STUDENT NOTE

The Diminishing Free Speech Rights of Military Chaplains in the Aftermath of Repealing "Don't ask Don't Tell"

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I. INTRODUCTION

For many religions homosexuality is a carnal sin. In fact, many religious leaders preach and counsel openly against homosexuality. Many military chaplains support this deeply embedded conviction.[1] The repeal of "Don't Ask Don't Tell" creates a clash between these military chaplains and the military's interest in eliminating discrimination against homosexuals. In the words of a retired navy chaplain, "Chaplains are entitled to preach whatever they think is necessary…but they certainly wouldn't be allowed to go around speaking against homosexuality… That would be counterproductive to good order and discipline."[2]

The repeal of "Don't Ask Don't Tell" potentially raises two free speech challenges chaplains might bring. First, there is an issue of censorship if chaplains want to continue preaching, or counseling, against homosexuality and are barred. Second, there may be a compelled speech claim if chaplains are forced to counsel homosexual soldiers in a way that conflicts with their religious beliefs. Chaplains' preaching against homosexuality seems to contradict the military's interest of successfully outlawing discrimination against homosexuals, the very purpose of repealing "Don't Ask Don't Tell". This clash will surely lead to a contentious First Amendment battle whose resolution will likely be found in our country's highest tribunal. If these premonitions of constitutional objections to either the revised, or existing law, or both, are in fact accurate, the Supreme Court may face a very difficult legal question.

II. HISTORY OF CHAPLAINCY

The practice of military chaplaincy dates back to America's Revolutionary War. [3]After the Constitution was ratified, Congress, through its enumerated power to provide for the conduct of our national defense[4], officially authorized the already prevalent practice of military chaplains.[5] The legitimacy of the chaplaincy

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[1] UNITED STATES DEPARTMENT OF DEFENSE, REPORT OF THE COMPREHENSIVE REVIEW OF THE ISSUES ASSOCIATED WITH A REPEAL OF "DON'T ASK, DON'T TELL", *available at* http://www.defense.gov/home/features/2010/0610_gatesdadt/DADTReport_FINAL_20101130(secure-hires).pdf (last visited April 6, 2011) (explaining that "a large number of military chaplains and their followers believe that homosexuality is a sin and an abomination, and that they are required by God to condemn it as such.")

[2] Adelle M. Banks, *Army Readies Chaplains before 'Don't Ask' Repeal*, USA TODAY, Mar. 25, 2011,http://www.usatoday.com/news/religion/2011-03-25-army-chaplains-gay_N.htm#uslPageReturn%23uslPageReturn.

[3] Katcoff v. Marsh, 755 F.Supp.2d 223 (2d Cir. 1985).

[4] *Id.* at 225.

[5] 10 U.S.C. §3073 (Outlining the creation of Military Chaplains).

was challenged, under the Establishment Clause, in Katcoff v. Marsh. [6] While the Supreme Court has not yet reached the issue, the court of appeals held the chaplaincy did not violate the Establishment Clause of the First Amendment.[7] The *Marsh* court reasoned that, viewed in a historical context, the framers of the Constitution did not perceive the military chaplaincy as an Establishment Clause violation.[8] Further, the court explained the necessity of chaplains to motivate soldiers, maintain the morale, and alleviate soldiers' personal stresses through spiritual support. [9] While the court was steadfast in its rationale, it refused to shield the subject of the chaplaincy from all possible future Constitutional challenges. [10] Still, the courts deference to the military when facing constitutional challenges was clear.[11] The *Katcoff* court explained, "The line where military control requires that enjoyment of civilian rights be regulated or restricted may sometimes be difficult to define. But caution dictates when a matter provided for by Congress in the exercise of its warpower and implemented by the Army appears reasonably relevant and necessary to furtherance of our national defense it should be treated as presumptively valid and any doubt as to its constitutionality should be resolved as a matter of judicial comity in favor of deference to the military's exercise of its discretion." [12] The question of the chaplaincy's constitutionality has not since been addressed by any higher courts. [13] The chaplaincy remains an active component of the United States military, and the extensive regulations applicable to military chaplains confirm this point.[14]

III. CURRENT APPLICABLE CHAPLAIN LAW

A crucial aspect of the military chaplaincy is a chaplain's dual role as both a religious leader and a staff director. [15] Chaplains staff responsibilities and religious responsibilities are specifically designated in two separate chapters of the military regulations. [16] While the chaplain's roles are differentiated in the military bylaws, the duties outlined by the separate chapters are all substantively religious. [17] For example, chaplains' staff responsibilities are essentially to advise the commander on matters of religion, morals and morale in regards to religious needs of assigned personnel, spiritual, ethical, and moral health of the command,

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[6] *Katcoff*, 755 F.Supp.2d at 234.
[7] See Richard D. Rosen, *Katcoff v. Marsh at Twenty-Two: The Military Chaplaincy and the Separation of Church and State*, 38 U. TOL. L. REV. 1137, 1142 (2007) (describing the "continued soundness" of Katcoff v. Marsh despite the lack of direct analysis by the Supreme Court).
[8] *Id.* at 232.
[9] *Id.* at 228.
[10] Rosen, *supra* note 7 (explaining the court's remand of the case to determine whether "government financing of military chaplaincy in limited areas … is constitutionally permissible.").
[11] *Katcoff*, 755 F.Supp.2d at 234.
[12] *Id.*
[13] Rosen, *supra* note 7, at 1142.
[14] *See* U.S. Dep't of Army, Reg. 165–1, Chaplain Activities in the United States Army para. 4–3(2004) [hereinafter 2004 AR 165-1], available at http://www.apd.army.mil/pdffiles/r165_1.pdf.
[15] 2004 AR 165-1, at para. 4–3.
[16] *Id.* para. 4–3, 4–4,4–5.
[17] *Id.* para. 4–5(a)(1)–(6).

programs related to moral leadership, etc.[18] These "staff" responsibilities, while designated separately from religious responsibilities, are, for the most part, religious in nature.

As for the chaplains' expressly delegated religious responsibilities, their overall mission is "to support religious spiritual, moral, and ethical needs of the army." [19] One of the more important regulations, in the context of this paper, is the requirement of chaplains to counsel all soldiers who seek their advice. This counseling obligation requires chaplains to be "available to all individuals, families, and the command for pastoral activities and spiritual assistance"[20], as well as "contribute to the enrichment of marriage and family living by assisting in resolving family difficulties." [21] In addition, regardless of a chaplain's religious affiliation, all chaplains must "facilitate the free exercise rights of all personnel."[22]

While the chaplain directives ensure free exercise and no denominational preference, there are regulations that protect the chaplains as well.[23] In the explanation of the chaplains' religious responsibilities it is abundantly clear that chaplains are not required to take part in any worship that is in contrast to their faith. [24] The protection for chaplains however, only extends to preaching and worship.[25] Chaplains are required to be available for counseling and advice to all command members, regardless of their own, or the individual command members, religious affiliations.[26]

Seemingly, the repeal of "Don't Ask Don't Tell" would require some revisions to the chaplain directives. In the bylaws, chaplains are required to counsel all service members. However, chaplains may wish not to counsel about homosexuality in a way that is contrary to their faith. For example, the repeal may mean family counseling for gay couples. This requirement could be problematic for those chaplains who are against counseling homosexual couples. However, according to the Congressional Report on "Don't Ask Don't Tell", the Pentagon is not recommending any changes in the existing chaplain law. [27] The recent chaplain training, readying the chaplains for the implementation of the

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[18] *Id.*
[19] *Id.* para. 4–1.
[20] *Id.* para. 4–4 (outlining how the chaplains will contribute to the spiritual well being of soldiers).
[21] *Id.*
[22] *Id.* para 4–4(b); *See also* 2004 AR 165–11, at 3-3 (explaining that the army does not favor one religion over another and "[A]ll denominations are viewed as distinctive faith groups, and all soldiers are entitled to chaplain support.").
[23] 2004 AR 165-11, at 4–4(e).
[24] *Id.*
[25] *Id.*
[26] 2004 AR 165-11, at 4–4.
[27] UNITED STATES DEPARTMENT OF DEFENSE, REPORT OF THE COMPREHENSIVE REVIEW OF THE ISSUES ASSOCIATED WITH A REPEAL OF "DON'T ASK, DON'T TELL" *available at* http://www.defense.gov/home/features/2010/0610_gatesdadt/DADTReport_FINAL_20101130(secure-hires).pdf (last visited Apr. 6, 2011).

repeal, echoes the Pentagon's assurance that no changes in the bylaws will be necessary. [28] Regardless of the Pentagon's desire to maintain the status quo in the current law, the repeal of "Don't Ask Don't Tell" will nonetheless raise free speech issues, whether the law stays the same or not.

IV. FREE SPEECH APPLICABLE PRECEDENT

A. Government Employee Test

Any challenges brought by chaplains in regards to their speech, or possibly even challenges assessing regulations, may be analyzed by the Supreme Court as a government employee speech case. Essentially, the justification behind restricting speech for government employees is the need for government efficiency. More specifically, the government entity must be able to function appropriately, and this sometimes requires limiting speech that may impair the organizations' ability to operate.[29] In Connick v. Myers, the court succinctly explains this underlying principle in saying, "[G]overnment officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[30] This need for government efficiency is even more present in military operations. The United States Court of Appeals for the Eleventh Circuit, in the case of Ethredge v. Hail states, "Courts must give great deference to the professional judgment of military authorities of a particular military interest." [31] Simply put, the military is very obviously a government operation, and those who work for the military are considered government employees. Hence, military chaplains would likely be subjected to the doctrinal government employee test established by the Supreme Court.

