

# TAKE A KNEE: APPLYING THE FIRST AMENDMENT TO LOCKER ROOM PRAYERS AND RELIGION IN COLLEGE SPORTS

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## I. INTRODUCTION: NO PRAY, NO PLAY

In 2003, two University of Georgia cheerleaders, who were both Jewish, complained to the athletic department that the cheerleading coordinator had discriminated against them based on their religion and that she had used her position to encourage students to adopt certain religious practices.<sup>1</sup> The coordinator, a Christian, often led her team in prayers.<sup>2</sup> Her husband was an ordained minister who led bible studies in their home that were attended

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1. *Braswell v. Bd. of Regents of Univ. Sys. of Ga.*, 369 F. Supp. 2d 1362, 1365 (N.D. Ga. 2005) (one of the cheerleaders pursued a formal complaint against the coordinator).

2. *Id.*

by University of Georgia cheerleaders.<sup>3</sup> The university investigated the complaint and placed the coordinator on probation and instructed her that there were to be no more religious overtones to her program.<sup>4</sup> The coordinator objected to the university's handling of the complaint, but agreed to comply with the university's order. In August 2004, the coordinator read a prepared statement to the cheerleading squad that identified one of the Jewish squad members who made the complaint, claimed that the allegations were without merit, and reflected a reluctant agreement to obey the university's order. As a result of this statement, the university terminated the coordinator's employment. The coordinator filed an action alleging the deprivation of free exercise of religion and the deprivation of free speech.<sup>5</sup>

The incident raised a number of questions for the university and the court. Did the university have legitimate concerns about such actions by a coach constituting a violation of the Establishment Clause of the U.S. Constitution? Was the coach's right to freely exercise her religion infringed upon by the university? What about her free speech rights? Was the behavior of the head football coach, who also led his team in prayer, another possible violation that the university should have addressed in the same manner?

The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."<sup>6</sup> Establishment Clause concerns are of particular importance in the operation of public education because "the public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny."<sup>7</sup> However, the separation of church and state has not always been clear in the locker rooms of our public colleges and universities.

Religion is a visible and pervasive element of many public college and university athletic programs. The beliefs and behaviors of student-athletes may sometimes be the source of religious practices in these locker rooms, but often it is the coach that sets a religious tone for the locker room and the program. Athletes may participate in rituals, such as team prayer, out of a sense of team unity and without considering the negative impact that such religious practices might have on their teammates or even themselves. Yet, as the incident at the University of Georgia illustrates, religious speech

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3. *Id.* at 1365, 1367.

4. This prohibition included bible studies, prayers on the list serve and using names of religious figures that might exclude members of a different faith. *See id.* at 1365.

5. *Id.* at 1365–66.

6. U.S. CONST. amend. I.

7. Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring).

and practice may not only negatively impact student-athletes, it can also raise constitutional questions for a college or university.

In recent years, colleges and universities have dealt with concerns that coaches were using their athletic programs to promote religion. In 1984, Rey Dempsey, the football coach at Memphis State University, was accused of attempting to impose Christian beliefs on his players, holding mandatory prayer meetings, asking players to raise their hands if they were not “saved,” and instituting a “[no] pray, [no] play” policy.<sup>8</sup> In 1996, the University of Wisconsin at Madison ordered the women’s basketball coach to stop including an optional religious program at a summer camp that she held on campus.<sup>9</sup> Concerns over mixing religion and sports had become an issue on the University of Wisconsin at Madison’s campus a year earlier when Athletes in Action, a Christian basketball team, was allowed to give a presentation and hand out religious pamphlets after an exhibition game.<sup>10</sup> In 2006, the American Civil Liberties Union filed a federal civil rights lawsuit on behalf of three former football players at New Mexico State University, claiming that they had been discharged from the team because of their Muslim faith.<sup>11</sup> In 2007, New Mexico State University announced that it had reached a settlement with the former players for an undisclosed amount.<sup>12</sup> As of 2008, the University of North Carolina’s Department of Athletics Staff Manual included a policy that allowed university teams to play “religious teams,” but provided that “any public statement or announcement of religious doctrine or beliefs at the athletic facility” is prohibited.<sup>13</sup>

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8. Charles S. Farrell, *Memphis State Coach is Accused of Imposing Religious Beliefs on Players*, 29 CHRONICLE OF HIGHER EDUCATION, Oct. 3, 1984, at A26. The ACLU decided not to pursue legal action after the university reprimanded the coach. See Peter Monaghan, *Religion in a State-College Locker Room: Coach’s Fervor Raises Church-State Issue*, 31 CHRONICLE OF HIGHER EDUCATION, Sept. 18, 1985, at A38 [hereinafter *Coach’s Fervor*].

9. *Sidelines*, 42 CHRONICLE OF HIGHER EDUCATION, July 12, 1996, at A37.

10. *Id.*

11. Samantha Henig, *Muslim Former Players Sue New Mexico State U.*, 53 CHRONICLE OF HIGHER EDUCATION, Sept. 8, 2006, at A37, available at <http://chronicle.com/weekly/v53/i03/03a03701.htm>. The players alleged that the head football coach, Hal C. Mumme, initiated a practice of having players lead the Lord’s Prayer after each practice and before each game, repeatedly questioned one of the players about the terrorist group Al Qaeda, demoted one of the players from starting tailback to fifth string, and made them “feel like outcasts” because of their religion. The university hired a law firm to investigate the allegations and determined that the players had been dismissed for performance reasons before the ACLU brought the suit. *Id.*

12. *New Mexico St., Ex-Muslim Players Settle Suit*, Associated Press, June 21, 2007, available at <http://nbcports.msnbc.com/id/19360438/>.

13. E-mail from Larry Gallo, Jr., Senior Associate Director of Athletics, University of North Carolina at Chapel Hill, to Kris Bryant (Nov. 20, 2008) (on file with author) [hereinafter *Gallo email*].

One coach whose behavior frequently raised church-state concerns was Bill McCartney, who founded Promise Keepers, a conservative Christian organization for training “godly men,”<sup>14</sup> while he was the football coach at the University of Colorado.<sup>15</sup> McCartney made religion a prominent part of his football program with prayers not only before games, but at practices, team meetings, team meals, pre-game warm-ups and post-game cool-downs.<sup>16</sup> In 1991 McCartney was censured by Colorado officials for denouncing homosexuality as “an abomination of almighty God” during a university press conference.<sup>17</sup> While McCartney was the subject of both controversy and reprimands,<sup>18</sup> his position as football coach never appeared to be in jeopardy; in fact, in six years he took the Colorado Buffaloes from a one win season to back-to-back eleven win seasons, and earned the team a number one national ranking and a national championship.<sup>19</sup>

The behavior of some of these coaches may seem extreme, and their institutions had good reason to be concerned about crossing the line of separation between church and state, but what about the traditional practice of teams praying together in a locker room before a game? Grant Teaff, the executive director of the American Football Coaches Association estimates that more than 50 percent of the nation’s high school football teams engage in some form of team prayer.<sup>20</sup> It is easy to imagine that a similar percentage might be found at the college and university level. Two of

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14. History of Promise Keepers, <http://www.promisekeepers.org/about/pkhistory> (last visited Oct. 25, 2009).

15. See *Coach’s Fervor*, *supra* note 8, at 37–38.

16. *Id.* McCartney was also accused of giving players and coaches who shared his beliefs priority in hiring, recruiting, and playing time. *Id.*

17. Peter Monaghan, *U. of Colorado Football Coach Accused of Using His Position to Promote His Religious Views*, 39 CHRONICLE OF HIGHER EDUCATION, Nov. 11, 1992, at A35. Earlier, McCartney had been criticized for endorsing the actions of Operation Rescue, a radical anti-abortion group and for being a member of Colorado for Family Values, a group that sponsored the anti-gay legislation. *Id.* Colorado for Family Values listed him as a board member and identified him as Colorado’s football coach. *Id.* It was at a press conference to disassociate his roles with the anti-gay group and the university that McCartney made the “abomination” comment, while speaking in a university facility, wearing a Colorado sweater, and standing behind a lectern bearing the university’s logo. *Id.* See also *Sidelines*, 38 CHRONICLE OF HIGHER EDUCATION, March 4, 1992, at A38 (McCartney criticized for questioning date-rape charges against two of his football players, saying physical injury always accompanies rape).

18. See, e.g., *Sports People: College Football; A Logo on the Bible?* N.Y. TIMES, Aug. 26, 1992, at B8.

19. See *2008 Colorado Football Media Guide*, COLORADO BUFFALOES, at 153, available at [http://admin.xosn.com/pdf4/133321.pdf?DB\\_\\_OEM\\_ID=600](http://admin.xosn.com/pdf4/133321.pdf?DB__OEM_ID=600) (last visited Oct. 25, 2009).

20. Greg Tufaro, *East Brunswick Coach Asks U.S. Supreme Court to Hear His Team Prayer Appeal*, Oct. 13, 2008, available at <http://www.mycentraljersey.com/article/20081013%20NEWS/810130365/1003/newsfront> (last visited on Nov. 17, 2008).

college football's most iconic coaches, Bobby Bowden and Joe Paterno, have both carried on the tradition of pre-game prayers for more than 30 years.<sup>21</sup>

College and university coaches have offered a number of rationales for making prayer a part of their locker room atmosphere. Coaches have suggested that prayer and religion build personal character, improve team unity,<sup>22</sup> instill discipline, diminish selfishness, and ultimately improve team performance.<sup>23</sup> Regardless of whether prayer actually helps accomplish any of these things, public colleges and universities should be concerned when a coach is leading or participating in locker room prayer because a "coach is traditionally a public official, on the public payroll, and a locker room is part of a government facility."<sup>24</sup> At the same time, colleges and universities have also had to address accusations of discriminating against coaches based on their religion<sup>25</sup> and failing to protect the free speech and free exercise rights of coaches.<sup>26</sup>

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21. Joe Drape, *Increasingly, Football's Playbooks Call for Prayer*, N.Y. TIMES, Oct. 30, 2005, § 1, at 1, available at <http://www.nytimes.com/2005/10/30/sports/football/30religion.html>. Bobby Bowden is the current head coach of the Florida State Seminoles football team; Joe Paterno is head coach of the Penn State Nittany Lions football team. Bowden also has a tradition of taking his teams to a church in a white community and a church in a black community during the preseason. *Id.* Mark Richt, the football coach at the University of Georgia and a former Bowden assistant, has a similar tradition and in addition has a devotional service on the night before each game and a prayer service on game day, both of which are voluntary. *Id.*

22. Bill Finley, *Church and Team: Where to Draw the Line?*, N.Y. TIMES, August 6, 2006, § 14NJ, at 3, available at <http://query.nytimes.com/gst/fullpage.html?res=9D06E0DF113FF935A3575BC0A9609C8B63>.

