LET US *NOT* PRAY: PRAYERS AT FORMAL ARMY EVENTS AND THE ESTABLISHMENT CLAUSE

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Christian chaplains are being told NOT to pray in the name of Jesus! . . . To suppress this form of expression would be a violation of their constitutional rights and religious freedoms. . . . We cannot sit idly by while our Christian military chaplains are singled out and silenced. [1]

I. Introduction: The Air Force Academy and Why Prayer Matters

Has it actually come to this? What is happening to our fine military chaplains?

The military's current religious maelstrom began in early 2004 at the United States Air Force Academy. In January 2004, Academy faculty complained during an annual command climate survey of religious bias at the school.[2] In March 2004, a flyer promoting a special screening of the heavily religious film *The Passion of the Christ*[3] appeared at each cadet's seat in the cadet dining facility, which prompted complaints that the Academy endorsed the film's Christian themes.[4] In April 2004, Academy officials brought a team from the Yale Divinity School (YDS) to assess the Academy's "religious atmosphere."[5] The Yale team released a memorandum in June 2004 that noted both "stridently evangelical themes" in general Protestant

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[1] American Center for Law & Justice, Protect Military Prayer (Oct. 24, 2005), http://www.aclj.org/Issues/Resources/ Document.aspx? ID=1976.

[2] Rob Boston, *Kingdom of Heaven? Fundamentalist Crusade at the Air Force Academy Sparks Official Military Investigation*, CHURCH & STATE, June 2005, at 8, 9. The Academy responded with a training program called Respecting the Spiritual Values of all People (RSVP) for faculty, staff, and cadets. *Id.* The RSVP program was designed to "expose attendees to forms of religious expression with which they are unfamiliar;" to teach "toleration and mutual respect;" and to explain the importance of official conduct being "strictly neutral with respect to religion." AMERICANS UNITED FOR THE SEPARATION OF CHURCH & STATE, REPORT OF AMERICANS UNITED FOR THE SEPARATION OF CHURCH & STATE ON RELIGIOUS COERCION AND ENDORSEMENT OF RELIGION AT THE UNITED STATES AIR FORCE ACADEMY 12 (2005), http://www.au.orgin/ pdf/050428AirForceReport.pdf [hereinafter AU AIR FORCE REPORT]. The RSVP program, however, was "substantially modified" following comments by the Air Force Chief of Chaplains, Chaplain (MG) Charles Baldwin. *Id.*

[3] THE PASSION OF THE CHRIST (Icon Productions 2004).

[4] AU AIR FORCE REPORT, *supra* note 2, at 7; Boston, *supra* note 2, at 8.

[5] Boston, *supra* note 2, at 8.

religious services[6] and the frequent use of religion to motivate new cadets during basic training.[7] Later in the summer, the advocacy group Americans United for the Separation of Church and State (AU)[8] began its own investigation into the Academy's religious climate upon learning that some Jewish cadets had been the targets of pervasive anti-Semitic slurs.[9]

In April 2005, AU concluded its investigation and published a report detailing incidents of "troubling religious policies and practices" at the Air Force Academy.[10] The report alleged that group prayer was a formal part of "mandatory or otherwise official events at the Academy," including cadre meetings during Basic Cadet Training, awards ceremonies, and mandatory meals in the cadet dining facility.[11] The report detailed instances of non-Christian cadets facing

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[6] Boston, *supra* note 2, at 9; David Van Biema, *Whose God Is Their Co-Pilot? The U.S. Air Force Academy faces charges that it has allowed rampant evangelization on campus*, TIME, June 27, 2005, at 61, 61; *see* Dick Foster, *AF: Thou Shalt Respect Diversity*, ROCKY MOUNTAIN NEWS (Denver), Aug. 30, 2005, at 5A, LEXIS, News & Business, Major Newspapers (noting the chaplain who explained to new cadets during Basic Cadet Training in June 2004 that persons who were not born again "will burn in the fires of hell," and that new cadets should explain this to non-Christian cadets).

[7] Pam Zobeck, *Task force on bias faulted for scope*, GAZETTE (Colo. Springs), May 21, 2005, http://www.gazette.com/ display.php?id=1307776&secid=1 (describing "faith language," such as "Let Jesus help you," being used by cadet cadre).

[8] Americans United for the Separation of Church and State is an "independent organization" that has "led the way in defending the separation of church and state" since 1947. Americans United for the Separation of Church and State, About AU, http://www.au.org/site/PageServer?pagename=aboutau (last visited Jan. 26, 2006).

[9] Boston, *supra* note 2, at 8. AU had been contacted by one of its members, Michael Weinstein, a 1977 Air Force Academy graduate and a former White House attorney. Van Biema, *supra* note 6, at 62. Mr. Weinstein's son was then a cadet at the Air Force Academy. *Id.* In July 2004, Mr. Weinstein learned from his son that non-Jewish cadets had been deriding Judaism and accusing Jewish persons of being "responsible for the execution of Jesus Christ." *Id.* Incensed, Mr. Weinstein began to interview people at the Academy and documented numerous instances of religious bias and Christian favoritism there, suggesting "an atmosphere . . . saturated with evangelical Christianity." Boston, *supra* note 2, at 8. In October 2005, Mr. Weinstein filed a lawsuit alleging that the Air Force had violated the Establishment Clause through a policy of "aggressive evangelizing" at the Air Force Academy. Alan Cooperman, *A Noisy Takeoff for Air Force Guidelines on Religion; Evangelical Christians Contend Restrictions Imperil Free Exercise*, WASH. POST, Oct. 31, 2005, at A20, *available at* LEXIS, News & Business, Major Newspapers.

[10] AU AIR FORCE REPORT, *supra* note 2, at 1.

[11] *Id.* at 2.

"proselytization or religious harassment" by their cadet superiors.[12] The report also asserted that Academy policies granted favorable treatment to religion and religious organizations.[13]

In what was perhaps the most troubling allegation, the AU report singled out the questionable religious activities of the Academy's Commandant of Cadets, Brigadier General (BG) Johnny Weida. BG Weida, who is regarded as a "deeply religious man,"[14] sent a mass e-mail to cadets in 2004 that endorsed National Prayer Week and instructed them to "[a]sk the Lord to give us the wisdom to discover the right, the courage to choose it, and the strength to make it endure."[15] More disturbingly, BG Weida developed a coded, religious-oriented call-and-response with Christian evangelical cadets and then used this code in his official communications to the entire Academy.[16]

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[12] *Id.* at 5.

[13] For example, cadets were authorized to hang crosses or other religious items in their dorm rooms, but were not allowed to hang similar non-religious items. *Id.* at 9–10. Cadets also had more flexibility to leave campus for religious reasons than for non-religious ones. Patrick Kucera, an atheist cadet who requested a non-chargeable pass to attend an off-campus Freethought meeting in 2004, had his request denied because the meeting was not "faith-based." *Id.* at 10. When Kucera tried to lodge a complaint of religious discrimination with the Academy's Military Equal Opportunity (MEO) Officer, that officer attempted to proselytize Kucera into Catholicism. *Id.*; Van Biema, *supra* note 6, at 62 (claiming that according to Kucera, the MEO Officer said he felt obliged to "try to bring [Kucera] back to the flock").

[14] Van Biema, *supra* note 6, at 62.

[15] AU AIR FORCE REPORT, *supra* note 2, at 6.

[16] During Basic Cadet Training Protestant chapel service, BG Weida spoke about the New Testament parable of the house built on rock (i.e., on faith in Jesus) and then instructed cadets that whenever he used the phrase "Airpower!," they should respond "Rock, sir!" *Id.* BG Weida also instructed the cadet congregation that they should use this call-and-response to start conversations with non-Christian cadets about Christianity. *Id.*

In May 2005, the Air Force created a task force to examine the Academy's religious climate.[17] The task force's report, released in June 2005, described "perceptions" of pro-Christian bias at the Academy[18] and found that "inappropriate expressions of faith and instances of insensitivity had created an atmosphere of intolerance" there.[19] The report blamed the Academy's problems on a failure to "fully accommodate all members' [religious] needs" and an innocent "lack of awareness" about permissible bounds of religious expression.[20]

Concerned about the Air Force's general religious climate in light of these findings, the Air Force in August 2005 published *Interim Guidelines Concerning Free Exercise of Religion in the Air Force*.[21] The guidelines explained that public prayer "should not usually be included in official settings such as staff meetings, office meetings, classes, or officially sanctioned activities" in the Air Force.[22] The guidelines also reminded Air Force chaplains of their mission to "provide care for all service members, including those who claim no religious faith."[23] Finally, the guidelines allowed formal, public prayer during the Air Force's "non-routine military

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[17] Boston, *supra* note 2, at 9. Even this seemingly routine response created controversy, especially among Christian political action committees like Focus on the Family. *Id.* at 10 (noting that Tom Minnery, Vice President of Public Policy for Focus on the Family, called the creation of the task force a "witch hunt" to "root out Christian beliefs").

[18] Foster, *supra* note 6, at 5A.

[19] Laura M. Colarusso, *Lawmakers protest guidelines on prayer*, AIR FORCE TIMES, Nov. 21, 2005, at 12. The Task Force fell short of finding "overt religious discrimination" at the school. Foster, *supra* note 6, at 5A.

[20] *Air Force Issues Report on Religious Bias at Academy, Pledges Fix*, CHURCH & STATE, July–August 2005, at 16, 16.

[21] U.S. DEP'T OF AIR FORCE, INTERIM GUIDELINES CONCERNING FREE EXERCISE OF RELIGION IN THE AIR FORCE (29 Aug 05) [hereinafter INTERIM GUIDELINES], *available at* http://www.af.mil/library/guidelines.pdf.

[22] *Id.* para. B(1).

[23] *Id.* Consequently, chaplains should "respect the rights of others to their own religious beliefs, including the right to hold no beliefs"; should "respect professional settings where mandatory participation may make expressions of religious faith inappropriate"; and must "remain sensitive to the responsibilities of superior rank . . . ." *Id.* para. D(2).

ceremonies or events of special importance" but required such prayer to be "brief" and "nonsectarian" for the purpose of adding a "heightened sense of seriousness or solemnity" to the event.[24]

Predictably, the Air Force's *Interim Guidelines* generated considerable controversy, especially their requirement that prayers at military ceremonies be nonsectarian.[25] The Interim Guidelines' many opponents—including Christian advocacy groups such as the American Center for Law and Justice[26] and the Air Force's Chief of Chaplains, Chaplain (MG) Charles C. Baldwin[27]—were rewarded with the more permissive[28] *Revised Interim Guidelines Concerning Free Exercise of Religion in the Air Force*[29] in February 2006. These revised guidelines, *inter*

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[24] *Id.* para. B(3). In addition, such prayers are not to "advance specific religious beliefs." *Id.*

[25] Cooperman, *supra* note 9, at A20.

[26] These groups have posted internet messages—including the one excerpted at the start of this section—and flooded the White House and the Department of Defense with emails, letters, and calls protesting the new guidelines. *Id.* Members of Congress have sent letters to President Bush urging that military chaplains be allowed to pray according to their respective faiths. Colarusso, *supra* note 19, at 12 (describing letters sent by numerous Congressmen and Senators to President Bush urging Presidential override of the *Interim Guidelines*). The American Center for Law and Justice (ACLJ) gathered over 200,000 on-line signatures for a petition to President Bush about relaxing this requirement through an Executive Order. American Center for Law & Justice, Protect Military Prayer, Oct. 24, 2005, http://www.aclj.org/Issues/Resources/ Document.aspx?ID=1976 (explaining that "a group of Congressmen has joined together to . . . protect by Executive Order the constitutional right of military chaplains to pray according to their faith" and organizing an on-line petition with the same goal).

[27] In mid-October 2005, the Air Force's Chief of Chaplains, Chaplain (MG) Charles C. Baldwin, sent a videotaped message to all Air Force chaplains asking for feedback to help the Air Force "get this right." Cooperman, *supra* note 9, at A20. In this message, MG Baldwin opposed the guidelines' limitations on both "sharing of faith" by senior chaplains and the offering of prayer outside of voluntary worship settings. *Id.* He has also suggested that the *Interim Guidelines*' ban on prayer at routine staff meetings would not include hymns, life lessons, and scripture readings at these events. *Id.*

[28] Anti-Defamation League, *ADL Says Air Force Guidelines on Religious Accommodation "A Significant Step Backwards,"* Feb. 9, 2006, http://www.adl.org/PresRele/RelChStSep_90/4866_90.htm (asserting that the revised guidelines "reopen the door to the serious and prevalent misconduct which the [U.S. Air Force] acknowledged and said it would correct").

