

NOTE

COLLEGE ATHLETICS, COERCION, AND THE ESTABLISHMENT CLAUSE: THE CASE OF CLEMSON FOOTBALL

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Once a person turns eighteen and goes to college, do they immediately become less susceptible to the influences of those in power and their peers? The Supreme Court tells us that they do. While consistently willing to find that prayers at middle school graduations and high school football games are violations of the Establishment Clause under the coercion test, the Court has stated that adults are more mature and “presumably” less susceptible to religious coercion. Scholars and the circuit courts of appeals have taken varying approaches and arrived at different outcomes when considering adult claimants. None, however, have articulated a uniform test for adults to establish coercion. Using indicative language from the Supreme Court, this Note argues for the first time that adult claimants must show that a State action has a “real and substantial likelihood” of coercion in order to bring a successful Establishment Clause challenge. It further proposes that a spectrum of susceptibility to coercion exists under the Establishment Clause based on certain populations’ ages and respective environments.

After articulating the standard of coercion for adults and the spectrum of susceptibility to coercion, this Note applies both to a prominent example of overt incorporation of religion into a public university—the Clemson University football program. The Clemson football coaching staff unabashedly integrates religion into many aspects of the program, from Bible studies led and organized by staff to baptisms of players on the practice field. Using psychological and educational research about

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the effects of coaches and teammates on a college student-athlete's values, beliefs, and behaviors, this Note argues that college student-athletes are uniquely prone to coercion and places them on the spectrum of susceptibility to coercion. Finally, it applies the standard of coercion for adults to conclude that religious aspects of Clemson's football program are unconstitutional under the Establishment Clause.

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INTRODUCTION

Situated in the small college town of Clemson, South Carolina, the Clemson University (“Clemson”) football team boasts quite a record. With NCAA College Football Playoff (“CFP”) National Championships in 2016 and 2018, consecutive CFP appearances and Atlantic Coast Conference Championships from 2015 to 2019, and at least ten wins in

each season from 2011 to 2019, head coach Dabo Swinney has built a culture of success in his program around his slogan “all in.”¹ While the students, alumni, and fans of Clemson football may consider football their religion, there is a tenet of actual sectarian religion deeply ingrained and woven into the program’s culture.² As documented by the Freedom from Religion Foundation’s (“FFRF”) 2014 letter sent to Clemson’s Senior Associate General Counsel, several of the program’s practices—which originate from the coaching staff’s conduct and are not student-led or organized—indicate not only an “endorsement of religion over nonreligion,” but also a preference for “Christian worship.”³ Coach Swinney has maintained an “an outwardly religious program.”⁴ Quite simply, “[a]t Clemson, God is everywhere.”⁵

In 2011, James Trapp became the official chaplain of the football team at Coach Swinney’s personal invitation and insistence.⁶ In his paid role as chaplain, Mr. Trapp went beyond simply leading team prayers. He “was regularly given access to the entire football team in between drills for the purpose of bible study,” maintained an office in the Jervey Athletic Center where he kept Bibles for distribution and displayed Bible quotes, and planned and facilitated sessions on “being baptized” in the athletic center.⁷ Mr. Trapp also organized more than eighty devotionals for the football team between March 2012 and April 2013, which were approved by Coach Swinney and led by members of the coaching staff.⁸ Further, he

¹ National Champions, <https://daboswinney.com/championships/> [https://perma.cc/9S7H-SPP4] (last visited Sept. 28, 2020); Greg Wallace, Inside a Top 10 College Football Team’s Summer Conditioning Program, *Bleacher Rep.* (June 6, 2014), <https://bleacher-report.com/articles/2088395-inside-a-top-10-college-football-teams-summer-conditioning-program> [https://perma.cc/274C-3ZG5] (internal quotation marks omitted).

² Tim Rohan, Faith, Football and the Fervent Religious Culture at Dabo Swinney’s Clemson, *Sports Illustrated* (Sept. 4, 2019), <https://www.si.com/college-football/2019/09/04/clemson-dabo-swinney-religion-culture> [https://perma.cc/46JS-8ZGA].

³ Letter from Patrick C. Elliott, Staff Att’y, Freedom from Religion Found., to Erin Swan Lauderdale, Senior Assoc. Gen. Couns., Clemson Univ. 1 (Apr. 10, 2014) [hereinafter FFRF Letter], https://ffrf.org/images/clemson_letter.pdf [https://perma.cc/Y26K-4HUA]. FFRF sent this letter to Clemson after they reviewed records obtained through a FOIA request. *Id.*

⁴ Kevin Trahan, Freedom from Religion Foundation Complains About Clemson Football Program, *SBNation* (Apr. 15, 2014), <https://www.sbnation.com/college-football/2014/4/15/5616602/clemson-football-dabo-swinney-religious-freedom-complaint>.

⁵ Brad Wolverton, With God on Our Side, *Chron. of Higher Educ.* (Nov. 24, 2013), <https://www.chronicle.com/article/With-God-on-Our-Side/143231> [https://perma.cc/7Q3G-M4PG].

⁶ FFRF Letter, *supra* note 3, at 1.

⁷ *Id.* at 2–3.

⁸ *Id.* at 4.

organized the team's transportation via coach buses to local churches for annual "Church Day[s]" during training camp.⁹

Journalists have reported other instances of the coaching staff's endorsement of religion. In the fall of 2012, star wide receiver DeAndre Hopkins was baptized on the field in his uniform and pads at the conclusion of practice.¹⁰ Then-Assistant Coach Jeff Scott even tweeted a photo that captured the scene.¹¹ Following Hopkins's baptism, it is estimated that between ten and fifteen player baptisms occurred over the next two seasons—many of which took place during camp in a pond by the practice field.¹² Coach Swinney tells recruits and their families that he is a Christian and, if they "have a problem with that, [they] don't have to be [there]."¹³ One recruit's mother distinctly remembers Coach Swinney's guarantee "that every single player that comes through this program will hear about the Gospel of Christ."¹⁴

If Clemson were a public high school instead of a public university, this situation would present a clear violation of the Establishment Clause of the First Amendment.¹⁵ The Supreme Court has stated, however, that college students "are . . . young adults" and are therefore "less impressionable than younger students."¹⁶ Yet, the Court has not spoken directly on the issue of religious coercion with respect to adult college students at a public university. While the religious nature of Clemson's football program presents only one example of overt incorporation of religion at a public university, the initial, more important, and unanswered

⁹ Id.

¹⁰ Rohan, *supra* note 2; see also Wolverton, *supra* note 5 (describing DeAndre Hopkins's baptism in a livestock trough on the practice field).

¹¹ Coach Jeff Scott (@coach_jeffscott), Twitter (Sept. 2, 2012, 10:14 PM), https://twitter.com/coach_jeffscott/status/24244533830313984.

¹² Rohan, *supra* note 2.

¹³ Wolverton, *supra* note 5.

¹⁴ Rohan, *supra* note 2.

¹⁵ See *Lee v. Weisman*, 505 U.S. 577, 592 (1992) ("[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.").

¹⁶ *Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981). *Widmar* was decided on free speech grounds as the Court did not find the State's interest in creating more separation between church and state than required by the Establishment Clause "sufficiently 'compelling' to justify content-based discrimination against respondents' religious speech." Id. at 276. For further discussion of circuit courts of appeals' application of *Widmar* to the coercion test in cases involving higher education, see also *infra* notes 110–12 and accompanying text.

question is what must adult claimants show in order to litigate a successful Establishment Clause challenge.¹⁷

Using the prominent example of Clemson football,¹⁸ this Note answers that question by articulating a coercion standard for adults, arguing that a spectrum of susceptibility to coercion exists under the Establishment Clause, and suggesting where college student-athletes fit along that spectrum. While some scholars have written about the Establishment Clause and college athletics, they do not apply the modern coercion test,¹⁹ articulate a coercion standard for adults, or advance a theory regarding a range of susceptibility to coercion. For example, Clayton Adams, emphasizing a need to protect a “government employee’s right to speak on matters of public concern,” applied a “modified coercion test” to religious aspects of various college football programs—including the Clemson football program.²⁰ Kris Bryant suggested that the Court should adopt a “Coercion/Endorsement Test ‘with teeth’” when analyzing the Establishment Clause claims of public university students.²¹ Gil Fried and Lisa Bradley briefly suggested that there is an “Establishment Clause case law scale from elementary school prayer to prayer opening legislative sessions cases” and recognized that “college prayer cases” fall “in between these two ends of the continuum” without theorizing further.²²

¹⁷ By “adult,” I mean individuals who have reached the age of majority in their respective states.

¹⁸ Clemson’s football program presents one of many examples of the incorporation of religion into college football. For examples of other football programs that have hired chaplains, see Freedom from Religion Found., *Pray to Play: Christian Coaches and Chaplains Are Converting Football Fields into Mission Fields* 13–15 (2015) [hereinafter *Pray to Play*], https://ffrf.org/images/Pray_To_Play_FINAL_REPORT1.pdf [https://perma.cc/A4QB-T8V-H]. Examples of the incorporation of religion can also be found in other college sports, such as basketball. See, e.g., Whitelaw Reid, *Man of Faith: How Tony Bennett’s Religion Has Shaped His UVa Tenure*, *Daily Progress* (Nov. 24, 2010), https://www.dailyprogress.com/-sports/man-of-faith-how-tony-bennett-s-religion-has-shaped/article_de7b70b5-54f2-5f94-bc4f-dc4449748bb8.html [https://perma.cc/CM7C-K9JR] (“As a number of recruits have signed to play for [Tony] Bennett, the first thing they’ve talked about . . . [is] the connection they’ve felt with Bennett through God.”).

¹⁹ The modern coercion test focuses on psychological coercion as articulated in *Lee v. Weisman*. See *infra* Section I.B.

²⁰ Clayton D. Adams, *Personal Foul, Roughing the Speaker: The Illusory War Between the Establishment Clause & College Football*, 84 *Miss. L.J. Supra* 167, 183, 194–202 (2015).

²¹ Kris Bryant, *Take a Knee: Applying the First Amendment to Locker Room Prayers and Religion in College Sports*, 36 *J. Coll. & U.L.* 329, 359–60 (2009).

²² 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, 303, 310–13 (1994).