23. Debra E. Blum, *Devout Athletes: Public Displays of Faith by Coaches and Players Raise Concerns*, 42 CHRONICLE OF HIGHER EDUCATION, Feb. 9, 1996, at A35. See also JAY COAKLEY, *SPORTS IN SOCIETY*, 548-54 (McGraw-Hill 8th ed. 2004) (suggesting six possible reasons that athletes themselves utilize religious prayer: as a coping mechanism for stressful situations; to help lead a moral life; to sanctify their commitment to sport; to put sport into perspective; to establish a strong bond of attachment between teammates; and to maintain social control).

24. Gil Fried & Lisa Bradley, *Applying the First Amendment to Prayer in a Public University Locker Room: An Athlete's and Coach's Perspective*, 4 MARQ. SPORTS L.J. 301, 314 (1994).

25. See *Stanford Officials Deny That They Rejected a Prospective Coach Over His Religious Beliefs*, 48 CHRONICLE OF HIGHER EDUCATION, May 3, 2002, at A39. Ronald Brown, a football coach and a Christian commentator who called homosexuality "dead wrong" on one of his radio shows, was considered for the position of head football coach at Stanford, but was not offered the job. *Id.* A Stanford associate athletic director indicated that Brown's religion "was definitely something that had to be considered," before backtracking in a letter to the editor and saying that this statement did not apply specifically to Brown. *Id.*

26. See *Braswell*, 369 F. Supp. 2d at 1366; *In Brief: Professor Says Clemson Violated His Rights*, 38 CHRONICLE OF HIGHER EDUCATION, Jan. 8, 1992, at A4 (head of political-science department at Clemson University said that his First Amendment

The proper balance between accommodating one person's right of religious expression while not infringing on another person's right to be free from religious coercion in the public school setting "continues to be a source of spirited debate."<sup>27</sup> The Establishment Clause requires government neutrality regarding religion, and the Free Exercise Clause prohibits government interference with an individual's religious practices.<sup>28</sup> Prayer in a public college or university locker room creates a potential conflict between the student-athletes' right to be free from state-sponsored religious indoctrination and the coach's right to free exercise and free speech.<sup>29</sup>

The United States Supreme Court has not addressed the constitutionality of a college or university coach leading his or her team in prayer or participating in a prayer led by a student-athlete, but the constitutional issues are authentic and the practice is quite common.<sup>30</sup> Though it has not addressed this particular issue, the Supreme Court has given some guidance in cases dealing with religion in public schools and in the tests that it has developed for applying the First Amendment in a public school setting. In evaluating how courts should deal with religion and prayer in collegiate athletics, this paper begins by considering Supreme Court jurisprudence and the First Amendment tests addressing the relationship between the state and religious practice, in Section I. Section II examines a sample of lower court decisions dealing with religion and prayer in public schools and assesses how those courts have relied on this jurisprudence and used these tests in analyzing First Amendment issues. Section III draws upon this research to establish some patterns in how the courts have dealt with prayer in public schools, including determining what tests have been applied in what situations and what kind of factors have been considered. Section IV contemplates the possible direction the current Supreme Court might take if it were to hear a case involving locker room prayer. Finally, Section V

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rights were violated when he was not reappointed because of claims that he used his classroom to preach religious beliefs, held prayer sessions in his office, and pressured students about their religious beliefs).

27. Tom Bennett & George Foldes, "Our Father in Heaven": A Legal Analysis of the Recitation of the Lord's Prayer by Public School Coaches, 81 THE CLEARING HOUSE, 4 Mar./Apr. 2008, at 185.

28. See Eric M. Helman, *Borden v. East Brunswick School District: Clarifying First Amendment Jurisprudence in the Public School Context*, 42 NEW ENG. L. REV. 363, 373 (2008) (citing *Bd. of Educ. v. Grumet*, 512 U.S. 687, 702 (1994)). The Free Exercise and Establishment Clauses are made applicable to states pursuant to the Fourteenth Amendment. *Id.*

29. The focus of this article is the constitutional issues relating to prayer and religious practice in the athletic programs of public institutions. While private institutions are certainly not immune from concerns regarding religious practices, especially in the context of religious accommodation and discrimination claims, a discussion of such issues is beyond the scope of this article.

30. Bennett & Foldes, *supra* note 27, at 187.

advocates for a judicial approach to locker room prayer that is vigorously protective of student-athletes and their right to be free from state-sponsored religious activity.

## I. WALKING THE TIGHTROPE—FIRST AMENDMENT JURISPRUDENCE IN THE PUBLIC SCHOOL CONTEXT

### A. The Establishment Clause Tests

Since 1948, the Supreme Court has decided thirteen cases that presented questions regarding the presence of religion in public schools.<sup>31</sup> During that time, the Court has developed numerous tests to determine Establishment Clause violations. However, the Court has yet to adopt a definitive standard to help school administrators walk the tightrope and find balance between protecting free exercise rights and paying proper attention to establishment concerns.

In 1971 Chief Justice Burger synthesized the requirements of the Establishment Clause into a three-pronged test in the case of *Lemon v. Kurtzman*. To survive scrutiny under the *Lemon* test, the challenged state action “must have a secular legislative purpose . . . its principal or primary effect must be one that neither advances nor inhibits religion, . . . [and it] must not foster an excessive government entanglement with religion.”<sup>32</sup> This test has been frequently criticized as problematic, inconsistent, and difficult to apply.<sup>33</sup> Nevertheless, the test has survived and the Court has yet to put forth a comprehensive replacement.<sup>34</sup> Rather, the Court has supplemented the *Lemon* test with other tests and standards.

In 1983 the Supreme Court found that the practice of having a paid chaplain open each session of the Nebraska Legislature with a prayer did not violate the Establishment Clause. Rather than using the *Lemon* test, the Court instead focused on the long historical practice of allowing such ceremonial prayers.<sup>35</sup> While some lower courts tried to apply such an

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31. Julie F. Mead, Preston C. Green & Joseph O. Oluwole, *Re-examining the Constitutionality of Prayer in School in Light of the Resignation of Justice O'Connor*, 36 J.L. & EDUC. 381, 384 (2007).

32. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (holding that Pennsylvania and Rhode Island statutes providing aid to church-related elementary and secondary schools were unconstitutional because of excessive entanglement between state and church).

33. See *Wallace v. Jaffree*, 472 U.S. 38, 68 (1985) (O'Connor, J., concurring); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

34. See *Wallace*, 472 U.S. at 63 (Powell, J., concurring) (Powell responded to criticism of the *Lemon* test by noting that it was “the only coherent test” of the Establishment Clause a majority of the Court ever adopted).

35. *Marsh v. Chambers*, 463 U.S. 783, 786–92 (1983). In *Marsh*, the Court concluded that such prayers were constitutional because the practice of “opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country” and has “become part of the

analysis to school prayers,<sup>36</sup> the Court has declined to extend this “historical approach” to public education.<sup>37</sup>

In her concurring opinion in the 1984 case of *Lynch v. Donnelly*,<sup>38</sup> which involved the inclusion of a nativity scene in a city’s Christmas display,<sup>39</sup> Justice O’Connor attempted to refine the purpose and effects prongs of the *Lemon* test with an “endorsement test.”<sup>40</sup> Justice O’Connor’s Endorsement Test considers whether the government “intend[ed] to convey a message of endorsement or disapproval of religion,” and secondly, whether the behavior actually had “the effect of communicating a message of government endorsement or disapproval of religion.”<sup>41</sup> The government may not, by “endorsing religion or a religious practice,” make adherence to religion “relevant to a person’s standing in the political community.”<sup>42</sup> The Endorsement Test examines the facts from the point of view of a “reasonable observer” to see whether such an observer would draw an inference from the facts that the State was “endorsing a religious practice

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fabric of our society. . . .” *Id.* at 786, 813. The Court noted that ceremonial legislative prayer had been common practice since the time the Constitution was adopted. *Id.*

36. *Stein v. Plainwell Cmty. Sch.*, 610 F. Supp. 43, 48 (W.D. Mich. 1985). The court, citing *Marsh*, upheld graduation prayers based in part on the school district’s “long tradition of including invocations and benedictions in their ceremonies.” *Id.*

37. *See Edwards v. Aguillard*, 482 U.S. 578, 583 n.4 (1987) (stating in dicta that such a “historical approach is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted.”); *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824, 828 (11th Cir. 1989) (finding that the *Marsh* analysis had no application in a case involving the practice of having invocations at high school football games). *See also Lee v. Weisman*, 505 U.S. 577, 596–97 (1992) (recognizing “inherent differences” between a legislative prayer involving adults who were free to leave and a graduation prayer involving students, where the “constraining potential” to participate in such an important moment would leave students “no alternative but to submit”). *But see Jones v. Clear Creek*, 977 F.2d 963 (5th Cir. 1992) (*Jones II*) (upholding a school district resolution allowing high school seniors to select a student to lead a non-sectarian graduation prayer). *See ACLU of New Jersey v. Black Horse Pike Reg’l Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996) (stating that the fact that students in *Jones II* made the decision about the graduation prayer was not a persuasive distinction from *Lee*, and that it could not “allow the school district’s delegate to make decisions that the school district [could not] make”)(hereinafter *ACLU*).

38. *Lynch v. Donnelly*, 465 U.S. 668 (1994).

39. *Id.* at 668.

40. *ACLU*, 84 F.3d at 1486 (citing *Lynch*, 465 U.S. at 690–91) (O’Connor, J., concurring).

41. *Id.* at 691–92.

42. *Wallace*, 472 U.S. at 69 (O’Connor, J., concurring). *See also Lynch*, 465 U.S. at 688 (O’Connor stating that government action endorsing religion or a particular religious practice is invalid under the Endorsement Test because it “sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community”).

or belief.”<sup>43</sup> While it has not replaced the *Lemon* test, the Endorsement Test has served as a useful analytical tool, which a number of Supreme Court justices have used in analyzing government action.<sup>44</sup>

In 1992 Justice Kennedy formulated yet another Establishment Clause test, the Coercion Test, in his majority opinion in *Lee v. Weisman*, which found a middle school graduation prayer unconstitutional.<sup>45</sup> Kennedy’s Coercion Test inquires as to whether government action, such as a school’s control over a religious activity, coerces anyone, directly or indirectly, “to support or participate in religion or its exercise.”<sup>46</sup> A number of other justices also have put the Coercion Test to use, particularly in cases involving school prayer.<sup>47</sup> Yet, they have characterized the test in widely divergent manners, creating a question as to its precedential value.<sup>48</sup>

Ultimately, because the Supreme Court has not mandated which tests should be applied to what circumstances, there is a “quagmire of uncertainty” in the lower courts regarding when and how to apply the various tests.<sup>49</sup> Lower courts are left free to decide which test to use on an *ad hoc* basis, and they frequently follow the Supreme Court’s approach of shaping some combination of the tests to fit the facts of the case.<sup>50</sup>

#### B. Free Exercise and Free Speech Analysis

The Free Exercise Clause protects a person’s “right to believe and profess whatever religious doctrine one desires” and to perform, or abstain from performing physical acts, such as assembling with others for worship services.<sup>51</sup> To demonstrate an infringement on free exercise rights, a person must show “the coercive effect of the [government action] as it

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43. *Witters v. Washington Dep’t of Serv. for the Blind*, 474 U.S. 481, 493 (1986) (O’Connor, J., concurring in part and concurring in judgment).