[29] U.S. DEP'T OF AIR FORCE, REVISED INTERIM GUIDELINES CONCERNING FREE EXERCISE OF RELIGION IN THE AIR FORCE (9 Feb 06) [hereinafter REVISED INTERIM GUIDELINES], *available at* http://www.af.mil/library/guidelines.pdf (emphasis added).

alia, explain that "non-denominational, inclusive prayer or a moment of silence may be appropriate for military ceremonies or events of special importance when its *primary* purpose is not the advancement of religious beliefs."[30] Significantly, the *Revised Interim Guidelines* remove guidance about what the purpose of ceremonial prayers should be.[31] The *Revised Interim Guidelines* also expressly explain that chaplains "will not be required to participate in religious activities, including public prayer, inconsistent with their faiths."[32] Unfortunately, the revised guidelines contain no corresponding provision for non-chaplain members of the Air Force who wish to avoid compulsory religious activities inconsistent with *their* religious beliefs.[33]

The events at the Air Force Academy and their tumultuous aftermath highlight the danger of religious coercion by military leaders in a pluralistic military society. If this religious controversy erupted in the Air Force, might the same fate befall the Army? One current Army activity that presents dangers of religious coercion similar to those found at the Air Force Academy is chaplain-led, official prayer at formal, non-religious Army ceremonies. Such ceremonies—including change-of-command ceremonies, graduation exercises at Army schools, award ceremonies, and reviews—are military, patriotic events and are not considered to be

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[30] *Id.* (emphasis added).

[31] *Id.*

[32] *Id.*

[33] Americans United for the Separation of Church and State, *Air Force Issues Troubling Guidelines on Religion, Says Americans United*, Feb. 9, 2006, http://www.au.org/site/News2?abbr=pr&page=NewsArticle&id=7929&security=1002 &news_iv_ctrl=1241 [hereinafter *Air Force Troubling Guidelines*].

religious services.[34] Soldiers[35] are often required to either participate in or provide support for these events. Nonetheless, these events typically contain an "invocation, reading, prayer, or benediction" offered by an Army chaplain.[36] Members of the audience and the ceremony's participants, many of whom likely were ordered to attend the ceremony in the first place, must stand and participate—or at least appear to participate—in the chaplain's prayer, a state-sponsored and state-conducted religious exercise. Under similar circumstances, the Supreme Court has held that such mandatory, coerced prayers violate the Establishment Clause of the First Amendment.[37]

This paper will examine the constitutionality of "Army ceremonial prayers," which for purposes of this paper are formal prayers led by Army chaplains at mandatory, non-religious, military and patriotic Army ceremonies.[38] Part II will first describe the purposes of the First Amendment's Religion Clauses.[39] Part III will examine the Supreme Court's Establishment

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[34] U.S. DEP'T OF ARMY, REG. 165-1, CHAPLAIN ACTIVITIES IN THE UNITED STATES ARMY para. 4-4h (25 Mar 04) [hereinafter 2004 AR 165-1].

[35] For purposes of this paper, the word "Soldiers" refers to all members of the Army: enlisted service members below the rank of E-5, non-commissioned officers, warrant officers, and commissioned officers.

[36] 2004 AR 165-1, *supra* note 34, para. 4-4h.

[37] U.S. CONST. amend. I ("Congress shall make no law respecting the establishment of a religion, or prohibiting the free exercise thereof . . . ."); *see infra* notes 192–233 (describing school prayer jurisprudence).

[38] Despite the coercive influence that commanders exerted at the Air Force Academy, this paper will not discuss prayers or religious expressions by Army commanders. Because the chaplain is the commander's staff expert on religious matters, a chaplain who offers official prayers at an Army ceremony acts on the commander's behalf. If any officer would be constitutionally allowed to offer ceremonial prayers, it would be the chaplain. *See infra* notes 309–26 and accompanying text (describing the constitutional permissibility of Army chaplains). The phrase "military and patriotic" comes from AR 165-1. *See* 2004 AR 165-1, *supra* note 34, para. 4-4h (noting that Army chaplains may be required to official prayers at "military and patriotic" ceremonies). The phrase "Army ceremonial prayer" should not be confused with the class of activities known as "ceremonial deism." *See infra* notes 129–40 and accompanying text.

[39] Together, the Establishment Clause and Free Exercise Clause comprise the Religion Clauses of the First Amendment. *See supra* note 37.

Clause jurisprudence, especially its school prayer cases, which bear important similarities to Army ceremonial prayers. Part IV will briefly discuss the Supreme Court's Free Exercise jurisprudence and the relationship between the Free Exercise and Establishment Clauses. These three parts will introduce the legal framework for analyzing the constitutionality of Army ceremonial prayers.

Part V will discuss the roles and duties of the Army chaplaincy. Offering invocations, benedictions, and other prayers at Army ceremonies seems to be a minor function of the chaplaincy, and important field references for both specific chaplains' duties and the general conduct of Army ceremonies fail to even mention such prayers, let alone provide concrete guidance on their conduct.[40] Part VI will consider the formative socialization process for Soldiers in the Army. The Army Socialization Process first immerses Soldiers in Army values and culture, and then it sustains Soldiers' identities as members of a distinct, specialized society, separate from the outside civilian community.[41] Part VII will apply Establishment Clause jurisprudential tests to the issue of Army ceremonial prayers and demonstrate that these prayers, like prayers at public school graduation ceremonies and football games, violate the Establishment Clause.

Part VIII will examine several lines of argument for preserving Army ceremonial prayers. The prayers may be such *de minimis* constitutional violations that any attempt to address them would be a tremendous waste of time and resources. Forbidding the prayers might unlawfully infringe either the free exercise rights of some members of the audience or the free speech and

[40] *See infra* Part V.C (discussing the chaplain's role of saying ceremonial prayers).

[41] *See infra* notes 370–96 and accompanying text.

free exercise rights of Army chaplains. Finally, the prayers may be defended as examples of ceremonial deism and public acknowledgments of God with longstanding historical roots, like prayers before legislative sessions. Part VIII will explain why none of these arguments demonstrably alters the unconstitutional nature of Army ceremonial prayers. Ultimately, the Army should no longer sanction an activity like ceremonial prayers that provides minimal free exercise benefits but that could coerce even one Soldier to participate in a government-sponsored religious activity in violation of the Establishment Clause.

II. Purposes of the Religion Clauses of the First Amendment

To understand any religious issue in constitutional law, one must discuss the underlying purposes of the First Amendment's Religion Clauses. Because an in-depth analysis of these purposes is beyond the scope of this paper, this section will provide a mere overview of the Religion Clauses' chief purposes: protecting religious liberty and freedom of conscience, preserving the private nature of religion, and removing religious issues from the political process.

A. Protecting Religious Liberty and Freedom of Conscience

According to the Supreme Court, the overarching purpose of the Religion Clauses is to protect religious liberty.[42] The Establishment Clause acts as a "social compact that guarantees

[42] *E.g.*, McCreary County v. Am. Civil Liberties Union of Ky., 125 S. Ct. 2722, 2746 (2005) (O'Connor, J., concurring) (stating that the goal of the Religion Clauses is "to carry out the Founders' plan of preserving religious liberty to the fullest extent possible in a pluralistic society"); Sch. Dist. of Abdington Twp. v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring) (explaining that the purpose of the Religion Clauses is to "assure the fullest possible scope of religious liberty and tolerance for all"). Some critics debate the "self-legend" that the Establishment Clause and the Free Exercise Clause equally protect the religious freedom of all Americans. Stephen

for generations a democracy and a strong religious community essential to safeguarding religious liberty."[43] The Religion Clauses jointly "ensure that no religion be sponsored or favored, none commanded, and none inhibited."[44] Government control or sponsorship tends to "degrade religion."[45] Because the Court has repeatedly held that the Religion Clauses protect the fundamental right of religious freedom from the interference of both state and federal governments, religious freedom may flourish at all levels of society.[46] In this permissive environment, without government restraint or regulation, individuals have a wider range of religious alternatives, and religious freedom can thrive.[47]

A closely related purpose of the Religion Clauses is to protect the freedom of conscience.[48] At a minimum, the freedom of conscience includes the right of an individual to worship in a manner of her choosing and to support the religious institution she wants to

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M. Feldman, *A Christian America and the Separation of Church and State, in* LAW AND RELIGION: A CRITICAL ANTHOLOGY 267, 270 (Stephen M. Feldman ed., 2000). For example, the Supreme Court has typically found it difficult to accommodate the religious practices of non-Christian religious minorities, and even when the Supreme Court does uphold such minority rights, it uses "distinctively Christian terms" to discuss and understand the minority's religion. *Id.*

[43] Lee v. Weisman, 505 U.S. 577, 606 (1992) (Blackmun, J., concurring).

[44] Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970) (quoted in Katcoff v. Marsh, 755 F.2d 223, 233 (2d Cir. 1985)).

[45] Engel v. Vitale, 370 U.S. 421, 432 (1962); *see* Marsh v. Chambers, 463 U.S. 783, 804 (1983) (Brennan, J., dissenting) (explaining that the Establishment Clause prevents the "trivialization and degradation of religion").

[46] 5 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 21.2, at 10 (3d ed. 1999); *see also* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) ("The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.").

[47] LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 228 (2d ed. 1994) ("[F]reedom from an establishment [of religion], even a non-preferential one, is an indispensable attribute of liberty.").

[48] *See generally* Rodney K. Smith, *Conscience, Coercion and the Establishment of Religion: The Beginning of an End to the Wandering of a Wayward Judiciary?*, 43 CASE W. RES. L. REV. 917 (1993) (suggesting that conscience-based analysis might eliminate the tension between the Religion Clauses).

support.[49] To enable these rights, the Establishment Clause ensures that "neither the power nor the prestige of the Federal Government" is "used to control, support, or influence" Americans' religious choices.[50] As the Court has consistently recognized, when the government places its influence behind "a particular religious belief," religious minorities feel a coercive pressure to conform to the majority dogma.[51] People who do not adhere to the favored, majority religion may feel as if they are on the outside looking in, excluded from the benefits of the political community because of their minority religious beliefs.[52]

Freedom of conscience also includes a freedom of belief, especially religious belief. As Part IV will explain, the Free Exercise Clause absolutely protects religious belief.[53] Government action may not interfere with religious beliefs, even if the majority of affected citizens would favor such action.[54] On the other hand, rituals based on and arising from religious beliefs are not absolutely protected.[55]

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[49] *E.g.*, McCreary County v. Am. Civil Liberties Union of Ky., 125 S. Ct. 2722, 2742 (2005) (explaining that in the Religion Clauses, the Framers meant to "protect the integrity of individual conscience in religious matters"); *Marsh*, 463 U.S. at 803 (Brennan, J., dissenting) (stating that the Establishment Clause forbids the government from "requir[ing] individuals to support the practices of a faith with which they do not agree").

[50] Engel v. Vitale, 370 U.S. 421, 429 (1962).

[51] *Id.* at 431; *see* Lee v. Weisman, 505 U.S. 577, 592 (1992) ("A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.").

[52] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309–10 (2000); *see* County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Ch., 492 U.S. 573, 594 (1989) (quoting Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)) (explaining that the Establishment Clause prohibits government from "making adherence to a religion relevant in any way to a person's standing in the political community").

[53] *See infra* notes 286–91 and accompanying text (discussing Free Exercise Clause jurisprudence).

[54] Garrett Epps, *What We Talk About When We Talk About Free Exercise*, 30 ARIZ. ST. L.J. 563, 575 (1998).

[55] Employment Div. of Or. v. Smith, 494 U.S. 872, 879 (1990) (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)) (noting that the Free Exercise Clause does not relieve an individual of the duty to

B. Preserving the Private Nature of Religion

The Religion Clauses also strive to keep religion a private matter; that is, a matter free of government regulation, supervision, or control.[56] As a result, the Religion Clauses commit the "transmission of religious beliefs and worship" to the "private sphere."[57] Proponents of this interpretation of the Religion Clauses note the absence of any mention of God in the text of the Constitution itself,[58] aside from the document's date (containing the words "in the year of our Lord") and Article VI's prohibition on religious tests for public office.[59] This absence is significant. Deistic references existed in both historical European constitutions and in the Articles of Confederation,[60] and the Framers were probably familiar with these documents.[61] The four-month constitutional convention provided the Framers ample opportunity to create

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comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)").

[56] McCreary County v. Am. Civil Liberties Union of Ky., 125 S. Ct. 2722, 2746 (2005) (O'Connor, J., concurring) (explaining that the Court's interpretations of the Religion Clauses have "kept religion a matter for the individual conscience, not for the prosecutor or the bureaucrat"); *Lee*, 505 U.S. at 589 ("The First Amendment's Religion Clauses mean that religious beliefs and religious expressions are too precious to be either proscribed or prescribed by the State."); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 228 (1963) (Goldberg, J., concurring) ("Under the First Amendment it is strictly a matter for the individual and his church as to what church he will belong to and how much support, in the way of belief, time, activity or money, he will give to it."); Engel v. Vitale, 370 U.S. 421, 431–32 (1962) ("The Establishment Clause thus stands as an expression of the principle . . . that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by [government officials].").

[57] *Lee*, 505 U.S. at 589.

[58] LEVY, *supra* note 47, at 79–80 (noting that the Constitutional Convention of 1787 gave "only slight attention to the subject of a bill of rights and even less to the subject of religion").

[59] U.S. CONST., pmbl. (listing date), art. VI (prohibiting religious tests for public office).

[60] LEVY, *supra* note 47, at 79.