Fried and Bradley, however, then applied the now disfavored *Lemon* test to analyze college locker room prayers.²³ In a similar vein, other scholars have addressed the Establishment Clause's application to students at public universities, or adults in general, without applying the psychological coercion test, articulating a coercion standard for adults, or proposing a theory regarding a range of susceptibility to coercion.²⁴

This Note addresses the gap in the literature regarding how to treat adult claimants under the coercion test of the Establishment Clause. Instead of suggesting a new or modified coercion test or using a now disfavored test, this Note articulates a practical coercion standard for adults that is rooted in the current jurisprudence. Part I of this Note traces the development of the modern coercion test in the Supreme Court and the test's application to cases involving higher education in the circuit courts of appeals. Then, Part II proposes a coercion standard for adults and, based on their respective environments, places various populations along a spectrum according to their level of susceptibility to coercion. Finally, Part III applies the coercion standard for adults and coercion spectrum to college student-athletes. It argues that college student-athletes should be seen as more susceptible to coercion than typical college students and that various religious-oriented aspects of the Clemson football program violate the Establishment Clause. A conclusion follows.

I. DEVELOPMENT OF THE COERCION TEST

The roots of the Establishment Clause are in the mid-twentieth century rather than in the Founding.²⁵ Modern Establishment Clause jurisprudence began with *Everson v. Board of Education*, where the

²³ *Id.*

²⁴ See, e.g., Phillip E. Marbury, Comment, Audience Maturity and the Object of the Establishment Clause, 6 *Liberty U. L. Rev.* 565, 579 (2012) (arguing that "audience maturity is a significant factor" in the Court's modern Establishment Clause jurisprudence); Elizabeth B. Halligan, Coercing Adults? The Fourth Circuit and the Acceptability of Religious Expression in Government Settings, 57 *S.C. L. Rev.* 923, 924–26 (2006) (analyzing *Mellen v. Bunting*, a Fourth Circuit case that struck down a prayer at a public military university because of public prayer's potential impact on adult audience members); Deanna N. Pihos, Assuming Maturity Matters: The Limited Reach of the Establishment Clause at Public Universities, 90 *Cornell L. Rev.* 1349, 1373 (2005) (arguing that the respective ages of high school and college students is a "questionable distinction on which to create two different standards of Establishment Clause protection" under the coercion, *Lemon*, and endorsement tests).

²⁵ John C. Jeffries, Jr. & James E. Ryan, A Political History of the Establishment Clause, 100 *Mich. L. Rev.* 279, 281 (2001).

Supreme Court took a strict separationist, no-aid approach to the relationship between the State and religious institutions.²⁶ Following *Everson*, Establishment Clause doctrine was so unstable and produced such inconsistent results that the Court candidly acknowledged that it could “only dimly perceive the lines of demarcation in this extremely sensitive area of constitutional law.”²⁷ The Court attempted to produce a single Establishment Clause test in *Lemon*, but the test²⁸ was difficult to apply. The *Lemon* test subsequently lost favor and a number of different tests again emerged.²⁹

As Establishment Clause doctrine continued to morph and develop, the Court placed more emphasis on the principle that the State could not coerce an individual into a religious belief or practice. That principle developed into an independent Establishment Clause coercion test. Distinct from the concept of coercion in Free Exercise jurisprudence,³⁰ the concept of coercion in Establishment Clause jurisprudence turns on psychological coercion.³¹ This Part first traces the concept of coercion

²⁶ *Id.* at 285.

²⁷ *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

²⁸ The *Lemon* test imposed three requirements for a State action to pass muster under the Establishment Clause: (1) “secular legislative purpose;” (2) “primary effect . . . that neither advances nor inhibits religion;” and (3) no “excessive government entanglement with religion.” *Id.* at 612–13.

²⁹ The Court subsequently introduced other methods of analysis for Establishment Clause cases, such as the neutral aid model introduced in *Zelman v. Simmons-Harris*, 536 U.S. 639, 640 (2002), and the endorsement test that was subsequently adopted by the majority in *County of Allegheny v. ACLU*, 492 U.S. 573, 592–94 (1989).

³⁰ Coercion under the Free Exercise Clause is related to the legal imposition of a substantial burden—often, a large financial penalty—that a person cannot avoid without violating her sincere religious belief. This forces a person to choose between following her religion and being penalized or not following her religion to avoid the penalty. See, e.g., *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751, 2779 (2014) (“[F]unding the specific contraceptive methods at issue violates [plaintiffs’] religious beliefs Because the contraceptive mandate forces them to pay an enormous sum of money—as much as \$475 million per year in the case of Hobby Lobby—if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs.”).

³¹ *Lee v. Weisman*, 505 U.S. 577, 593–94 (1992). Some members of the Court have disagreed with the controlling test of psychological coercion in Establishment Clause jurisprudence and believe that the Establishment Clause can be violated only by a showing of “legal coercion.” See *id.* at 640 (Scalia, J., dissenting) (“The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty.*”); *Town of Greece v. Galloway*, 572 U.S. 565, 610 (2014) (Thomas, J., concurring) (“[T]o the extent coercion is relevant to the Establishment Clause analysis, it is actual legal coercion that counts—not the ‘subtle coercive pressures’ allegedly felt by respondents in this case.”); see also Bryant, *supra* note 21, at 350 (“Scalia believes that the Establishment Clause is violated only when the government acts to directly

from its early influence through its development into the modern test. It then surveys three circuit court decisions that take two different approaches to coercion in the higher education environment.

A. The Early Influence of Coercion in Establishment Clause Jurisprudence

The Supreme Court first indicated that coercion is an important part of the Establishment Clause analysis in *Engel v. Vitale*, which laid the groundwork for the modern coercion test. In *Engel*, the Court struck down the daily classroom prayer procedure of a New York school district as an Establishment Clause violation.³² The script for the prayer was provided by the school district by way of the State Board of Regents' recommendation.³³ The Court's reasoning focused on the history of the Establishment Clause and the fact that it forbids the State from directly "prescrib[ing] by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity."³⁴ The Court then articulated concerns about the effects of indirect governmental compulsion, stating that "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."³⁵

The Court continued to indirectly define coercion's role in Establishment Clause doctrine in *School District of Abington Township v. Schempp*, where the Court held that practices and laws requiring daily Bible readings were unconstitutional under the Establishment Clause by focusing on the State's failure to "maintain strict neutrality, neither aiding nor opposing religion."³⁶ The Court discussed the compulsive and coercive nature of the daily prayer practice that was struck down in *Engel*.³⁷ The Court then suggested that coercion may be sufficient, but not

coerce religious practice, through financial support, legal penalty, or sanction. In contrast, Kennedy has shown a willingness to recognize that subtle indirect pressure 'can be as real as any overt compulsion.'" (footnote omitted).

³² 370 U.S. 421, 424 (1962).

³³ *Id.* at 422–23.

³⁴ *Id.* at 430.

³⁵ *Id.* at 431.

³⁶ 374 U.S. 203, 205, 225 (1963).

³⁷ *Id.* at 220–21.

necessary, to establish an Establishment Clause violation—in contrast to coercion’s necessary role in establishing a Free Exercise Clause violation.³⁸

The concept that coercion should be treated differently for children and adults under the law traces back to Justice Stewart’s dissent in *Schempp*. Justice Stewart, sharply disagreeing with the majority, stated that “[i]n the absence of coercion upon those who do not wish to participate—because they hold less strong beliefs, other beliefs, or no beliefs at all—such provisions [mandating Bible readings in schools] cannot . . . be held to represent the type of support of religion barred by the Establishment Clause.”³⁹ Acknowledging that a different degree of coercive danger exists in a classroom than in events attended by adults, Justice Stewart opined that constitutional invalidity under the Establishment Clause “turns on the question of coercion.”⁴⁰

Faced twenty years later with a prayer that was different in kind rather than degree, the Court upheld the Nebraska state legislature’s practice of opening each session with a prayer by a paid chaplain in *Marsh v. Chambers*.⁴¹ Noting that the practice of opening legislative sessions with prayer “is deeply embedded in the history and tradition of this country,” the Court declared that “the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom.”⁴² Starting with the First Congress and continuing “without interruption” in the Senate and the House of Representatives for two centuries, chaplains have opened legislative sessions in prayer.⁴³ In fact, “Congress authorized the appointment of paid chaplains” only three days after “final agreement was reached on the language of the Bill of Rights.”⁴⁴ The Court used the timing of those events to support the notion that “the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment.”⁴⁵ The practice

³⁸ See *id.* at 223.

³⁹ *Id.* at 316 (Stewart, J., dissenting).

⁴⁰ *Id.*

⁴¹ 463 U.S. 783, 784–86 (1983).

⁴² *Id.* at 786.

⁴³ *Id.* at 787–88, 790. However, “prayers were not offered during the Constitutional Convention.” *Id.* at 787.

⁴⁴ *Id.* at 788.

⁴⁵ *Id.*

carried over to most states, including Nebraska, where it had “been followed consistently.”⁴⁶

Finding the practice of opening prayers to be an activity that was not proselytizing and that did not symbolize the government’s approval of a religious view, the Court pointed out that “the individual claiming injury by the practice is an adult, presumably not readily susceptible to ‘religious indoctrination,’ . . . or peer pressure.”⁴⁷ In contrast, Justice Brennan recognized in his dissent that “indirect coercive pressure” could exist in the context of legislative prayer.⁴⁸ Even with the Court now endorsing the psychological coercion test, the tension between the historical practice doctrine and the coercion test remains.

B. The Modern Coercion Test

The concept of the coercion test as it is utilized today was first introduced in Justice Kennedy’s concurrence in *County of Allegheny v. ACLU*. The majority enjoined the display of a crèche on the Grand Staircase of the Allegheny County Courthouse because the government had impermissibly signaled an endorsement of the Christian religion.⁴⁹ But, the Court also found that the display of a menorah next to an outdoor Christmas tree was permissible under the Establishment Clause because it did not signal a governmental endorsement of religion.⁵⁰ In light of precedents that rejected coercion as being necessary to establish a violation of the Establishment Clause, the divided Court declined to accept the county’s argument to analyze the displays under a coercion test, and instead continued its use of the endorsement inquiry.⁵¹

Justice Kennedy began his concurrence by criticizing the *Lemon* test.⁵² Kennedy then surveyed a host of cases in which “without exception” the Court had “invalidated actions that further[ed] the interests of religion

⁴⁶ Id. at 788–89.

⁴⁷ Id. at 792 (citations omitted).

⁴⁸ Id. at 798 (Brennan, J., dissenting) (quoting *Engel v. Vitale*, 370 U.S. 421, 431 (1962)).