The current three part doctrinal test for government employees was firmly established by the Supreme Court in Garcetti v. Ceballos. [32] If the speech is pursuant to employees' official duties, it is government speech and is not protected by the First Amendment.[33] The First Amendment provides protection for private speech, with certain limitations, but government speech is not shielded in the same way.[34] As the *Garcetti* court explains, "When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[35]

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[28] Banks, *supra* note 2. (referring to the power point slides being presented to chaplains. Specifically explaining that "The Chaplains Corps' First Amendment freedoms and its duty to care for all will not change).
[29] Connick v. Meyers, 461 U.S. 138, 146 (1983).
[30] *Id.*
[31] Ethredge v. Hail, 56 F.3d 1324, 1328 (1995).
[32] Garcetti v. Ceballos, 547 U.S. 410, 126 (2006).
[33] *Id.* at 1960.
[34] *Id.*
[35] *Id.*

If the speech is not in pursuant to official duties, and is thus regarded as private, the court must next decide whether or not the speech was on a matter of public concern.[36] If the speech is not on a matter of public concern it is not protected.[37] If the speech does address a matter of public concern it is subject to the balancing test articulated in Pickering v. Board of Education.[38] This balancing test essentially determines whether or not the speech is unduly disruptive.[39] In order to ascertain whether or not that speech is unduly disruptive, the individuals right to free expression must be balanced with the government entity's ability to function.[40] As the court in *Pickering* articulated, "The problem in any case is to arrive at a balance between the interests of… a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[41] In summary, in order for a government employee's speech to be protected, the speech must not be in pursuant to an official duty, it must be on a matter of public concern, and it cannot be unduly disruptive.[42]

B. Precedent Regarding Military Chaplains in Particular

The Supreme Court has not yet addressed the free speech rights of military chaplains. In fact, very few courts have ruled on this issue.[43] The United States District Court for the District of Columbia ruled on the issue in 1997 in the case of Rigdon v. Perry.[44] In this case, the court held that a Chaplain's free speech rights were violated when the Air Force prevented chaplains from orally urging command members to write Congress regarding pending abortion legislation.[45] The facts of this case are fairly parallel to the situation military chaplains are facing now. The chaplain in this case was forced to choose between his faith, which require he oppose abortion openly, and his employer directives, which required him to be neutral on political matters.[46] Chaplains here are forced to choose between their faith, which requires opposition to homosexuality, and the

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[36] *Connick*, 461 U.S. at 1690.
[37] *Id.*
[38] Pickering v. Board of Education, 390, U.S. 986, 88 (1967).
[39] *Id. See also Connick*, 461 U.S 138.
[40] *Pickering* 390 U.S. at 568.
[41] *Id*.
[42] *Id. See also Connick*, 461 U.S. 138; *Garcetti* 547 U.S. at 126.
[43] *See* Klingenschmitt v. Winter, No. 06CV1832 (2006), *dismissed* (holding the alleged free speech violation for being forced to practice pluralistic religion could not be reached because the chaplain failed to properly amend his complaint after losing his endorsement.) see also Veitch v. Danzig, 135 F.Supp.2d 32 (D.D.C. 2001) (holding the alleged free speech violation could not be reached by the court because ultimately the chaplain's dismissal was for disrespect of a superior officer and not disagreement over divine doctrine).
[44] Rigdon v. Perry, 962 F.Supp. 150 (D.D.C. 1997).
[45] *Id.*
[46] Steven H. Aden, *The Navy's Perfect Storm: Has a Military Chaplaincy Forfeited its Constitutional Legitimacy by Establishing Denominational Preferences?,* 31 W. ST. U. L. REV. 185, 199 (2004).

speech restrictions inherent in the implementation of the repeal of "Don't Ask Don't Tell".

Since this case was decided before *Garcetti*, and also analyzed the constitutionality of regulations, not speech, the *Rigdon* court did not determine whether or not the chaplain's speech was pursuant to their official duties.[47] Instead, the court drew a distinction between a chaplains acting in their religious capacity versus their official capacity.[48] The court reasoned that when [chaplains] are acting in their religious capacity, they are not acting as representatives of the military or on official duty.[49] Further, the *Rigdon* court explained, "Military chaplains can in fact have communications with their congregants solely in their religious capacity, regardless of the fact that they have an official status as members of the military."[50] The court never explicitly articulates that when speech falls under a chaplain's religious capacity, it is private, because the *Rigdon* court is analyzing the constitutionality of the regulations on speech, rather then speech itself.[51] However, the rationale indicates that chaplain's speech, in their religious capacity, is private, because if it was government speech, it would receive no First Amendment protection, and the regulations would be upheld.[52]

In addition, in order for the *Rigdon* court to proceed to forum analysis, as they do, the regulations must be viewed as restricting solely private speech. This is because forum analysis only comes into the picture when private speech is being assessed.[53] Courts use forum analysis to determine the protection that the private speech is granted in a given situation.[54] For example, a court must determine whether the forum is public, non-public, or designated in order to resolve the level of scrutiny given to the speech.[55] However, when the speech is classified as government speech, forum analysis is not necessary.[56] Therefore, the fact that the *Rigdon* court reached the question of forum infers that the speech was classified as private. Finally, the *Rigdon* court does speak to the general principle of deference to the military.[57] However, the court notes that the defendants failed

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[47] *Rigdon*, 962 F.Supp. 150.
[48] *Id.* at 159.
[49] *Id.*
[50] *Id.*
[51] *Id.* at 152.
[52] *Contra* Ira C. Lupu & Robert W. Tuttle, *Instruments of Accommodation: The Military Chaplaincy and the Constitution*, 110 W. VA. L. REV. 89, 164 (2007) (concluding that "Despite the language in Rigdon, the decision does not stand for the proposition that the speech of chaplains in faith group worship is equivalent, for purposes of constitutional analysis, to private religious speech. Instead, the decision interprets specific restrictions on the content of official speech and finds that the policies underlying the restrictions do not apply to religious speech of chaplains in the context of faith group worship.").
[53] Pleasant Grove City v. Summum, 555 U.S. 460 (2009).
[54] Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 45 (1983).
[55] *Id.*
[56] *Summum*, 555 U.S. 460 (2009).
[57] *Perry Education Assn.,* 460 U.S. at 162.

to show how the chaplains' speech would threaten the loyalty and morale of the military, and therefore, the regulations could not be upheld.[58]

C. Precedent Regarding Prison Chaplains in Particular

The free speech rights of prison chaplains also have not been addressed by the Supreme Court, but have been analyzed by the District Court of Ohio in Akridge v. Wilkinson.[59] Similar to *Rigdon*, this case was decided prior to *Garcetti*, and therefore the court did not analyze whether or not the speech was pursuant to the chaplain's official duties.[60] In contrast to *Rigdon*, this court was analyzing the constitutionally of the speech, rather then a regulation.[61] Therefore, the *Akridge* court did use the government employee analysis established in *Pickering* and *Connick*.[62] In *Akridge*, the chaplain prevented a gay inmate from leading the choir band in a Protestant service.[63] Akridge specifically said, "I didn't know you were gay. But since you tell me you are gay, then that is reason enough for you not to … lead the band."[64] The court found the speech about homosexuality to be a mixed matter of public and private concern and therefore subjected the speech to the *Pickering* analysis.[65] The court held that under the *Pickering* balancing test, the speech is not entitled to First Amendment protection because it undermined prison officials legitimate interests in preventing discrimination on basis of sexual orientation and interests in the ordered administration of the institution and its policies.[66]

The chaplains in this instance are therefore facing a body of law that is not perfectly clear. While the Supreme Court has established the government employee test, they have never reached the questions about the legitimacy of the chaplaincy, the free speech rights of chaplains in the military, or the free speech rights of prison chaplains. Lower courts have addressed all of these questions but reached different conclusions.[67] While the legitimacy of the military chaplaincy is relatively sound, the free speech rights of chaplains are much more controversial. *Rigdon* classified chaplain speech as private, while *Akridge* found it to be unprotected speech.[68] However, neither lower court used the *Garcetti* analysis. This is applicable precedent the Supreme Court will be analyzing when presented with the question at hand.

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[58] *Id.*
[59] Akridge v. Wilkinson, 178 Fed.Appx.474, 2006 WL 1112855 (C.A.6 (Ohio)).
[60] *Id.*
[61] *Id.* at 476.
[62] *Id*. at 478.
[63] *Id.* at 476
[64] *Id.*
[65] *Id.* at 478.
[66] *Id.* at 480.
[67] *See Akridge*, *178* Fed.Appx.474, 2006 WL 1112855 (C.A.6 (Ohio)). *See also Rigdon*, 962 F.Supp. 150.
[68] *Akridge*, 178 Fed.Appx.478, 2006 WL 1112855 (C.A.6 (Ohio)).

V. FRAMING CHAPLAINS' FREE SPEECH CLAIMS

Chaplains have the ability to frame their claims in two main ways. They could bring a censorship claim, essentially a paradigmatic free speech violation. The First Amendment is explicit in its wording that "Congress shall make no law abridging the freedom of speech."[69] As such, censorship is the most classic example of a free speech violation. This would occur if chaplains were unable to preach or advise against homosexuality. A censorship claim could be brought if chaplains were fired and asked the court to analyze their speech. A censorship claim could occur if chaplains wanted to challenge existing regulations or a hypothetical regulation forbidding chaplains from counseling soldiers that homosexuality was a sin. The latter of these two regulations could also framed as a compelled speech claim, requiring chaplains to counsel soldiers positively about homosexuality, and will be discussed in that section. Chaplains could bring compelled speech claims both if they were fired for failure to follow regulations or if they wished to challenge the constitutionality of the restrictions.