[61] Susan Jacoby, *Original Intent*, MOTHER JONES, Dec. 2005, at 29, 30.

similar references in the United States Constitution, and their failure to do so cannot reasonably be called inadvertent.[62]

Some critics lament that this interpretation of the Religion Clauses has relegated religion to the private sphere, and they argue that this "privatization" prevents religion from guiding government policy.[63] Religious structures and institutions are then unable to influence public decisions, one of religion's essential roles in American society.[64] Some of these critics also cite the Court's desire to keep religion out of the public sphere as evidence of a pervasive, sinister bias against both religion and its followers.[65]

Other critics assert that pushing religion into the private sphere exclusively is inconsistent with the underlying relationship between religion and government at the founding of the United

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[62] *See id.* (citing the inexplicability of the Founders' failure to "spell out their intentions" in the Constitution if they truly wanted to "base the government on Christianity or monotheism").

[63] STEPHEN V. MONSMA, POSITIVE NEUTRALITY: LETTING FREEDOM RING 181 (1993) (stating that the "mindset that is prevalent today" casts religious beliefs as "essentially private beliefs, relevant to individuals' personal lives but irrelevant to the affairs of the State"); Michael Novak, *Introduction* to MONSMA, *supra*, at ix, ix ("The Court's recent understanding of religion as a private matter for individuals has plainly become malnourished and impoverished."); Thomas Berg, *The Church-State Battle: Finding the Right Solution*, CHRISTIAN LAW., Fall 2005, at 22, 24 (encouraging "religious citizens" to be "equal participants in the legitimate sphere of government, with an equal right to influence government to adopt their views as good policy").

[64] MONSMA, *supra* note 63, at 163 (citing participation in "society's public policy-making process," by both direct political involvement and indirect influence exerted on adherents, as one of the four primary roles of religion in America). *See* Ronald F. Thiemann, *The Constitutional Tradition: A Perplexing Legacy*, *in* LAW AND RELIGION: A CRITICAL ANTHOLOGY 345, 345 (Stephen M. Feldman ed., 2000) (noting that in light of the "pervasiveness and importance of religious convictions within the American populace," it would be "odd" to "deny such profound sentiments any role in our public life"); Bill Haynes, Religion and Politics (Oct. 10, 2004), http://www.aclj.org/news/read.aspx?ID=625 (noting that "many of the cultural issues that are critical to Christians and the church are intertwined with the political world" and encouraging the church to "speak to [moral] issues" with a "clear and loud voice or else place itself in the realm of the irrelevant").

[65] *Id.* at 68 (explaining the "persuasive evidence" within "influential segments of the population" of a "very anti-religious strain" that reacts against persons who treat their faith as "an authoritative, literal force in their lives").

States.[66] In the Founding Era, the primary argument for the establishment of official State religions posited that a republic needs public virtue—the willingness of individuals to sacrifice for the public good—and that religion promotes public virtue.[67] Consequently, religion should receive government support so it might prosper and public virtue, in turn, might increase to the overall benefit of the nation.[68]

The Founders generally agreed on the first two principles but not the conclusion about official support of religion.[69] Having official, State-sponsored (i.e., established) colonial religions weakened religious authorities by relinquishing their religious control to the colonial governments.[70] Disestablishment of official religions through the Establishment Clause did try to fix the shortcomings of state-funded religions,[71] but disestablishment did not signify that the Founders thought religion was undesirable in the so-called public square.[72] Therefore, the

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[66] *E.g.*, McCreary County v. Am. Civil Liberties Union of Ky., 125 S. Ct. 2722, 2748 (2005) (Scalia, J., dissenting) ("Religion is [not] to be strictly excluded from the public forum. [Exclusion] is not, and never was, the model adopted by America.").

[67] Berg, *supra* note 63, at 23 ("James Madison, evangelical preachers Isaac Backus and John Leland, and many others believed that religion, the duty to the Creator, was both important in itself and essential to the virtue of citizens and society."); Audio Tape: Honorable Michael W. McConnell, U.S. Court of Appeals for the Tenth Circuit, The Meador Lecture on Law and Religion: Religion at the Founding: Republicanism, Public Virtue, and Disestablishment (Oct. 27, 2005) (on file with author) [hereinafter Meador Lecture].

[68] Meador Lecture, *supra* note 67; *see McCreary County*, 125 S. Ct. at 2749 (Scalia, J., dissenting) (stating that the Founders believed that "morality was essential to the well-being of society and that encouragement of religion was the best way to foster morality").

[69] Meador Lecture, *supra* note 67.

[70] *Id.*

[71] *Id.*

[72] This interpretation of Founding Era history, however, is far from undisputed. *See, e.g.*, Jacoby, *supra* note 61, at 30 (criticizing the "revisionist script," which asserts that the Founders "based their new government in Christian teaching . . .; they were unconcerned about religious interference with government . . . and . . . there was no tension between secularism and religion . . . because everyone accepted God as the source of civic authority").

modern privatization of religion is inconsistent with the original understanding of religion's role in American society and government.

Despite these criticisms, the Court continues to hold that the Religion Clauses make religion a private matter and forbid religion from becoming a governmental responsibility. As discussed above, keeping religion a private matter insulates it from meddlesome government control.

C. Removing Religious Issues from the Political Process

Finally, the Religion Clauses, particularly the Establishment Clause, prevent considerable political discord by removing debate over inherently contentious religious issues from "governmental supervision or control."[73] In the sixteenth and seventeenth centuries, disputes over the content of the Book of Common Prayer for the Anglican Church caused tumult in England.[74] The political and social divisiveness of England's religious disputes prompted some minority religious groups to leave England and form a new government in England's North

[73] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 310 (2000); Marsh v. Chambers, 463 U.S. 783, 805 (1983) (Brennan, J., dissenting) (explaining that the Establishment Clause helps "assure that essentially religious issues" do not "become the occasion for battle in the political arena"); Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 228 (1948) (Frankfurter, J., concurring) (explaining that the Religion Clauses "prohibited the Government common to all from becoming embroiled, however innocently, in the destructive religious conflicts of which the history of even this country records some dark pages").

[74] Engel v. Vitale, 370 U.S. 421, 426, 426 n.7 (1962) (citing historical evidence of the numerous revisions of the Book of Common Prayer in the sixteenth and seventeenth centuries and explaining that these revisions "repeatedly threatened to disrupt the peace" of England).

American colonies.[75] Later, recognition of the depth of potential political strife from religious issues encouraged the drafting of the Religion Clauses.[76]

As the Court has recently observed, the Framers used the Religion Clauses to "guard against the civic divisiveness that follows when the Government weighs in on one side of religious debate."[77] Furthermore, if government officials can shelter their policy decisions beneath the mantle of religion and divine inspiration, questioning these officials is transformed into questioning the higher power who has guided their decisions and who is "beyond reproach."[78] Unfortunately, recent examples of this tendency among our elected leaders are readily available.[79]

The removal of religion from governmental debate and control has been influenced, in part, by a realization that established religions both in England and in the colonies had frequently led to religious persecutions.[80] James Madison remarked that establishment of a national religion in the United States would be a "departure from that generous policy, which, offering an asylum to the persecuted and oppressed of every Nation and Religion, promised a lustre to our

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[75] *Id.* at 427 (explaining that religious groups, "lacking the necessary political power to influence the Government on the matter, decided to leave England and its established church and seek freedom in America from England's governmentally ordained and supported religion").

[76] *Id.* at 432 ("Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally-established religions and religious persecutions go hand in hand.").

[77] McCreary County v. Am. Civil Liberties Union of Ky., 125 S. Ct. 2722, 2742 (2005).

[78] Lee v. Weisman, 505 U.S. 577, 607 (1992) (Blackmun, J., concurring).

[79] *See, e.g.*, Antonia Zerbisias, Editorial, *Bush's Hotline to Heaven*, TORONTO STAR, July 3, 2003, at A23, *available at* LEXIS, News & Business, Major Newspapers (recounting that during a meeting with Palestinian Prime Minister Abbas in June 2003, President Bush reportedly said, "God told me to strike at Al Qaeda and I struck them, and then He instructed me to strike at Sadaam, which I did.").

[80] *Engel*, 370 U.S. at 432–33.

country . . . ."[81] Consequently, government should avoid any entanglement with and maintain strict neutrality towards religion.[82] Thomas Jefferson's 1802 letter to the Baptist Association of Danbury, Connecticut, exemplified this view and explained that the First Amendment's Religion Clauses built a "wall of separation between Church and State."[83] While the Court has used neutrality as a guiding principle for its Establishment Clause analysis, it has moved away from the strict neutrality that the "wall of separation" metaphor implies.[84] Part III will examine the paths that the Court has followed in its Establishment Clause jurisprudence.

III. Establishment Clause jurisprudence of the U.S. Supreme Court

Few areas of constitutional law are as convoluted as the Establishment Clause. The Court has repeatedly noted that the constitutional test for Establishment Clause violations is "not susceptible to a single verbal formulation,"[85] and the Establishment Clause "is not a precise, detailed provision in a legal code capable of ready application."[86] Because the Establishment

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[81] James Madison, To the Honorable General Assembly of the Commonwealth of Virginia: A Memorial and Remonstrance § 9 (1785), *reprinted in* JAMES MADISON ON RELIGIOUS LIBERTY 55, 58 (Robert S. Alley ed., 1985).

[82] *See* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 217 (1963) (quoting Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 31–32 (1947) (Rutledge, J., dissenting)) ("But the object was broader than separating church and state in [a] narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.").

[83] Letter from Thomas Jefferson to Danbury (Conn.) Baptist Assoc. (Jan. 1, 1802), *reprinted in* JOHN T. NOONAN, JR. & EDWARD MCGLYNN GAFFNEY, JR., RELIGIOUS FREEDOM: HISTORY, CASES, AND OTHER MATERIALS ON THE INTERACTION OF RELIGION AND GOVERNMENT 205–06 (2001).

[84] *See infra* notes 93–95 and accompanying text.

[85] County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Ch., 492 U.S. 573, 591 (1989); *see* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 33 (2004) (O'Connor, J., concurring) (quoting Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring)) ("As I have said before, the Establishment Clause 'cannot easily be reduced to a single test.' There are different categories of Establishment Clause cases, which may call for different approaches.").

[86] Lynch v. Donnelly, 465 U.S. 668, 678 (1984).

Clause forbids "all laws respecting an establishment of religion,"[87] the Court has given the Establishment Clause a "broad interpretation . . . ."[88] One central principle of Establishment Clause jurisprudence is government neutrality toward religion.[89]

A. The Neutrality Principle and its Application

One famous formulation of the neutrality principle of the Establishment Clause appears in *Everson v. Board of Education of Ewing*,[90] in which the Court explains:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state not the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion.

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[87] U.S. CONST. amend. I.

[88] Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 220 (1963) (quoting McGowan v. Maryland, 366 U.S. 420, 441–42 (1961)); *see* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) ("A given law might not *establish* a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.").

[89] *E.g.*, McCreary County v. Am. Civil Liberties Union of Ky., 125 S. Ct. 2722, 2742–43 (2005) ("A sense of the past thus points to governmental neutrality as an objective of the Establishment Clause, and a sensible standard for applying it."); MONSMA, *supra* note 63, at 30 (explaining that a "fundamental goal" of the Supreme Court's Religion Clause jurisprudence is "neutrality of government, both among different religions and between religion and non-religion"). The neutrality principle is not universally accepted, however. *See McCreary County*, 125 S. Ct. at 2750 (Scalia, J., dissenting) (blasting the neutrality principle as nothing more than "thoroughly discredited say-so," unsupported by either history or the original understanding of the Establishment Clause); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 245 (1963) (Brennan, J., concurring) (calling the line between neutrality and non-hostility towards religion "elusive"); Frank S. Ravitch, *A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 GA. L. REV. 489, 492–94 (2004) (asserting that "neutrality, whether formal or substantive, does not exist," and that the Court has not established a consistent baseline from which to assess government neutrality with respect to religion).

[90] 330 U.S. 1 (1947).

> No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.[91]

The neutrality principle generally has required the government to pursue secular goals in a manner that does not favor religion over non-religion and does not favor any single religion over others.[92] The Court's Establishment Clause jurisprudence since 1947 has moved from strict neutrality, demonstrated by the Court's metaphor of a "wall of separation between Church and State,"[93] to nondiscriminatory neutrality, which prohibits government preferential treatment of religion generally or any religious sect specifically.[94] A third variation of neutrality, benevolent neutrality, has been advocated by individual justices but never adopted by the Court.[95]

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[91] *Id.* at 15–16.

[92] *E.g.*, *McCreary County*, 125 S. Ct. at 2733 ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and non-religion."); *see* ROTUNDA & NOWAK, *supra* note 46, § 21.1, at 2.

