishment Clause violation.[225] When student athletes are forced to attend a baptism or similar act of religious worship whether they wish to or not, the instance rises to the level of a clear Establishment Clause violation. These situations represent the very type the Establishment Clause, and my test, are meant to protect against. In light of all the foregoing factors, Swinney's actions simply cannot pass constitutional muster, and the act of baptizing Hopkins on the practice field in the presence, mandatory presence, of teammates is impermissible.

C. Bobby Bowden's Tenure at Florida State

Bobby Bowden enjoyed one of the most storied careers in college football coaching history.[226] During his tenure at Florida State, Bowden invited prominent Christians, such as Billy Graham, to speak to the team before games.[227] However, Bowden's practices went farther than simply exposing his players to Christian teachings or inviting prominent Christian speakers to give talks to the team.

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[224] *Id.*

[225] *See supra* notes 215-20 and accompanying text.

[226] Bowden served as the head coach of the West Virginia Mountaineers from 1970-75 and accepted the head coaching position at Florida State University (FSU), starting with the 1976 season. *See Bio*, BOBBYBOWDEN.COM, http://bobbybowden.com/Bio.html (last visited Aug. 10, 2015). Bowden held the job at FSU until his retirement after the 2009 season. *Id.* During that span, Bowden led Florida State to two national championships in 1993 and 1999. *Id.* Bowden is the "[w]inningest coach in the history of major college football." *Id.*

[227] Letter from Andrew L. Seidel, Attorney, Freedom From Religion Foundation, to Carolyn Egan, Gen. Counsel, Fla. State Univ. 2 (Sept. 12, 2014) (on file with author).

Bowden was very vocal with his players about their faith.[228] Bowden held mandatory devotionals in between practice drills and began practice with a devotional.[229] After the death of a teammate, Bowden increased his resolve; his graduate assistant, current Georgia head coach Mark Richt, was quoted as saying Bowden

> did share his faith, actually, with the entire football team after the death of Pablo Lopez . . . . He basically presented the Gospel to the team . . . . He was talking to the team, but I was a young graduate assistant coach . . . right there I was convicted [*sic*] to go see coach the next morning and pray to receive Christ as my Lord and savior.[230]

Bowden was also quoted as saying, "I had to be like a father to these boys. Well, my father taught me about the Bible, my father taught me about church . . . ."[231] Bowden went so far as to say his mission as a head football coach was to lead players to Jesus.[232]

Bowden's practice of taking the team to church services was not mandatory.[233] Therefore, so long as players were not subject to any punishment or consequences for their decision not to attend such gatherings, this tradition passes the test of constitutional muster. However, many of Bowden's other customs fail the test. Bowden sought to indoctrinate players with his version of Christian teachings in mandatory settings.[234] Student athletes were offered no choice in whether to attend, and from the language it is clear Bowden's words went beyond mere exposure or persuasion toward a particular belief.[235] Bowden's actions rose to the level of proselytizing. Such indoctrination is something for which there is no room in the realm of constitutional theory.

In addition to the proselytizing nature of Bowden's comments and actions, if players who expressed differing views or refused to

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[228] *Id.*
[229] *Id.* at 3.
[230] *Id.* at 1.
[231] *Id.* at 2.
[232] *Id.* at 3.
[233] *Id.* at 2.
[234] *Id.*
[235] *Id.*

participate in Bowden's customs faced negative consequences for their decision, this action would violate the test. A drop on the depth chart, running extra laps in practice, or even losing a designed play in the playbook are just some of the ways a player may face some form of negative repercussions for refusing to participate or expressing a different point of view. All of these actions would also violate the Establishment Clause under my proposed test, and no doubt some form of discrimination against non-religious players or religious players of non-Christian faiths occurred at FSU during Bowden's tenure there.

CONCLUSION

As winter tightens its chilling grip across the United States in late January, football coaches around the country have but a moment for a short rest. Yes, the bowl games are over, but they must hit the recruiting trail now; the fate of the program may come down to one commitment gained or lost on National Signing Day. As Freeze and like-minded coaches hit the recruiting trails again, they will no doubt tell potential recruits and parents about the faith they hold so close, a faith that influences practically every part of their life. The ultimate legal question, and one that, given the rise of Separationist movements, is increasingly likely to come before our nation's courts, is whether a university employee's speech rights are so limited, so hampered, that they cannot speak about their religious views.

The Founding Fathers thought freedom of speech was so important they placed it within the many sacred rights secured by the First Amendment.[236] The Supreme Court, since *Pickering*, has consistently held that governmental employees cannot be denied the right to speak on matters of public concern.[237] That same Court has also held that the rights of free speech extend in full force to universities, and that the denial of access to a religious group seeking to use facilities for any type of religious speech is equated to viewpoint discrimination, which is the most disruptive of content discrimination.[238] Finally, the Court has held speech

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[236] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

[237] *See supra* note 21 and accompanying text.

[238] *See supra* notes 49-51 and accompanying text.

that contains within it a call to action "does not lose its protected character, however, simply because it may embarrass others or coerce them into action."[239]

Those same Founders also protected against the establishment of religion.[240] Although the interpretations of the Establishment Clause have changed over time, a central tenet has emerged in the Court's reasoning: religious practices cannot coerce an individual to participate.[241] In the case of high school students, the Court has recognized certain peer pressures exist which create an overly coercive environment, where potential dissenters feel compelled to join the majority.[242] However, such pressures are not present amongst mature adults, and, in that case, "[o]ffense . . . does not equate to coercion."[243] Finally, the Court has recognized that university students can easily distinguish the views of the individual speaker from the so-called "views" endorsed by the university, which, in the case of state sponsored activity, is the primary objective.[244]

Given the precedent, there is no reason why a university employee should not be able to speak to students about matters of religion if he or she wishes, so long as the speech or practices are not mandatory or overly coercive in blatant violation of the Establishment Clause, or do not impose some sort of penalty, such as a reduction in grades or a loss of playing time. Nonparticipation in religious beliefs, the speech, or practice should not be held to violate the Establishment Clause. This approach combines the plurality's and concurrence's understandings of the coercion test from *Town of Greece*.[245] It also provides an adequate balancing of the employee's right to speak on matters of public concern like religion, while protecting the government's special interest of not violating the Establishment Clause.[246]

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[239] *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 910 (1982).

[240] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . .").

[241] *See supra* notes 62-63, 81-82 and accompanying text.

[242] *See supra* notes 62-63 and accompanying text.

[243] *See* Town of Greece v. Galloway, 134 S. Ct. 1811, 1826 (2014).

[244] *See supra* note 50 and accompanying text.

[245] *See supra* notes 81-85, 92-95 and accompanying text.

[246] *See supra* notes 103-06 and accompanying text.

Students at universities are no longer high school students; they are adults, and thus offense is not the same as coercion.[247] Finally, it furthers the overall goal of the university system, which is meant to embody the marketplace of ideas that is so central to our notions of freedom of speech.[248] As for the issue of prayer on university campuses, the same analysis of the coercion test from *Town of Greece* should apply for similar reasons.[249]

At the moment, two of the most basic clauses of the First Amendment appear to be at war on our nation's college campuses. The issue of protecting employee religious speech is not one where the freedom to speak trumps the Establishment Clause. Conversely, the Establishment Clause should not trump the individual's right to speech. However, this perceived friction is mainly illusory. The test proposed in this Comment allows the two clauses to remain in harmony with one another, adequately representing the interest of both of these ideas central to our Constitution.

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[247] *See supra* notes 151-52 and accompanying text.

[248] *See supra* notes 156-67 and accompanying text.

[249] *See supra* note 144 and accompanying text.

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