VI. CENSORSHIP AND GOVERNMENT EMPLOYEE ANALYSIS

A. Pursuant to Official Duties

The *Garcetti* court holds that when a government employee is acting pursuant to his official duties, his speech is not protected under the First Amendment.[70] The court notes in making this determination, however, that it is not dispositive that a view is being expressed at the workplace or that the subject matter of the speech concerns employment.[71] Rather, the threshold matter is that a government employee is someone who goes to work and performs the tasks he or she is paid to perform, and if that task is part of what the employee is employed to do, it is pursuant to official duties.[72] The court did however, decline to create a bright line rule for defining the scope of what employee duties actually are.[73] If the court, in analyzing the speech of chaplains, chooses to accept the *Garcetti* analysis, the first conclusion would be that chaplains are government employees and they are paid for their duties. Further, the tasks the chaplains perform, preaching and advising, are part of what they are employed to do. [74]Therefore, chaplains are in fact preaching and advising pursuant to their official duties, and their speech would be considered government speech. This conclusion could suggest that if chaplains were fired for preaching or advising against homosexuality, their termination would be constitutional. While this holding is possible, some of the dicta in the *Garcetti* opinion may be helpful to the chaplains. As Reed notes, the majority opinion addressed the fact that if public

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[69] U.S. CONST. amend. I.
[70] *Garcetti*, 547 U.S. at 1960.
[71] *Id.* at 1964.
[72] *Id.* at 1960.
[73] *Id.* at 1961.
[74] 2004 AR 165–11.

employees wish to express their grievances, they could create "internal venues" for doing so.[75] The chaplains may point to this in their argument because creating an internal venue for expressing their dislike of homosexuality is not feasible in the military setting.

The *Rigdon* court creates a distinction between a military chaplain's official conduct and religious conduct.[76] This idea of two distinct roles is not a foreign concept, as many of the military's regulations separate the two types of duties.[77] The issue the *Rigdon* court struggles with is defining these distinct roles.[78] As explained in the section about current applicable chaplain law, separating religious and official conduct is often difficult because even under the military bylaws, all chaplain duties are substantively religious and the separation of the roles is vague at best.[79] Regardless, the *Rigdon* court must solidify these separate categories in order to establish the extent of the free speech protection for chaplains.

In attempting to separate these roles, the *Rigdon* court relies on the status of military chaplains as explained in the pertinent regulations. [80] Specifically, the court refers to the chaplains' legal status as "rank without command."[81] Relying on this categorization, the court creates the distinction between chaplains' military and religious responsibilities.[82] Aden elaborates on this point in saying, "The court drew a clear distinction between a chaplain's exercise of military authority, authority severely limited by dearth of command status, and his exercise of religious authority as a representative of a religious denomination and counselor to willing participations…"[83] The *Rigdon* court relies on the chaplains explanation that due to his military status, "rank without command", if the chaplain did have a problem with personnel, he could not pursue "disciplinary action" himself, but rather would have to approach a commanding officer.[84] Based on this the *Rigdon* court concludes that the only possible solution is to distinguish a chaplains religious roles from the official roles.[85]

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[75] Jessica Reed, Note, *From Pickering to Ceballos: The Demise of the Public Employee Free Speech Doctrine*, 11 N.Y. CITY L. REV. 95, 118 (2007).
[76] *Rigdon*, 962 F.Supp. at 159.
[77] 2004 AR 165–11 (distinguishing between chaplains staff responsibilities and religious responsibilities).
[78] *Rigdon*, 962 F.Supp. at 159.
[79] CDR William A. Wildhack III, CHC, USNR, *Navy Chaplains at the Crossroads: Navigating the Intersection of Free Speech, Free Exercise, Establishment, and Equal Protection*, 51 Naval L. Rev. 217 (2005) (highlighting the overlap between religious and official duties for chaplains). *See also* Kenneth J. Schweiker, Note, *Military Chaplains: Federally Funded Fanaticism and the United States Air Force Academy*, 8 RUTGERS J. L. & RELIGION 5, 26 (2006) (explaining how the job descriptions for chaplains are too "open ended" and will only end in "disaster.").
[80] *Rigdon*, 962 F.Supp. at 157.
[81] *Id.*
[82] *Id.* at 159.
[83] Aden, *supra* note 46, at 201.
[84] *Rigdon*, 962 F.Supp. at 157.
[85] *Id.*

One of the primary reasons the *Rigdon* court supplies to distinguish religious duties from official duties is the idea that preaching is not an order and therefore not an official duty. The military was attempting to have the court characterize the religious speech here as an order, so that the speech would fall in the category of "official conduct", and therefore be government speech, which could be regulated.[86] The military argues that soldiers may "feel constrained to adhere to what may be perceived as an 'order' from a … chaplain."[87] The court dismisses this argument by reasoning that "[the idea] that parishioners might interpret religious sermonizing as a military order defies common sense."[88] The court explains that if chaplains were in fact giving orders when speaking religiously soldiers would be required to believe in things such as the resurrection of Jesus or the idea that Moses wrote the Torah.[89]

After the *Rigdon* court distinguishes the two roles, they find that chaplains speech to be religious, rather then official.[90] The explanation for this finding lies in the courts narrow interpretation of an official duty.[91] This is the main difference between the *Rigdon* and *Garcetti* courts' analysis. In *Rigdon,* the court dismisses the military's claim that, since the chaplain's primary duties are religious functions, when they perform them, they are acting in their official duty.[92] This directly opposes the broader understanding of official duty in *Garcetti*, which is, if the task is part of what the employee is employed to do, it is in fact an official duty.[93] However, similar to the *Garcetti* analysis, the court here does not create a bright line rule between what is and what is not an official duty.[94] Yet, the *Rigdon* court does reason that some of the words the chaplains utter are not an official act taken "under the color of the military."[95] In essence, the *Rigdon* court seems to be concluding that a chaplain's official conduct could be government speech, but solely religious conduct is private speech.[96]

Finally, the *Rigdon* court seems to be applying the idea of acting in a religious capacity to both preaching and advising.[97] Throughout the opinion the court refers specifically to "preaching" or "conducting worship", yet when discussing the fact that religious speech is not an order, the court explains, "If a chaplain were to say to a congregant who had confessed to having a bitter argument with his wife, 'Go and forgive her, and say ten Hail Mary's, surely this

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[86] *Id* at 160.
[87] *Id.* at 160.
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.* at 159.
[92] *Id.* at 159.
[93] *Garcetti*, 547 U.S. at 1960.
[94] *Rigdon*, 963 F.Supp. at 164.
[95] *Id.* at 160.
[96] *Id.*
[97] *Id.*

could not by any stretch of the imagination be considered the issuance of a military order…"[98] This assertion indicates that when the court is discussing this dual role of official conduct and religious conduct, advising falls in the latter category.

There are two possibilities that could occur if the court accepts the *Rigdon* analysis of the "dual role" and concludes that the chaplain's speech against homosexuality is purely private speech. If the Supreme Court chose to follow this analysis then religious preaching may not be considered in pursuant to official duties, and would be a communication solely in the chaplains' religious capacity. The likely path the court would take is to finish the rest of the doctrinal test for a government employee. Meaning, the court would proceed to analyze whether the speech was on a matter of public concern under *Connick*, and whether the speech was unduly disruptive by assessing its value in the *Pickering* balancing test.[99] Since *Connick* and *Pickering* are the controlling Supreme Court cases, it is highly unlikely the Court would follow the analysis of *Rigdon* any further then possibly accepting *Rigdon's* suggestion that religious speech is private speech.[100]

The second possibility, in the unlikely event that the court chooses to follow *Rigdon* without finishing the government employee test, classifying the speech as purely private, the court would be to proceed to forum analysis and strict scrutiny.[101] The court would then have to choose a standard of review based on the forum.[102] If the court was following *Rigdon's* forum analysis, the military would be a designated public forum requiring strict scrutiny for any content based speech restriction.[103] Professor Green argues that the military has established a limited public forum by allowing worship services.[104] However, he acknowledges that the limited forum only extends so far.[105] Further, he argues that a chaplains "interest may be curtailed by the military simply through the elimination of the forum."[106]

Therefore, even if the court chose this unlikely alternative, it is highly doubtful they would follow the *Rigdon* courts choice of forum. It is more likely the court would classify the forum as non-public, as it is a military base.[107] Still,

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[98] *Id.* at 164.
[99] *Pickering* 390, U.S. at 568; *See also Connick*, 461 U.S. 138.
[100] Again however, *Garcetti* is the controlling law for assessing whether or not the employee was acting "pursuant to official duties" so it is feasible that the court will not accept any of the rationale by the *Rigdon* court.
[101] *Rigdon*, 963 F.Supp.150.
[102] *Id.* at 163.
[103] *Id.*
[104] Steven K. Green, *Reconciling the Irreconcilable: Military Chaplains and the First Amendment*, 110 W. VA. L. REV. 167, 185 (2007).
[105] *Id.*
[106] *Id.*
[107] *See* United States v. Albertini, 472 U.S. 675 (1985) (holding that a military base is not public forum simply because the general public is invited for a day); Greer v. Spock, 424 U.S. 828 (1976) (holding that "the business of a base is to train soldiers, not to provide a public forum").

the distinction here would make no difference because even as a non-public forum, strict scrutiny is still required for religious restrictions, as they are always considered view point restrictions.[108] If the court proceeded to strict scrutiny, the military would not have a difficult time articulating a compelling interest. For example, the court would likely find the implementation of the "Don't Ask Don't Tell" repeal to be compelling. The only problem the military would face is having the restrictions narrowly tailored. That was the aspect of strict scrutiny the military failed to comply with in the *Rigdon* case.[109] It is unlikely the court would proceed with the latter possibility, especially given the doctrinal test for government employees coupled with the fact that the *Rigdon* court was assessing the military regulation on the chaplain's speech and not the speech itself.