[93] *Everson*, 330 U.S. at 16 ("In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'"); Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring) ("Separation means separation, not something less. Jefferson's metaphor in describing the relation between Church and State speaks of a "wall of separation," not of a fine line easily overstepped."). Strict neutrality requires "a consistent no aid to religion policy" and "governmental noninvolvement in religious matters." Thiemann, *supra* note 64, at 359. The Court officially abandoned the strict neutrality approach in 1971. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) ("[T]otal separation [between church and state] is not possible in an absolute sense."); *see* Lynch v. Donnelly, 465 U.S. 668, 673 (1984) (explaining that the "wall between church and state" metaphor is "not a wholly accurate description" of the church-state relationship). Strict neutrality is "unworkable in practice." Thiemann, *supra* note 64, at 360. In American society, government regulation is so widespread that government contacts and affects all societal institutions, even religious ones. *Id.*

[94] *McCreary County*, 125 S. Ct. at 2742 ("[T]he principle of neutrality has provided a good sense of direction: the government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals under the Free Exercise Clause.").

[95] Benevolent neutrality promotes accommodation of "religious expressions and acknowledgments" in the public sphere and forbids only either officially established religions in the colonial sense (direct government support of religion) or government interference with religion (coercion of religious expression by government). Thiemann, *supra* note 64, at 360. Benevolent neutrality asserts that government must be neutral between religious sects but does not have to be neutral between religion and non-religion. *Id.* Justices Scalia and Thomas have incorporated the principles of benevolent neutrality into some of their concurring and dissenting opinions. *See, e.g.*, *McCreary County*, 125 S. Ct. at 2748 (Scalia, J., dissenting) (stating that the European model of government, in which religion is "strictly excluded from the public forum," "is not, and never was, the model adopted by America"); Elk Grove

The neutrality principle has produced an array of constitutional tests in the Court's Establishment Clause jurisprudence. To analyze the constitutionality of Army ceremonial prayers, three such tests are relevant: the *Lemon* test; the endorsement test, especially with respect to ceremonial deism; and the coercion test, which the Court has consistently applied in school prayer cases.

B. The *Lemon* Test

The Supreme Court first stated the *Lemon* test in *Lemon v. Kurtzman*,[96] striking down statutes in Rhode Island and Pennsylvania that provided for partial state subsidization of the salaries of non-public school teachers.[97] The Court explained that a law that is religiously neutral on its face does not violate the Establishment Clause if the law: (1) has a valid, secular purpose;[98] (2) has a primary effect that neither inhibits nor advances religion; and (3) does not create an excessive entanglement between government and religion.[99] These three tests together

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Unified Sch. Dist. v. Newdow, 542 U.S. 1, 52–53 (2004) (Thomas, J., concurring) (claiming that the Establishment Clause was directed at "establishments of religion" that involved "legal coercion," and concluding that "government practices that have nothing to do with creating or maintaining" coercive state establishments of religion do not violate the Establishment Clause).

[96] Lemon v. Kurtzman, 403 U.S. 602 (1971).

[97] *Id.* at 606 (1971). The Rhode Island statute directed the State to pay teachers in non-public elementary schools a supplement of 15% of their annual salary. *Id.* Under the Pennsylvania statute, the State reimbursed non-public elementary and secondary schools their costs of teachers' salaries and secular instructional materials. *Id.*

[98] To determine if a challenged law comports with the purpose prong, courts consider the "statute on its face, its legislative history, or its interpretation by a responsible administrative agency." Edwards v. Aguillard, 482 U.S. 578, 594 (1987).

[99] *Lemon*, 403 U.S. at 612–13. To assess "excessive entanglement," courts must consider the nature of the institution that received the government benefit, the nature of the government benefit given, and the relationship between the government and religious leaders that results. *Id.* at 615.

became known as "the *Lemon* test," with each issue comprising a "prong."[100] In 1997, the Court revised the *Lemon* test by making excessive entanglement "an aspect of the inquiry into a statute's effect" rather than a separate prong.[101]

Criticism for *Lemon* has been fairly widespread.[102] Supreme Court Justices have questioned the *Lemon* test, often in concurring and dissenting opinions.[103] The most recent criticisms occurred in the late-Chief Justice Rehnquist's plurality opinion in *Van Orden v. Perry*,[104] which upheld the display of a granite replica of the Ten Commandments on the grounds of the Texas statehouse. The *Van Orden* plurality discredited the *Lemon* test and avoided using it to decide the case. The plurality noted that "just two years after *Lemon* was decided," the

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[100] The first two prongs of the *Lemon* test originated in *School District of Abington Township v. Shempp*, 374 U.S. 203 (1963), in which the Court explained: "The test [for challenges to statutes under the Establishment Clause] may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Id.* at 222 (citations omitted); *see* Zelman v. Simmons-Harris, 536 U.S. 639, 669 (2002) (O'Connor, J., concurring) (making the same observation about *Lemon*'s origins).

[101] Agostini v. Felton, 521 U.S. 203, 233 (1997) (holding that the New York City Board of Education's program of sending public school teachers into parochial schools to provide remedial education for disadvantaged parochial school students did not violate the Establishment Clause).

[102] Thiemann, *supra* note 64, at 358 (explaining that the Court's analysis in *Lemon* "has come under increasing fire, from advocates both of governmental neutrality [towards religion] and of government accommodation [of religion]"); Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 941 (1986) ("Not what flunks the three-part test, but what interferes with religious liberty, is an establishment of religion.").

[103] *E.g.*, Lamb's Chapel v. Moriches Union Free Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia, J., concurring) ("For my part, I agree with the long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced."); Lee v. Weisman, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting) (chiding the Court for "ignoring" *Lemon* in its decision and speculating that "the interment of [*Lemon*] may be the one happy byproduct of the Court's otherwise lamentable decision [in *Lee*]"); Lynch v. Donnelly, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring) ("It has never been entirely clear, however, how the three parts of the [*Lemon*] test relate to the principles enshrined in the Establishment Clause.").

[104] 125 S. Ct. 2854 (2005).

Court called *Lemon*'s factors "no more than helpful signposts."[105] The plurality further explained that many of the Court's recent Establishment Clause decisions either "simply have not applied the *Lemon* test"[106] or have applied it "only after concluding that the challenged practice was invalid under a different Establishment Clause test."[107]

Despite these criticisms and repeated invitations to reconsider or overturn the decision,[108] *Lemon* is still good law. In fact, on the same day as the *Van Orden* decision, the Court relied on *Lemon*'s purpose prong to strike down the display of a Ten Commandments wall poster in the hallway of a Kentucky county courthouse in *McCreary County v. American Civil Liberties Union of Kentucky*.[109] Thus, while *Van Orden* seemed to place *Lemon* on its death bed, *McCreary County* miraculously revived *Lemon*'s continued role in Establishment Clause jurisprudence.[110]

C. The Endorsement Test

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[105] *Id.* at 2861 (quoting Hunt v. McNair, 413 U.S. 734, 741 (1973)).

[106] *Id.*

[107] *Id.*

[108] *Lamb's Chapel*, 508 U.S. at 395 n.7 ("[W]e return to the reality that . . . Lemon, however frightening it may be to some, has not been overruled."); *Lee*, 505 U.S. at 586 ("[W]e do not accept the invitation of petitions and amicus for the United States to reconsider our decision in *Lemon v. Kurtzman*.").

[109] 125 S. Ct. 2722, 2732 (2005). Unlike the hostility to the *Lemon* test in *Van Orden*, the Court actually began its analysis in *McCreary County* by reciting that *Lemon* required government action to have a "secular . . . purpose" that was "genuine, not a sham, and not merely secondary to a religious objective." *Id.* at 2735. The Court then found that the county had a "religious object" for displaying the Ten Commandments inside its courthouse because the display was an "unmistakably religious statement dealing with religious obligations and with morality subject to religious sanction." *Id.* at 2739.

[110] *See Lamb's Chapel*, 508 U.S. at 398 (Scalia, J., concurring) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again . . . .").

A second test that the Supreme Court has used to assess the government's neutrality toward religion is the endorsement test. The endorsement test arose from Justice O'Connor's suggested "clarification" of the *Lemon* effect prong in her concurring opinion in *Lynch v. Donnelly*.[111] Justice O'Connor suggested that the effect prong "asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or approval."[112] The Court later incorporated Justice O'Connor's endorsement test in Establishment Clause opinions,[113] especially in cases of government involvement in public prayers[114] and static displays of religious symbols.[115]

Under the endorsement test, the Court determines whether a challenged government action creates the appearance that the government is promoting or expressing favoritism towards

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[111] 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

[112] *Id.* The Court adopted this analysis of the *Lemon* effect prong in *Edwards v. Aguillard*, 482 U.S. 578, 583–84 (1987).

[113] *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 655 (2002) ("[N]o reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement."); Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 390 (1985) (stating that when evaluating the effect of government action under the Establishment Clause, courts must determine whether "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the non-adherents as a disapproval, of their individual religious choices"); Wallace v. Jaffree, 472 U.S. 38, 56 (1985) ("In applying the purpose test, it is appropriate to ask whether government's actual purpose is to endorse or disapprove of religion.").

[114] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000) ("In cases involving state participation in a religious activity, *one of the relevant questions* is "whether an objective observer . . . would perceive it as a state endorsement of [religion].") (emphasis added).

[115] McCreary County v. Am. Civil Liberties Union of Ky., 125 S. Ct. 2722, 2747 (2005) ("The purpose behind the counties' display [of the Ten Commandments] is relevant because it conveys an unmistakable message of endorsement to the reasonable observer."); County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Ch., 492 U.S. 573, 599–600 (1989) (holding that a Christmas crèche on the grand staircase of the county courthouse violated the Establishment Clause because "no viewer could reasonably think [the display] occupie[d] this location without the support and approval of the government," which conveyed the "unmistakable message" that the county "support[ed] and promote[d] the Christian praise to God that [was] the crèche's religious message").

religion.[116] This unconstitutional endorsement often appears to place the State's "seal of approval" on a particular religious expression or activity.[117] Government endorsement of religious activity violates the Establishment Clause because it both creates the appearance that the government is taking "a position on questions of religious belief" and makes "adherence to a religion relevant in any way to a person's standing in the political community."[118] Endorsement makes members of the endorsed religion feel as if they are political insiders and "favored members of the political community."[119] At the same time, non-adherents of the endorsed religion feel like outsiders to the political process.[120] Such effects are completely inconsistent with the principle of government neutrality toward religion. [121]

Because the endorsement test hinges on the appearance that the government is favoring one religion, the Court asks whether a hypothetical "objective observer," acquainted with the "text, legislative history, and implementation" of the challenged policy or statute, would

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[116] Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 787 (1995) (Souter, J., concurring) ("Effects matter to the Establishment Clause, and one principle was that we assess them is by asking whether the practice in question creates the appearance of endorsement to the reasonable observer."); *County of Allegheny*, 492 U.S. at 593 (quoting Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring)) ("[T]he prohibition against governmental endorsement of religion 'preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.'").

[117] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000); *see County of Allegheny*, 492 U.S. at 590–91 ("[T]his Court has come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine or organization . . . .").

[118] *County of Allegheny*, 492 U.S. at 593; Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

[119] *E.g.*, *McCreary County*, 125 S. Ct. at 2733 (2005); *Santa Fe*, 530 U.S. at 309–10; *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

[120] Agostini v. Felton, 521 U.S. 203, 243 (1997) (Souter, J., dissenting) ("Governmental approval of religion tends to . . . carry a message of exclusion to those of less favored views."); *County of Allegheny*, 492 U.S. at 627 (O'Connor, J., concurring).

[121] *County of Allegheny*, 492 U.S. at 627 (O'Connor, J., concurring) (explaining that the government must not "show[] either favoritism or disapproval towards citizens based on their personal religious choices").

"perceive it as an endorsement" of religion by the government.[122] This objective observer must "embody a community ideal of social judgment,"[123] so she is deemed to both understand and remember the history of the challenged policy or statute and the "context in which [the] policy arose."[124] Relying on the hypothetical objective observer prevents an Establishment Clause violation from being proven by a single plaintiff's perception that the government had improperly endorsed religion.[125]

The Court has attempted to distinguish between government action that unlawfully endorses religion and private religious expression that the government merely allows to occur.[126] If the government behaves neutrally toward private religious speech without regard to its religious content, it has not endorsed this private speech for purposes of the Establishment Clause.[127] By merely permitting private religious expression to occur on public property without

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[122] *Santa Fe*, 530 U.S. at 308 (quoting Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring)); *McCreary County*, 125 S. Ct. at 2734 (explaining that the "objective observer" is one who "takes account of the traditional external signs that show up in the 'text, legislative history, and implementation of the statute,' or comparable official act") (internal citations omitted), 2737 (explaining that "reasonable observers have reasonable memories" and the Court will not "turn a blind eye to the context" in which the challenged act arose).

[123] Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 33 (2004) (O'Connor, J., concurring).

[124] *McCreary County*, 125 S. Ct. at 2737 (quoting Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 315 (2000)); *Newdow*, 542 U.S. at 34 (2004) (O'Connor, J., concurring) (explaining that the "reasonable observer must be deemed aware of the history" of the challenged practice and "must understand its place in our *Nation's* cultural landscape") (emphasis added); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 781 (1995) (O'Connor, J., concurring) (explaining that the reasonable observer "must be deemed aware of the history and context" in which the challenged practice occurs); *County of Allegheny*, 492 U.S. at 629 (explaining that the endorsement test "depends on a sensitivity to the unique circumstances and context of a particular challenged practice").