⁴⁹ *County of Allegheny v. ACLU*, 492 U.S. 573, 601–02 (1989).

⁵⁰ Id. at 620.

⁵¹ Id. at 597 n.47.

⁵² Id. at 655–56 (Kennedy, J., concurring in the judgment in part and dissenting in part) (“Substantial revision of our Establishment Clause doctrine may be in order; but it is unnecessary to undertake that task today, for even the *Lemon* test, when applied with proper sensitivity to our traditions and our case law, supports the conclusion that both the crèche and the menorah are permissible displays in the context of the holiday season.”). Kennedy’s concurrence was joined by Chief Justice Rehnquist, Justice White, and Justice Scalia.

through the coercive power of government.”⁵³ Kennedy acknowledged that “[s]ymbolic recognition or accommodation of religious faith may violate the [Establishment] Clause in an extreme case” because “coercion need not be a direct tax in aid of religion or a test oath.”⁵⁴ By displaying the crèche and the menorah, the government did not use its “power to coerce . . . to further the interests of Christianity or Judaism,” it did not compel anyone to “observe or participate in any religious ceremony or activity,” and it did not “contribute[] significant amounts of tax money to serve the cause of one religious faith.”⁵⁵ Since “no realistic risk” existed “that the crèche and the menorah represent[ed] an effort to proselytize,” Kennedy found that it was permissible for the government to erect both of the displays.⁵⁶

The coercion test was officially endorsed by a majority of the Court in *Lee v. Weisman*, where the Court found prayers during the graduation ceremonies of public schools unconstitutional in a challenge brought by a middle school graduate and her father.⁵⁷ Justice Kennedy declared that “[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise.”⁵⁸ The school district not only selected the clergyman to deliver the prayers, it also “directed and controlled the content of the prayers.”⁵⁹ The nature of the school district’s involvement signaled “clear[ly] that the graduation prayers bore the imprint of the State and thus put school-age children who objected in an untenable position.”⁶⁰ Relying on the support of psychological research for “the common assumption that adolescents are often susceptible to pressure from their peers towards conformity,” Kennedy acknowledged that attending students were subject to pressure from the public and from peers to participate in the prayers by standing with the group or remaining

⁵³ Id. at 660.

⁵⁴ Id. at 661.

⁵⁵ Id. at 664.

⁵⁶ Id. Especially when considering that “Congress and the state legislatures do not run afoul of the Establishment Clause when they begin each day with a state-sponsored prayer for divine guidance offered by a chaplain whose salary is paid at government expense,” Justice Kennedy could not “comprehend how a menorah or a crèche, displayed in the limited context of the holiday season, [could] be invalid.” Id. at 665.

⁵⁷ 505 U.S. 577, 581, 587 (1992).

⁵⁸ Id. at 587.

⁵⁹ Id. at 588.

⁶⁰ Id. at 590.

respectfully silent.⁶¹ Further, “[t]o recognize that the choice imposed by the State constitutes an unacceptable constraint only acknowledges that the government may no more use social pressure to enforce orthodoxy than it may use more direct means.”⁶²

The Court rejected the relevance of the parties’ stipulation that the students were not required to attend the graduation ceremonies.⁶³ While attendance may not have been officially required, a student’s “absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years.”⁶⁴ Put simply, “[t]he Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation.”⁶⁵

The Court did not address whether an Establishment Clause violation would occur if the State put mature adults to the choice of whether or not to participate in a prayer under similar circumstances.⁶⁶ Addressing the differences between *Lee* and *Marsh*, the Court noted that the context of a state legislature session “where adults are free to enter and leave” could not “compare with the constraining potential of the one school event most important for the student to attend. The influence and force of a formal exercise in a school graduation are far greater than the prayer exercise” that was condoned in *Marsh*.⁶⁷ The Court noted the “high degree of control” that school officials maintained over “the precise contents of the program, the speeches, the timing, the movements, the dress, and the decorum of the students.”⁶⁸ Students were “left with no alternative but to submit” where the State had “in every practical sense compelled attendance and participation in an explicit [and State-sanctioned] religious exercise” that any “objecting student had no real alternative to avoid.”⁶⁹

The Court again applied Justice Kennedy’s coercion test in *Santa Fe Independent School District v. Doe*, where the Court held that student-organized and student-led prayer over the public address system before high school varsity football games in a public school district violated the

⁶¹ Id. at 593–94.

⁶² Id. at 594.

⁶³ Id. at 595.

⁶⁴ Id.

⁶⁵ Id. at 596.

⁶⁶ Id. at 593.

⁶⁷ Id. at 597.

⁶⁸ Id.

⁶⁹ Id. at 597–98.

Establishment Clause.⁷⁰ Analogizing the case to *Lee*, the Court found that by simply permitting students to deliver the prayer, the school had a degree of involvement that made “it clear that the pregame prayers [bore] the imprint of the State,” which put any objecting students “in an untenable position.”⁷¹

Although the school district argued that there was no coercive effect because football game attendance was clearly voluntary for most students, other students “such as cheerleaders, members of the band, and . . . the [football] team members themselves” were required to attend based on their commitment to their extracurricular activities.⁷² For those students, “the choice between attending these games and avoiding personally offensive religious rituals [was] in no practical sense an easy one.”⁷³ Even though the prayer system was student-led, it “threaten[ed] the imposition of coercion upon those students not desiring to participate in a religious exercise.”⁷⁴ The Establishment Clause forbid the State from requiring students to make that difficult choice, even with respect to extracurricular activities.⁷⁵

In *Town of Greece v. Galloway*—the Court’s first encounter with legislative prayer since its adoption of the coercion test—the Court flatly refused to acknowledge similar concerns about coercion in a legislative setting that it had wholeheartedly embraced in the school prayer context. Instead, it embraced historical practice as an alternative threshold to avoid an Establishment Clause violation. Justice Kennedy—the champion of the coercion test—wrote for the majority in upholding the town board’s practice of including an invocation delivered by unpaid local clergymen of rotating congregations during the opening services of each monthly meeting against a challenge brought by adult attendees.⁷⁶ Any person, minister or otherwise, of “any persuasion” was permitted to give the invocation.⁷⁷ However, between 1999 and 2007, each participating minister was Christian.⁷⁸ Analogizing to *Marsh* and the fact that

⁷⁰ 530 U.S. 290, 294, 301 (2000).

⁷¹ *Id.* at 305 (quoting *Lee*, 505 U.S. at 590) (internal quotation marks omitted).

⁷² *Id.* at 311.

⁷³ *Id.* at 312.

⁷⁴ *Id.* at 317.

⁷⁵ *Id.* at 311–12.

⁷⁶ 572 U.S. 565, 570–71 (2014).

⁷⁷ *Id.* at 571.

⁷⁸ *Id.* The Court seemed to believe that this fact was related to the religious character of the town as the majority of the town’s local congregations were Christian. *Id.*

legislative prayer had more than 200 years of history, the Court emphasized that “the Establishment Clause must be interpreted ‘by reference to historical practices and understandings.’”⁷⁹

The Court also distinguished any effect of the prayers on meeting attendees from the coercion found in school prayer cases because community members were not “dissuaded from leaving the meeting room during the prayer [or] arriving late” after the invocation ended.⁸⁰ While the respondents claimed that they were offended and felt excluded by the prayer, the Court clarified that “[o]ffense . . . does not equate to coercion.”⁸¹ Neither choosing to leave the room during the prayer nor quietly declining to participate in the prayer represented “an unconstitutional imposition as to mature adults, who ‘presumably’ [were] ‘not readily susceptible to religious indoctrination or peer pressure.’”⁸² Going back to the days of multiple Establishment Clause tests, the historical practice doctrine now exists as a justification for a practice’s constitutionality so long as the practice does not actually result in coercion.

C. The Coercion Test in Higher Education Settings

While the coercion test is now clearly established as a doctrinal framework for cases involving prayer and symbols in public institutions such as government and schools, the Supreme Court has never directly addressed the issue of religious coercion at the public university level. Three circuit courts of appeals have decided cases on the matter, resulting in two distinct, yet reconcilable,⁸³ outcomes. The Seventh and Sixth Circuits relied on the historical practice justification and the now disfavored *Lemon* test, respectively, to uphold prayer practices at a university. The Fourth Circuit, however, acknowledged that certain college environments result in more coercive pressure and found a violation of the Establishment Clause under the coercion test.

⁷⁹ *Id.* at 576 (quoting *County of Allegheny v. ACLU*, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part)).

⁸⁰ *Id.* at 590.

⁸¹ *Id.* at 589.

⁸² *Id.* at 590 (quoting *Marsh v. Chambers*, 463 U.S. 783, 792 (1983)).

⁸³ See *infra* Section II.C and Subsection III.A.3 (acknowledging that even if adult college students are generally less susceptible to coercion, adult college students engaged in special activities with particularly coercive environments, such as military programs and athletics, are more susceptible to coercion than their peers who are not involved in any special activities).

The Seventh Circuit upheld a university's long-held practice of inviting a local religious leader to open and close its commencement ceremony with a non-sectarian invocation and benediction in *Tanford v. Brand*.⁸⁴ Interestingly, the court distinguished its decision from *Lee*—which involved impermissible prayer at a public school's graduation ceremony—and analogized to *Marsh*—which involved permissible prayer to open a legislative session.⁸⁵ The court found no real or indirect coercion on the students to participate in the ceremony or on the “mature stadium attendees” who were “voluntarily present and free to ignore the cleric's remarks.”⁸⁶ With no finding of unconstitutional coercion, the court gave weight to the university's more than 150-year-old practice that was “widespread throughout the nation” and, relying on *Marsh*, found no violation of the Establishment Clause.⁸⁷

Later the same year, the Sixth Circuit found no Establishment Clause violation in a challenge to the non-sectarian prayers and moments of silence offered at a public university's functions in *Chaudhuri v. Tennessee*.⁸⁸ The prayer practices at issue were broader in scope than those in earlier cases, as the prayers were given not only during graduation ceremonies, but also at “faculty meetings, dedication ceremonies, and guest lectures.”⁸⁹ The faculty member who filed the lawsuit alleged that he was required to attend functions during which prayers were offered and that his participation in university events factored into his performance evaluations through a consideration of his “university service.”⁹⁰

The court used the *Lemon* test to uphold the practice as constitutional.⁹¹ The court then indicated that *Lee v. Weisman* was not controlling because “*Lee* attached particular importance to the youth of the audience and the risk of peer pressure and ‘indirect coercion’ in the primary and secondary school context.”⁹² Citing *Tanford*, the court gave weight to the

⁸⁴ 104 F.3d 982, 983, 986 (7th Cir. 1997). A local religious leader had opened and closed Indiana University's commencement ceremonies for 155 years at the time of the decision. *Id.* at 986.