44. Mead, Green & Oluwole, *supra* note 31, at 393.

45. *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

46. *Id.* See also *id.* at 592 (finding a ceremonial prayer at a graduation ceremony unconstitutional because such a practice used the “machinery of the state” to coerce those present to pray).

47. Mead, Green & Oluwole, *supra* note 31, at 393.

48. Antony Barone Kolenc, *Mr. Scalia’s Neighborhood: A Home for Minority Religions?* 81 ST. JOHN’S L. REV. 819, 834 (2007) (contrasting Justice Scalia’s and Justice Thomas’s different interpretations of the Coercion test).

49. Diane Heckman, *One Nation Under God: Freedom of Religion in Schools and Extracurricular Athletic Events in the Opening Years of the New Millennium*, 28 WHITTIER L. REV. 537, 624 (2006).

50. Helman, *supra* note 28, at 375 (noting that in *Santa Fe Independent School District v. Doe* the Court applied three tests and described them as complementary and occasionally overlapping). See *Santa Fe Indep. Sch. Dist v. Doe*, 530 U.S. 290, 308–12 (2000).

51. *Employment Div., Dep’t of Human Res. of Or. v. Smith (Smith II)*, 494 U.S. 872, 877 (1990).

operates against him in the practice of his religion.”<sup>52</sup> While the freedom of individual beliefs is absolute, the protection of physical acts is limited.<sup>53</sup> The Supreme Court has also indicated that the government’s accommodation of free exercise rights cannot “supersede the fundamental limitations imposed by the Establishment Clause.”<sup>54</sup>

In addition to free exercise claims, some of the cases considered in this paper analyze free speech claims, often using the *Connick-Pickering* test.<sup>55</sup> The free speech issue usually arises in the context of a claim by a state employee alleging that he or she has been fired in retaliation for his or her exercise of the First Amendment right to freedom of speech.<sup>56</sup> Originally a two-part test, the test has been extended to a four-step analysis.<sup>57</sup> An employee must show by a preponderance of evidence that: (1) her speech was on a matter of public concern; (2) her First Amendment interest in the speech outweighs “the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees,”<sup>58</sup> and (3) her speech played a “substantial part” in her termination.<sup>59</sup> If the employee meets these three factors, the burden shifts and the employer must prove that (4) it would have made the same decision absent protected conduct.<sup>60</sup>

The first step of the *Connick-Pickering* test is a difficult hurdle for coaches seeking protection of speech relating to religion or religious practices. In *Connick*, the Supreme Court held that:

[W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the

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52. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963).

53. *Minersville Sch. Dist. Bd. of Educ. v. Gobitis*, 310 U.S. 586, 594 (1940) (stating that “[c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs”) (cited in *Smith II*, 494 U.S. at 879).

54. *Lee*, 505 U.S. at 587.

55. *See Braswell*, 369 F. Supp. 2d at 1368.

56. *See id.*

57. *See id.*

58. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (holding that a public school teacher, who had written letters to the local paper criticizing how the board of education had handled revenue proposals, had a right to speak on issues of public importance without being dismissed from his position, so long as such statements were not knowingly or recklessly false).

59. *Braswell*, 369 F. Supp. 2d at 1368.

60. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285, 287 (1977) (finding that a public school impermissibly refused to rehire a teacher in retaliation for the teacher relaying to a radio station a memorandum from the principal regarding teacher dress and appearance, which the school administration felt was impacting public support for bond issues).

wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.<sup>61</sup>

It is unlikely that a court will regard a coach's religious speech or reaction to school policies limiting his or her religious speech as being speech "on a matter of public concern" rather than speech on a matter of personal interest.

In *Garcetti v. Ceballos*, the Supreme Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."<sup>62</sup> Justice Kennedy, writing for the majority, was careful to distinguish *Garcetti* from *Pickering*, noting that in writing the memorandum Ceballos was acting pursuant to his duties as a government employee, not as a citizen, as was the case in *Pickering*.<sup>63</sup> While *Garcetti* seems to draw the line in a different place, it does not fundamentally disturb the doctrine established in *Pickering* and *Connick*.<sup>64</sup> Ultimately, a coach's religious speech or criticism of school policies restricting his or her religious behavior is unlikely to find much protection under *Connick-Pickering* or *Garcetti*.<sup>65</sup>

Having established the framework for Establishment Clause and Free Exercise Clause analysis, the next step is to examine how some courts have applied these guidelines in the public school setting. While the specific issue being addressed in this Note is religion and prayer in college and university sports, some of the cases involve high school and middle school students. The age and the maturity of college and university students compared to younger students is one factor often considered by the courts in analyzing the presence of religious practices in public education under

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61. *Connick v. Myers*, 461 U.S. 138, 147, 151–54 (1983) (finding that while an office questionnaire circulated by a recently transferred district attorney touched on matters of public concern in only a "most limited sense," the attorney's free speech interest was easily outweighed by the state's need to prevent disruption of the work environment and interference with working relationships).

62. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (deputy district attorney charged that he was subject to retaliatory measures, such as reassignment and denial of a promotion, after he wrote a memorandum to his superior criticizing the granting of a search warrant based on an affidavit with numerous discrepancies).

63. *Id.* at 424.

64. *Id.* at 430 (Souter, J., dissenting). *Garcetti* essentially broadens the scope of the first step of the *Connick-Pickering* test by making job-related speech and citizen speech mutually exclusive categories.

65. Under the *Connick-Pickering* test, the coach's speech is not likely to be considered as touching on a "public concern," and the coach's interest will be easily outweighed by the state's interest in the efficiency of its public service. Under *Garcetti*, such speech is either job-related speech falling outside of First Amendment protection or it is under the *Connick-Pickering* analysis.

the religion clauses of the First Amendment.<sup>66</sup> The exploration of the constitutionality of locker room prayer at the college and university level will nevertheless benefit from scrutinizing the steps that various courts have taken in dealing with prayers and religious behavior involving student-athletes of all ages.

## II. ESTABLISHMENT CLAUSE CONCERNS IN RECENT CASES INVOLVING RELIGION AND PRAYER IN PUBLIC SCHOOLS

### A. *Braswell & Bishop*

In *Braswell v. Board of Regents of University System of Georgia* (described in the introduction to this Note), the district court held that the cheerleading coordinator failed to demonstrate a substantial likelihood of success on the merits of her free exercise claim and denied her motion for a temporary restraining order and/or preliminary injunction.<sup>67</sup> The court found that “Braswell’s personal religious practice was not restricted” and the “directives in the notice of probation neither caused her to do anything that compromised her religious beliefs nor prevented her from doing anything essential to her exercise of religion.”<sup>68</sup> In reaching this conclusion, the court relied heavily on the Eleventh Circuit’s decision in *Bishop v. Aronov*.<sup>69</sup>

In *Bishop*, a health and physical education professor brought an action challenging a university memorandum instructing him to refrain from interjecting religious beliefs in class lectures and from conducting optional classes to discuss Christian perspectives on class topics. The court, in rejecting Bishop’s free exercise claim, found that Bishop had made no true suggestion “that any proscribed conduct of his impedes the practice of his religion” and that the university’s restrictions were “not directed at his efforts to practice religion, *per se*, but rather [were] directed at his practice of teaching.”<sup>70</sup> While not reaching the question of whether the proscribed behavior violated the Establishment Clause, the court indicated that the optional class was “particularly suspect.”<sup>71</sup> The court stated that the university “can restrict speech that falls short of an establishment violation.”<sup>72</sup>

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66. *Tilton v. Richardson*, 403 U.S. 672, 686 (1971) (noting that “college students are less impressionable and less susceptible to religious indoctrination” than elementary and secondary school students).

67. *Braswell*, 369 F. Supp. 2d at 1371.

68. *Id.* at 1367–68.

69. *Id.* (citing *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991)).

70. *Bishop*, 926 F.2d at 1077.

71. *Id.*

72. *Id.* (arguing that, because of the potential establishment conflict, “even the appearance of proselytizing by a professor should be a real concern to the University”).

The plaintiffs in both *Bishop* and *Braswell* claimed that, in addition to violating their free exercise rights, their respective universities also violated their free speech rights.<sup>73</sup> While teachers, like students, do not “shed their constitutional rights to [free speech] at the schoolhouse gate,”<sup>74</sup> the State, as an employer, has an interest in promoting the efficiency of the service it provides and that interest must be balanced with the interest of a teacher in commenting on matters of public concern.<sup>75</sup> Public employees do enjoy substantial free speech rights, but those rights are limited.<sup>76</sup>

The *Bishop* court, in its balancing analysis, considered the context of the speech, a university classroom during class-time, and the university’s position as a public employer, “which may reasonably restrict the speech rights of employees more readily than those of other persons.”<sup>77</sup> Ultimately, the court concluded that the university’s order that Bishop refrain from expression of religious viewpoints in a university classroom was not a free speech violation.<sup>78</sup>

In *Braswell*, the plaintiff contended that her termination constituted unlawful retaliation for her exercise of her freedom of speech in reading her prepared statement to the cheerleading squad. The *Connick-Pickering* test was applied in the court’s analysis of the plaintiff’s free speech retaliation claims.<sup>79</sup> The court found that Braswell’s speech was personal speech and not on a matter of public concern,<sup>80</sup> and that even if it did address a matter of public concern it would not be protected speech because the state’s interest in disciplining an insubordinate employee

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The opinion also indicated that Bishop’s conduct connected the University with a particular religious viewpoint and that “such a connection [could] give the impression that the University sponsors that viewpoint.” *Id.*

73. *Id.* at 1070 (alleging that the university memorandum restricted his free speech rights and he sought injunctive relief); *Braswell*, 369 F. Supp. 2d at 1366–67 (contending that her termination constituted an unlawful retaliation for her exercise of her First Amendment right to freedom of speech in reading her prepared statement to the cheerleading squad). The court in *Bishop* stated that although the religion clauses were implicated by the religious character of Bishop’s remarks, its primary analysis would focus on the free speech rights of a public university professor. *Bishop*, 926 F.2d at 1072.

74. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

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

76. *See Connick v. Myers*, 461 U.S. 138, 148–54 (1983); *Pickering*, 391 U.S. at 568.

77. *Bishop*, 926 F.2d at 1074. In its analysis, the court relied on *Kuhlmeier*’s “concern for the ‘basic educational mission’ of the school which gives it authority by the use of ‘reasonable restrictions’ over in-class speech that it could not censor outside the classroom.” *Id.* (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266–67 (1988)).

78. *Id.* at 1076–77. The court noted that the university’s restriction on Bishop applied “only to the classroom speech of Dr. Bishop—wherever he purports to conduct a class for the University.” *Id.* at 1075–76.

79. *Braswell*, 369 F. Supp. 2d at 1368.