[125] *Newdow*, 542 U.S. at 34 (O'Connor, J., concurring) (stating that the endorsement test's use of the objective observer prevents the test from becoming a "heckler's veto").

[126] *See, e.g.*, *Pinette*, 515 U.S. at 764 (internal citations omitted) ("Where we have tested for endorsement of religion, the subject of the test was either expression by the government itself or else government action alleged to discriminate in favor of private religious expression or activity.").

[127] *Id.* (calling such an approach a "transferred endorsement" test that "has no antecedent in our jurisprudence").

becoming more extensively involved, the government does not offend the Establishment Clause.[128]

1. Ceremonial Deism

As part of its endorsement analysis, the Court has defined a class of government activities that, despite their apparent religious nature, have been deemed to not convey an unconstitutional government endorsement of religion to an objective observer. This class of activities is known as "ceremonial deism."[129] The Court has "implicitly referred" to ceremonial deism since at least the early-1950s[130] and continues to recognize ceremonial deism today.[131]

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[128] *See id.* at 770 (holding that private religious expression—in this case, a wooden cross erected by the Ohio Ku Klux Klan—that occurs in a traditional or designated public forum "cannot violate the Establishment Clause").

[129] "Ceremonial deism" was coined by former Yale Law School Dean Walter Rostow in a 1962 lecture at Brown University. Susan B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2091 (1996). Dean Rostow identified a "class of public activity" that was "so conventional and uncontroversial as to be constitutional," which he called "ceremonial deism." *Id.* "Deism" was an eighteenth-century philosophy that taught the existence of a Supreme Deity, who people should adore, while rejected formal theological and religious strictures. *See id.* Deists also "rejected revelation and all the supernatural elements of the Christian Church" and preferred to read the "word of the Creator" in Nature. Brooke Allen, *Our Godless Constitution*, NATION, Feb. 21, 2005, at 14, 16.

[130] *See* Zorach v. Clauson, 343 U.S. 306, 312–13 (1952) (citing legislative prayers, appeals to God in presidential addresses, Thanksgiving Day proclamations, the use of "so help me God" in courtroom oaths, and the use of the phrase "God save the United States and this Honorable Court" before United States Supreme Court sessions as permissible government interactions with religion).

[131] *See, e.g.*, Van Orden v. Perry, 125 S. Ct. 2854, 2861–63 (2005) (citing an "unbroken history of official acknowledgment . . . of the role of religion in American life," such as Thanksgiving Day proclamations, prayers to open legislative sessions, and depictions of the Ten Commandments and Moses in several federal buildings in Washington, D.C., including the Supreme Court's courtroom); Lynch v. Donnelly, 465 U.S. 668, 675–77 (1984) (explaining that United States history is "replete with references to the value and invocation of Divine guidance in deliberations and pronouncements" of government officials and listing examples); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 303 (1963) (Brennan, J., concurring) (speculating that the national motto, "In God We Trust," was "interwoven . . . so deeply into the fabric of our civil polity" that its use "may well not present that type of involvement [with religion] that the First Amendment prohibits").

While it is true that "no one acquires a vested or protected right in violation of the Constitution by long use,"[132] the Court has been reluctant to strike down longstanding government practices that refer to or acknowledge God. Instead, the Court has upheld these activities in the face of Establishment Clause challenges based on the history of the activities and the Court's determination that, in light of that history, the challenged activities "involved no significant danger of eroding government neutrality" toward religion.[133] The longstanding existence and "nonsectarian nature" of the activities would not "convey a message of endorsement" of religion to an objective observer.[134] Instead, these practices, "despite their religious roots," are deemed to no longer be "a celebration of . . . particular religious beliefs"[135] because they serve the "legitimate *secular* purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society."[136]

Thus, through the doctrine of ceremonial deism, the government may sometimes publicly acknowledge God and refer to the tenets of specific religions yet not violate the Establishment Clause.[137] The category of ceremonial deism has never been fully defined. Professor Susan

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[132] Walz v. Tax Comm'n, 397 U.S. 664, 678 (1970). This is true "even when that span of time covers our entire national existence and indeed predates it." *Id.*

[133] ROTUNDA & NOWAK, *supra* note 46, § 21.3, at 25.

[134] County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Ch., 492 U.S. 573, 631 (1989) (O'Connor, J., concurring).

[135] *Id.* at 631 (majority opinion), 657 (Kennedy, J., dissenting) ("Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage.").

[136] *Id.* at 596 n.46 (quoting *Lynch*, 465 U.S. at 693) (majority opinion) (emphasis added).

[137] Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 37 (2004) (O'Connor, J., concurring) ("Symbolic references to religion that qualify as instances of ceremonial deism will pass the coercion test as well as the endorsement test."); *see* LYNDA BECK FENWICK, SHOULD THE CHILDREN PRAY? A HISTORICAL, JUDICIAL, AND

Epstein lists the following activities as "core ceremonial deism" due to their repeated mention by the Supreme Court and widespread acceptance by lower courts: (1) legislative prayers and prayer rooms in legislative buildings; (2) invocations and benedictions at presidential inaugurations; (3) presidential addresses invoking God; (4) the invocation "God save the United States and this Honorable Court" at the start of Supreme Court sessions; (5) public oaths invoking God and using the Bible; (6) the dating of documents with "in the year of our Lord"; (7) the Thanksgiving and Christmas holidays; (8) the National Day of Prayer; (9) the words "under God" in the Pledge of Allegiance; and (10) the national motto, "In God We Trust."[138]

The doctrine of ceremonial deism also tends to expand the scope of permissible activities under the Establishment Clause. It allows courts to use the following steps when considering if a challenged practice violates the Establishment Clause: Cite traditional practices that pass constitutional muster, especially those that qualify as ceremonial deism; decide that the practice at issue does not advance or establish religion "any more than" these permissible practices; and conclude that the practice at issue must be consistent with the Establishment Clause.[139] Although ceremonial deism originated as a means to validate longstanding official

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POLITICAL EXAMINATION OF PUBLIC SCHOOL PRAYER 178 (1989) ("The question is whether [ceremonial deism] gestures have enhanced the spiritual lives of American citizens . . . or have trivialized religious concepts to the point that they go unnoticed . . . .").

[138] Epstein, *supra* note 129, at 2104–24 (1996); *see Newdow*, 542 U.S. at 37 (O'Connor, J., concurring) (listing national motto, patriotic songs, and Supreme Court's opening call as ceremonial deism), 27–29 (Rehnquist, C.J., concurring) (listing Thanksgiving Day proclamations and presidential inaugural addresses as ceremonial deism).

[139] Epstein, *supra* note 129, at 2087. The Supreme Court opted for this "syllogistic approach" in *Marsh v. Chambers*, 463 U.S. 783 (1983), concluding that "'legislative prayer presents no more potential for establishment' than other activities that had previously passed constitutional muster." Epstein, *supra* note 129, at 2087 n.15 (quoting *Marsh*, 463 U.S. at 791).

acknowledgments of God, courts have used it to legitimate a series of practices that are neither historically ubiquitous nor presently devoid of religious significance.[140]

2. *Legislative Prayer as Ceremonial Deism*

One of Professor Epstein's examples of core ceremonial deism merits additional comment: prayers at the opening of daily legislative sessions. This example arguably provides one of the strongest justifications for traditional Army ceremonial prayers.

In *Marsh v. Chambers*,[141] the Supreme Court upheld Nebraska's practice of opening each day's session of the Nebraska Legislature with a public prayer by the legislature's State-funded chaplain.[142] Such a prayer was "simply a tolerable acknowledgment of beliefs widely held among the people of this country."[143] The Court gave tremendous weight to the historical acceptance of legislative prayers,[144] especially the practices of the First Congress.[145] Because the

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[140] Epstein, *supra* note 129, at 2088 (explaining that some of these religious acknowledgments include: prayers at college graduations, government-sponsored nativity scenes, religious symbols displayed on government property or embedded in government seals, religious Christmas carols sung in public schools, and recognition of Good Friday as a public holiday) (citations omitted); *see also Lynch*, 465 U.S. at 682 ("We are unable to discern a greater aid to religion deriving from inclusion of the crèche than from these benefits and endorsements previously held not violative of the Establishment Clause."), 685–86 (noting that the crèche is "no more so" identified with "one religious faith" than activities that did not conflict with the Establishment Clause).

[141] 463 U.S. 783 (1983).

[142] *Id.* at 792 (explaining that to invoke "Divine guidance on a public body entrusted with making the laws" was not "an 'establishment' of religion or a step toward establishment").

[143] *Id.*

[144] *Id.* at 786 (explaining that opening "sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country" and that since "the founding of the Republic . . . the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom.").

[145] *Id.* at 790 (quoting Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888)) (explaining that an act "passed by the [F]irst Congress assembled under the Constitution, many of whose members had taken part in framing that instrument . . . is contemporaneous and weighty evidence of its true meaning").

First Congress, soon after drafting the First Amendment, created the congressional chaplaincy and allowed those chaplains to open daily sessions of Congress with prayer, legislative prayer presumably was consistent with the First Amendment.[146] Consequently, the Court found Nebraska's nearly identical practice to be constitutional as well.[147]

In addition to this historical analysis, the *Marsh* Court noted the nature of the audience of these legislative prayers. The Nebraska legislators listening to the invocations were adults who were not "readily susceptible" to either "religious indoctrination" or "peer pressure."[148] On the other hand, the audience for public school prayers is made up of children who could be either indoctrinated or pressured by State-sponsored religious activity. By making this distinction, the *Marsh* Court was not bound by school prayer precedents.[149] Interestingly, the *Marsh* Court also declined to examine the content of the prayers that had been offered in the Nebraska Legislature, finding "no indication that the prayer opportunity [had] been exploited to proselytize or advance any one, or to disparage any other, faith or belief."[150]

Marsh demonstrates two key components of ceremonial deism jurisprudence. First, *Marsh* places great weight on the history and longstanding nature of legislative prayers in

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[146] *Id.* at 788.

[147] *Id.* at 795.

[148] *Id.* at 792.

[149] *See infra* notes 164–88 and accompanying text (discussing pre-*Marsh* school prayer jurisprudence).

[150] *Id.* at 794–95. Justice Stevens chided the Court for refusing to scrutinize the content of the invocations that supposedly were not being used to advance any one faith or belief and suggested that if the Court had done so, it would have been "unable to explain away the clearly sectarian content of some of the prayers" in violation of the Establishment Clause. *Id.* at 823 (Stevens, J., dissenting).

general.[151] Although *Marsh* does not conclude that legislative prayers may never create the perception of an unconstitutional government endorsement of religion, it does call legislative prayers "part of the fabric" of American society.[152] *Marsh* characterizes the prayers as a "traditional, innocuous practice" rather than any meaningful religious expression or act of worship.[153] Second, after laying the historical basis for the prayers, *Marsh* uses the "no more than" paradigm to uphold them. *Marsh* fist cites a list of government practices that benefited religious institutions yet had been found to be constitutional, and then concludes that the "legislative prayer presents no more potential for establishment" than these practices.[154]

3. Marsh*'s continuing relevance*

For many years after *Marsh*, the Court often refused to apply *Marsh*'s history-laden analysis in Establishment Clause cases.[155] In 2005, however, *Van Orden v. Perry*[156]upheld the display of a granite monument of the Ten Commandments on the Texas statehouse grounds based on the nature of the monument and the history of public religious acknowledgment in the

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[151] *Id.* at 786–91 (majority opinion).

[152] *Id.* at 792 (concluding that the "practice of opening legislative sessions with prayer has become part of the fabric of our society").

[153] MONSMA, *supra* note 63, at 215 (stating that legislative prayers lack "any real meaning or significance in terms of specific religious tenets").

[154] *Marsh*, 463 U.S. at 791 (citing "the provision of school transportation, beneficial grants for higher education, or tax exemptions for religious organizations" as valid government practices that aided religion) (internal citations omitted).

[155] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 586 (1992) (affirming the Fifth Circuit Court of Appeal's reasoning that "*Marsh* had no application to school prayer cases"); County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Ch., 492 U.S. 573, 603 (1989) ("Thus, *Marsh* plainly does not stand for the sweeping proposition . . . that all accepted practices 200-years-old and their equivalents are constitutional today.").

[156] 125 S. Ct. 2854 (2005) (plurality opinion).

United States.[157] The *Van Orden* plurality listed several examples of buildings throughout Washington, D.C., that prominently displayed depictions of the Ten Commandments and religious figures.[158] Because these architectural acknowledgments of religion were deeply rooted in American history, they did not violate the Establishment Clause.[159] The Texas Ten Commandments display was similar to these examples of religion-infused architecture, so it too did not violate the Establishment Clause.[160]

Nonetheless, the Court apparently is still willing to treat cases "monitoring compliance with the Establishment Clause in elementary and secondary schools" under a separate line of analysis.[161] Both the plurality opinion and Justice Breyer's deciding concurrence in *Van Orden* recognize the "particular concerns" that arise in these contexts[162] because of the "impressionability of the young"[163] and the corresponding requirement that the government

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[157] *Id.* at 2861. Justice Breyer's concurring opinion, which provided the deciding fifth vote, focused on the context of the display and the slight likelihood that it would cause the sort of divisiveness the Religion Clauses were meant to prevent. *Id.* at 2869–71 (Breyer, J., concurring).