⁸⁵ *Id.* at 985–86; *supra* note 40 and accompanying text.

⁸⁶ *Tanford*, 104 F.3d at 985.

⁸⁷ *Id.* at 986. The court did not indicate the factual basis for its conclusion regarding the breadth of the practice across the nation.

⁸⁸ 130 F.3d 232, 233 (6th Cir. 1997).

⁸⁹ *Id.* at 233–34.

⁹⁰ *Id.* at 234–35 (internal quotation marks omitted).

⁹¹ *Id.* at 238.

⁹² *Id.* at 238–39.

university's assertion that faculty attendance was "encouraged but not mandatory" at its functions and that it had never penalized a faculty member for non-attendance.⁹³ Even accepting the faculty member's allegation that attendance was required, the court found "absolutely no risk that [the faculty member]—or any other unwilling adult listener—would be indoctrinated by exposure to the prayers."⁹⁴ The court, finding no unconstitutional coercion, concluded that an "obvious difference between" adults and "children at an impressionable stage of life 'warrant[ed] a difference in constitutional results.'"⁹⁵

The Fourth Circuit declined to follow the Sixth and Seventh Circuits' line of reasoning when it struck down the Virginia Military Institute's ("VMI") daily "supper prayer" as a violation of the Establishment Clause in *Mellen v. Bunting*.⁹⁶ As a "state-operated military college," VMI shaped its "adversative method of training" to produce "physical and mental discipline" and "a strong moral code" in its cadets.⁹⁷ To accomplish its goals, VMI used "a rigorous and punishing system of indoctrination" of which "submission and conformity [were] central tenets" throughout all four years of a cadet's tenure.⁹⁸ At the beginning of each day's supper, a scripted prayer was read by the Post Chaplain during which the cadets were required to remain silently standing but were "not obliged to recite the prayer, close their eyes, or bow their heads."⁹⁹

Rejecting VMI's urging to simply uphold the prayer as constitutional under *Marsh* as a traditional historic practice, the court instead found the practice unconstitutional under the coercion analysis from *Lee* and *Santa Fe*.¹⁰⁰ While acknowledging that VMI cadets were not children, the court found the cadets "uniquely susceptible to coercion" as a result of VMI's educational system.¹⁰¹ Noting the "detailed regulation of conduct[,] . . . the indoctrination of a strict moral code," and the cadets' submission "to mandatory and ritualized activities," the court held that the cadets were "plainly coerced into participating in a religious exercise"

⁹³ Id. at 239.

⁹⁴ Id.

⁹⁵ Id. (quoting *Edwards v. Aguillard*, 482 U.S. 578, 584 n.5 (1987)).

⁹⁶ 327 F.3d 355, 360 (4th Cir. 2003).

⁹⁷ Id. at 360–61 (quoting *United States v. Virginia*, 518 U.S. 515, 520 (1996)).

⁹⁸ Id. at 361.

⁹⁹ Id. at 362.

¹⁰⁰ Id. at 370–72.

¹⁰¹ Id. at 371.

even though they were “mature adults.”¹⁰² The court, giving full weight to the unique coercive pressures of the environment, did not consider the supper prayer’s “technical ‘voluntariness’” a mitigating factor because “the communal dining experience, like other official activities, [was] undoubtedly experienced as obligatory.”¹⁰³

While the Fourth, Sixth, and Seventh Circuits have reached different conclusions regarding whether adults in higher education environments can be coerced under the Establishment Clause, recognizing the relevance of the environments’ coercive nature and the individuals’ susceptibility to coercion allows reconciliation of the circuit split.

II. ADULTS AND RELIGIOUS COERCION

The Supreme Court has never “even briefly discussed the merits” of whether an “older and presumably more mature” adult can be unconstitutionally coerced into participating in a government-sponsored religious activity in an education setting.¹⁰⁴ The Court has, however, indicated in dicta that adults are not especially prone to the coercive power of the government, at least when compared to children in K–12 public schools.¹⁰⁵ The Court’s statements—while not precluding the idea that the State can coerce adults into participating in a religious activity—do suggest that the Court would hesitate to find an Establishment Clause violation. At the very least, the State would have to do more than sponsor a prayer at the beginning of a legislative session before it would violate the Establishment Clause. Precisely how much more would be required for the Court to find a violation when the allegedly coerced party is an adult is unknown.

Some scholars have suggested that the Court should adopt a new or modified coercion test.¹⁰⁶ Rather than advocating for the adoption of a

¹⁰² *Id.* at 371–72.

¹⁰³ *Id.* at 372.

¹⁰⁴ Pihos, *supra* note 24, at 1365–66.

¹⁰⁵ See, e.g., *Town of Greece v. Galloway*, 572 U.S. 565, 590 (2014) (noting that the choice of whether to participate in a legislative prayer, exit the room, or quietly acquiesce did not represent “an unconstitutional imposition as to mature adults, who ‘presumably’ [were] ‘not readily susceptible to religious indoctrination or peer pressure’” (quoting *Marsh v. Chambers*, 463 U.S. 783, 792 (1983))); see also *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 316 (1963) (Stewart, J., dissenting) (explaining that “[i]t is clear that the dangers of coercion involved . . . in a schoolroom differ qualitatively from those presented . . . in ceremonies attended by adults”).

¹⁰⁶ See *supra* notes 20–24.

new test, this Note adheres to the current coercion test to succinctly answer the question of what an adult must show in order for the Court to recognize an Establishment Clause violation. Using indicative language from *Town of Greece*, this Part articulates a coercion standard for adults. Then, it seeks to resolve the circuit split in higher education environments by utilizing the coercion standard for adults and considering the respective parties and environments of those cases. Finally, it presents a theory regarding the level of susceptibility to coercion of various populations and places those populations along a spectrum.

A. The Coercion Standard for Adults

In both *Marsh* and *Town of Greece*, where the Court mentioned the lack of coercive pressure on adults in dicta, the Court relied heavily upon the history and tradition of legislative prayer in upholding the practices at issue.¹⁰⁷ However, Justice Kennedy indicated in *Town of Greece* that tradition alone does not save legislative prayer from an Establishment Clause infirmity. Kennedy noted that “[c]ourts remain free to review the pattern of [legislative] prayers over time to determine whether they comport with the tradition of solemn, respectful prayer approved in *Marsh*, or whether coercion is a real and substantial likelihood.”¹⁰⁸ Kennedy also articulated a presumption against a finding of coercion where “mature adults” are concerned, since they “‘presumably’ are ‘not readily susceptible to religious indoctrination or peer pressure.’”¹⁰⁹

The Supreme Court has addressed one especially pertinent case from the aid and benefits context concerning the Establishment Clause in higher education. In *Widmar v. Vincent*, the Court held—on free speech grounds—that a university’s desire to abide by the Establishment Clause is not a sufficiently compelling interest to justify excluding registered student groups who wish to use the university’s facilities for religious purposes.¹¹⁰ In a footnote, used by the Sixth and Seventh Circuits to reach

¹⁰⁷ See *Marsh*, 463 U.S. at 787–90 (tracing the consistent history of legislative prayer from the Continental Congress in 1774 through 1982 and using that history to indicate that “the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation” of the Establishment Clause); *Town of Greece*, 572 U.S. at 576 (“That the First Congress provided for the appointment of chaplains only days after approving language for the First Amendment demonstrates that the Framers considered legislative prayer a benign acknowledgement of religion’s role in society.”).

¹⁰⁸ *Town of Greece*, 572 U.S. at 590 (emphasis added).

¹⁰⁹ *Id.* (quoting *Marsh*, 463 U.S. at 792).

¹¹⁰ 454 U.S. 263, 275–76 (1981).

their conclusions in *Chaudhuri* and *Tanford*,¹¹¹ the Court stated that college students are “young adults” who are “less impressionable than younger students.”¹¹²

By combining the presumption that adults are less susceptible to religious coercion with the indication that there *are* situations where legislative prayer—to which the challenging parties are typically adults—can have a “real and substantial likelihood” of coercion,¹¹³ it is clear that the State *can* unconstitutionally coerce adults under the Establishment Clause. It is also clear that a claim that an adult has been impermissibly coerced would be analyzed under a more stringent standard than a claim that a child has been impermissibly coerced—especially considering the presumption against a finding of coercion where adults are concerned.¹¹⁴

The typical coercion standard is simply that the “government may not coerce anyone to support or participate in religion or its exercise.”¹¹⁵ By incorporating the Court’s qualifying statements about the presumption against coercion with respect to adults, a particular coercion standard for adults can be articulated: the government impermissibly coerces an adult “to support or participate in religion or its exercise” when there is a “real and substantial likelihood” of coercion.¹¹⁶

B. Resolving the Circuit Split

Utilizing the more stringent coercion standard for adults and acknowledging that a “real and substantial likelihood” of coercion exists when college students are engaged in activities with particularly coercive

¹¹¹ See *Chaudhuri v. Tennessee*, 130 F.3d 232, 239 (6th Cir. 1997) (“The Supreme Court has always considered the age of the audience an important factor in the analysis. . . . We may safely assume that doctors of philosophy are less susceptible to religious indoctrination than children are.” (citing *Widmar*, 454 U.S. at 274 n.14) (other citations omitted)); *Tanford v. Brand*, 104 F.3d 982, 986 (7th Cir. 1997) (noting that where “the special concerns underlying the Supreme Court’s decision in *Lee* are absent . . . *Lee* does not require the challenged practices to be struck down”) (citing *Widmar*, 454 U.S. at 274 n.14). Interestingly, the Fourth Circuit did not cite *Widmar* at all in *Mellen*. See *Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003).

¹¹² *Widmar*, 454 U.S. at 274 n.14; see also *supra* note 16 and accompanying text.

¹¹³ See *Town of Greece*, 572 U.S. at 590.

¹¹⁴ See *supra* note 109 and accompanying text.