The Supreme Court would have to make a fairly straightforward choice in the initial stage of the analysis. The court would either classify the chaplain's speech as private, as *Rigdon* did, or pursuant to official duties, and thus government speech, as the *Garcetti* court did. However, there may be a constitutional problem with either classification. In creating the military chaplaincy, the government had to restrict chaplains' duties to only religious duties in order to not run afoul of the establishment clause.[110] The chaplains were not able to have any "sovereign authority" because then the separation of church and state would not be achieved.[111] This indicates that all of the chaplains' duties are religious.[112] If *all* the duties are religious, then preaching and advising would always be pursuant to official duties and the court would be forced to reject the alternative analysis posed by *Rigdon* separating religious and official duties.

Yet, rejecting the alternative analysis and accepting *Garcetti's* conclusion that chaplain's speech is government speech also threatens the principles of the establishment clause by attributing religious speech to the government.[113] Green elaborates on this conundrum when he explains that chaplains are employed by the army to perform religious duties and in performing these duties they are acting as government agents.[114] Therefore, it would seem obvious that "their religious speech and activity is government speech, not that of their own."[115] However, Green goes on to suggest that the "dual authorities" the military regulations create,[116] and are thus analyzed in *Rigdon*, make it seem as though the "speech that accompanies a worship service or counseling session may not necessarily be attributable to the government to justify the same type of government constraints

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[108] Lambs Chapel v. Center Moriches School District, 508 U.S. 384 (1993).
[109] *Rigdon*, 963 F.Supp. at 164.
[110] Steven H. Aden, *supra* note 46 (acknowledging that chaplain's duties in the military are solely religious).
[111] *Id.* at 209.
[112] *Id.*
[113] Steven K. Green, *supra* note 104, at 182.
[114] *Id.*
[115] *Id.*
[116] *Id.*

as have been legitimated in the Court's government employee jurisprudence."[117] His conclusion, referencing Professor Lupu and Tuttle,[118] is that the status of chaplains must be viewed as a "hybrid form of government employee."[119] In simpler terms, the Court would need to essentially determine which of the two classifications of the speech offends the establishment clause less.

B. A Matter of Public Concern

As explained above, *Connick* stands for the proposition that speech on a matter of public concern is more likely to be considered protected by the First Amendment (even as a government employee), but is still subjected to a balancing test.[120] If the Chaplains speech was able to triumph over the *Garcetti* standard, the speech would then be subject to the "public concern" test. The *Connick* court explains that in order to determine if employee speech was a public concern, it is necessary to look at content, form, and context, as well as time, place, and manner.[121] In general, "[W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of personal interest…", the speech is not protected.[122] The requirement of "speech on a matter of public concern" can be viewed in a broad or a narrow context. The chaplains' speech would more likely be protected if the court analyzed this requirement in a broad fashion.

i. Narrow View

If the court takes a narrow view one of the things it would likely consider is whether or not the speech brought to light the wrong doing of a public institution. In *Connick*, the court considered the employee's questionnaire at issue as a matter of personal interest because she did not seek to discuss the responsibilities of the institution to the public or bring light of wrongdoing of the institution to the public.[123] Rather she was attempting to gather ammunition for another round of controversy with her superiors.[124] In contrast, in Pickering, the teacher was attempting to bring light of the wrongdoing of the school system to the attention of the public.[125] Under *Pickering* and *Connick* it is possible that chaplains' speech would be seen as a matter of public concern if they were preaching against the repeal of "Don't Ask Don't Tell". This could be interpreted

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[117] *Id.*
[118] Ira C. Lupu & Robert W. Tuttle, *supra* note 52, at 164 (concluding that "a chaplains speech in faith group worship, falls in a unique netherworld between a government employee's job-related speech (restrictable under Garcetti) and the expression of a private individual (protected against compulsion by Wooley and Barnette))".
[119] *Id.*
[120] *Connick*, 461 U.S. 138.
[121] *Id.* at 147.
[122] *Id.*
[123] *Id.* at 148.
[124] *Id.* at 148.
[125] *Pickering*, 390 U.S. 986.

as chaplains attempting to show the disservice the military is doing to the public by allowing the repeal of "Don't Ask Don't Tell". However, following this line of reasoning, if the chaplains were preaching against homosexuality, and not the repeal of "Don't Ask Don't Tell", the court, like in *Connick*, may classify the speech as simply ammunition against superiors. The *Connick* court explained that an employee expressing contempt with the status quo falls into the category of speech on a matter of personal interest.[126] If the chaplains were preaching against homosexuality, this could be interpreted as their personal moral displeasure with the idea of homosexuals in the military. In other words, instead of bringing to light what the military is doing wrong, they would simply be expressing a personal opinion, which is at odds with message being portrayed by superior officers in support of the repeal.

Support for this conclusion is found in Akridge v. Wilkinson.[127] The district court in *Akridge* explains that had the prison chaplain been commenting on the social or legal ramifications in general about homosexuality, the speech may have been protected.[128] However, the chaplains personal opinions about "whether the Protestant faith condemns homosexuality as a sin, regardless of their validity, do not constitute matters of public concern."[129] This distinction seems to support the conclusions that would be reached applying the *Connick* analysis. Preaching against the repeal of "Don't Ask Don't Tell" would speak to the social and legal ramifications of homosexuality. However, preaching against homosexuality in the general moral fashion associated with a chaplain's faith, would not constitute a matter of public concern. Further, the *Akridge* district court explained that, "Plaintiffs views … would be sending a message to other inmates of tolerance or acceptance of homosexuality incompatible with the Protestant faith and plaintiff's own beliefs do not involve matters of public concern." [130]This, again, leads to the inference that preaching against homosexuality, as a morale issue, in reference to tenants of a faith, would not be speech on a matter of public concern. However, as explained below, the circuit court in *Akridge*, partially agreed with the lower court, but also took a broader view of public concern.[131]

The conclusion reached by this narrow view of "public concern" under *Connick, Pickering*, and the district court in *Akridge*, is directly at odds with the analysis of speech in *Rigdon*. The *Rigdon'*s courts assessment would lead to the deduction that that the preaching would in fact have to be against homosexuality and not about the repeal of "Don't Ask Don't Tell". This is because, as the *Rigdon* court explains, chaplains are not allowed to participate in political activities while on duty.[132] However, that regulation does not prevent chaplains from "discussing the morality of current issues in their sermons or religious

[126] *Connick*, 461 U.S. at 148.
[127] *Akridge*, 178 Fed.Appx.474.
[128] *Akridge*, 178 Fed.Appx. at 477.
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Rigdon*, 963 F.Supp. at 157.

teachings".[133] This would seem to indicate that the chaplains could preach against homosexuality but not against the repeal of "Don't Ask Don't Tell" because homosexuality could be considered a moral issue addressed in religious teachings, while preaching against the repeal of "Don't Ask Don't Tell" could be considered overtly political. However, it is possible, under this *Rigdon* analysis, that preaching against "Don't Ask Don't Tell" could still be allowed because it could be classified as "indirect encouragement."[134] The *Rigdon* court explained that the chaplains were not intending to directly influence the votes of the soldiers, but rather suggesting they contact their respective legislative members who would then vote regarding a piece of legislation.[135] Therefore, seemingly, military chaplains in this situation could possibly preach against "Don't Ask Don't Tell" if re-implementation of the policy was put up for Congressional vote, but not popular vote.

Another clash between this "narrow view" and the *Rigdon* court analysis is the impermissible use of speech, according to *Connick*, to "gather ammunition against ones superiors." [136]This is because, according to the chaplain regulations, "there is no command relationship in the Chaplain corps."[137] It can be inferred from this bylaw that chaplains in fact then are essentially unable to gather ammunition against their superiors. Aden explains, "This prohibition precludes a superior or subordinate relationship between chaplains when it comes to purely religious matters, such as sermon content or aspects of religious activity. Because there is no superior/subordinate relationship in matters of religion, there can be no disrespect to a superior when discussing or defending a religious practice."[138] This lack of superior relationship undermines the narrow view of public concern because there can be no assumption that the speech's purpose is to "gather ammunition against superiors."

ii. Broad View

While the narrow view of the "public concern" aspect is one the court could possibly take, it is much more likely that the court would take a broad view. In *Akridge*, the circuit court (in reviewing the case), clarified that the chaplain's speech could be viewed as a "mixed speech" situation.[139] It agreed with the district courts assessment of the speech as private because his statements were made about his authority as a chaplain to make final decisions about worship. They also reasoned, using a broader view of "public concern" that since the speech was about homosexuality, and the "propriety" of homosexuality had been public debate in the national spectrum, there were aspects of the speech that were

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[133] *Id.* at 153.
[134] *Id.* at 157.
[135] *Id.*
[136] *Connick*, 461 U.S. at 148.
[137] Aden, *supra* note 46, at 210.
[138] *Id.*
[139] *Akridge*, 178 Fed.Appx.474 at 478.

matters of public concern.[140] This broader view seems to indicate that the chaplains' speech against homosexuality would in fact be on a matter of public concern.