[158] *Id.* at 2862–63 (2005) (plurality opinion).

[159] *Id.* at 2863. At the same time, however, *McCreary County* downplayed the significance of historical practices in Establishment Clause jurisprudence. The Court considered competing evidence of the original understanding of the meaning of the Establishment Clause and concluded that "there was no common understanding about the limits of the establishment prohibition." McCreary County v. Am. Civil Liberties Union of Ky., 125 S. Ct. 2722, 2744 (2005). *McCreary County* also distinguished the unconstitutional courthouse Ten Commandments display from legislative prayers in *Marsh* and refused to broadly read *Marsh* as allowing all public acknowledgments of religion. *Id.* at 2743 n.24. The Court explained that "prayers by legislators do not insistently call for religious action on the part of citizens," but the counties' purpose in posting the Ten Commandments was "to urge citizens to act in prescribed ways as a personal response to divine authority." *Id.*

[160] *Van Orden*, 125 S. Ct. at 2864 (plurality opinion).

[161] *Id.* at 2863–64 (quoting Edwards v. Aguillard, 482 U.S. 578, 583–84 (1987)). Families entrust their children's education to public schools "on the understanding that the classroom will not purposely be used to advance religious views" that might conflict with the families' views. *Edwards*, 482 U.S. at 584.

[162] *Van Orden*, 125 S. Ct. at 2864 (plurality opinion).

[163] *Id.* at 2871 (Breyer, J., concurring).

"exercise particular care in separating church and state" in public school settings.[164] Apparently, then, *Van Orden* does not undermine the Court's school prayer jurisprudence.[165]

D. School Prayer Jurisprudence and the Coercion Test

The last important branch of Establishment Clause jurisprudence concerns public school prayer. The Supreme Court's school prayer cases have consistently held that organized, official prayer occurring during school hours on school property violates the Establishment Clause.[166] The Court has extended this ban to include prayers at official school functions in which: (1) the prayers bear the stamp of school endorsement, and (2) the school directly or indirectly coerces students to take part in the prayers.[167]

1. Seminal School Prayer cases

The Supreme Court's jurisprudence on school prayer began with two landmark decisions in the early 1960s: *Engel v. Vitale*[168] and *School District of Abington Township v. Schempp*.[169]

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[164] *Id.*

[165] *See id.* at 2864 (plurality opinion) (explaining that the Ten Commandment monument at issue is "quite different from the prayers involved" in *Lee v. Weisman*, 505 U.S. 577 (1992)); *see infra* notes 192–231 and accompanying text (discussing *Lee* and other school prayer cases). Despite this limiting language, the broader statements allowing, in certain contexts, public messages consistent with a religious doctrine will likely be used by school prayer advocates urging reversal of *Lee* and *Santa Fe*. *E.g.*, *Van Orden*, 125 S. Ct. at 2863 (plurality opinion) ("Simply having a religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.").

[166] *See infra* notes 168–88 and accompanying text (discussing seminal school prayer cases from the 1960s).

[167] *See infra* notes 192–233 and accompanying text.

[168] 370 U.S. 421 (1962).

[169] 374 U.S. 203 (1963). Of course, these were not the Court's first cases involving religion in the public schools. By 1962, the Court had already struck down religious instruction in public school buildings as part of a "release-

These decisions marked one of the Court's first rebukes to the influence of Protestant Christianity on American government and society, which during the 19th and 20th centuries had been "open and largely unquestioned."[170] These decisions also helped reverse a trend toward Christian religious instruction in public schools that had begun with the nation's earliest public school founders, such as Horace Mann in Massachusetts.[171] Consequently, Americans living in the early 1960s were accustomed to an American public education curriculum containing organized, formal school prayer.[172] In *Engel* and *Schempp*, the Court held that mandating such official school prayer was not a proper function of the State and was therefore impermissible in American public schools.[173]

a. Engel v. Vitale

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time program," *Illinois* ex rel. *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948); upheld a release-time program in which the religious instruction occurred off public school grounds, *Zorach v. Clauson*, 343 U.S. 306 (1952); and upheld a subsidy of bus service to parochial schools, *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1 (1947).

[170] Marvin E. Frankel, *Religion in Public Life: Reasons for Minimal Access*, 60 GEO. WASH. L. REV. 633, 634 (1992); *accord* MONSMA, *supra* note 63, at 226 (noting the "reigning Protestant consensus" in the United States during the 19th and early 20th centuries that "simply assumed the tone and tenor of U.S. society . . . would reflect that consensus").

[171] Zelman v. Simmons-Harris, 536 U.S. 639, 720 (2002) (Breyer, J., dissenting) ("[D]uring the early years of the Republic, American [public] schools . . . were Protestant in character."); Epstein, *supra* note 129, at 2102 (quoting 2 ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 56 (1950)) (explaining that, under Mann's leadership, early public school instruction included "the life and character of Jesus Christ, as the sublimest [sic] pattern of benevolence, of purity, of self-sacrifice, ever exhibited to mortals").

[172] JAMES JOHN JURINSKI, RELIGION ON TRIAL: A HANDBOOK WITH CASES, LAWS, AND DOCUMENTS 48 (2004) ("Prayer and Bible reading was an established routine in many if not most schools, and many people couldn't understand why the Court would ban the practice if a majority of the community wanted it."). *But see* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 267 (1963) (Brennan, J., concurring) (noting that "Bible reading and daily prayer in the schools have been the subject of debate, criticism by educators and other public officials, and proscription by courts and legislative councils" and citing examples from across the country).

[173] LEVY, *supra* note 47, at 199 (explaining that the Court's decisions in *Engel* and *Schempp* correctly identified the constitutional danger not of *all* student prayer but of the "*state's* effort to further praying, which is no more the business of the state than whether a child has received the sacrament of baptism") (emphasis added).

In *Engel*, the Court struck down a daily prayer composed by state officials and recited by students in all New York public schools.[174] The daily prayer was a nondenominational, nonsectarian, monotheistic prayer.[175] In addition, participation in the prayer was voluntary, for students were "free to stand or not stand [for the prayer], to recite or not recite [the prayer], without fear of reprisal or even comment by the teacher or any other school official."[176] The statute also allowed students to opt out of the prayers entirely.[177] Despite these prophylactic measures, the Court held that New York's practice, which used the "public school system to encourage recitation of the [prescribed] prayer," was "wholly inconsistent with the Establishment Clause."[178]

b. School District of Abington Township v. Schempp

The next year, in *School District of Abington Township v. Schempp*,[179] the Court struck down a Pennsylvania statute requiring daily Bible reading and recitation of the Lord's Prayer "at

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[174] Engel v. Vitale, 370 U.S. 421, 422–23 (1962).

[175] *Id.* at 422 ("Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.").

[176] *Id.* at 438 (Douglas, J., concurring).

[177] *Id.* at 423 n.2 (majority opinion), 438 (Douglas, J., concurring) ("Provision is also made for excusing children, upon written request of a parent or guardian, from the saying of the prayer or from the room in which the prayer is said.").

[178] *Id.* at 424 (majority opinion). The Court also noted that both the Establishment Clause and the Free Exercise Clause are "operative against the States by virtue of the Fourteenth Amendment." *Id.* at 430. The Court had reached this conclusion years before, holding in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), that the Fourteenth Amendment made the Establishment Clause, a fundamental right, applicable to states through selective incorporation. *Id.* at 303. The Court explained that the Establishment Clause "must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government." *Engel*, 370 U.S. at 425.

[179] 374 U.S. 203 (1963).

the opening of each public school" but allowing any child to be excused from these activities "upon the written request of his parent or guardian."[180] The Court first admitted that in the United States, "religion has been closely identified with our history and government."[181] The Court cited specific historical examples, such as the writings of the Founding Fathers and the presence of government-paid chaplains in the armed forces.[182] The Court also noted examples of public religious acknowledgments in the conduct of everyday government functions.[183]

Despite these longstanding practices, though, the Court reaffirmed that the Establishment Clause required government neutrality toward religion.[184] Citing earlier cases, the Court explained that if either the purpose or the primary effect of a statute is the "advancement or inhibition of religion," then the statute violates the Establishment Clause.[185] The Court then found that reading the Bible and reciting the Lord's Prayer were intentional, government-sponsored religious ceremonies.[186] The purpose and primary effect of these religious ceremonies

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[180] *Id.* at 205. The statute specified that "[a]t least ten verses from the Holy Bible shall be read, without comment" each day. *Id.*

[181] *Id.* at 212.

[182] *Id.* These Founding Era writings demonstrated that the Founders "believed devotedly that there was a God and that the unalienable rights of man were rooted in Him . . . ." *Id.*

[183] *Id.* at 213 (listing oaths of office containing the words "so help me God," prayers led by government-paid chaplains at the start of each daily session of Congress, and the Supreme Court crier declaring "God save the United States and this honorable Court" before each Supreme Court session).

[184] *Id.* at 215 (citations omitted).

[185] *Id.* at 222. Instead, "there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Id.* This test would later become the second prong of the *Lemon* test. *See supra* notes 96–110 and accompanying text (discussing the *Lemon* test).

[186] *Id.* at 223. The Court did not hold, however, that *all* religious references in the public school environment were unconstitutional. *See id.* at 225 (explaining that both teaching comparative religion or religious history classes and studying the Bible for "its literary and historic qualities" would be consistent with the Establishment Clause despite the patent religious content of such instruction).

advanced religion in violation of the Establishment Clause,[187] despite the voluntary nature of the prayer and Bible reading sessions and the express opt-put provisions in the Pennsylvania statute.[188]

The bright-line rule of *Engel* and *Schempp*, which disallowed religious ceremonies (prayer and/or Bible reading) as part of the official curriculum in public schools,[189] did not address the question of prayer at school events and functions occurring outside the classroom, such as graduation ceremonies and football games. To resolve these questions, the Court relied on the coercion test: Under the Establishment Clause, "the government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes a [State] religion or religious faith, or tends to do so."[190] Although coercion is not necessary for proving an Establishment Clause violation, it clearly is sufficient.[191]

2. Lee v. Weisman: *Graduation ceremonies and the coercion test*

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[187] *Id.* at 223.

[188] As Justice Douglas explained in his concurring opinion, even without coercive elements, the State's conduct of a religious exercise violated the neutrality "required of the State by the balance of power between individual, church and state that has been struck by the First Amendment." *Id.* at 229 (Douglas, J., concurring). In addition, by using public facilities to conduct a religious exercise, the State violated the Establishment Clause by giving "any church . . . greater strength in our society than it would have by relying on its members alone." *Id.*

[189] *But see supra* note 186.

[190] Lee v. Weisman, 505 U.S. 577, 587 (1992).

[191] *See id.* at 604 (Blackmun, J., concurring) ("[A] violation of the Establishment Clause is not predicated on coercion."), 619 (Souter, J., concurring) ("Our precedents . . . simply cannot support the position that a showing of coercion is necessary to a successful Establishment Clause claim."), 620 (Souter, J., concurring) (explaining that although the constitutional language of the Establishment Clause is not "pellucid," "virtually everyone acknowledges that the [Establishment] Clause bans more than formal establishment of religion in the traditional sense, that is, massive state support of religion through, among other means, comprehensive schemes of taxation."). Nevertheless, the Court has retained the "coercion" test in its later Establishment Clause decisions. *See infra* notes 214–33 and accompanying text.

In *Lee v. Weisman*,[192] the Supreme Court held that prayers at middle and high school graduation ceremonies were state-sponsored "religious exercises" in violation of the Establishment Clause.[193] First, the Court identified significant government involvement with the prayers through the official actions of the Providence, Rhode Island, public school principal.[194] For the ceremony at issue, the June 1989 graduation ceremony for Nathan Bishop Middle School, the principal had invited a local rabbi to say an invocation and benediction.[195] The principal gave the rabbi written guidelines for the prayers, which directed that they promote "inclusiveness and sensitivity."[196] Thus, a school official both decided that prayers would be said at the graduation and chose the cleric to offer them. The government involvement with the graduation prayer created, in the Court's view, a "state-sponsored and state-directed religious exercise in a public school."[197]

Second, the Court noted that elements of the graduation ceremony itself contributed to coercion. In general, the Court reasoned that "in elementary and secondary public schools[198] there are heightened concerns with protecting freedom of conscience from subtle coercive pressure" and that "prayer exercises in public schools carry a particular risk of indirect

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[192] 505 U.S. 577 (1992).

[193] *Id.* at 599.

[194] *Lee*, 505 U.S. at 581.

[195] *Id.*

[196] *Id.*

[197] *Id.* at 587.