80. *Id.* at 1368–69 (citing *Connick*, 461 U.S. at 147).

would outweigh her First Amendment interest.<sup>81</sup>

*B. Doe v. Duncanville Independent School District*

In 1988, Jane Doe entered the seventh grade in the Duncanville Independent School District (DISD) in Texas and qualified to play on the girls' basketball team.<sup>82</sup> The girls' basketball coach, Coach Smith, regularly initiated or participated in saying the Lord's Prayer with the basketball team at team practices, in the locker room before games, on the bus traveling to and from games, and after games in the center of the court in front of spectators.<sup>83</sup> Doe felt uncomfortable about the prayers and, after speaking with her father about the practice, decided not to participate. From that point on, she was required to stand by while the team prayed, including during the post-game prayer on the court. This drew attention from her classmates and spectators, who questioned why Doe refused to join in the prayers and whether she was a Christian. Her history teacher referred to Doe as a "little atheist" during a class.<sup>84</sup> Doe's father complained to the assistant district superintendent about the prayers, but the assistant superintendent insisted that there was nothing he could do about the post-game prayer.<sup>85</sup>

In 1991, the Does sought to enjoin the use of prayers by the basketball coach. After the permanent injunction hearing, the district court found that DISD had violated the Establishment Clause by "permitting its employees to lead, encourage, promote, or participate in prayers with students during curricular or extracurricular events."<sup>86</sup> DISD appealed and contended that the district court erred in forbidding DISD employees from participating in or supervising student-initiated prayers.<sup>87</sup>

In its review, the Fifth Circuit chose to utilize a combination of the *Lemon* test, the Coercion Test, and the Endorsement Test in analyzing the Establishment Clause concerns in this case.<sup>88</sup> The Fifth Circuit held that

81. *Id.* at 1369 (citing *Pickering*, 391 U.S. at 568).

82. *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 404 (5th Cir. 1995). Doe was also placed in an athletic class designated for basketball team members. *Id.*

83. *Id.* at 405. These prayers had been part of the team's routine for almost twenty years. *Id.* The Duncanville Independent School District also engaged in a number of other religious practices, such as including prayers as part of awards ceremonies, "allowing student-initiated prayers before football games, allowing Gideon Bibles to be distributed to fifth grade classes, and until 1990, including prayers during school pep rallies." *Id.* at 404-05.

84. *Id.* at 404.

85. *Id.* (noting that he did, however, stop the prayers at the pep rallies).

86. *Duncanville*, 70 F.3d at 405. The temporary restraining order and preliminary injunction was granted by the district court and upheld by the court of appeals.

87. *Id.* at 406. Based on the information in the opinion, it does not appear that DISD contested the rule forbidding coaches from leading prayers.

88. *Id.* at 405 (noting that modern Establishment Clause jurisprudence is "rife with

that the district court had not erred in enjoining school employees from participating in student-led prayers, emphasizing that the challenged prayers took place during “school-controlled” activities, where coaches and other school employees were present as “representatives of the school.”<sup>89</sup>

Moreover, the court found that the rule prohibiting school employee supervision of student-initiated prayer did not contradict the Supreme Court’s ruling in *Mergens*, which upheld the Equal Access Act’s requirement that “a non-curricular student prayer group be given the same access to school facilities as other student groups.”<sup>90</sup> The court reasoned that the facts in this case did “not even vaguely resemble a *Mergens* situation” because membership on the basketball team is “at least extra-curricular” and the games are “school-sponsored and -controlled” and do not provide “any sort of open forum for student expression . . . .”<sup>91</sup> The court also distinguished this case from *Jones II*, which upheld a school policy allowing high school seniors to choose whether to have a student volunteer deliver a non-sectarian invocation during their graduation, a “once-in-a-lifetime event”<sup>92</sup> that the court felt could be appropriately solemnized with a prayer.<sup>93</sup> The *Duncanville* court noted that a basketball game was a far less solemn occasion than a high school graduation, the prayer was “quintessentially Christian,” and the students were twelve years of age.<sup>94</sup>

While the court held that the school was properly enjoined from allowing a coach to participate in or supervise student-initiated prayers, it did not give much guidance as to what specific behavior would constitute impermissible participation, except for its comments in a note, stating that:

[N]either the Establishment Clause nor the district court’s order prevent DISD employees from treating students’ religious beliefs and practices with deference and respect; indeed, the [C]onstitution requires this. Nothing compels DISD employees to make their non-participation vehemently obvious or to leave the room when students pray . . . . However, if while acting in

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confusion”).

89. *Id.* at 406 (citing *Bishop v. Aronov*, 926 F.2d 1066, 1073 (11th Cir. 1991) (“A teacher’s [religious] speech can be taken as directly and deliberately representative of the school.”)).

90. *Duncanville*, 70 F.3d at 406 (citing *Bd. of Educ. of Westside Comm. Sch. v. Mergens*, 496 U.S. 226, 253 (1990)). Under the EAA, school employees can be present at student religious meeting for custodial purposes only. *See* Equal Access Act, 20 U.S.C. § 4071 (2006).

91. *Duncanville*, 70 F.3d at 406.

92. *Id.* at 406–07.

93. *Jones v. Clear Creek Indep. Sch. Dist. (Jones II)*, 977 F.2d 963, 966–72 (5th Cir. 1992). *Jones II* has actually received a good deal of criticism. *See* *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 818 (5th Cir. 1999) (recognizing the implied overruling of its earlier decision).

94. *Duncanville*, 70 F.3d at 406–07.

their official capacities, DISD employees join hands in a prayer circle or otherwise *manifest approval and solidarity with student religious exercises*, they cross the line between respect for religion and endorsement of religion.<sup>95</sup>

Based on this ruling, it seems students could initiate prayers at practice or in the locker room and a coach could show respect for the religious practice of students, but could not participate in a way that shows approval or solidarity, like holding hands.<sup>96</sup> The Fifth Circuit's decision in this case was cited by and received positive treatment from the United States Supreme Court in *Santa Fe Independent School District v. Doe*.<sup>97</sup>

The next case raises a question about another prayerful posture. What about taking a knee?

*C. Borden v. School District of the Township of East Brunswick*

In 2005, Marcus Borden, the head football coach at East Brunswick High School in New Jersey, filed a suit against the school district seeking a declaration that the district's policy "prohibiting faculty participation in student-initiated prayer" violated his freedom of speech.<sup>98</sup> During his tenure of more than twenty years as head football coach, Borden had engaged in two pre-game prayers, one occurring at the team dinner and the other while taking a knee in the locker room before the game.<sup>99</sup> In 2005, the district superintendent received some complaints from parents about the prayers, and, subsequently, the district's counsel sent a memo to Borden indicating that school representatives could not initiate prayers with students or participate in student-initiated prayer. Borden initially resigned, but he quickly withdrew his resignation and agreed to abide by the district's policy.<sup>100</sup> Borden then brought his claim against the school

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95. *Id.* at 406 n.4 (emphasis added).

96. *See id.* at 406. This standard would seem to mean that students could initiate prayers after practices or in the locker room, so long as the coach did not participate in a manner that showed approval.

97. *Santa Fe*, 530 U.S. at 308 (holding that a school policy allowing student-led, student-initiated prayers at high school football games violated the Establishment Clause).

98. *Borden v. Sch. Dist. of Twp. of New Brunswick*, 523 F.3d 153, 158–59 (3d Cir. 2008).

99. *Id.* at 159. Originally, a local minister said the pre-meal prayer, then for a few years students read a prayer written by the minister, and for the last couple of years Borden would say the pre-meal prayer at the first game and for rest of the season he would select a senior to say the prayer. As for the pre-game prayer, for twenty-three seasons Borden would instruct his players to take a knee in the locker room and he would say a prayer after discussing tactics and strategy.

100. *Id.* at 160–62. Prior to the 2006 season, Borden emailed the captains of the team and asked them to ask the players if they wanted to continue the tradition of the two pre-game prayers. Players then led both prayers and Borden stood and bowed his head with everyone else during the pre-meal prayer and knelt with the team during the

district. He sought to be able to: (1) bow his head during the pre-meal prayer; and (2) take a knee with his team in the locker room.<sup>101</sup> Borden alleged that the district's policy prevented him from engaging in these "silent acts."<sup>102</sup> The district court granted summary judgment to Borden and the East Brunswick School District appealed.<sup>103</sup>

The Third Circuit analyzed Borden's free speech claims under the first prong of the *Connick-Pickering* test and found that the speech in this case was personal to Borden and his team and not on a matter of public concern.<sup>104</sup> Thus, the speech did not even trigger the second prong of the balancing test.<sup>105</sup> However, the court took an additional step and found that the school had a legitimate educational interest in adopting the guidelines because it was concerned about Establishment Clause violations.<sup>106</sup>

In its Establishment Clause analysis, the court followed the approach of the Supreme Court in "cases involving state participation in a religious activity" and examined Borden's behavior using the Endorsement Test.<sup>107</sup> The court noted the similarities between the facts of this case and those in *Duncanville* and it followed the reasoning of the *Duncanville* court, determining that Borden's actions of bowing and taking a knee made

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pre-game prayer.

101. *See generally id.*

102. *Id.* at 162–63.

103. *Id.* at 164.

104. *Id.* at 169–70. The court reasoned that speech on a matter of public concern generally addresses a "social or political concern of the community, such as speech relating to "broad social or policy issues. . . ." *Id.* at 170 (citing *Sanguini v. Pittsburgh Bd. of Pub. Educ.*, 968 F.2d 393, 397 (3d Cir. 1992); *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410 (1979)), or "the way in which a government office [i]s serving the public." *Sanguini*, 968 F.2d at 398 (citing *Czurlanis v. Albanese*, 721 F.2d 98 (3d Cir. 1983). *See also* *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1117, 1188 (6th Cir. 1995) (finding that a basketball coach's use of the word 'nigger' in the locker room was not speech on a matter of public concern and noting the private nature of a pep talk in the locker room in a case where the coach alleged his discharge by the university violated the First Amendment).

105. *Borden*, 523 F.3d at 171. The court notes that where a public school official "does not have a First Amendment right to his or her expression, the school district's policy does *not* need to be 'reasonably related to a legitimate educational interest.'" *Id.* at 174 (emphasis added) (citing *Edwards v. Cal. Univ. of Pa.*, 156 F.3d, 488, 491 (3d Cir. 1998).

106. *Borden*, 523 F.3d at 174 (observing that the Supreme Court has stated that "compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech") (citing *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 761–62 (1995)). *See also* *Locke v. Davey*, 540 U.S. 712, 730 n.2 (2004) (Scalia, J., dissenting) ("[A] State has a compelling interest in not committing *actual* Establishment Clause violations.") (emphasis original). Keep in mind that under the *Borden* analysis all that is required is a legitimate educational interest, not a compelling state interest.