The language in various Supreme Court decisions supports this broader view. In San Diego v. Roe the court explained that "[P]ublic concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication".[141] In *Connick*, the court reasoned, that speech was on a matter of public concern when it can "fairly be considered as relating to any matter of political, social, or other concern in the community …"[142] The Supreme Court recently cited to both of those statements in the decision it handed down in the case of Snyder v. Phelps.[143] The court in *Snyder* begins its analysis of public concern by citing San Diego v. Roe[144], which explains that, "the boundaries of the public concern test are not well defined."[145] The court goes on to explain that, "Although that remains true today, we have articulated some guiding principles … that accord broad protection to speech to ensure that courts themselves do not become inadvertent censors."[146] In *Snyder*, while the court admitted that the speech could be hurtful, they concluded that the subject matter of the signs plainly fell into a matter of public concern. Explaining their reasoning the court expressly classified the issue of homosexuality as a matter of public concern.[147] The court said, "[T]he issues they [the signs] highlight –the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving Catholic clergy–are matters of public import."[148] Since the Supreme Court has so recently classified homosexuality in the military as a matter of public concern, it would be very unlikely for them to hold that the chaplain's speech in this instance was not on a matter of public concern. However, it is necessary to acknowledge some of the other factors the court has previously considered in assessing whether speech was on a matter of public concern.

The fact that speech has a controversial nature would not undermine the conclusion that the speech was in fact on a matter of public concern.[149] For example, in the case of Rankin v. McPherson, a clerical employee made comments about killing the president.[150] The court, acknowledging the *Connick* context requirement, explained that, "The inappropriate or controversial character of a statement is irrelevant to the question of whether it deals with a matter of

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[140] *Id.*
[141] San Diego v. Roe, 543 U.S. 77, 84 (2004).
[142] *Connick*, 461 U.S. at 146.
[143] Snyder v. Phelps, No. 09-751, slip op. (U.S. March 2, 2011).
[144] *Id.* at 6.
[145] *Roe*, 543 U.S. 77 at 83.
[146] Snyder v. Phelps, No. 09–751, slip op.
[147] Snyder v. Phelps, No. 09–751, slip op at 8.
[148] *Id.*
[149] *See* Rankin v. McPherson, 483 U.S. 378 (1987); *See also* Snyder, No. 09-751, slip op at 8.
[150] Rankin v. McPherson, 483 U.S. 378 (1987).

public concern."[151] More recently, in *Snyder*, the court cited this very statement in explaining that although the speech fell short of "refined social or political commentary"[152] and "its contribution to public discourse may be negligible" [153]and it "inflicted great pain"[154], it was still a matter of public concern. The chaplains' speech will surely be classified as controversial, and therefore the *Rankin* and *Snyder* courts analysis is very helpful to the chaplains' claims and further solidifies the likelihood that the court will take a broader view of public concern. However, the "controversial character" may still play into the balancing test.

Another distinguishing factor that strengthens the argument in favor of protecting the speech as a matter of public concern is that the speech in this case is religious. In general, religious speech tends to receive more protection and therefore[155], religious speech is always a matter of public interest. Even if the court takes the narrow view of public concern, as explained above, the fact that the speech is religious may allow the chaplains to overcome the suggestion, in *Connick*, that the speech must "bring to light the failure of a public institution". As the *Rigdon* court explained, they refused to distinguish between religious speech and religious speech with political undertones.[156] This is a very positive point for the Chaplains. Since the speech in *Connick* was not religious, it may have been given less deference than the speech in *Rigdon*. Meaning, the court may give more deference to the chaplains, regarding the speech being a matter of public concern, because they do not wish to split hairs over whether or not preaching against homosexuality is religious or political. It is possible that the court would be willing to say that the requirement of "bringing to light the wrongdoing of an institution" is satisfied because by preaching against homosexuality, it is implied that the chaplains were preaching against the repeal of "Don't Ask Don't Tell" as well. If the court takes the broader view, it is even more likely that the fact that the religious nature of the speech would be taken into consideration.

As mentioned, it is extremely likely that the court would take the broad view of public concern and accept that the chaplains' speech against homosexuality falls into this category. However, if the court holds that the speech is not a matter of public concern, they will not even proceed to the final requirement of the government employee analysis, the balancing test.[157] The court and *Connick* made it very clear that when the employee's speech was not on a matter of public concern, they had no reason to examine her termination.[158] As the

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[151] *Id.* at 387.
[152] *Snyder*, No. 09–751, slip op at 8.
[153] *Id.* at 15.
[154] *Id.*
[155] *See* Lambs Chapel, 508 U.S. 384 (1993) (holding that regardless of the type of forum, discrimination on religious speech is viewpoint discrimination and is subject to strict scrutiny).
[156] *Rigdon*, 963 F.Supp. at 164.
[157] *Roe*, 543 U.S. 77 at 84.
[158] *Connick*, 461 U.S. 138 at 146.

Connick court explained, "Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable." [159] Therefore, if the court found that the chaplain's speech was not on a matter of public concern, the Court would allow a chaplain to be terminated and stop the analysis.

C. Unduly Disruptive Speech: The Balancing Test

The purpose of the balancing test is for the court to weigh the interests of an individual's free speech with the government's interest in proper functioning.[160] Both positions will be examined in turn. Again, the chaplains' claims will only reach this point in the analysis if the court determines the speech is not pursuant to official duties and the speech is found to be a matter of public concern. In performing the balancing test, the court takes into consideration a variety of factors to analyze the government's interests.[161] These factors include, but are not limited to, whether or not the speech undermines the government entity's ability to perform, whether the speech impairs harmony among co-workers or has a detrimental impact on close working relationships, whether the speech impedes the performance of the speakers duty, and whether or not the speech is representative or attributable to the government employer.[162] The court will also consider historical deference to the military. On the opposing side, the court will attempt to assess the free speech rights of the chaplains.[163]

i. Free Speech Rights of Chaplains

Historically, the free speech rights of individuals have been justified by three major principles: the marketplace of ideas, democratic self-government, and personal autonomy.[164] The marketplace of ideas approach maintains that speech is important to facilitate numerous ideas circulating in society.[165] Recently, the *Snyder* court reiterated the importance of this free speech justification in saying, "As a Nation we have chosen a different course–to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[166] This principle supports the idea that all viewpoints on homosexuality need to be represented in the marketplace in order for people to come to their own informed and reasoned viewpoint. All viewpoints are necessary in the marketplace regardless of whether

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[159] *Id.* at 146.
[160] *Pickering*, 390 U.S. at 568.
[161] *Id.*
[162] *Id; see also Connick*, 461 U.S. 138; *Garcetti*, 547 U.S. 410; *Rankin*, 483 U.S. 378; *Roe*, 543 U.S. 77.
[163] *See Akridge*, 178 Fed.Appx.474.
[164] Kathleen M. Sullivan & Gerald Gunther, First Amendment Law 6–8 (Robert C. Clark et al. eds., 4th ed. 2010).
[165] *Id.*
[166] Snyder v. Phelps, No. 09-751, slip op at 15.

the ideas are true or false.[167] Cate explains this idea of "truth" from a perspective of John Stuart Mill.[168] She explains that the freedom of expression, according to Mill, is based on the very idea that the "expression of dissenting opinions, regardless of whether they are true, partially true, or false, aids in the discovery of truth."[169] The Rankin court also supports this argument when they explain, "Just as erroneous statements must be protected to give freedom of expression the breathing space it needs to survive, so statements criticizing public policy and implementation of it must be similarly protected."[170] Here, the chaplains are circulating one idea against homosexuality. It is arguably very important to have the viewpoints of chaplains on homosexuality, from a religious standpoint, in order to further enrich the marketplace. In addition, this particular viewpoint may encourage those who believe in homosexuality to speak out.

A problem with this viewpoint is that there is always the possibility that the speech has the opposite effect of encouraging people to speak out and in fact silences the opposition. This is problematic for chaplains because this is exactly what repealing "Don't Ask Don't Tell" is attempting to prevent. Another criticism of the marketplace of ideas justification is that the marketplace itself only caters to the ideas of the majority, or those with the dominant viewpoint.[171] Cate explains, "Society often engages in oppressive practices because a majority is so convinced it has the truth on its side, that it feels justified in silencing individuals who hold other opinions…" [172] Since the chaplains are in a position of power, their viewpoint against homosexuality could be seen as majoritarian, thus, forcing out minority views from the marketplace. In fact, it is very possible that some chaplains could believe the truth is on their side, based on their religious convictions, and are therefore validated in attempting to silence those who believe in homosexuality. However, this majority viewpoint is not necessarily a negative aspect in the market place of ideas. For example, Justice Holmes argues that it is true that minority groups should be entitled to free speech as well, but only in order to become the majority or the dominant view.[173] In other words, "free speech facilitates the implementation of the ideas held by shifting majorities at any given time."[174] Under this rationale, even if chaplains' speech is viewed as majoritarian, those who oppose their viewpoint still have the ability to counter their arguments. Thus, the majoritarian nature of their speech against homosexuality may not be fatal to the market place of ideas justification.