[198] *Lee* considered a specific challenge to prayers at graduations for middle and high schools, but its reasoning applies to graduation ceremonies for *all* levels of the educational system below the university level, such as pre-school, grade school, middle school, junior high, vocational/technical school, and high school.

coercion."[199] Specific facets of the school graduations also troubled the Court. Students entered and sat as a group, apart from their families.[200] Students were then directed to stand for the Pledge of Allegiance and remain standing for the invocation.[201] Under these circumstances, the Court concluded that students would feel pressure both from teachers monitoring the ceremony and from their fellow classmates in attendance to "stand as a group or, at least, maintain respectful silence" during the prayers.[202]

As a result, students who objected to participating in the prayer faced an unappealing range of options and were put in the "untenable position" of objecting to an official school activity and policy.[203] These students could conform to the pressure, ignore their consciences, and commit "an expression of participation in the rabbi's prayer"[204] by standing silently while their fellow students prayed. The students could instead absent themselves from the ceremony during the prayers, calling attention to their objection and exposing themselves to predictable derision.[205] Finally, the students could skip the graduation ceremony altogether, for attending the ceremony was not a formal graduation requirement.[206] The Court did not find any of these

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[199] *Id.* at 592; *see also* Edwards v. Aguillard, 482 U.S. 578, 584 (1987) (noting the State's "coercive power" through, *inter alia*, children's susceptibility to peer pressure).

[200] *Lee*, 505 U.S. at 583.

[201] *Id.*

[202] *Id.* at 593.

[203] *Id.* at 590.

[204] *Id.*

[205] *Id.*; *see* Santa Fe Indep Sch. Dist. v. Doe, 530 U.S. 290, 294 n.1 (2000) (describing extreme measures taken to discover the identity of the plaintiffs who had anonymously challenged the school district's policy of offering a student-led prayer before home varsity football games).

[206] *Lee*, 505 U.S. at 595.

alternatives satisfactory. When students conformed to pressures to participate in the prayer, the State was able to invade students' freedom of conscience by prescribing religious expression.[207] Opting-out of the prayers was not a "real alternative" either.[208] Even if it were, the Court reasoned, the State could not require an objector to "take unilateral and private action" to prevent the State's policy from violating the Establishment Clause.[209] Finally, objecting students should not have to forfeit the "intangible benefits" of the graduation ceremony[210] as "the price of resisting . . . state-sponsored religious practice."[211] Because the graduation ceremony prayers were state-sponsored religious exercises that students were coerced to participate in, the Court found the prayers to be inconsistent with the Establishment Clause.[212]

3. Santa Fe Independent School District v. Doe: *Pre-game Public Prayers*

In *Santa Fe Independent School District v. Doe*,[213] the Supreme Court struck down a Texas public school district's policy of allowing student-led, student-initiated prayers before varsity football games.[214] The Court's decision rested on both the endorsement and coercion tests. Using the endorsement test, the Court explained that the school district was so deeply

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[207] *Id.* at 589.

[208] *Id.* at 588 (explaining that the students had "no real alternative which would have allowed [them] to avoid the fact or appearance of participation" in the prayers).

[209] *Id.* at 596.

[210] *Id.* at 595.

[211] *Id.* at 596.

[212] *Id.* at 599.

[213] 530 U.S. 290 (2000).

[214] *Id.* at 301.

involved in the prayers that an "objective observer," familiar with the policy's "text, . . . history, and implementation," would perceive the policy "as a state endorsement of prayer in public schools."[215] The Court explained that the pre-game prayers were not "purely private" for a number of reasons. Official school district policy authorized the prayers.[216] They occurred "on government property at government-sponsored, school-related events"[217] and were broadcast over the school's public address system at the football stadium.[218] The District School Board regulated the content of the prayers.[219] Most importantly, the district "failed to divorce itself from the [prayers'] religious content,"[220] so the pre-game prayers bore the unmistakable "imprint of the State" and amounted to an unconstitutional endorsement of religion.[221]

Using the coercion test, the Court found that the Santa Fe School District's policy was forcing students "to participate in religious observances."[222] The policy in *Santa Fe* differed from that in *Lee* in two respects—the pre-game prayers resulted from student referenda rather than from the independent decision of school officials,[223] and the prayers occurred at

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[215] *Id.* at 308.

[216] *Id.* at 302.

[217] *Id.*

[218] *Id.* at 307–08.

[219] *Id.* at 303.

[220] *Id.* at 305.

[221] *Id.*

[222] *Id.* at 310; *see* John M. Swomley, *Myths About Voluntary School Prayer*, 39 WASHBURN L.J. 294, 302 (1995) (asserting that student-led prayers before a "captive audience" are voluntary "only for the student who does the vocalizing" and not to the other students in attendance).

[223] *Santa Fe*, 530 U.S. at 297–98. The referendum provision allowed school officials to plausibly deny that they were responsible for the prayers. School officials merely gave students a choice about having prayers at the games and then accommodated the majority's (predictable) wishes.

extracurricular activities rather than at graduation ceremonies.[224] The Court did not find either difference to be constitutionally significant. First, the Court criticized the referendum provisions, which allowed the high school student body to determine both if an invocation would be delivered before the games and, if so, which student would deliver it.[225] The Court observed that this process improperly placed students with minority religious views "at the mercy of the majority."[226] As a result, the school district's decision to "allow the student majority to control whether students of minority [religious] views are subjected to school-sponsored prayer violate[d] the Establishment Clause."[227]

Second, the Court evaluated the coercive factors at the football games. Certain students, such as football players and those enrolled in band courses, were required to attend the games.[228] Other students might either feel "immense social pressure" or have a "truly genuine desire" to attend yet not wish to hear the pre-game prayers.[229] Such students should not have to skip the games to avoid the "personally offensive religious ritual"[230] of pre-game prayers. Further, once students arrived at the stadium to watch the games, the Court concluded that the pre-game prayers had "the improper effect of coercing those present to participate in an act of religious

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[224] *Id.* at 295.

[225] *Id.* at 298 n.6.

[226] *Id.* at 304.

[227] *Id.* at 317 n.23.

[228] *Id.* at 311.

[229] *Id.* at 311–12.

[230] *Id.* at 312.

worship."[231] Thus, the Court expanded its coercion test[232] to include both policies incorporating a student referendum and policies that allowed prayer only at non-mandatory, after-hours, extracurricular school events.[233]

4. Chaudhuri, Tanford, *and* Mellen*: The University Prayer cases*

The Court's decisions in *Lee* and *Santa Fe* considered policies in elementary and secondary schools, respectively.[234] Neither decision addressed prayers at public universities. If the analysis in university prayer cases has distinguished adult audiences from the younger audiences in *Lee* and *Santa Fe*, then the analysis of ceremonial prayers before adult, Army audiences may also be distinguishable from *Lee* and *Santa Fe*.

a. Official prayers at public university commencement exercises

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[231] *Id.*

[232] Analysis of coercion based on non-punitive consequences was present in school prayer cases as far back as *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963). Testimony before the trial court in *Schempp* indicated that Mr. Schempp decided not to request that his children be excused from the school's morning prayer ceremonies for a number of reasons, such other students teasing and ostracizing his children and the likelihood that his children would have to stand in the hallway during the prayers *as if* they were being punished for "bad conduct." *Id.* at 208 n.3. These reasons seem at least as compelling as the possibility of social coercion that the Court relied on in *Lee v. Weisman*, 505 U.S. 577, 592–94 (1992). Furthermore, the children in *Schempp* could not absent themselves from school entirely during the prayer, which presents an arguably more coercive environment than existed in *Lee* (considering an optional graduation ceremony) or *Santa Fe* (considering a high school football game that was mandatory only for participants, such as team or band members). Thus, the coercion test has roots in seminal school prayer cases and continues to have relevance on school prayer cases today.

[233] Nevertheless, proponents of public school prayer could find some solace in *Santa Fe*'s safe harbor for student prayer. As the Court explained, "[N]othing in the Constitution . . . prohibits any public school student from voluntarily praying at any time before, during, or after the school day." *Santa Fe*, 530 U.S. at 313. Such prayers, free from the stamp of State approval, would not violate the Establishment Clause and would be valid exercises of the students' free exercise and free speech rights.

[234] *See supra* notes 192–233 and accompanying text (discussing *Lee* and *Santa Fe*).

In the late 1990s, federal courts upheld the constitutionality of formal prayers during state university commencement ceremonies in *Chaudhuri v. Tennessee*[235] and *Tanford v. Brand*.[236] *Chaudhuri* analyzed the policy at Tennessee State University (TSU) of including a formal invocation and benediction as part of its commencement ceremonies.[237] The university arranged for local religious leaders to offer the prayers, specifying only that the prayers be "nonsectarian" and not refer to Jesus Christ.[238] Although these guidelines were apparently followed, Dr. Chaudhuri, a Hindu faculty member at TSU, filed in April 1993 for a preliminary injunction to prevent all prayers at the May 1993 commencement exercises.[239]

On appeal from a decision granting summary judgment to the State of Tennessee, the Sixth Circuit Court of Appeals held that TSU's nonsectarian graduation prayers did not violate the Establishment Clause.[240] The court first applied the *Lemon* test, explaining that the TSU prayer served a valid secular purpose, "to dignify or to memorialize a public occasion";[241] did not "advance or inhibit religion";[242] and created, "at most, *de minimis*" entanglement between the

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[235] 130 F.3d 232 (6th Cir. 1997), *cert. denied*, 523 U.S. 1024 (1998).

[236] 104 F.3d 982 (7th Cir. 1997), *cert. denied*, 522 U.S. 814 (1997).

[237] *Chaudhuri*, 130 F.3d at 233.

[238] *Id.* at 234.

[239] *Id.* at 235. In response to his suit, TSU replaced its formal prayers at graduation exercises with moments of silence, and the district court granted summary judgment to the State. *Id.* Ironically, at the May 1993 commencement, the moment of silence was filled with a "spontaneous" recitation of the Lord's Prayer by several graduating students and members of the audience. *Id.* A similar occurrence happened at the summer graduation exercises in August 1993. *Id.* TSU denied that it had any prior knowledge of or involvement in these audience-led prayers at either ceremony. *Id.*

[240] *Id.* at 238–39.

[241] *Id.* at 236.

[242] *Id.* at 237–38.

State and religion.[243] The court then noted that although the TSU prayer had a "religious component," "religious acknowledgments" were "customary at civic affairs" and had been "since well before the founding of the Republic."[244]

The court also distinguished *Lee*[245] from the facts in *Chaudhuri*. *Lee* involved young people in elementary and secondary schools and focused on the "subtle coercive pressure" inherent in those settings.[246] On the other hand, the students graduating from TSU were adults, and neither students nor faculty members were forced to participate in the TSU commencement exercises.[247] As a result, the court concluded, there was "absolutely no risk that Dr. Chaudhuri—or any other unwilling adult listener [to the TSU graduation prayers]—would be indoctrinated" by the prayers.[248] Furthermore, it was unreasonable to "suppose that an audience of college-educated adults could be influenced unduly" by TSU's nonsectarian commencement prayers.[249]

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[243] *Id.* at 238. As discussed above, the third prong of the *Lemon* test forbade excessive, not *de minimis*, entanglement between the government and religion. *See supra* notes 96–110 and accompanying text (discussing *Lemon*).

[244] *Id.* at 236. This line of reasoning was reminiscent of history-based Establishment Clause holdings. *See supra* notes 141–54 and accompanying text.

[245] Lee v. Weisman, 505 U.S. 577 (1992).

[246] *Chaudhuri*, 130 F.3d at 239.

[247] *Id.*

[248] *Id.*

[249] *Id.* at 237. One judge on the Sixth Circuit panel disagreed with the majority's evaluation of Dr. Chaudhuri's Establishment Clause challenge and insisted that the court be "vigilant to guard against quantifying the humiliation against one who follows a non-Christian religion or tradition within a nation that maintains a strong Christian tradition." *Id.* at 241 (Jones, J., concurring in part and dissenting in part). He then criticized the substance of the challenged prayers, claiming that they had a Christian foundation and used Christian concepts. *Id.* As a result, the prayers were likely to be perceived as an endorsement of Christianity and a rejection of non-Christian faiths. *Id.* Judge Jones's opinion raises interesting questions. First, do non-denominational, nonsectarian monotheistic prayers promote a distinct religious worldview? And is such promotion, especially in light of the "increasingly diverse

In the same year as *Chaudhuri*, the Seventh Circuit Court of Appeals in *Tanford v. Brand* upheld invocations and benedictions at the commencement exercises of Indiana University (IU).[250] IU selected local ministers to deliver these prayers and recommended that the prayers be "unifying and uplifting."[251] First, the court explained that unlike the graduation ceremony in *Lee*, the IU commencement exercises presented students with "no coercion—real or otherwise—to participate."[252] Instead, graduating IU students did not have to attend the commencement at all, and those who did attend could easily either leave during the prayers or refuse to stand when the prayers were being said.[253] Thus, the "special concerns" of "protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools"[254] were absent, so *Lee* did not invalidate the IU commencement prayers. Next, the court focused on the 155-year history of commencement prayers at IU, deeming the prayers to be a "tolerable acknowledgment of beliefs widely held among the people of this country."[255] Finally, the court succinctly affirmed the district court's *Lemon* analysis in the case, concluding that the IU commencement prayers did not offend the Establishment Clause.[256]

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religious orientation of the American public," *id.*, consistent with underlying Establishment Clause principles of neutrality and non-endorsement?