107. *Borden*, 523 F.3d at 175 (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (holding that a school policy allowing student-led, student-initiated prayers at high school football games violated the Establishment Clause)).

manifest his approval of and solidarity with student religious exercises.<sup>108</sup> The court found that Borden's acts "cross[ed] the line and constituted an unconstitutional endorsement of religion."<sup>109</sup>

Based on Borden's history, the court held that "a reasonable observer would conclude that Borden is showing not merely respect when he bows his head and takes a knee with his teams and is instead endorsing religion."<sup>110</sup> Borden's history carried a lot of weight in this analysis and the court suggested that "if a football coach who had never engaged in prayer with his team were to bow and take a knee while his team engaged in a moment of reflection or prayer, [it] would likely reach a different conclusion."<sup>111</sup> While it did not make a determination on the matter, the court suggested that in emailing the team captain and asking him to poll the team about the prayers, Borden himself initiated the "student-initiated" prayers in further violation of the Establishment Clause.<sup>112</sup>

### III. FINDING SOME DIRECTION: A FEW ESTABLISHED POINTS OF LAW

While there continues to be uncertainty about the Establishment Clause tests and very little case law examining the issue of religion and prayer in college and university sports, the courts have provided some guidance. The cases examined give some direction and provide some legal precedents for the courts, as well as colleges and universities, to draw upon.

First, the courts have consistently found that student-initiated prayer is constitutionally protected.<sup>113</sup> At the same time, courts have indicated that coaches, teachers, and other persons acting as school officials or representatives cannot initiate prayers with student-athletes.<sup>114</sup> Nor can

108. *Id.* at 175, 178 (citing *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 406 (1995)).

109. *Id.* at 178.

110. *Id.* (rejecting Borden's contention that his purpose in taking these actions was not to endorse religion, but to show respect to his team, because their inquiry is what a reasonable observer would think, not what the coach's subjective intention was). *See also Santa Fe*, 530 U.S. at 294 (considering the school districts lengthy history of beginning football games with a prayer led by the Student Chaplain).

111. *Borden*, 523 F.3d at 178–79.

112. *Id.* at 178 n.23 (noting that this argument is supported by *Santa Fe*).

113. *See Santa Fe*, 530 U.S. at 313 ("[N]othing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday [sic]"); *Duncanville*, 70 F.3d at 409 (Jones, J., concurring in part and dissenting in part) (noting that this decision "does not prevent students from exercising their constitutional rights of free speech, association and free exercise by praying at appropriate times and in an appropriate manner during athletic practices or games").

114. *See Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1289 (11th Cir. 2004) (finding that the behavior of a high school teacher, who began class by taking prayer requests before observing a moment of silence, was a "blatant" violation of the Establishment Clause—"[b]y now it should go without saying that it is unconstitutional for a teacher or administrator . . . to lead students aloud in voluntary prayer"); *Engel v.*

coaches participate in student-initiated prayers.<sup>115</sup> While there have been very few claims brought by student-athletes against coaches or their respective colleges and universities, courts have shown a willingness to respond to such claims and ensure that the fundamental limitations imposed by the Establishment Clause are not violated.<sup>116</sup> Additionally, when colleges and universities have responded to student and community concerns and restricted the speech of their coaches, courts have upheld reasonable action based on legitimate Establishment Clause concerns.<sup>117</sup> Courts also have made a distinction between locker room prayers and the ceremonial religious practices that have been upheld on some more formal occasions.<sup>118</sup> In their examinations, the courts have considered all of the Establishment Clause tests, sometimes using a combination of tests.<sup>119</sup> Finally, while the courts have produced some bright line rules, they have more frequently rendered rulings that are quite fact-specific.

Courts have recognized that the line between deference and reverence is a fine one.<sup>120</sup> In a case involving locker room prayers, a court would have

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Vitale, 370 U.S. 421, 422 (1962) (prohibiting recitation of nondenominational prayer); Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 216 (1963) (invalidating school board practice of reciting the Lord's Prayer over the school loudspeakers each day).

115. See *Duncanville*, 70 F.3d at 406 (finding that school district did not err in enjoining school employees from participating in student-initiated prayers); *Borden*, 523 F.3d at 178 (holding that a coach bowing his head and taking a knee during team prayers amounted to participation and an unconstitutional endorsement of religion).

116. *Borden*, 523 F.3d at 178; *Braswell v. Bd. of Regents of Univ. Sys. of Ga.*, 369 F. Supp. 2d 1362, 1368 (N.D. Ga. 2005); *Bishop v. Aronov*, 926 F.2d 1066, 1077 (11th Cir. 1991). The possible reasons why relatively few student-athletes have brought claims alleging Establishment Clause violations against their schools or coaches will be addressed *infra*, Part V.

117. See *Braswell*, 369 F. Supp. 2d at 1369; *Bishop*, 926 F.2d at 1077.

118. See B. Glen Epley, *The Establishment Clause and Public Schools in the 21<sup>st</sup> Century*, 91 NASSP Bulletin, Sept. 2007, at 186 (declaring that it seems "that current jurisprudence would approve of practices that are clearly ceremonial, have long-standing traditions, are not specific to a certain religion, and that have minimal religious content").

119. See *Duncanville*, 70 F.3d at 405.

120. See *Id.* at 409–10 (Jones, J., concurring and dissenting). Judge Jones indicated that a key question here was "how teachers may respond to student-initiated prayers." *Id.* at 409. She suggested that "the line between deference and sympathetic reverence is a fine one that cannot and should not be policed, if teachers' individual freedom of conscience is to retain any meaning in this context." *Id.* at 410. Judge Jones argued that surely federal courts "may not reach into the minds of individual teachers to prescribe their responses to student-initiated prayers." *Id.* However, this fine line is exactly what the court is and should be policing. Clearly the government cannot police the internal, "spiritual" response of a teacher to student-initiated prayer, but when that internal response is accompanied by outward manifestations of approval and solidarity, the court may and should determine that such action crosses the line and is an impermissible endorsement of religion by a state employee. *Id.* To suggest that courts should refrain from attempting to draw this line because of a desire to protect teachers' freedom of expression would seem to reverse the emphasis of the standard proclaimed

to determine whether the facts of the case reveal impermissible participation by a coach in student-initiated prayer. A great deal depends on whether the court regards any kind of overt participation as impermissible or only acts which result in actual “promotion” or “coercion” of religious practice.

The Department of Education’s “Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools” and the Equal Access Act provide some practical “common sense” guidance for school administrators attempting to draw a line defining permissible and impermissible behavior. Both of these documents indicate that schools should not allow employees to participate in religious activities with students.<sup>121</sup> In its brief analysis of the case law, the Department of Education traces the distinction “between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.”<sup>122</sup>

The courts, as well as the efforts by Congress and the Department of Education, have endeavored to draw a line where deference becomes reverence. The next section considers how the current Supreme Court might rule in a case in which a college or university coach was flirting with this line, perhaps taking a knee with his or her team as Marcus Borden did. What kind of analysis would the Court apply? What would be the result? Where would the Supreme Court draw the line?

#### IV. THE CURRENT SUPREME COURT: A THEORETICAL ANALYSIS OF LOCKER ROOM PRAYERS AND RELIGION IN COLLEGE AND

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by the Supreme Court in *Lee*, which stated that the government’s accommodation of free exercise rights cannot “supersede the fundamental limitations imposed by the Establishment Clause.” *Lee v. Weisman*, 505 U.S. 577, 586–87 (1992).

121. See Equal Access Act, 20 U.S.C. § 4071(c)(3) (2006) (providing a fair opportunity for secondary school students to have religious club meetings, where the school has created a limited public forum and where “employees or agents of the school or government are present at religious meetings only in a *nonparticipatory* capacity”) (emphasis added); Department of Education, *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, Feb. 7, 2003, available at [http://www.ed.gov/policy/gen/guid/religionandschools/prayer\\_guidance.html](http://www.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html) (stating that “teachers, school administrators, and other school employees are prohibited by the Establishment Clause from encouraging or discouraging prayer, and from actively *participating* in such activity with students”) (emphasis added).

122. Department of Education, *supra* note 121 (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000)). (emphasis original). The Department of Education emphasizes the consistent theme of neutrality toward religion in the case law. In its guidelines, a principle of neutrality requires that while school officials are restrained from directing or endorsing prayer, the rights of students to freely practice their religion are protected, so long as such expression does not materially interfere with the school’s educational program or the rights of other students. The Department of Education sets forth guidance for applying this principle of neutrality in various school contexts.

## UNIVERSITY SPORTS

## A. The Status of the Establishment Clause Tests in the Current Supreme Court

While the Supreme Court has not overturned the *Lemon* test as a guiding principle, its use in cases involving prayer has certainly diminished over time.<sup>123</sup> O'Connor's Endorsement Test has been widely utilized by judges across the ideological spectrum.<sup>124</sup> Likewise, the Coercion Test has been applied in some manner by virtually every justice on the Court.<sup>125</sup> The fact that justices have consistently reached contrary results using the same tests indicates that the justices characterize and apply these tests in markedly different manners.

Justice Scalia's and Justice Kennedy's divergent applications of the Coercion Test exemplify the significant discrepancies of interpretation. Scalia defines coercion in very narrow terms, while Kennedy takes a wider view of the type of actions which can have an impermissible coercive effect. Scalia believes that the Establishment Clause is violated only when the government acts to directly coerce religious practice, through financial support, legal penalty, or sanction.<sup>126</sup> In contrast, Kennedy has shown a

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123. See Mead, Green & Oluwole, *supra* note 31, at 391–93. A number of justices have been outspoken critics of the *Lemon* test, particularly Scalia, who described the test as: “[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys . . . .” *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., dissenting). Thomas believes the test has been “discredited.” *Cutter v. Wilkinson*, 544 U.S. 709, 727 (2005) (Thomas, J., concurring). Kennedy does not want to be seen as advocating for the test. *County of Allegheny v. ACLU*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in part and dissenting in part). Chief Justice Roberts urged the Court to overrule the *Lemon* test when he was Deputy Solicitor General under George H. Bush and in his Senate confirmation hearing he continued to criticize the *Lemon* test, but admitted that it was a “survivor.” See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Comm. on the Judiciary*, 109th Cong. 138–39 (Sept. 13, 2005) (statement of John G. Roberts), available at <http://www.gpoaccess.gov/congress/senate/judiciary/sh109-158/57-140.pdf> [hereinafter *Roberts Confirmation Hearings*].

124. See Mead, Green & Oluwole, *supra* note 31, at 393. Some of the court's conservative judges have been critical of this test. Kennedy argued that the test disregarded the fact that government had traditionally endorsed religion in general. *Allegheny County v. ACLU*, 492 U.S. 573, 670–74 (Kennedy, J., dissenting). Scalia leveled a similar criticism, arguing that the Constitution itself gives religion preferential treatment. *Lamb’s Chapel*, 508 U.S. at 400 (Scalia, J., concurring).

125. See Mead, Green & Oluwole, *supra* note 31, at 393.

126. *Lee v. Weisman*, 505 U.S. 577, 632, 642 (Scalia, J., dissenting) (contrasting his “historical” coercion analysis, defined as “coercion of religious orthodoxy and of financial support by force of law and threat of penalty,” with the “boundlessly manipulable test of psychological coercion” of Kennedy and others, and stating that he

willingness to recognize that subtle indirect pressure “can be as real as any overt compulsion.”<sup>127</sup> Following Scalia’s approach would result in an analysis much more tolerant of religious practice in school. Scalia’s approach would allow religious practice so long as students are somehow free not to participate, either by not attending or by simply listening and not participating.<sup>128</sup> On the other hand, an analysis that followed Kennedy’s formulation would be more sensitive to indirect pressures, such as the authoritative example of a teacher or coach.