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[167] Sullivan & Gunther, *supra* note 164, at 6.
[168] Irene M. Ten Cate, Note, *Speech, Truth, and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendell Holmes's Free Speech Defenses*, 22 YALE J.L. & HUMAN. 35, 62 (2010).
[169] *Id.*
[170] *Rankin*, 483 U.S. at 387.
[171] Sullivan & Gunther, *supra* note 164, at 6.
[172] Cate, *supra* note 168, at 52.
[173] *Id.* at 59.
[174] *Id.*

The democratic self-government justification is grounded on the idea that free speech serves four major functions: The first function allows the public to gather knowledge and vote wisely.[175] The *Connick* court explains this aspect of the First Amendment, "The explanation for the Constitution's special concern with threats to the right of citizens to participate in political affairs is no mystery. The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[176] This likely hurts the chaplains argument because not only are they not allowed to endorse specific voting preferences, but, "Don't Ask Don't Tell" has already been repealed and therefore the change has already occurred. However, it is always possible that the policy would be reinstated and, therefore, the speech against homosexuality contributes to deliberation and allows for possible change through reinstatement of "Don't Ask Don't Tell". The second function is to shape and contribute to deliberation and allow for change.[177] The *Pickering* court placed great emphasis on this contribution to deliberation made by the teachers. They explained that the teachers are the members of the community most likely to have informed opinions about school funding, and it is therefore crucial that they be able to express their views.[178] Chaplains also have informed and definite opinions about homosexuality in the military. However, the court may not be willing to recognize that they should speak out because, in contrast to the teachers in Pickering, their opinions do not necessarily relate directly to the functioning of he military with homosexuals, but rather are colored by a religious bias.

The third function free speech serves is to prevent government abuse of power.[179] This justification may work for or against chaplains. The repeal of "Don't Ask Don't tell" could be seen as the government in fact correcting its prior abuse of power by now allowing soldiers that fight for our nation to be openly homosexual. However, the chaplains may argue that this is simply shadowing the religious viewpoint. As one author explains, "Critics familiar with the Army presentation [training for implementation of repeal], however, say the military is essentially telling chaplains who are not theologically conservative that they are not welcome."[180] The chaplains may argue that outlawing a religious viewpoint is equally as much of a government abuse of power as outlawing a homosexual viewpoint. The final and fourth function of speech is that it promotes political stability by allowing a safe avenue for dissent.[181] This is a crucial aspect for the military chaplains. They need a safe place to disagree with implementation of "Don't Ask Don't Tell" since they do not endorse homosexuality. If the chaplains are prevented from sharing an opposing viewpoint then they have no avenue to express their views unless they choose to resign from the military.

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[175] *Id.* at 7.
[176] *Connick*, 461 U.S. at 145.
[177] Sullivan & Gunther, *supra* note 164, at 7.
[178] *Pickering*, 390 U.S. at 572.
[179] Sullivan & Gunther, *supra* note 164, at 7.
[180] Banks, *supra* note 2.
[181] Sullivan & Gunther, *supra* note 164, at 7.

Personal autonomy is one of the most important validations behind free speech.[182] The ability to express oneself and not be censored is an idea that lies at the heart of the First Amendment.[183] As for the autonomy of chaplains, arguably, their religious beliefs are essentially how they define their "sense of self". Without this autonomy to express their religious views, chaplains are censored regarding the speech that essentially defines them. If the court chose to follow the *Rigdon* analysis, the military should not be able to censor the religious speech of chaplains. The court says, "The chaplains in this case seek to preach only what they would tell their non military congregants. There is no need for heavy-handed censorship, and any attempt to impinge on the plaintiffs constitutional and legal rights is not acceptable."[184] Clearly the *Rigdon* court finds the autonomy of the chaplains to weigh against the interest of the military.[185] However, in that case the chaplains were preaching against abortion and the military policy was against political endorsement. Here, the interests are far more contrasting. In this case, military chaplains would preach against homosexuality while the military is simultaneously trying to implement a policy tolerating homosexuality.

In consideration of all the above factors, weighing in favor of protecting the speech of chaplains, it is still likely the court would rule that the balancing test favors the military. Although the First Amendment is a fundamental aspect of our nation, if the court has to choose between the free speech rights of a group, and national security, they likely will not chose the former. While the marketplace of ideas, democratic self-government, and personal autonomy, are free speech justifications that date back to the making of our Constitution, in this instance, they will likely not triumph over the government's interest. The views of the chaplains and the military do not differ slightly. They do not involve a small policy decision or a minor alteration of regulations. They are diametrically opposed. As explained below, the speech here threatens the unique inter-workings of the military and that is not something the Court will be willing to allow.

ii. Government's Interest

If the individuals speech undermines the government entity's ability to function efficiently, it is likely the court will consider the speech to be unduly disruptive.[186] The *Connick* court explained the importance of this factor in saying, "The Pickering balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public."[187] The

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[182] *Id.*
[183] *Id.* at 8. *See also* Guy. E Carmi, Note, *Dignity–The Enemy From Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification*, 9 U. PA. J. CONST. L. 957, 974 (2007) (explaining that "the autonomy defense is often linked with artistic expression or speech that defines personality since these kinds of speech lie close to how people perceive themselves").
[184] *Rigdon*, 963 F.Supp. at 165.
[185] *Rigdon*, 963 F.Supp. at 165.
[186] *Connick*, 461 U.S. at 150.
[187] *Id.*

court tends to be very deferential to the employer when analyzing this factor.[188] For example, in *Connick*, the court explained that even if the speech has not yet harmed the workplace, measures could be taken in order to avoid disruption. [189] Following this analysis, the chaplain's speech against homosexuality would greatly undermine the military's ability to perform. Preaching against homosexuality directly opposes the goals of repealing "Don't Ask Don't Tell" and creating uniform tolerance. It is quite possible, under this reasoning, that even if the preaching against homosexuality had not created problems, the military could still engage in preventative measures. The deference the *Akridge* court showed to prison officials[190], in holding that the speech was not protected, is a huge obstacle for the military chaplains. The court explained that even if the speech touches on a matter of public concern, "…[It] will not be constitutionally protected unless the employee's interest in speaking on these issues outweighs the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[191] In *Akridge,* the court found the "scales" in the *Pickering* analysis to tip heavily for the prison officials.[192] They held for the prison officials regardless of their finding that the chaplain's speech did not impede his duties or impair harmony among co-workers.[193] The fact that the speech undermined the interests of the prison in preventing discrimination based on sexual orientation[194] was dispositive enough to rule against the chaplain. This situation is analogous, if not expressly parallel, to that of the military chaplains. Simply put, if the court finds this factor in the balancing test to be as important as the other courts have, it is likely that they will hold that preaching against homosexuality to undermine the military's legitimate interest in implementing the repeal of "Don't Ask Don't Tell" and preventing discrimination based on sexual orientation.

While no further analysis is really necessary, other factors do point in the military's favor. Speech that impairs the harmony among co-workers and has a detrimental impact on close working relationships, for which personal loyalty and confidence are necessary, will likely not be protected.[195] In *Pickering,* the court found that the teachers role with the Board and the Superintendent were not close enough relationships in which "loyalty and confidence were necessary for their proper functioning."[196] The opposite would be true for military chaplains. The military could easily make an argument that loyalty and confidence were in fact foundational requirements among all members of the military and their superiors. Preaching against homosexuality would threaten relationships with chaplains and superiors as well as chaplains and soldiers with opposing views. Further,

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[188] *Id.* at 152.
[189] *Id.*
[190] *Akridge*, 178 Fed.Appx. at 479.
[191] *Id.*
[192] *Id.* at 480.
[193] *Id.*
[194] *Id.*
[195] *Pickering*, 390 U.S. at 570.
[196] *Id.*

preaching against homosexuality could threaten soldiers' relationships with each other. For example, soldiers that disagreed with homosexuality may interpret the chaplain's message as an endorsement to openly oppose homosexuality and fellow soldiers that were homosexual. In *Connick,* the court explained, "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate."[197] Again, this is problematic for chaplains. Following the *Connick* analysis, great deference would be given to the military because close working relationships are essential for the military in fulfilling public responsibilities.[198] The military would have a sound argument because when soldiers are fighting for their lives, trust, loyalty, and confidence, are critical.

If an individual's speech impedes the performance of his or her own duty, then the court will likely hold that it is unduly disruptive.[199] In *Pickering,* the court reasoned that the speech was protected because it did not impair the teacher's ability to function in his everyday duties in the classroom.[200] For the chaplains, preaching or advising against homosexuality (ie: gay marriage, domestic partnership, children of gay couples) may interfere with their duties. If the chaplains did not want to advise about homosexuality, they would not be fulfilling the military's requirement that chaplains counsel all soldiers. Equally as important, if the chaplains do advise about homosexuality (in a positive light), it is impeding their duty to the religious organization that is endorsing them, as the chaplains would not be staying true to their religious tenants. If this occurs, it is likely the chaplains would lose endorsement from their respective religious organizations and slowly certain denominations of chaplains would diminish in the military.[201] This may create a contrast with the idea of the government entity being able to function correctly. It is a double-edged sword. If the chaplains do speak out, the military's purpose of repealing "Don't Ask Don't Tell" is threatened. If the chaplains don't speak out, they possibly lose their endorsement and are no longer able to participate as a chaplain in the military, also threatening the organization of the military. The court may be required to choose which consequence they believe to be the lesser of two evils.