¹¹⁵ *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

¹¹⁶ This test is indeed distinct from the typical coercion standard for K–12 children, which requires only a possibility of coercive pressure, as illustrated by *Lee*: “What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context *may appear* to the nonbeliever . . . to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.” *Id.* at 592 (emphasis added).

environments is the best way to resolve the split between the Sixth and Seventh Circuits and the Fourth Circuit. In *Tanford*, a law professor, two law students, and one undergraduate student challenged the invocation and benediction of the university graduation ceremony.¹¹⁷ In *Chaudhuri*, a tenured professor of mechanical engineering challenged the offering of prayers at various university functions.¹¹⁸ Both the Sixth and Seventh Circuits applied the presumption against finding that an adult has been coerced and found no Establishment Clause violation.¹¹⁹

A unique and distinguishing feature in *Mellen* is that the challengers to the daily “supper prayer” were not simply college students or professors, but two former VMI cadets.¹²⁰ The two cadets were subject to an environment where “certain values” were instilled through a “system of indoctrination” that included “mandatory and ritualized activities,” a “detailed regulation of conduct,” and tenets of “submission and conformity.”¹²¹ The court specifically noted “VMI’s coercive atmosphere” in finding that the adult cadets were “uniquely susceptible to coercion.”¹²² Distinguishably, in *Tanford* and *Chaudhuri*, the students and professors were not purported to be involved in any particular activity that resulted in an especially coercive environment that may have assisted in overcoming the presumption against finding unconstitutional coercion of adults. Thus, it was the cadets’ “unique[] suscepib[ility] to coercion” based on their involvement in VMI’s coercive environment that overcame the presumption¹²³ and established a “real and substantial likelihood” of coercion.

C. The Spectrum of Susceptibility to Coercion

Acknowledging the environmental and susceptibility distinctions between *Mellen*, *Chaudhuri*, and *Tanford* leads to the conclusion that certain populations are more or less susceptible to coercion based on their respective environments. At the low-to-no-susceptibility end of the

¹¹⁷ *Tanford v. Brand*, 104 F.3d 982, 983 (7th Cir. 1997).

¹¹⁸ *Chaudhuri v. Tennessee*, 130 F.3d 232, 233 (6th Cir. 1997).

¹¹⁹ See *supra* notes 84–95 and accompanying text.

¹²⁰ *Mellen v. Bunting*, 327 F.3d 355, 360 (4th Cir. 2003).

¹²¹ *Id.* at 361, 371.

¹²² *Id.* at 371–72.

¹²³ See *id.*

spectrum are adults attending a legislative session¹²⁴ or a college graduation,¹²⁵ and—perhaps regardless of age—observers of passive legislative religious symbols.¹²⁶ Under the specific facts of the cases brought so far, these situations would not lead to a sufficient showing of a “real and substantial likelihood” of coercion under the coercion test. The next step toward susceptibility would be typical adult college students.¹²⁷ Because the Court has placed more emphasis on coercion in K–12 education cases than in legislative prayer cases, typical adult college students are likely more susceptible to coercion than the prior category—even with the presumption against a finding of coercion with respect to adults. Yet another step toward higher susceptibility would be adult college students at state military schools.¹²⁸ Finally, children in K–12 public schools would be at the farthest end of the spectrum representing the highest susceptibility to coercion.¹²⁹

¹²⁴ See *Town of Greece v. Galloway*, 572 U.S. 565, 590 (2014) (explaining that the choice to exit the room or remain and quietly acquiesce in a prayer during a legislative session does not “represent[] an unconstitutional imposition as to mature adults, who ‘presumably’ are ‘not readily susceptible to religious indoctrination or peer pressure’” (citing *Marsh v. Chambers*, 463 U.S. 783, 792 (1983))).

¹²⁵ See *Tanford v. Brand*, 104 F.3d 982, 985 (7th Cir. 1997) (“[T]he mature [adult] stadium attendees were voluntarily present and free to ignore the cleric’s [prayer].”).

¹²⁶ See *County of Allegheny v. ACLU*, 492 U.S. 573, 664 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (“[T]he government’s power to coerce has [not] been used to further the interests of [religion]. No one was compelled [by the government’s display of a crèche and a menorah] to observe or participate in any religious ceremony or activity.”). The majority opinions in several recent religious symbol cases have not even mentioned the coercion test. See *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067 (2019); *McCreary County v. ACLU*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005).

¹²⁷ By “typical,” I mean adult college students who are not involved in *any* special activity that would subject them to a particularly coercive environment.

¹²⁸ See *supra* notes 96–103 and accompanying text; see also Pihos, *supra* note 24, at 1368 (using *Mellen* to describe “the difficulty of prohibiting prayer in higher education under the coercion test (except, perhaps, in the most unique university settings)”). Outside of military colleges, William J. Dobosh, Jr. has argued that mandatory army events with religious components fail the coercion test irrespective of the soldiers’ age and thus violate the Establishment Clause. William J. Dobosh, Jr., *Coercion in the Ranks: The Establishment Clause Implications of Chaplain-Led Prayers at Mandatory Army Events*, 2006 *Wis. L. Rev.* 1493, 1531–35 (asserting that “soldiers ordered to participate in Army ceremonies that contain official prayers are coerced into taking part in government-sponsored religious exercises”).

¹²⁹ See *Lee v. Weisman*, 505 U.S. 577, 592 (1992) (“[P]rayer exercises in [K–12] public schools carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, but it is most pronounced there.”); see also *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000) (“[T]he religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer [in public schools].”).

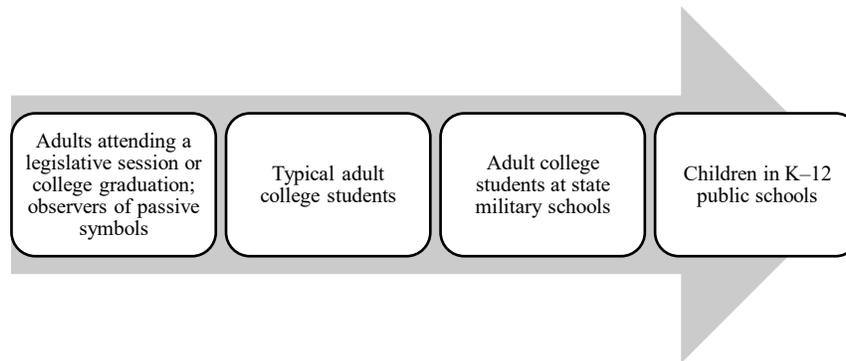


Figure 1¹³⁰

This spectrum further illustrates the more stringent standard for adults who claim that they have been unconstitutionally coerced in Establishment Clause cases. Adults must show that there is a “real and

¹³⁰ Figure 1: Susceptibility to Coercion Spectrum, from least susceptible to most susceptible. The spacing between these categories could actually be quite uneven, with larger gaps between certain categories than between others. One category that is not included in the spectrum is adult prison inmates and parolees. At least four circuit courts of appeals have recognized religious coercion as an actionable violation of the Establishment Clause in challenges brought by adult prison inmates and parolees. Coercion cases involving adult prison inmates and parolees tend to involve the added element of punishment if the inmate or parolee chooses not to participate in the religious activity or benefit if the inmate or parolee chooses to participate in the religious activity, both of which go beyond the susceptibility to psychological coercion that this spectrum represents. See *Jackson v. Nixon*, 747 F.3d 537, 543 (8th Cir. 2014) (finding that a prisoner sufficiently stated a coercion claim by alleging “that a parole stipulation requir[ed] him to attend and complete a substance abuse program with religious content in order to be eligible for early parole”); *Inouye v. Kemna*, 504 F.3d 705, 713–14 (9th Cir. 2007) (noting that “[t]he Hobson’s choice [the parole officer] offered [the parolee]—to be imprisoned or to renounce his own religious beliefs—offends the core of Establishment Clause jurisprudence” and “was clearly coercive”); *Warner v. Orange Cnty. Dep’t of Prob.*, 115 F.3d 1068, 1075 (2d Cir. 1997) (“There can be no doubt . . . that [the prisoner] was coerced into participating in these religious exercises”—an Alcoholics Anonymous program with “a substantial religious component”—“by virtue of his probation sentence.”); *Kerr v. Farrey*, 95 F.3d 472, 473–74 (7th Cir. 1996) (finding “that the state ha[d] impermissibly coerced inmates to participate in a religious program” when it “require[d] an inmate, upon pain of being rated a higher security risk and suffering adverse effects for parole eligibility, to attend a substance abuse counseling program with explicit religious content”); see also *supra* note 31 (noting Justices who have disagreed with the controlling standard of psychological coercion in Establishment Clause jurisprudence in preference of a “legal” coercion standard). In the Clemson football program, there have been no reports of punishment if a player chooses not to participate in a religious activity nor of provision of benefits if a player chooses to participate in a religious activity. See *infra* note 164 and accompanying text.

substantial likelihood” of coercion because both the Supreme Court and circuit courts of appeals have found that adults are less susceptible to coercion in ordinary environments with a lack of particularly coercive pressure—such as legislative sessions or college graduations. When the adult claimants in *Mellen* demonstrated that their environment posed a “real and substantial likelihood” of coercion, the Fourth Circuit was willing to find a violation of the Establishment Clause notwithstanding the presumption against finding that adults have been unconstitutionally coerced. The Supreme Court has already dictated the farthest end of the spectrum: “[P]rayer exercises in public [K–12] schools carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, but it is most pronounced there.”¹³¹ Realizing and acknowledging where adults fall along the spectrum of susceptibility to coercion provides a framework for the proper analysis of the religious tenets of Clemson’s football program.

III. COLLEGE ATHLETICS AND THE CASE OF CLEMSON FOOTBALL

The incorporation of religion into the management and operations of Clemson’s football team is well documented and, frankly, undisputed. Several organizations of various professions—from law, sports, and higher education—have drawn attention to the religious culture, including the Freedom from Religion Foundation (“FFRF”), *Sports Illustrated*, and the *Chronicle of Higher Education*.¹³²

This Part demonstrates this Note’s proposed framework through a discussion of college athletics and Clemson football. It first analyzes college student-athletes’ unique susceptibility to coercive pressures due to their involvement in a particularly coercive environment. It then places college student-athletes on the susceptibility to coercion spectrum. Finally, it argues that several religious-oriented components of Clemson’s football program fail the coercion test under the standard for adults and violate the Establishment Clause.

¹³¹ *Lee*, 505 U.S. at 592.

¹³² See generally Rohan, *supra* note 2 (describing controversy around Dabo Swinney’s religious coaching style); FFRF Letter, *supra* note 3 (expressing constitutional concerns about Clemson football’s religious aspects); Wolverton, *supra* note 5 (describing religion’s role in Clemson’s football program).