Because the justices apply each of these Establishment Clause tests in quite different manners, the particular test that is applied will not necessarily be determinative of the outcome.<sup>129</sup> The result will depend, rather, on how the justices define “endorsement” or “coercion.”

#### B. Counting Heads: How the Court Might Rule on a Locker Room Prayer Case<sup>130</sup>

If the current Court was confronted with the practice of a coach like Marcus Borden, or perhaps like Bobby Bowden, who wanted to take a knee while a player led the team in a pre-game prayer, would the Court find such behavior unconstitutional? Members of the current Court have been involved in a number of decisions dealing with school prayer, including: finding an Alabama “moment of silence” statute enacted to “restore prayer” in public schools unconstitutional;<sup>131</sup> upholding the right of a student-led

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is a disciple of Blackstone rather than Freud) (emphasis original).

127. *Id.* at 593 (Kennedy noting the significant peer pressure of students having to stand as a group and be respectful and silent during a graduation invocation and benediction).

128. *Id.* at 642 (Scalia, J., dissenting) (noting that graduation attendance was “voluntary” and that sitting and listening to a graduation prayer was not a experience of coercion because “[s]peech is not coercive; the listener may do as he likes”) (citing *Am. Jewish Congress v. Chicago*, 827 F.2d 120, 132 (7th Cir. 1987) (Easterbrook, J., dissenting)).

129. However, it could be argued the Endorsement test is more likely to restrict government’s accommodation of religion. The Endorsement test is more of an outcome-driven test and when government action would appear to endorse or favor one religion over others (or over no religion), then that action is impermissible under the Endorsement test. The Coercion test, on the other hand, might more easily allow religion to be a part of government action, so long as such action did not force others to participate in some way.

130. On October 13, 2008, Marcus Borden filed a petition with the Supreme Court for a review of the Third Circuit Court of Appeals’ decision reversing the district court’s ruling permitting him to take a knee during student-initiated prayer. The American Football Coaches Association plans to file its own petition in support of Borden. While it looks unlikely that the Court would take this case, the presence of Justices Roberts and Alito, in addition to Scalia and Thomas, increases the possibility that the necessary four justices might vote to hear this petition. *See* Tufaro, *supra* note 20.

131. *Wallace v. Jaffree*, 472 U.S. 38 (1985).

religious club to meet at a public high school as constitutional under the Equal Access Act;<sup>132</sup> finding a clergy-led middle school graduation prayer unconstitutional;<sup>133</sup> declaring student-led prayers before high school football games unconstitutional;<sup>134</sup> and declaring constitutional the request of a religious club for elementary students to use public school facilities after hours.<sup>135</sup> Of these cases, *Lee v. Weisman* and *Santa Fe Independent School District v. Doe* provide the most guidance because they involve public school prayers.

In *Lee* the Court held that a school policy that allowed principals to invite clergy to give invocations and benedictions at middle school graduation ceremonies was an unconstitutional violation of the Establishment Clause. The Court was particularly concerned with the direct involvement of school officials in selecting clergy and the coercive pressure that the state's sanction of such prayers placed on students to participate.<sup>136</sup> The Court found that the state's involvement in and the coercive power of such a prayer amounted to compelling students to participate in a religious exercise in violation of the Establishment Clause.<sup>137</sup>

In *Santa Fe* it was a student rather than an adult who was delivering the prayer, this time before high school football games. The Court held that the school policy allowing students to elect a peer to give a non-sectarian, non-proselytizing prayer before football games constituted a violation of the Establishment Clause.<sup>138</sup> In its analysis, the Court considered the involvement of the school in the mechanism of selecting a student, the fact that attendance at football games was not really "voluntary" for all students, and the immense social pressure of such a prayer.<sup>139</sup> The Court also found that this was not a case involving private student speech, when the prayers were delivered at school-sponsored events, over the school's public address system, by a speaker representing the student body, under faculty supervision, and pursuant to a school policy that explicitly and implicitly encouraged public prayer.<sup>140</sup>

Though these cases offer some insight into the Supreme Court's thinking on the issue of school prayer, the ideological views of the Court's newest members must be taken into account. The three most recently appointed

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132. Bd. of Educ. of Westside Comm. Sch. v. Mergens, 496 U.S. 226 (1990).

133. *Lee v. Weisman*, 505 U.S. 577 (1992).

134. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

135. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (where the request was consistent with the rules applied to other groups).

136. *Lee*, 505 U.S. at 586–93.

137. *Id.* at 599.

138. *Santa Fe*, 530 U.S. at 301.

139. *Id.* at 305–12.

140. *Id.* at 302–03.

justices—Chief Justice Roberts, Justice Alito, and Justice Sotomayor—were not involved in any of the Court’s prior school prayer cases, and may impact future holdings by the Court on this topic. Chief Justice Roberts does not have much of a record for review regarding school prayer,<sup>141</sup> but commentators point to two memos he wrote while serving in the Reagan-Bush administrations as being indicative of his interpretation of the Establishment Clause.<sup>142</sup> Based on these memos Roberts would seem to have a very narrow view of the Establishment Clause, finding a violation only where “the practice at issue provides direct benefits to religion in a manner that threatens the establishment of an official church or compels persons to participate in religion or religious exercise contrary to their consciences.”<sup>143</sup> While commentators note that in both instances he was working as an advocate and not a judge, it is likely that Roberts will be “ideologically conservative on matters of religion and public schools.”<sup>144</sup>

In comparison to Roberts, Justice Alito’s record provides much more evidence of his thinking with respect to school prayer. While on the Third Circuit Court of Appeals, Alito dissented from a decision which found a school district policy allowing students to vote on whether to have a graduation prayer unconstitutional.<sup>145</sup> Commentators have noted that “like Justices Scalia and Thomas, Alito has concluded that each issue of public

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141. See *Roberts Confirmation Hearing*, *supra* note 124, at 278. In response to a question about his interpretation of the Establishment Clause, Roberts stated, “I don’t think I’ve had an Establishment Clause case . . . [and] I haven’t expressed my personal views on the Establishment Clause in any context.” *Id.*

142. As a young lawyer in the Reagan administration, Roberts wrote a memo regarding the Supreme Court’s decision in *Wallace v. Jaffree* in which he stated that opposition to a moment of silence was “indefensible.” Linda Greenhouse, *Roberts’ Files Recall 80’s Cases*, N.Y. TIMES, Aug. 16, 2005, at A1. Then, when serving as Deputy Solicitor General under George H. Bush, Roberts helped draft an amicus brief in *Lee v. Weisman* arguing that the graduation prayer was non-coercive and thus constitutional. The brief stated that such prayers “merely respect the religious heritage of the community” and should be upheld as “an expression of civic tolerance and accommodation to all citizens.” Amicus Brief for the United States, *Lee v. Weisman*, 505 U.S. 577 (1992) (No. 90-1014), available at <http://www.usdoj.gov/osg/briefs/1990/sg900354.txt> [hereinafter *Lee Amicus Brief*].

143. *Lee Amicus Brief*, *supra* note 142.

144. Mead, Green & Oluwole, *supra* note 31, at 394 (citing David Espo, *Roberts Memo Shows School Prayer Sympathy*, ASSOCIATED PRESS, Aug. 15, 2005; Ron Hutcheson, *Roberts Defended School Prayer, Documents Show*, KNIGHT RIDDER WASH. BUREAU, Aug. 16, 2005; John Roberts, *John the Evangelist? The Church-State Divide*, THE ECONOMIST, Aug. 27, 2005). See also Erwin Chemerinsky, *John Roberts and the Establishment Clause and the Role of the Religious Test Clause in the Confirmation Process*, CENTER FOR AMERICAN PROGRESS, presented August 17, 2005, at 2, available at <http://www.acslaw.org/pdf/chemerinsky.pdf>. (arguing that Roberts would be “the fifth vote on the Court to shift the law in a much more conservative direction, allowing far more government support for religion”).

145. *ACLU v. Black Horse Pike Reg’l Bd. of Educ.*, 84 F.3d 1421 (3d Cir. 1996).

prayer at issue before him created no Establishment Clause violation.”<sup>146</sup> This record indicates that Alito is also likely to join the conservative block of the Court on the prayer in school issue.<sup>147</sup>

Along with Roberts and Alito, Justices Thomas and Scalia would make up a conservative block less likely to object to religious practices and more inclined to allow accommodations of religion in public arenas. Yet, it is not necessarily a given that all of these justices would uphold a coach’s participation in a student-led prayer. For example, Justice Scalia, the most vocal supporter of a narrow reading of the Establishment Clause, might be opposed to a “sectarian” locker room prayer.<sup>148</sup> Additionally, the argument that ceremonial or classroom prayers should be allowed because such practices are part of longstanding American tradition may not be as strong for locker room prayers. Nevertheless, it is improbable that the conservative block of the Court would regard a coach’s participation in a student-led prayer, even a sectarian one, as impermissibly coercive.

The liberal block of the Court, which joined in the majority in the *Lee* and *Santa Fe* decisions, would also likely find the participation of a coach in a student-led prayer unconstitutional.<sup>149</sup> This would make Justice Kennedy, the author of the Coercion Test, the swing vote. Kennedy, who penned the majority opinion in *Lee*, also joined the majority in *Santa Fe*.

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146. Mead, Green & Oluwole, *supra* note 31, at 398. See also *Child Evangelism Fellowship v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 526 (3d Cir. 2004) (writing for the majority, Alito found that Establishment Clause concerns could not justify exclusion of a religious club from a “back to school night” when the school had created a limited public forum for such groups); *ACLU v. Shundler*, 168 F.3d 92, 107 (3d Cir. 2001) (again writing for the majority, Alito found that a holiday display including a crèche in front of a municipal building sent a message of pluralism and did not convey a message of government endorsement of religion); *C.H. ex rel. Z.H. v. Oliva*, 226 F.3d 198, 212 (3d Cir. 2000) (Alito, J., dissenting) (arguing that the removal of a kindergartener’s artwork, in which the student had drawn a picture of Jesus after being instructed to draw something he was thankful for, could not be justified on the basis of Establishment Clause concerns).

147. Mead, Green & Oluwole, *supra* note 31, at 398 (citing Eric Black, *4 Conservatives, 4 Liberals, and Justice Kennedy*, *Minneapolis Star Tribune*, Jan. 14, 2006, at 1A).

148. See *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting) (stating that our constitutional tradition has ruled out government endorsement of religion where the endorsement is “sectarian”). But see *McCreary County v. ACLU*, 545 U.S. 844, 893–99 (Scalia, J., dissenting) (arguing that the Decalogue and monotheistic prayers are both non-sectarian); Erwin Chemerinsky, *Transcript of the University of Hawaii Law Review Symposium: Justice Scalia and the Religion Clauses*, 22 U. HAW. L. REV. 501, 504 (2000) (arguing that Scalia would only object “if the government literally established a church, or . . . coerced religious participation, or . . . preferred some religions over others”); Kathleen M. Sullivan, *Justice Scalia and the Religion Clauses*, 22 U. HAW. L. REV. 449, 461 (2002) (suggesting Scalia would confine the Establishment Clause “to a limited ban on oaths, tithes, and explicit sectarian discrimination”).