When an individual's speech, especially if controversial, is attributable to, or representative of the government entity, it is less likely to be granted protection.[202] The *Rankin* court noted that the level of the position in the government office is important to this analysis.[203] In *Rankin,* because McPherson was only a clerical employee, her speech was not attributable to the office.[204] This

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[197] *Connick*, 461 U.S. at 151–152.
[198] *Id.*
[199] *Pickering*, 390 U.S. at 572.
[200] *Id.*
[201] Steven H. Aden, *supra* note 46 (explaining how chaplains maintaining their position in the military is dependent on policies of their endorsing agency).
[202] *Rankin*, 483 U.S. at 389.
[203] *Id.* at 392.
[204] *Id.*

could be problematic for the chaplains because their preaching against homosexuality, in partially military uniform, as it is required at all times[205], could very easily be attributable to the military. The uniform would definitely be a consideration, albeit not a dispositive factor. As the court in San Diego v. Roe explains, "Roes expression was widely broad-cast, linked to his official status as a police officer, and designed to exploit his employer's image."[206] Part of the reason the *Roe* court linked the speech at issue to the employer (the police department) was because he was wearing a police uniform.[207] Following this reasoning, it would be very easy for the court to find that since the chaplains are in partial military uniform while preaching against homosexuality, it is attributable to the government entity in a harmful way and therefore cannot be protected. However, the analysis of the uniform in *Roe* was in regards to whether or not the speech was on a matter of public concern.[208] This distinction however, would not change the likely outcome for the military chaplains. In addition, under *Rigdon*, religious speech is separate and some of what the chaplains say is not considered official.[209] Therefore, this analysis of whether or not the speech was representative of the military would depend on whether or not the court accepted the notion that chaplains' religious capacity was separate from their official capacity.

a. Historical Deference to the Military

In performing the *Pickering* analysis, it is impossible to ignore the general principle that courts afford great deference to the military. The explanation behind this deference is relatively simple. The consequences of the court issuing a decision that impedes the functioning of the military are grave. The military protects our nation, and if it were unable to perform properly, our national security would be at issue. Captain John Carr explained the idea of deference succinctly in his article, *Free Speech in the Military Community: Striking a Balance Between Personal Rights and Military Necessity,* when he referred to the military as a separate community.[210] He explained that the court must be deferential to the military based upon "the unique military mission, the critical importance of obedience and subordination, and the complimentary development of military custom."[211] Carr further explained that, "Based upon one or more of

[205] 2004 AR 165-11, at 4–4(d).
[206] *Roe*, 543 U.S. at 84.
[207] *Id.* at 81.
[208] *Compare with, Roe*, 543 U.S. 77 (assessing the uniform in regards to whether or not the speech was on a matter of public concern. The court did not reach the *Pickering* balance test because it was held that the speech in *Roe* did not pass the threshold requirement of being on a matter of public concern).
[209] *Rigdon*, 963 F.Supp. 150.
[210] Captain John A. Carr, USAF, *Free Speech in the Military Community: Striking a Balance Between Personal Rights and Military Necessity,* 45 A.F.L. Rev. 303(1998); *See also* Ira C. Lupu & Robert W. Tuttle, *supra* note 52, at 164; *See also* Wildhack III,CHC,USNR, CDR William A. Wildhack III, CHC, USNR, *Navy Chaplains at the Crossroads: Navigating the Intersection of Free Speech, Free Exercise, Establishment, and Equal Protection*, 51 NAVAL L. REV. 217, at 244 (2005).
[211] *Id.* at 308.

these characteristics, courts confronted with free speech issues in the military context typically refuse to apply the free speech protections afforded civilians or other government employees, preferring to defer to the military's judgment of the potential disruptive effect of the speech in question."[212]

This principle is exemplified by the Supreme Court case of Goldman v. Weinberger.[213] In this case, the court holds that a restriction preventing an officer from wearing a yarmulke, because of religious beliefs, is valid if the military believes the practice would "detract from the uniformity sought by dress regulations."[214] The courts rationale illustrates the deference principle. The *Goldman* court reasons, "whether or not expert witnesses find that the religious exceptions are desirable is quite beside the point. The desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment."[215] While this case analyzed a free exercise claim, lower courts have dealt directly with free speech claims in the military and also were extremely deferential. In the case of Ethredge v. Hail, the military outlawed bumper stickers that would embarrass the president.[216] The court ruled that military officials need not demonstrate actual harm before implementing a regulation restricting speech.[217] Further, the court explained, "[W]e must remain mindful that the military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps." [218] The *Ethredge* court also noted that "[C]ourts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have…"[219]

It is clear that the military's interests are extremely strong in regards to preaching against homosexuality. Seemingly, the *Pickering* balance favors the government in the case at hand. Not only is the judicial system extremely deferential to the military in general, but the speech against homosexuality severely undermines the military's ability to function efficiently. The speech undermines this ability by destroying harmony among co-workers, in a job where loyalty, confidence, and trust are of utmost importance. The speech further destroys the efficiency of the military by impeding the duties of the chaplains themselves, both to the military, and to their respective religious organizations. Finally, the speech is directly attributable to the military in a negative fashion, and thus prevents the military from obtaining their goal of successfully implementing the repeal of "Don't Ask Don't Tell". The only aspect of the analysis that

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[212] *Id.*
[213] Goldman v. Weinberger, 475 U.S. 503, 106(1986).
[214] *Id.* at 503.
[215] *Id.* at 509.
[216] *Ethredge*, 56 F.3d at 1325.
[217] *Id.* at 1326.
[218] *Id.*
[219] *Id.*

undercuts the military's interest is the idea that if the chaplains are not allowed to preach against homosexuality, their endorsement from their respective religious agency could be removed, and the military chaplaincy as a program could suffer the loss of various denominations. However, if the court is faced between choosing either a possibly Unitarian military chaplaincy, or the downfall of unity in the military, due to lack of tolerance furthered by preaching against homosexuality, it is almost certain to chose the former. Even if the chaplains prevail through the first two aspects of the government employee test, the speech at issue will lose its protection here.

VII. COMPELLED SPEECH

Compelled speech is interpreted as the right not to speak or to have a message attributed to you that you do not wish to convey.[220] The chaplains may have compelled speech claims in two different situations: If chaplains had to administer religious rites to all congregants who attended their services, regardless of sexual orientation, or if the chaplains were required to preach or advise about homosexuality in a positive fashion without the right to opt out.

A. Applicable Precedent

The seminal case regarding compelled speech is West Virginia Board of Education v. Barnette.[221] This case stands for the proposition that under the Bill of Rights the government cannot compel you to speak when you do not want to.[222] The court explains the importance of their holding in saying, "to sustain a compulsory flag salute, we are required to say that the Bill of Rights, which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind."[223] This rationale is very favorable to the chaplains. It is clear by the language of this case that military superiors should not be allowed to force military chaplains to counsel or advise about something that they do not believe. The *Barnette* court also reasons that they cannot foresee any possible exception to this compelled speech doctrine.[224] The court says, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."[225] Here, the court specifically mentions religion, and states that no authority can dictate what is conventional in the religious sphere.[226] Again, this is favorable to the chaplains compelled speech

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[220] WV Board of Education v. Barnette, 319 U.S. 624 (1943).
[221] *Id.*
[222] *Id.* at 634.
[223] *Id.*
[224] *Id.* at 642.
[225] *Id.*
[226] *Id.*

claims. The court clearly understands the First Amendment as a protection against forced speech.[227]

Another landmark case dealing with compelled speech is Wooley v. Maynard.[228] Here, a group of Jehovah's witnesses challenged the law requiring residents to have the state motto on their license plates.[229] The court found that the state was "forcing an individual as part of his daily life, to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the state invades the sphere of intellect and the spirit of the First Amendment."[230] Clearly, under this analysis, if the chaplains were forced to administer sacraments to homosexuals or advise homosexuals in a way that is contrary to their religion, the speech would be classified as compelled speech. It certainly forces the chaplains to foster adherence to an ideological and religious point of view that is contrary to their beliefs.

B. Summary of Court's Test

The main difference between the government employee test and the one used for compelled speech is the distinction between analysis of speech vs. analysis of regulations. If the Chaplains brought claims against the existing regulations, or hypothetical regulations, they would likely not be analyzed under the government employee analysis. The government employee analysis would take place if the chaplains were fired for their speech or for refusing to comply with regulations.[231] In that situation the court is required to examine the speech of the chaplains. There is still a possibility that the court may analyze regulations under the government employee test and therefore the analysis would follow as explained in the first section. It is more likely, however, that if the chaplains were questioning the Constitutionality of regulations, rather then the constitutionality of their dismissal for certain speech, the court would use a different test. The court will first assess whether or not the regulation is dealing with speech or conduct.[232] The next question will be whether the regulation is content neutral, or content based.[233] If it is content neutral then it must further a substantial government interests and must be sufficiently tailored to achieve that purpose.[234] There also needs to be alternative channels of communication.[235] If the regulation is content

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[227] *Id.*
[228] Wooley v. Maynard*,* 430 U.S. 705, 97 (1977).
[229] *Id.*
[230] *Id.*
[231] For example, if Chaplains were fired because they did not comply with the hypothetical regulation banning chaplains from counseling that homosexuality is a sin. In this instance, refusing to comply with regulations is coupled with speech (ie: homosexuality is a sin) that results in termination. This would be analyzed under the government employee test.
[232] United States v. O'Brien, 391 U.S. 367 (1968).
[233] *Id.*
[234] *Id.*
[235] *E.g.,* City of Ladue v. Gilleo, 512 U.S. 43 (1994) (holding the regulation that banned the posting of certain types of signs in ones home as unconstitutional partially because the court did not find that sufficient alternative channels of expression existed).

based, the court will determine if it is subject matter discrimination or viewpoint discrimination.[236] The former restricts both sides of the debate while the later restricts only one.[237] All content-based regulations require a strict scrutiny analysis unless they are subject matter restrictions in a non-public forum.[238]