A. The Coercive Environment of College Athletics

Although college student-athletes are mature adults, the environment of a college athletics team is the type of environment where higher susceptibility to coercion is present. Coaches and teammates both serve powerful, influential roles over a college student-athlete's beliefs, values, and health decisions. Coaches maintain control over playing time and scholarships during an athlete's time at the college, while also playing a significant role in a player's later transition to professional sports and to non-sport careers.¹³³ Meanwhile, college student-athletes, particularly younger college student-athletes, are uniquely susceptible to peer pressure due to the value they place on relationships with teammates and a desire to obtain approval from teammates.¹³⁴ The tendencies of college student-athletes to conform their behavior and beliefs to the pressures from coaches and teammates demonstrate the population's higher susceptibility to coercion and the particularly coercive nature of the college athletics environment.

1. The Relationship Between Coach and Student-Athlete

The powerful influence of coaches on college student-athletes' beliefs, values, and college experience—both with respect to athletics and academics—make student-athletes more susceptible to coercion. More specifically, “[t]he coach is the most important person in determining the quality and success of an athlete's sport experience.”¹³⁵ Coaches provide more than instruction on “athletic skill,” they bestow guidance and

¹³³ See Bryant, *supra* note 21, at 355–56 (“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 education. . . . [T]o some degree, a student-athlete's entire life is in the coach's hands.”); Abby L. Bjornsen & Danae M. Dinkel, *Transition Experiences of Division-1 College Student-Athletes: Coach Perspectives*, 40 *J. Sport Behav.* 245, 250–51, 258 (2017) (analyzing the role and influence of coaches in college student-athletes' life transitions). Coaches' control over players' playing time corresponds with control over which athletes might have future professional careers and, thus, the accompanying salaries of those careers. *Pray to Play*, *supra* note 18, at 4.

¹³⁴ See Kelley E.C. Massengale, Alice Ma, Kelly L. Rulison, Jeffrey J. Milroy & David L. Wyrick, *Perceived Norms and Alcohol Use Among First-Year College Student-Athletes' Different Types of Friends*, 65 *J. Am. Coll. Health* 32, 33, 36–37 (2017).

¹³⁵ Jean M. Williams, Gerald J. Jerome, Laura J. Kenow, Tracie Rogers, Tessa A. Sartain & Greg Darland, *Factor Structure of the Coaching Behavior Questionnaire and Its Relationship to Athlete Variables*, 17 *Sport Psych.* 16, 16 (2003).

influence an “athlete’s individual efficacy.”¹³⁶ As such, coaches contribute significantly to “the reinforcement of athlete identification, sometimes at the expense of other types of personal identification.”¹³⁷ Coaches develop the culture of their team, which in turn “determines the quality and success of” players’ personal, athletic, and academic experiences.¹³⁸ When coaches exhibit “supportive behavior,” student-athletes tend to have “goals, personality, and beliefs [that] are consistent with their coaches’ goals, personality, and beliefs.”¹³⁹ Further, coaches instill “performance values” that “are supported by a deeply institutionalized system” of certain values and “opportunity for those who adhere to [those] ideals.”¹⁴⁰ These influences are exaggerated by “the hierarchical nature of the coach-athlete relationship and the power that a coach has over a student-athlete.”¹⁴¹

Multiple studies have demonstrated coaches’ significant influence on various aspects of college student-athletes’ lives. Coaches who use “[w]ell-developed communication skills” have a positive impact on student-athletes’ general mental health—specifically anxiety and stress—and on student-athletes’ academic anxiety.¹⁴² When coaches demonstrate a belief in players’ academic abilities, players perceive significantly less stereotype threat related to academic performance.¹⁴³ If players “perceive that they are expected to perform well academically by one as significant as the coach,” they experience an improvement in “academic self-efficacy.”¹⁴⁴ Coaches even exert incidental influence over the likelihood that a college student-athlete will report concussion symptoms, as student-athletes have a “[p]erceived pressure to not report” that “is

¹³⁶ Deborah L. Feltz, Richard Schneider, Seunghyun Hwang & Nikolaus J. Skogsberg, Predictors of Collegiate Student-Athletes’ Susceptibility to Stereotype Threat, 54 *J. Coll. Student Dev.* 184, 186 (2013) (citation omitted).

¹³⁷ *Id.* (citation omitted).

¹³⁸ Seunghyun Hwang & Youngjun Choi, Data Mining in the Exploration of Stressors Among NCAA Student Athletes, 119 *Psych. Reps.* 787, 799 (2016).

¹³⁹ *Id.* (citation omitted).

¹⁴⁰ Steven R. Corman, Bradley J. Adame, Jiun-Yi Tsai, Scott W. Ruston, Joshua S. Beaumont, Jessica K. Kamrath, Yanqin Liu, Karlee A. Postheher, Rikki Tremblay & Lisa J. van Raalte, Socioecological Influences on Concussion Reporting by NCAA Division 1 Athletes in High-Risk Sports, 14 *PLOS One* 1, 17 (2019).

¹⁴¹ See Bryant, *supra* note 21, at 356.

¹⁴² Hwang & Choi, *supra* note 138, at 799–800 (citation omitted).

¹⁴³ Feltz et al., *supra* note 136, at 196. “Stereotype threat refers to the perceived risk of confirming, through behavior or performance, negative stereotypes that are held about one’s social identity.” *Id.* at 184.

¹⁴⁴ *Id.* at 196.

internalized through social interactions” with coaches and is complicated by players’ desire not to lose playing time.¹⁴⁵ The “social pressures from coaches” are also “considered to be [a] key social factor[] in the development of disordered eating behaviors.”¹⁴⁶

2. *Peer Pressure and Teammates*

In addition to the role of a coach in a college student-athlete’s life, college student-athletes also experience significant peer pressure to fit in with their teammates, which further contributes to their higher susceptibility to coercion. In part due to the significant amount of time spent in “sport-related activities” such as “practice, competition, strength and agility training,” college student-athletes spend a notable amount of time with teammates.¹⁴⁷ College student-athletes also place a “great emphasis” on their “athlete identity and sport participation,” which further influences the time spent with teammates.¹⁴⁸ College student-athletes simply “value [their] interpersonal and emotional relationships with their teammates.”¹⁴⁹ The “[p]ressure to conform” to the team that is felt by college student-athletes “can alter [the] attitude/behavior expressions” that the athlete “would otherwise display.”¹⁵⁰

The influential role of peer pressure from teammates over college student-athletes—especially with respect to matters of health—has been demonstrated by numerous studies. Peer pressure from teammates has an independent significant positive relationship with “disordered eating

¹⁴⁵ Corman et al., *supra* note 140, at 2, 16. This remains true even with increased “intervention efforts to promote reporting” of concussions, including “educating athletes about signs of brain injury and associated risks, and the importance of reporting symptoms.” *Id.* at 2.

¹⁴⁶ Stacey A. Gaines & Taylor Beth S. Burnett, Perceptions of Eating Behaviors, Body Image, and Social Pressures in Female Division II College Athletes and Non-Athletes, 37 *J. Sport Behav.* 351, 354 (2014) (citation omitted); see also Brittany N. Beckner & Rachael A. Record, Navigating the Thin-Ideal in an Athletic World: Influence of Coach Communication on Female Athletes’ Body Image and Health Choices, 31 *Health Comm’n* 364, 368–70 (2016) (finding that female college student-athletes “perceive[], and even obsess[] about, their coaches’ communication about their weight and body image . . . as a vital factor in their coach’s evaluation of [their] athletic abilities” and discussing the relevant implications, including the potential development of “unhealthy eating behaviors”).

¹⁴⁷ Massengale et al., *supra* note 134, at 33.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ See Corman et al., *supra* note 140, at 5.

behaviors.”¹⁵¹ Student-athletes also weigh factors such as “possible undesirable reactions from [their] teammates” when making decisions about reporting concussion symptoms.¹⁵²

Additionally, relationships with teammates have various impacts on the amount of alcohol that college student-athletes consume.¹⁵³ First-year student-athletes tend to identify teammates as their closest friends, and there is a significant relationship between student-athletes’ alcohol consumption and the “perceived peer approval [of] their closest friends.”¹⁵⁴ Further, “[p]erceived approval by upperclassmen friends” has a stronger relationship “than perceived [alcohol] use” by first-year college student-athletes’ closest friends,¹⁵⁵ which can exaggerate the influence of upperclassmen teammates over the beliefs and values of younger teammates.

3. Placing College Student-Athletes on the Susceptibility to Coercion Spectrum

Because of their involvement in a particularly coercive environment with a high likelihood of conforming to the unique pressures from coaches and teammates, college student-athletes should be considered more susceptible to coercion than typical adult college students regardless of the fact that they are “mature adults.” Similar to the cadets who were subject to the unique environment of a state-sponsored military college in *Mellen*,¹⁵⁶ and in contrast to the college students who were not involved in any special activity in *Tanford* and *Chaudhuri*, college student-athletes are involved in activities that have a particularly coercive atmosphere due to the substantial coercive influences of coaches and teammates.

If the coercive influences of coaches and teammates affect college student-athletes’ academic efficacy, propensity to develop eating disorders, and likelihood of reporting concussion symptoms,¹⁵⁷ it is not difficult to assume that those influences would also have an effect on

¹⁵¹ Gaines & Burnett, *supra* note 146, at 363. Pressure from romantic partners, however, does not have a significant independent contribution. *Id.*

¹⁵² Corman et al., *supra* note 140, at 16.

¹⁵³ See generally Massengale et al., *supra* note 134, at 37 (describing the influence of friends, including upperclassmen and peer teammates, on student athletes’ alcohol use).

¹⁵⁴ *Id.* at 36–37.

¹⁵⁵ *Id.* at 37.

¹⁵⁶ Pray to Play, *supra* note 18, at 5 (“College teams are highly regimented and disciplined, much like the military.”).

¹⁵⁷ See *supra* Subsections III.A.1 and III.A.2.

college student-athletes' religious beliefs, values, and practices. This is especially true given the "deeply institutionalized system" of values instilled by the coaching staff¹⁵⁸ and the "[p]ressure to conform" with teammates,¹⁵⁹ both of which have statistically significant relationships with a college student-athletes' tendency to alter their own beliefs, values, and practices.¹⁶⁰ In addition to those coercive pressures, the college athletics environment relies on an overarching "rigorous . . . system" that utilizes "mandatory . . . activities" and "regulation of conduct," aims to produce "physical and mental discipline," and emphasizes certain values.¹⁶¹ As such, adult college student-athletes are more likely than typical adult college students to be able to show a "real and substantial likelihood" of coercion. Thus, they are at least situated higher on the susceptibility to coercion spectrum than their non-athlete peers.