149. Justices Stevens and Souter were part of the majority in *Lee* and in *Santa Fe*, where they were joined by Justices Ginsburg and Breyer.

Based on his opinion in *Lee*, it would seem that Kennedy would likely be against another instance of school prayer, but some of the concerns that motivated his *Lee* opinion might not be applicable in the case of a college or university locker room prayer.<sup>150</sup> It is possible that Kennedy would view a coach's participation in a locker room prayer led by college and university students as an event without considerable involvement on the part of the state, which therefore does not bear the imprint of the state in the same way a graduation ceremony does, and does not exert the same type of "peer pressure" on young adults as it would on adolescents.<sup>151</sup> Because of the close nature of these decisions and the uncertainty regarding certain justices, a single change in the makeup of the Court could have a significant impact on how it would decide such a case.

It is uncertain what impact the August 2009 appointment of Justice Sonia Sotomayor to the United States Supreme Court will have on the Court's Establishment Clause jurisprudence. Justice Sotomayor replaced Justice Souter, who was a strong proponent of church-state separation, so it is possible that her appointment could shift the balance in the Court. Sotomayor's record on church-state separation and Establishment Clause issues is not lengthy. Sotomayor has taken part in decisions dealing with prisoners' religious liberty rights,<sup>152</sup> displays of religious symbols on public property,<sup>153</sup> and teacher-led prayers in public schools.<sup>154</sup> Drawing on this scant record, it is difficult to predict how Justice Sotomayor might deal with a case on locker room prayer.

Much like in the lower courts' Establishment Clause cases, the Supreme

150. Justice Kennedy found the degree of school involvement and control over the process for obtaining the rabbi's services troubling. He also argued that the students would feel obligated to attend a graduation ceremony and that prayer in such a ceremony would bear the "imprint of the State." *Lee*, 505 U.S. at 590. In his psychological coercion argument, Kennedy emphasizes that "adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention." *Id.* at 593.

151. Looking forward, the Obama administration is likely to appoint more liberal justices for future vacancies on the Supreme Court. Such appointments could possibly shift the balance toward a broader reading of the Establishment Clause.

152. See *Ford v. McGinnis*, 352 F.3d 582 (2nd Cir. 2003); *Campos v. Coughlin*, 854 F. Supp. 194 (S.D.N.Y. 1994).

153. See *Mehdi v. United States Postal Service*, 988 F.Supp. 721 (S.D.N.Y. 1997) (applying the endorsement test and concluding that a policy that allowed decorated evergreen trees and menorahs with other seasonal displays was not unconstitutional on its face); *Flamer v. City of White Plains*, 841 F.Supp. 1365 (S.D.N.Y. 1993) (rejecting city's Establishment Clause concerns where plaintiff sought to display a free-standing menorah in a city park during Hanukkah, and noting that a public park was not closely associated with the seat of government).

154. See *Rosario v. Does*, 36 Fed. Appex. 25 (2nd Cir. 2002) (joining in a panel recognizing a school board's compelling interest in avoiding Establishment Clause violations, in a case where the school terminated a teacher who had laid hands on her students and prayed to protect them and had told her students that Jesus was the Son of God).

Court's analysis in such a case would be quite fact-specific. The Court's assessment would greatly depend on how the individual justices would respond to these facts and whether they would make distinctions from prior cases. Would the fact that the prayer is in a college or university setting be significant? What kind of actions by the coach would be viewed as participation, leadership, or endorsement? Would the Court pay particular attention to the history of religious practices in a specific college or university, or by a coach or team?

While ultimately the direction that the current Court might take with a locker room prayer case is uncertain, there are strong reasons for the Court to make an incisive examination of such a case. If such a case were to come before it, the Supreme Court should vigorously protect the rights of student-athletes to be free from state-sanctioned pressure to participate in religious practices.

#### V. AN ARGUMENT FOR A VIGOROUS DEFENSE OF THE FIRST AMENDMENT RIGHTS OF STUDENT-ATHLETES

##### A. Why Have Student-Athletes Not Come Forward?

Rev. Barry W. Lynn, a lawyer and executive director of Americans United for Separation of Church and State, declared that the common practice of locker room prayers and religious services in college and university athletic programs is a "lawsuit waiting to happen."<sup>155</sup> The fact that few students have come forward to complain about religious practices in college and university athletic programs may be more indicative of the weight of coercive power suppressing any objections than of the absence of any problems. Fearing that their playing time or scholarships might be at risk, student-athletes may be hesitant to voice objections to such practices or may simply wish to avoid the appearance of rocking the boat. They may be afraid of peer reaction or of being ostracized by their team.

##### B. A Disparity in Power

There are a number of aspects of the lives and circumstances of college and university student-athletes that put them in a position where they are more likely to be subject to the imposition of religious beliefs and practices, and at the same time less likely to object to such imposition. First, there is the hierarchical nature of the coach-athlete relationship and the power that a coach has over a student-athlete. A coach controls an athlete's playing time, position on a team, daily schedule, and, in the case of scholarship athletes, the coach holds the keys to their scholarship and

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155. Drape, *supra* note 21, at 1 (suggesting that "university administrations are playing a game of chicken").

education.<sup>156</sup> Compared with a student-teacher relationship, an athlete spends many more hours a week with his or her coach. A teacher may have control over a student's grade in a class, but, to some degree, a student-athlete's entire life is in the coach's hands.

Additionally, the nature of the relationship is more intimate and more intense than that of a high school student and teacher. Donna Lopiano, the executive director of the Women's Sports Foundation, in comparing the "emotionally charged and stress-charged" coach-athlete relationship with the teacher-student relationship, described college and university athletics as an "intense, emotional environment, where there's a much larger place for emotional dependence of a student on a coach."<sup>157</sup> Being in these positions of power may be part of the reason that coaches feel the need or responsibility to preach and instill certain values in their players, and religion may be the best or only way they know how to do that.<sup>158</sup>

To put it simply, a coach has enormous power and decision-making authority over a student-athlete who may feel powerless to object to a coach's imposition of religious beliefs and practices. The relationship between a coach and student-athlete is inherently coercive. Beginning in recruitment, a coach is constantly trying to get something from the student-athlete: a commitment to play for his or her team, better performance, a greater dedication to the team over other interests. If religious practice is part of the coach's program, even in subtle ways, there is a significant risk that such behavior will have a coercive effect on student-athletes.

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156. See Farrell, *supra* note 8, at A26 (where the lawyer for the ACLU, in describing the reluctance of the Memphis State football players to come forward and complain the coach's imposition of religious beliefs, stated, "It is clear that personnel on athletic scholarships are not going to complain"); Henig, *supra* note 11, at A37 (where coach made Muslim players "feel like outcasts," questioned them on their thoughts about Al Qaeda, demoted one player from first to fifth string, and ultimately dismissed and revoked the scholarship of three football players from the team at New Mexico State); *Jennings v. Univ. of N.C.*, 482 F.3d 686, 696-97 (4th Cir. 2007) (in a sexual harassment action against a women's soccer coach, the Fourth Circuit took note of the coach's tremendous power and influence over a player's future opportunities in the sport, the coach's involvement in all the aspects of the players' personal lives, the disparity of power between the coach and players, the coaches power over scholarship eligibility, and the fact that even a team captain was so "acutely mindful" of the coach's power that she "took care not to provoke him").

157. Karla Haworth, *A Sexual Harassment Lawsuit Shakes Up the Tight-Knit World of Women's Soccer*, 45 CHRONICLE OF HIGHER EDUCATION, Nov. 6, 1988, at A63.

158. See Drape, *supra* note 21, at 1 (Bobby Bowden and Mark Richt acknowledging that they use religion to boost morale, build unity and help their players become better persons). In this same article Dr. Leo Sandon, professor emeritus of religion at Florida State, states that when the position of someone seeking to question the appropriateness of such a use of religion is juxtaposed with "the iconic status of some of these coaches, it becomes more daunting and doesn't get much comment." (Interestingly, Dr. Sandon was not commenting on student-athletes being intimidated by a coach, but on university administrators, like himself, being reluctant to criticize a successful head coach). *Id.*

In 1965, Dean Smith was beginning his fourth year as head basketball coach at the University of North Carolina. At that time, Smith required his players to attend church and to bring him a church bulletin each week to prove that they had been to church. However, one of Smith's first star recruits, Larry Miller, balked at this requirement and told Smith, "at this point in my life, I don't think it's right for me to go to church just to bring you a brochure that shows you I went to church."<sup>159</sup> Smith eventually relented. Even considering the fact that Miller was a top-two national recruit and that Smith was a thirty-four year-old coach who had yet to get his team into the NCAA tournament, Miller's defiance is surprising.<sup>160</sup> How much more difficult would it be to imagine such an interaction if the player was just a role player fighting for playing time and the coach had already achieved legendary status and, perhaps, was not quite as understanding and empathetic a person as Coach Smith?

In addition to the coercive power of the coach, teammates also exert peer pressure on student-athletes to be a team player and not rock the boat. Other athletes may not be state actors, in the way that a coach is, but if the state is involved in creating a "captive audience" and allowing such imposition of religious belief and practice, the state may be implicated.<sup>161</sup> Student-athletes that do speak up can face retaliation not only from their coaches, but also from other players and members of the community.<sup>162</sup>

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159. JOE MENZER, *FOUR CORNERS: HOW UNC, N.C. STATE, DUKE & WAKE FOREST MADE NORTH CAROLINA THE CENTER OF THE BASKETBALL UNIVERSE* 163 (University of Nebraska Press 2004). It is worth noting that Coach Smith has always been politically progressive and helped integrate not only ACC basketball but also the city of Chapel Hill.

160. Smith had actually been hung in effigy on UNC's campus earlier that year after a loss to Wake Forest. *See id.* at 120.

161. The state could be implicated based on the use of its locker room, facilities or perhaps oversight by college or university personnel. *See* Fried & Bradley, *supra* note 24, at 313 (suggesting that such peer pressure can effectively deprive a student-athlete of the choice to participate in prayer or not) (citing *Bd. of Educ. v. Mergens*, 496 U.S. 226, 251 (1990); *Brandon v. Bd. of Educ.*, 635 F.2d 971, 978 (1980)).