C. Existing Regulations

As explained above, in the current law for chaplains, the mission of chaplains is to support religious, spiritual, moral, and ethical needs of the army.[239] Chaplains must contribute to the spiritual well being of soldiers.[240] All soldiers are entitled to chaplain service and support.[241] The court would likely interpret these regulations as content neutral regulations of conduct, not speech. These would be regulations that incidentally affect speech.[242] Therefore, the regulations would be subject to intermediate scrutiny.[243] The test for intermediate scrutiny dictates that there must be a significant governmental interest where the means are sufficiently tailored to meet that interest.[244] Further, the government interest cannot be related to the suppression of speech and alternative channels of communication must be available.[245] The military would not have a difficult time establishing a substantial government interest. They could articulate their interest as providing religious and moral support for all of the soldiers in the army. Since the Supreme Court already held this to be a legitimate interest in Katcoff v. Marsh[246], the military would pass this threshold with ease. As for the regulations being sufficiently tailored to achieve the purpose, the military would argue the regulations were tailored because chaplains are aware of the requirements, which view all denominations equally, and specifically state that chaplains must be available to counsel all command members.[247] The last aspect of the test, alternative means of communication, may be more difficult for the military to prove. If the regulations are interpreted to bar the chaplains from preaching against homosexuality as well as require the chaplains to counsel regarding homosexuality, chaplains may not have other means of expression. However, given the likely conclusion that the military base is a non-public forum, the court may be extremely deferential to the military. Further, the fact that chaplains were

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[236] Sullivan & Gunther, *supra* note 164, at 198.
[237] *Id.*
[238] *See* Burson v. Freeman, 504 U.S. 191 (1992) ("This Court has held that the First Amendment's hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of public discussion on an entire topic. This . . . section is a facially content-based restriction… in a public forum and thus, must be subjected to exacting scrutiny.").
[239] 2004 AR 165-11, at 4–1.
[240] *Id.*
[241] *Id.*
[242] *O'Brien*, 391 U.S. at 376.
[243] *Id.*
[244] *Id.* at 377.
[245] *Id.*
[246] *Katcoff*, 755 F.Supp.2d 223.
[247] 2004 AR 165-11, at 4–1.

on notice of the bylaws regulating their activity also supports the likely constitutionality of the regulations.

D. Hypothetical Regulations

i. Rites

One possible regulation that the military could implement would be that chaplains administer rites to all soldiers who wanted to participate. The military may want to have a regulation, such as this, to facilitate tolerance. Allowing all soldiers to participate in religious rites, regardless of their sexual preference, would send a message of unity. Essentially, this type of directive would prevent homosexuals from being "singled out" due to their lack of involvement. Here, compelled speech issues arise if, for example, if a chaplain was forced, against his faith, to administer communion to an openly homosexual soldier. However, this regulation likely would not even need analysis by the court because the military laws specifically state that chaplains are not required to take part in worship when in variance with the tenets of their faith.[248] In essence, this by law is an opt out provision for chaplain preaching.

ii. Counseling In a Positive Fashion

Another regulation the military may be interested in executing is the requirement that chaplains counsel about homosexuality in a positive fashion. Since all chaplains are required to be available to counsel soldiers[249], the military may want to make sure that chaplains are not counseling against homosexuality. This military would likely provide parallel reasoning for needing this restriction along side the restriction about preaching against homosexuality. If chaplains could not preach against homosexuality for legitimate reasons outlined by the military, it would make little sense that they could counsel against it behind closed doors. Obviously, for chaplains, this creates a compelled speech claim. While chaplains likely recognize their responsibility to counsel command members, if they are unable to advise against homosexuality, then they are forced to convey a message they do not believe in. In *Barnette*, the court held this was unacceptable even for the pledge of allegiance.[250] They explained, "It must also be noted that the pledge requires affirmation of belief and an attitude of mind."[251] As previously mentioned, in the section on current applicable chaplain law, some of these duties to counsel include assisting in family difficulties and contributing to the enrichment of the marriage and family.[252] If chaplains are forced to counsel on the issue of gay marriage or domestic partnerships, and it is contrary to their faith, they face a clash between their duty to the military and their religious tenets.

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[248] *Id.* para. 4–4(e).
[249] *Id.* para. 4–4.
[250] *Barnette*, 319 U.S. at 633.
[251] *Id.*
[252] *Id.*

If the chaplains challenged the constitutionality of this regulation the court would likely hold it to be a content based and viewpoint based restriction on speech. The regulation is viewpoint based because it is requiring chaplains to essentially say good things about homosexuality and not bad things. This removes the chaplain's viewpoint from the marketplace of ideas. This kind of regulation is subject to strict scrutiny.[253] In order to pass strict scrutiny, the military would need to first prove a compelling government interest. Again, this would not be difficult. The interest would be articulated as the implementation of repealing "Don't Ask Don't Tell" and achieving unified message to the soldiers.

Secondly, the military would need to prove that the restriction, not allowing chaplains to counsel against homosexuality, was narrowly tailored to achieve the compelling interest. This is where the military may run into problems. For example, the military could instead designate chaplains who were willing to discuss homosexuality in counseling sessions and leave out those who do not wish to address the subject. This would allow chaplains that wanted to opt out the ability to do so, but it would still provide advice and positive counseling to homosexuals who wanted to speak to chaplains. However, the military may argue that allowing "opting out" undermines their compelling interest. For example, if certain chaplains are allowed to opt out of counseling homosexuals, this may create an internal stigma against homosexuals in the military. The military may argue that all the soldiers, gay or straight, know which chaplains agree with homosexuality and which ones don't, based on who is willing to counsel on the matter. Regardless of this possible minor undermining in the military's interest, in order for the regulation to be narrowly tailored, the "opt out" provision for counseling may be constitutionally required. The *Maynard* court explains this principle well in the context of a states interest to appreciate "history, state pride, and individualism."[254] While the court holds that the state "[M]ay pursue such interests in any number of ways."[255] They continue on to say, "Where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."[256] Simply put, without the "opt out" clause the regulation likely would not pass constitutional muster.

Yet a different problem arises when opting out simply is not a feasible option. For example, if there is only one military chaplain stationed with a particular command unit that is deployed, or even one chaplain assigned to a particular military base. Unfortunately for chaplains in this situation, at first glance, the military's regulation may prevail. After all, the military really would not have any other way to make the restriction more narrowly tailored. If no other chaplains are present then the "opt out" provision is moot. In this particular

[253] *Burson*, 504 U.S. 191.
[254] *Maynard,* 430 U.S. at 717.
[255] *Id.*
[256] *Id.*

situation, it is possible that chaplains would have to counsel soldiers about homosexuality in a positive fashion. However, it is difficult to imagine that the Supreme Court would allow this type of compelled speech, even in light of historical military deference. Another possible result is that the court would require the military to set up some sort of screening process. For example, if a command is only assigned one chaplain, the military would have to station only chaplains that would be willing to counsel positively about homosexuality. This is the more likely result as it would make the regulation narrowly tailored.

It is likely that all of the chaplains claims against compelled speech would prevail. While the government may be able to impose censorship, forcing chaplains to counsel against their beliefs is unconstitutional. While all of the above solutions, making the compelled speech regulations narrowly tailored, seem feasible, none of them would cure the problem of those who wished to counsel against homosexuality. This is where the censorship claim overlaps with the compelled speech claim. Forcing chaplains to counsel in a positive fashion is compelled speech, not allowing chaplains to counsel in a negative fashion is censorship. As the above analysis indicates, the first of the two restrictions are probably unconstitutional but, as the censorship section explained, the latter restriction is likely constitutional. It is true that in the context of the military, courts are very deferential. In fact, the state interest articulated in this situation is particularly strong and may even signal more deference then usual to the military. However, the *Barnette* court makes it abundantly clear that the legitimate interest in pursuing unity and national security cannot be attained by infringing on the First Amendment rights of individuals.[257] The court says, "National unity as an end which officials may foster by persuasion and example is not in question. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Compulsory unification of opinion achieves only the unanimity of the graveyard."[258]

VIII. CONCLUSION

The Supreme Court will be faced with a question it has never before addressed. While it has legitimized the chaplaincy in the legislature, and seemingly endorsed the legality of the military chaplaincy, through in-action, and establishment clause decisions following *Katcoff*, the Court has never ruled on the individual free speech rights of military chaplains. The first and most difficult question for the court will be deciding whether or not chaplain speech is pursuant to an official duty. Following the conclusions of Professor Green and both Professor Lupu and Tuttle, the court will likely have to create a "hybrid approach" between *Rigdon* and *Garcetti*. *Garcetti* is simply too narrow and *Rigdon* is far too broad. Once the court creates this test, a seemingly impossible fusion of private speech and government speech, they will easily determine that the speech of chaplains, against homosexuality, is on a matter of public concern. However, at

[257] *Barnette*, 319 U.S. at 639.
[258] *Id.* at 641.

the onset of the balancing test, the chaplains' free speech claims will be approaching defeat. The court will likely hold that it is impossible to reconcile the chaplains' individual speech rights with the interests of the military. Following the historical tendency, great deference will be given to the military. Regulations censoring chaplain's ability to openly preach and counsel against homosexuality may be held Constitutional. However, it is improbable the Court would allow directives forcing chaplains to counsel about homosexuality in a positive fashion. This type of regulation is far to invasive on First Amendment freedoms.

At first glance, the modern trend of invading individual liberties for the interest of national security will again prevail. Free speech rights of chaplains will take a backseat to the goals and objectives of the military. However, simultaneously, the individual liberties of homosexuals are being afforded vast Constitutional protection. The court will surely take these factors into consideration. While the law is too blurred to determine the exact analysis the court will employ, it is undeniable that the social forces on the issue of religion and homosexuality are at a heightened alertness. It is in this setting that the Supreme Court will likely decide some of the most legally critical, and socially relevant, free speech cases, of this time.