¹⁵⁸ Corman et al., *supra* note 140, at 17.

¹⁵⁹ *Id.* at 5.

¹⁶⁰ See *id.* at 16; Hwang & Choi, *supra* note 138, at 799.

¹⁶¹ *Mellen v. Bunting*, 327 F.3d 355, 361, 371–72 (4th Cir. 2003); Strength & Conditioning, Clemson Tigers, <https://clemsontigers.com/strength-conditioning> [<https://perma.cc/TKD6-57XN>] (last visited Sept. 28, 2020) ("The major goal of the Tiger Strength, Speed and Conditioning Program is to provide to our competitive athletes the means by which they develop attitude, work ethic, mental toughness, discipline and pride, in-self and total program."); Bruce Feldman, Alabama and Georgia Explain How 2017's Best Teams Define Discipline, *Sports Illustrated* (Apr. 3, 2018), <https://www.si.com/college/2018/04/03/alabama-georgia-discipline-nick-saban-kirby-smart> [<https://perma.cc/P3SR-NYMF>]. Coach Nick Saban's definition of discipline is "do what you're supposed to do, when you're supposed to do it, the way it's supposed to be done—all of the time." *Id.*

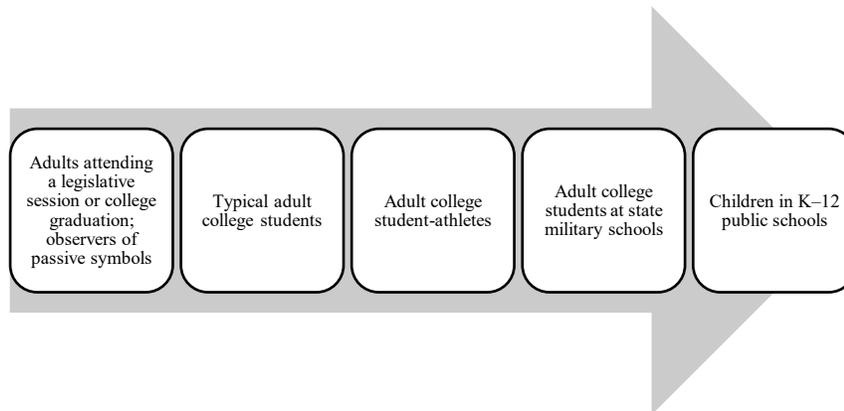


Figure 2¹⁶²

B. Application of the Coercion Standard for Adults to Religious Components of Clemson's Football Program

Since the members of Clemson's football team are adults, challenges to the constitutionality of religious aspects of the football program under the Establishment Clause would be analyzed under the more stringent coercion standard for adult claimants: the State impermissibly coerces an adult when there is a "real and substantial likelihood" of coercion.¹⁶³ Thus far, there are neither reports of punishments nor of reductions in playing time for those players who opt not to participate in the religious activities nor of benefits or increases in playing time for those players who choose to participate in the religious activities.¹⁶⁴ However, as college student-athletes, Clemson football players are already engaged in a special activity and environment that results in a higher susceptibility to

¹⁶² Figure 2: Revised Susceptibility to Coercion Spectrum, from least susceptible to most susceptible, incorporating adult college student-athletes. The gap in susceptibility between typical college students and college student-athletes is likely quite larger than the gap between college student-athletes and college students at state military schools due to college student-athletes' involvement in special activities with particularly coercive environments.

¹⁶³ See *supra* note 116 and accompanying text.

¹⁶⁴ Reportedly, when it comes to playing time, "[t]he only discriminating [Coach Swinney] does is based on talent." Wolverton, *supra* note 5. Coach Swinney "says: 'When we get out on the football field, it's not about if you're a Christian, it's about who's the best player.'" *Id.*

psychological coercion as a result of student-athletes' likelihood to conform to influential pressures from coaches and teammates.¹⁶⁵

While Coach Swinney has not been identified as specifically leading any distinct team religious activity, all of the team's activities take place in light of his comments regarding Christianity and his support and approval of those activities.¹⁶⁶ Coach Swinney has entwined religion into his recruiting efforts,¹⁶⁷ his press conferences,¹⁶⁸ and his overall leadership of the team.¹⁶⁹ While building the Tigers into "one of the premier college football programs in the country," Coach Swinney has kept "religion front and center."¹⁷⁰

1. Team Chaplain and Religious Programming

James Trapp was hired as the official, paid chaplain of Clemson's football program in 2011 following a personal invitation from Coach Swinney.¹⁷¹ While the constitutionality of the team's chaplain position may itself be questionable,¹⁷² the presence of an official chaplain as a member of the team's staff certainly contributes further to the team's already coercive environment. During Mr. Trapp's time as the official

¹⁶⁵ *Supra* Subsection III.A.3.

¹⁶⁶ See *supra* notes 8, 13–14 and accompanying text. The free exercise rights and free speech rights that Coach Swinney and members of his staff may have as government employees to speak on religious matters are a separate issue. See Adams, *supra* note 20, at 183–89; Bryant, *supra* note 21, at 334 ("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.").

¹⁶⁷ See *supra* notes 13–14 and accompanying text.

¹⁶⁸ For example, at Coach Swinney's first press conference of the season following the Tigers' 2019 National Championship, he stated: "I know what my purpose as a man is. That's to glorify God, . . . and use the game of football to equip young people for life." Dan Andros, *Clemson's Dabo Swinney Uses Very First Press Conference of the Season To Glorify God*, CBN News (Aug. 31, 2019), <https://www1.cbn.com/cbnnews/entertainment/2019/august/-clemsons-dabo-swinney-uses-very-first-press-conference-of-the-season-to-glorify-god> [<https://perma.cc/653W-HGHP>].

¹⁶⁹ See, e.g., Trahan, *supra* note 4 ("Under Swinney, Clemson has had an outwardly religious program . . .").

¹⁷⁰ Rohan, *supra* note 2.

¹⁷¹ FFRF Letter, *supra* note 3, at 1.

¹⁷² See generally *Pray to Play*, *supra* note 18, at 16–21 (articulating arguments against the constitutionality of official team chaplains of college athletics teams due to the coercive nature of the chaplain's activities and the State's endorsement of religion through the chaplain position). This Note focuses on the potential unconstitutional coercion of the chaplain's documented activities and programming rather than on the constitutionality of the position of chaplain itself.

Clemson team chaplain, he regularly held Bible studies in between drills, kept Bibles for distribution in his office in the Athletic Center, and conducted sessions on “being baptized” in the Athletic Center.¹⁷³ In addition to the eighty-plus devotionals held for the team within the period of a year, Mr. Trapp also organized transportation of the team to local churches for annual “Church Day[s]” during training camp.¹⁷⁴ Coach Swinney approved all of the devotionals, which were led by members of the coaching staff.¹⁷⁵

As a paid state employee acting in an official capacity and under Coach Swinney’s approval, Mr. Trapp was engaged in coercive behavior regardless of the players’ adult status. There is no reason to believe that Mr. Trapp had control or influence over coaching decisions such as playing time or scholarships.¹⁷⁶ However, he still served in an official role as he repeatedly gained access to players for activities that were not only clearly religious, but also preferenced a particular religious sect—Christianity—over others.¹⁷⁷ Even though the activities were technically voluntary,¹⁷⁸ “like other official activities,” they were “undoubtedly experienced as obligatory.”¹⁷⁹ The Court has previously refused to allow a lack of official mandatory attendance to save an otherwise unconstitutional coercive activity.¹⁸⁰ With the uniquely coercive

¹⁷³ FFRF Letter, *supra* note 3, at 2–3.

¹⁷⁴ *Id.* at 4; see also Rohan, *supra* note 2.

¹⁷⁵ FFRF Letter, *supra* note 3, at 4.

¹⁷⁶ Mr. Trapp did, however, take a clear role in recruiting. In fact, Coach Swinney made the chaplaincy a paid position so that Mr. Trapp would “be authorized to speak to recruits, which is rare for a public school team chaplain.” Rohan, *supra* note 2; see also Wolverton, *supra* note 5 (explaining Mr. Trapp’s interactions with a group of recruits at “the team’s biggest game of the year,” which included his emphasis on “the need to focus on more than football”).

¹⁷⁷ The Court has historically shown disfavor to the State having a clear, intentional preference for one religious sect over others. See *Engel v. Vitale*, 370 U.S. 421, 431 (1962) (“When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.”).

¹⁷⁸ See Rohan, *supra* note 2 (“After the FFRF made its complaints public in 2014, some Clemson players came out defending Swinney, saying that the Church Day, the bible studies and the public baptisms had been voluntary.”).

¹⁷⁹ *Mellen v. Bunting*, 327 F.3d 355, 372 (4th Cir. 2003) (finding VMI supper prayer unconstitutional despite its technical voluntariness). The FFRF has argued that “[c]oach suggestions, even if they violate the players’ religion or lack thereof, are not viewed as optional.” Pray to Play, *supra* note 18, at 3–4.

¹⁸⁰ See, e.g., *Lee v. Weisman*, 505 U.S. 577, 595 (1992); cf. *Engel*, 370 U.S. at 431 (“When the power, prestige and financial support of government is placed behind a particular religious

environment of college athletics, student-athletes' likelihood to conform to coach and peer pressure, the prevalence of religious activities in Clemson's football program, and the presence of the chaplain himself, any team member who did not want to participate in these religious activities would be subject to a "real and substantial likelihood" of coercion.

Additionally, a paid football team chaplain is distinguishable from a legislative chaplain, as no argument can be made that paid football team chaplains are "deeply embedded in the history and tradition of this country."¹⁸¹ The Court has recently expanded the historical approach to analyzing allegations of Establishment Clause violations outside the context of legislative prayer, but the approach is still largely undertaken in order to understand whether an otherwise non-coercive practice is consistent with the understanding of Establishment Clause "philosophy at the time of the founding."¹⁸² The practice of "university-sponsored chaplains" for college football teams traces back to merely 1981 when Head Coach Bobby Bowden appointed a team chaplain at Florida State University.¹⁸³ This is simply not the type of long-standing practice that the Court typically references in its historical approach to analyzing claims under the Establishment Clause.