162. Some of the students who were identified as being responsible for the complaints against Marcus Borden were reportedly taunted and bullied by some of Borden's staunch supporters. *See* Doug McKenzie, *EBHS Coach's Resignation Sparks Nationwide Debate: Borden Steps Down After Being Told Not to Pray With His Team*, *THE SENTINEL*, Oct. 13, 2005, available at [http://ebs.gmnews.com/news/2005/1013/Front\\_Page/002.html](http://ebs.gmnews.com/news/2005/1013/Front_Page/002.html). *See also* *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 404 (5th Cir. 1995) (7<sup>th</sup> grader called a "little atheist" by her teacher); *Air Force Gives Up Pregame Prayer Under New Policy*, *ASSOCIATED PRESS*, Sept. 1, 2005, available at <http://nbcsports.msnbc.com/id/9161427/> (In 2004, Fisher DeBerry, football coach at the Air Force Academy, stopped leading pre-game prayers, which he had done for 21 years, and removed a locker room banner which stated "I am a Christian first and last," following a Pentagon task force's investigation of broader allegations of religious intolerance at the Air Force Academy). *But see* *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 121 (2001) (Scalia, J., concurring) (arguing that such peer-pressure, "if it can even be considered coercion, is, when it arises from private activities, one of the attendant consequences of a freedom

Yet, when student-athletes keep silent about such abuses, much of the damage may be internalized by the athletes, as they chastise themselves for betraying their own faiths, beliefs, and ideals. As a result, these experiences may be quite detrimental to student-athletes and may have a long-term negative impact on the quality of their lives.<sup>163</sup> In an analysis of the imposition of religious beliefs and practices in college and university locker rooms, it is important to bear in mind that the First Amendment “fundamentally operates to protect minority interests.”<sup>164</sup> The silence of those who are being marginalized should not reinforce their further marginalization.

### C. Drawing a Line that Protects the Rights of College and University Student-Athletes

While college and university students may be less susceptible to religious coercion than younger students,<sup>165</sup> the power of college and university coaches and the precarious position of student-athletes should push the scales of justice toward a strong scrutiny of locker room behavior that may violate the Establishment Clause.<sup>166</sup> Some commentators have advocated for a bright line standard that lays out what behavior would be impermissible for a coach.<sup>167</sup> Because each incident of locker room prayer

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of association that is constitutionally protected”). However, this type of behavior would seem to go beyond “subtle coercive pressures.” *Lee v. Weisman*, 505 U.S. 577, 588 (1992).

163. In some ways this experience could be analogized to the experience of closeted gay student-athletes. See Jennifer Jacobson, *Facing Derision in a Macho Culture, Many Gay Athletes in Team Sports Hide Their Sexuality*, 49 CHRONICLE OF HIGHER EDUCATION, Nov. 1, 2002, at A36, available at <http://chronicle.com/weekly/v49/i10/10a03601.htm> (referring to the fear of ostracization that motivates gay college athletes to keep their sexuality a secret).

164. *Bauchman for Bauchman v. W. High Sch.*, 132 F.3d 542, 545 (10th Cir. 1997).

165. See *Mergens*, 496 U.S. at 235; *Widmar v. Vincent*, 454 U.S. 263, 271–74 (1981).

166. See Fried & Bradley, *supra* note 24, at 321 (arguing that because college athletes are in a “rigidly supervised environment that is controlled by a state agent,” they “should have a level of protection comparable to the protection afforded to middle/high school students in First Amendment cases” and that a “coach’s free speech right has to be suspended to avoid entanglement”).

167. Eric Helman suggests a “Purpose of Congregation Test,” that would allow a coach to bow his or her head during a student-initiated prayer, but not take a knee, “because kneeling in this context can too easily be misinterpreted as a manifestation of prayer.” Helman, *supra* note 28, at 384–85. I would argue that such a standard misses the mark by a degree and that bowing one’s head could reasonably be interpreted as a manifestation of *endorsement* and could certainly have an impermissibly *coercive* effect. In fact, I do not think it is beyond reason to suggest that by making time for a moment of silence before going out on a field or a by telling his or her team to “take a knee” before a captain leads a prayer, a coach could impermissibly endorse a religious practices without bowing a head, taking a knee, making the sign of the cross, or

will have its own unique history and facts, such a standard would be difficult to develop.<sup>168</sup>

Instead of developing yet another test, the Court should simply announce its support for a Coercion/Endorsement Test that gives real consideration to indirect coercion and does not turn a blind eye to behavior endorsing a religious practice. A Coercion/Endorsement Test “with teeth” would scrutinize the “deferential” behavior of a coach and hold as impermissible any behavior that has the effect of organizing a space for or endorsing religious practice. Additionally, this test would take seriously the coercive affect of a coach’s participation in religious practices on student-athletes, paying particular attention to the relative disparity of power between a coach and a student-athlete. Most significantly, such a test would look beyond a coach’s or school administration’s rationale for allowing such behavior and examine the real impact of the action of the state actor and whether it has the effect of placing the state’s seal of approval upon religious practices and/or coercing student-athletes to participate or to quietly accept such behavior as normative.

The application of such a standard would significantly limit a coach’s ability to infuse his or her program with religious belief and practices. Additionally, it would prevent a coach from participating in student-initiated prayer in any manner that would make manifest his or her approval of such a prayer.<sup>169</sup> If some of the common religious practices—invitations to join prayer meetings, voluntary pre-game devotional services, locker room prayers—of college coaches were to come before a court, the utilization of a Coercion/Endorsement Test “with teeth” would mean that most of these practices would be found to be unconstitutional violations of the Establishment Clause.

While coach-led prayers and coach-initiated prayers like the ones in *Duncanville* and *Borden* are almost certainly unconstitutional, even under

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engaging in any other physical act of congregating with the team for the purpose of prayer. If a coach guides student-athletes directly or by some kind of cue as to when and where they are to engage in their student-initiated prayer, is it really student-initiated?

168. Other commentators have suggested that a good approach would be to have a “neutral policy for a moment of silence before a game,” which would not violate the Establishment Clause. See Fried & Bradley, *supra* note 24, at 321. But see *Wallace v. Jaffree*, 472 U.S. 38, 59–60 (1985) (striking down an Alabama statute authorizing silent prayer, when the motivation for passing the statute was to advance religion). If a team or coach with a history of locker room prayer suddenly shifts to a moment of silence, it would be hard to see how the purpose of the policy was not the advancement of religion.

169. This approach would not be aimed at making sure that students never felt uncomfortable. It would allow the students the freedom to initiate or participate in religious practices and prayers, or not to do so. While such actions might make other students uncomfortable, the state’s seal of approval would not be placed upon such religious practice in the form of participation by a state actor.

the Coercion/Endorsement Test as it has recently been applied, a stricter standard would further limit behavior that results in endorsement of religion or has a coercive affect on student-athletes. Coaches would not be able to outwardly participate in student-initiated prayers in any way. Actions like taking a knee or bowing a head, which manifest approval or endorsement, would not be allowed under this stricter standard. In fact, any “student-initiated” prayer where a coach is still in the locker room would be immediately suspect. Likewise, any kind of “coach’s policy” about a moment of silence or allowing the team to decide if it wants a captain to say a prayer would be heavily scrutinized.<sup>170</sup> A great deal would still depend on the particular facts of each case, which the courts would have to examine to see if the current policy is just the latest chapter in a long history of a coach or a college or university endorsing religion. Ultimately, this stricter standard would result in greater scrutiny of the behavior of school employees, school policies, and the history of coercion and endorsement of religion in the particular academic institutions.

If the Court would adopt and apply a Coercion/Endorsement Test “with teeth,” it would encourage schools and colleges and universities to be more vigilant in protecting the First Amendment rights of student-athletes. As *Borden*, *Duncanville*, *Braswell*, and many similar stories illustrate, schools, as well as colleges and universities, are often reluctant to act on Establishment Clause concerns until there is a complaint from students or members of the community. Academic institutions tend to be passive and reactive when it comes to Establishment Clause concerns and the past decisions of the Supreme Court have given them little reason to adopt a different approach. The passive approach of many colleges and universities may account for some of the reluctance of student-athletes to come forward with Establishment Clause complaints. The enforcement of this stricter, Coercion/Endorsement Test “with teeth,” standard would motivate these institutions to be more proactive in their approach to Establishment Clause concerns. As a result, student-athletes, assured of the validity of their Establishment Clause concerns and confident that their colleges and universities will address such concerns in a serious manner, will be more likely to come forward.

As for school policy, schools should implement policies that focus first of all on the education of school employees in regards to Establishment Clause concerns and the First Amendment rights of students. Furthermore, school policies should emphasize procedures for monitoring and enforcing compliance within their athletic programs. Finally, when problems do arise, schools must strive to address the Establishment Clause concerns of student-athletes in a manner that displays recognition of both the

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170. Coaches would do better to not have any kind of policy about prayer or moments of silence, and simply be respectful of truly student-initiated prayers, so long as those prayers are not disruptive.

boundaries between Church and State in public institutions and the rights of student-athletes to pursue their academic and athletic careers without being subjected to religious discrimination, indoctrination, or proselytization by school employees.

## VI. CONCLUSION

Many would view an argument for a rigid restriction on coach participation in religious practices with his or her team as just another attempt to push religion out of public education in the name of secularism. However, from the perspective of the student-athlete—the citizen that the First Amendment is intended to protect—the vigorous enforcement of First Amendment rights of students, including the right to be free from religious indoctrination, is simply a defense of a student's right to choose to exercise the religion of his or her choice or to exercise no religion at all. For such exercise to be truly free, then it must be the student's choice and not the choice of the state or the choice of a religious majority utilizing the state's accommodation of religion. Religion must be unshackled from the machinery of the state in order to truly be a matter for the individual conscience.<sup>171</sup>

In its long history, the Supreme Court has tackled a number of cases dealing with issues of religious liberty and religious indoctrination in public education. During that time the Court has set forth a number of standards, applied a variety of tests, and changed its direction more than once. As the Court continues to find its way and navigate a course that can be followed by lower courts, as well as schools and colleges and universities, it would do well to look to some of its early Establishment Clause jurisprudence and the words of Justice Black:

[The Establishment Clause's] first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those

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171. Justice O'Connor argued that:

The goal of the [First Amendment religion clauses] is clear: to carry out the Founders' plan of preserving religious liberty to the fullest extent possible in a pluralistic society. By enforcing the Clauses, we have kept religion a matter for the individual conscience, not for the prosecutor or bureaucrat. At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate....Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?

McCreary County v. ACLU, 545 U.S. 844, 882 (2005) (O'Connor, J., concurring).

who held contrary beliefs. That same history showed that many people had lost their respect for any religion that had relied upon the support of government to spread its faith. The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate.<sup>172</sup>

When a coach at a public college or university prays, proselytizes, or simply takes a knee with his or her team, the message conveyed by such an action is that this behavior and belief is desirable and endorsed by the state. The cumulative effect of these actions is substantial. Our courts must continue to insist that the wall of separation between church and state is maintained in public education, and that locker rooms, gyms, practice and playing fields do not go overlooked. Coaches who would tear down this wall and build instead an altar must be confronted with the fact that, in addition to being unconstitutional, such behavior can be damaging to the spirit and identity of a player. If this wall of separation is not properly maintained, then the athletic activities intended to promote and develop teamwork and unity, will instead cultivate division and discord. A locker room where unity and respect flourish in the midst of different beliefs, practices and ideas, would be a better reflection of the kind of society our Founders envisioned.

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172. *Engel v. Vitale*, 370 U.S. 421, 431–32 (1962).