Further, at least one of Mr. Trapp's regular activities—sessions on "being baptized" that were held in the Athletic Center¹⁸⁴—was clearly proselytizing in nature. While one may attempt to defend the other activities on grounds of character-building purposes,¹⁸⁵ it is difficult to conceive of a reason other than to save souls to justify hosting sessions for players about baptism. The Court has expressly indicated that proselytism was absent from the legislative prayer cases where the

belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.").

¹⁸¹ *Marsh v. Chambers*, 463 U.S. 783, 786 (1983) (explaining the historical significance of opening legislative sessions with prayer).

¹⁸² *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2087 (2019).

¹⁸³ *Pray to Play*, *supra* note 18, at 12–13.

¹⁸⁴ FFRF Letter, *supra* note 3, at 3.

¹⁸⁵ Former Clemson University President James Barker defended the coaching staff's "religious guidance" on the grounds of character building. Wolverton, *supra* note 5 ("One of the things we like to emphasize here is the importance of character," Mr. Barker says. "Sometimes it's hard to take spirituality out of that."). Sammy Watkins, another former star wide receiver, has also defended Coach Swinney's incorporation of religion on the grounds that Swinney "wants you to be a good person, a good man." Rohan, *supra* note 2 (internal quotation marks omitted).

presumption against finding that an adult had been unconstitutionally coerced was applied.¹⁸⁶ Any would-be religious dissenter who saw the baptism sessions as official activities of the team would likely feel a “real and substantial likelihood” of coercive pressure to attend these sessions.

2. *Player Baptisms*

In addition to educating players about baptism, Clemson’s football program has hosted actual baptisms directly following and during team events on and around the team’s facilities.¹⁸⁷ The first highly publicized baptism was that of DeAndre Hopkins, a former star wide receiver.¹⁸⁸ As the team gathered for the conclusion of a practice in 2012, “Rubbermaid troughs” were stationed on the practice field and Coach Swinney “invited [everyone] to stay and watch” Hopkins’s baptism “on the field.”¹⁸⁹ Few, “if any,” players left while “Hopkins climbed in [a tub], still dressed in his jersey and pads,” and proclaimed that he was living his life for Christ.¹⁹⁰ Then-Assistant Coach Jeff Scott tweeted that “seeing DeAndre Hopkins get Baptized in front of his teammates on Thursday after practice” was the “[h]ighlight of [his] week” along with a photo of the occasion.¹⁹¹ An estimated ten to fifteen player baptisms then occurred between 2013 and 2015, often during camp in “a little pond by [the team’s] practice field.”¹⁹² Former star defensive end Shaq Lawson said that the player baptisms happened “[j]ust from the word, what Coach Swinney was telling us, how he was preaching to us.”¹⁹³

Focusing on Hopkins’s baptism, it is clear that the event “bore the imprint of the State and thus put [players] who [may have] objected in an

¹⁸⁶ *Marsh*, 463 U.S. at 794 (“[T]here is no indication that the prayer opportunity has been exploited to proselytize.”); *Town of Greece v. Galloway*, 572 U.S. 565, 585 (2014) (“Absent a pattern of prayers that over time . . . proselytize, . . . a challenge based solely on the content of a prayer will not likely establish a constitutional violation.”). Justice Kennedy also noted that there was “no realistic risk” that the passive legislative symbols in *County of Allegheny* “represent[ed] an effort to proselytize.” *County of Allegheny v. ACLU*, 492 U.S. 573, 664 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

¹⁸⁷ See *supra* notes 10–12 and accompanying text.

¹⁸⁸ See Rohan, *supra* note 2.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ Coach Jeff Scott (@coach_jeffscott), Twitter (Sept. 2, 2012, 10:14 PM), https://twitter.com/coach_jeffscott/status/242445338303139841?lang=en.

¹⁹² Rohan, *supra* note 2.

¹⁹³ *Id.* (internal quotation marks omitted).

untenable position.”¹⁹⁴ Even though the event was technically voluntary since the players were “invited to stay and watch,”¹⁹⁵ it was “undoubtedly experienced as obligatory”¹⁹⁶ given its timing immediately following an assumedly mandatory official practice and student-athletes’ likelihood to conform to the coercive influences of coaches and teammates. There is a “real and substantial likelihood” that any players who would have objected felt coercive pressure to participate in the religious activity by gathering “as a group or, at least, maintain[ing] respectful silence” during the baptism.¹⁹⁷ By allowing the baptism to take place on the practice field, supplying the troughs, arranging for a local pastor to conduct the baptism, and inviting the team to stay and watch, the coaching staff certainly “directed and controlled” the religious activity.¹⁹⁸

This event was a “step from proselytizing to baptizing”¹⁹⁹ and the Court appears willing to find coercion—perhaps even in the legislative prayer setting—when a State action is proselytizing.²⁰⁰ There is little doubt that any potential objecting players would have felt a “real and substantial likelihood” of coercive pressure to attend the baptisms of players during or close to the time of official team activities at and around the Clemson practice facilities that were organized and facilitated by the coaching staff. These State actions should overcome the presumption against finding that an adult has been unconstitutionally coerced and surpass the higher coercion standard for adults.

¹⁹⁴ *Lee v. Weisman*, 505 U.S. 577, 590 (1992) (describing the degree of school involvement on graduation prayers that put school-age children in an “untenable position”).

¹⁹⁵ Rohan, *supra* note 2.

¹⁹⁶ *Mellen v. Bunting*, 327 F.3d 355, 372 (4th Cir. 2003) (describing the lack of voluntariness of the communal dining experience and supper prayer at VMI). This is especially true given the “high degree of control” that the coaches maintain “over the precise contents” of practice and “the timing, the movements, [and] the dress” of the players. See *Lee*, 505 U.S. at 597.

¹⁹⁷ *Lee*, 505 U.S. at 593 (describing “public pressure” and “peer pressure” on high school students during prayer at graduation ceremony). When the State “in every practical sense compel[s] attendance and participation in an explicit religious exercise,” objecting students are “left with no alternative but to submit” to participation and have “no real alternative to avoid” the activity. *Id.* at 597–98.

¹⁹⁸ *Id.* at 588 (describing the principal’s direction and control of the high school graduation prayer).

¹⁹⁹ *Pray to Play*, *supra* note 18, at 10.

²⁰⁰ See *supra* note 186 and accompanying text.

3. *Future Implications for Clemson Football*

No Clemson player has publicly complained about the religious tenets of the football program.²⁰¹ That, however, does not indicate the lack of a constitutional violation as much as it demonstrates a very complicated situation for players. The lack of reporting can be at least partly attributed to the power dynamics between coach and student-athlete and student-athletes' desire and likelihood to conform with the values put forth by coaches and teammates. As members of one of the top football programs in the country and with eyes towards championships and potential lucrative professional careers, it is conceivable that Clemson players do not want coaches or teammates to see them as unwilling participants. It is also possible that players tend to self-select into the program because of the religious environment, especially with the coaching staff's openness about the seemingly intentional incorporation of religion into the program.²⁰²

Regardless of why dissenters have not come forward, Clemson University—as a public institution under the purview of the Establishment Clause—should at least attempt to temper the religious activities of the football program, especially those that are proselytizing in nature. This is particularly important given the Fourth Circuit's acknowledgement of VMI's coercive environment in *Mellen v. Bunting*.²⁰³

Most of the press has focused on events from 2011 to 2013. While it is unclear which religious activities are still implemented in the program today, there is no reason to believe that the activities have ceased.²⁰⁴ The program's previously documented religious activities, some of which were certainly proselytizing in nature, clearly bore “the imprint of the State”—based on the coaching staff's level of direction and involvement, the timing of such activities in relation to mandatory activities, and the

²⁰¹ Aaron Kelly, a Jehovah's Witness who was a four-year starter at wide receiver during Coach Swinney's time as the receivers coach, has said that he “almost [felt] like an outsider” during religious activities. Rohan, *supra* note 2 (internal quotation marks omitted). Even after telling Coach Swinney that he would be unable to participate in Church Day, “Kelly stresses that he never felt as though Swinney had held his faith against him.” *Id.*

²⁰² See *supra* notes 11–14 and accompanying text.

²⁰³ 327 F.3d 355, 371 (4th Cir. 2003).

²⁰⁴ In a 2019 *Sports Illustrated* article, an FFRF attorney reported that Clemson University had not notified FFRF of any changes made to the program. Rohan, *supra* note 2. After the top quarterback recruit of the 2020 class visited Clemson, he told his mother: “You can feel the presence of God here He's here, Mom. He's here.” *Id.*

use of university facilities for the majority of the activities—and put players who may have objected “in an untenable position.”²⁰⁵ Notwithstanding their status as “mature adults,” if any players were to object and file suit, they would likely be able to show that they were subject to a “real and substantial likelihood” of coercion.

CONCLUSION

Even before the emergence of the modern coercion test, the Court “without exception . . . invalidated actions that further[ed] the interests of religion through the coercive power of government.”²⁰⁶ The religious aspects of Clemson’s football program undoubtedly “further the interests of religion,” but the Court’s hesitancy to find that an adult challenger has been unconstitutionally coerced complicates a potential Establishment Clause challenge. Other than articulating a presumption against such a finding, the Court has not directly indicated what it would require an adult to show in order to establish unconstitutional coercion. Justice Kennedy invited lower courts to determine “whether coercion is a real and substantial likelihood” in cases involving adult challengers to legislative prayer.²⁰⁷ Considering that invitation and the different approaches at the appellate level, one can assume that the Court would find a violation of the Establishment Clause if an adult showed that an action had a “real and substantial likelihood” of coercion. Various religious aspects of Clemson’s football program violate the more stringent coercion standard for adults, especially in light of college student-athletes’ higher susceptibility to coercion due to the particularly coercive environment of college athletics and student-athletes’ tendency to conform to the powerful influences of coaches and teammates. Although Clemson’s success on the football field continues, several of its program’s documented religious practices should fail an Establishment Clause challenge.

²⁰⁵ *Lee v. Weisman*, 505 U.S. 577, 590 (1992) (describing the position of school-age children subjected to prayers at a high school graduation).

²⁰⁶ *County of Allegheny v. ACLU*, 492 U.S. 573, 660 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

²⁰⁷ *Town of Greece v. Galloway*, 572 U.S. 565, 590 (2014).