[250] 104 F.3d 982 (7th Cir. 1997). Indiana University is a state university in Bloomington, Indiana. *Id.* at 983.

[251] *Id.* at 986.

[252] *Id.* at 985.

[253] *Id.*

[254] *Id.* (quoting Lee v. Weisman, 505 U.S. 577, 592 (1992)).

[255] *Id.* at 986 (quoting Marsh v. Chambers, 463 U.S. 783, 792 (1983)).

[256] *Id.* (concluding that the University's inclusion of a "brief, nonsectarian invocation and benediction" served a legitimate secular purpose, did not have the primary effect of "endorsing or disapproving religion," and did not lead to an "excessive entanglement" between the state and religion).

Thus, two federal courts of appeals distinguished prayers at public university commencement exercises from prayers at middle and high school graduation ceremonies. These courts focused on both the university commencement exercise itself and the maturity of the student audience in concluding that the coercion test did not invalidate the commencement prayer policies. The university commencement exercises seemed more conducive to acts of individual non-participation in the prayers than did the graduation ceremony in *Lee*.[257] In addition, the graduating college students, whom the courts presumed to be sophisticated and mature, were not as prone to the subtle, coercive pressures to pray as were the younger, more impressionable students in *Lee*.

But neither university prayer case involved a military atmosphere, in which coercive pressures to behave in a particular way are more pronounced and opportunities for individual acts of non-participation are more limited. The Fourth Circuit Court of Appeals considered mandatory prayers in such a setting in 2003.

b. Mellen v. Bunting*: Mandatory Prayer at a Military College*

In *Mellen v. Bunting*,[258] a unanimous panel of the Fourth Circuit Court of Appeals held that invocations before mandatory evening meals at the Virginia Military Institute (VMI) violated the Establishment Clause.[259] VMI is a military college operated by the Commonwealth

[257] Chaudhuri v. Tennessee, 130 F.3d 232, 239 (6th Cir. 1997); *Tanford*, 104 F.3d at 985.

[258] 327 F.3d 355 (4th Cir. 2003).

[259] *Id.* at 360.

of Virginia.[260] The *Mellen* court analyzed the VMI prayers under both the *Lemon* test[261] and under the school prayer rubric of *Lee* and *Santa Fe*,[262]and it concluded that VMI's dinner invocations were unconstitutional.[263]

Although the Supreme Court has not applied the *Lemon* test in the school prayer context,[264] the Fourth Circuit applied it in *Mellen*. First, the court found that the VMI prayer had a "plainly religious" purpose.[265] The challenged prayers began with a reference to a benign monotheistic deity[266] and were dedicated either to thanking God or asking for God's blessings.[267] Next, the court found that the primary effect of the prayers was to impermissibly promote religion by sending "the unequivocal message that VMI, as an institution, endorses the religious expressions embodied in the prayer."[268] Finally, because VMI had "composed, mandated, and monitored" the daily prayers, the institution had become excessively entangled with religion.[269] Thus, under all three prongs of the *Lemon* test, the VMI prayers violated the Establishment Clause.

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[260] *Id.* at 360–61. One of VMI's goals is to "prepare its cadets for military service and leadership, training them to be 'ready as citizen-soldiers to defend their country in time of peril.'" *Id.* at 361.

[261] *Id.* at 372–75.

[262] *Id.* at 371–72; *see supra* notes 192–212 (discussing *Lee*), 213–231(discussing *Santa Fe*) and accompanying text.

[263] *Id.* at 360, 376.

[264] *See supra* notes 168–233 and accompanying text (discussing school prayer jurisprudence).

[265] *Mellen*, 327 F.3d at 374.

[266] *Id.* at 362.

[267] *Id.*

[268] *Id.* at 374.

[269] *Id.* at 375. The court analyzed excessive entanglement as a separate prong rather than as part of the effect prong, contrary to *Agostini v. Felton*, 521 U.S. 203 (1997). *See supra* note 101 and accompanying text.

In addition, the *Mellen* court recognized that under the coercion tests of *Lee* and *Santa Fe*, school officials may not "compel students to participate in a religious activity."[270] The court noted that VMI cadets are "uniquely susceptible to coercion" because of VMI's adversative method of training.[271] In short, the general military setting at VMI coerced cadets to act in certain ways and follow orders without hesitation. Like the middle school setting in *Lee*, VMI was a formative environment in which students were subject to constant molding and development, even outside the setting of formal classroom instruction.

Furthermore, the specific traits of the challenged prayers enhanced the coercive nature of the religious exercise. Because the prayers occurred in conjunction with each mandatory evening meal, cadets could not opt out of the prayers entirely.[272] Cadets were required to "remain standing and silent" during the prayers.[273] Granted, the cadets did not have to respond or otherwise participate,[274] but they were also not free to remain seated, converse with fellow cadets, or otherwise go about their business during the prayers.

The *Mellen* court further distinguished VMI's prayers from prayers at state university graduation ceremonies, which had been upheld in part because these ceremonies were not

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[270] *Id.* at 371.

[271] *Id.* The adversative method emphasized "physical rigor, mental stress, equality of treatment, little privacy, minute regulation of personal behavior, and inculcation of certain values." *Id.* at 361. It also involved a "rigorous and punishing system of indoctrination" which stressed "submission and conformity" as part of the "educational philosophy." *Id.*

[272] *Id.* at 362.

[273] *Id.*

[274] *Id.*

excessively coercive.[275] In contrast to a one-time graduation prayer, the VMI prayers occurred six times per week before mandatory dinners.[276] Despite the comparable ages of the audiences in *Mellen* on one hand and in *Tanford* and *Chaudhuri* on the other, the coercive elements of everyday VMI cadet life—nonexistent at public civilian universities—distinguished the VMI pre-meal prayers from permissible university graduation prayers.[277] As a result, while recognizing that VMI's cadets were "not children," the court also concluded that the VMI setting more closely resembled a public middle or high school than a public university.[278] As a result, the reasoning of *Lee* and *Santa Fe*, especially the coercion test, applied to an analysis of VMI's dinner prayers. Under this reasoning, the *Mellen* court found that VMI had coerced its cadets into participating in a government sponsored religious activity in violation of the Establishment Clause.[279]

Although *Mellen* is not a Supreme Court case, it stands for three important propositions. First, the age of the audience at a ceremony does not alone determine the applicability of *Lee* and *Santa Fe*. Merely having a ceremony audience that is above high school age does not prevent *Lee* and *Santa Fe* from controlling the analysis of an Establishment Clause challenge to prayers at that ceremony. Second, formative military environments more closely resemble public middle

[275] *Id.* at 368 (citing Tanford v. Brand, 104 F.3d 982, 985–86 (7th Cir. 1997)). Students in *Tanford* were not required to attend the graduation ceremony, and there was no compulsion on attendees to participate in the prayer. *Id.*

[276] *Id.* at 362.

[277] *Id.* at 371–72.

[278] *Id.* at 371.

[279] *Id.* at 372.

and high schools than public universities.[280] American public universities pioneered the concept of providing postsecondary education in a vast array of academic fields.[281] American universities have become esteemed for their environments of intellectual freedom, which tends to produce independently thinking graduates.[282] On the other hand, the lower tiers of the educational system—the elementary, middle, junior high, and high schools—tend to produce orderly, largely fungible pupils.[283] These schools emphasize order, discipline, and programmed instruction,[284] similar to a formative military environment. Finally, when prayer precedes a mandatory military event, the audience's inability to avoid the event entirely and requirement to, at a minimum, "remain standing and silent" during the prayer[285] undermines any attempts to credibly call the prayers "voluntary."

The Court's Establishment Clause jurisprudence is only part of the content of the First Amendment's Religion Clauses, for the Free Exercise Clause also protects religious liberty and

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[280] *Id.* at 371–72.

[281] Phillip G. Altbach, *The American Academic Model in Comparative Perspective*, *in* IN DEFENSE OF AMERICAN HIGHER EDUCATION 17 (Phillip G. Altbach, Patricia J. Gumport, & D. Bruce Johnstone eds., 2001).

[282] *See* Nannerl O. Keohane, *The Liberal Arts and the Role of Elite Higher Education*, *in* IN DEFENSE OF AMERICAN HIGHER EDUCATION 184 (Phillip G. Altbach, Patricia J. Gumport, & D. Bruce Johnstone eds., 2001) (discussing the importance of both developing the mental discipline required to learn a new subject and experiencing "wide-ranging intellectual exploration" as part of a college education).

[283] *See* NOAM CHOMSKY, CHOMSKY ON MISEDUCATION 17 (Donald Macedo ed., 2000) (claiming that "early on" in their educational lives, students "are socialized to understand the need to support the power structure, primarily corporations"); BERTRAND RUSSELL, EDUCATION AND THE SOCIAL ORDER 37 (George Allen & Unwin 1977) (1932) ("Education has at all times had a twofold aim, namely instruction and training in good conduct.").

[284] RUSSELL, *supra* note 283, at 26–27 (claiming that routine in children's lives provides a "sense of security" and is an indispensable part of education). The different approaches are largely driven by the typical cognitive development of elementary, middle, and high school students on one hand and of university students on the other. *See, e.g.*, ANITA WOOLFOLK, EDUCATIONAL PSYCHOLOGY 66–103 (9th ed. 2004) (describing the developmental theories of, *inter alia*, Erikson and Piaget).

[285] *Mellen*, 327 F.3d at 362.

freedom of conscience. A brief discussion of the Free Exercise Clause and its relationship to the Establishment Clause will complete the legal framework for analyzing Army ceremonial prayers.

IV. Free Exercise Jurisprudence and the Religion Clauses' Troubled Relationship

A. Free Exercise Jurisprudence: When "Exercise" Means "Mere Belief"

The Supreme Court's Free Exercise jurisprudence has mostly involved requests for excusal from the application of facially neutral laws—i.e., laws that do not expressly regulate or penalize religion—that conflict with religious beliefs or practices.[286] Whether the request for accommodation is based on an infringement of religious belief or of religious practice arising from that belief is significant. Religious beliefs have been absolutely protected in the Court's Free Exercise Clause jurisprudence. As the Court explained in 1940, the First Amendment's Religion Clauses "embrace[] two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."[287] Consequently, laws may not restrict a person's "freedom of conscience" and freedom to "adhere to such religious organization or form of worship" as she may choose."[288] The Free Exercise Clause forbids the government from, inter alia, punishing the expression of certain religious doctrines,[289]

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[286] Thiemann, *supra* note 64, at 357.

[287] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[288] *Id.*; *see* Employment Div. of Or. v. Smith, 494 U.S. 872, 877 (1990) (*Smith II*) ("The free exercise of religion means, first and foremost, the right to believe and profess whatever religion one desires."); Torasco v. Watkins, 367 U.S. 488, 495 (1961) ("We repeat and again affirm that neither a State nor the Federal Government can constitutionally force a person to profess a belief or disbelief in any religion.").

[289] *See* United States v. Ballard, 322 U.S. 78, 86–88 (1944) (forbidding the government from submitting the question of the truth of a religious doctrine to a criminal jury).

compelling anaffirmation of belief in God as a requirement for holding public office,[290] or weighing in on disputes concerning religious dogma.[291]

Religious rituals, however, have not received the same protection as religious beliefs, especially the rituals of minority religions that do not consist entirely of speech and symbolic speech.[292] Instead, generally applicable, religion-neutral laws may impose an incidental burden on the observance of religious rituals without offending the Free Exercise Clause.[293] A law is generally applicable if it pursues "governmental interests" against both religious and non-religious conduct.[294] Thus, a law that targeted only religious conduct would not be generally applicable. A law is neutral toward religion if it is facially neutral toward religion and it has a neutral purpose with respect to religion.[295] If a law is either not generally applicable or is not neutral toward religion, that law must survive strict scrutiny to be constitutional.[296]

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[290] *Torasco*, 367 U.S. at 496.

[291] *See* Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 107–08 (1952).

[292] Epps, *supra* note 54, at 580. Professor Epps explains, "Ritual as ritual has no protection at all under current [Free Exercise Clause] doctrine . . . ." *Id.*

[293] *Smith II*, 494 U.S. at 878. Such laws are valid if they are rationally related to a legitimate government interest. Arguably, *Smith II* reversed the trend of prior Free Exercise Clause cases, such as *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Hernandez v. Commissioner*, 490 U.S. 680 (1989). These cases had considered: (1) whether the challenged government policy had put a substantial burden on the observation of a central religious belief or practice, and (2) if so, whether a compelling government interest justified the burden. *Hernandez*, 490 U.S. at 699; *Sherbert*, 374 U.S. at 403–06. *Smith II* explained that the Court had in a series of recent cases "abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all," *Smith II*, 494 U.S. at 883, and concluded that the *Sherbert* test was "inapplicable" to challenges to an "across-the-board criminal prohibition on a particular form of conduct." *Id.* at 884. Interestingly, the Court refused to apply *Sherbert* in *Smith II*, although ostensibly the case involved the denial of unemployment benefits to two Oregon men because of their practice of ritual ingestion of peyote in the Native American Church. *Id.* at 874–75.

[294] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543 (1993).

[295] *Id.* at 533. Facial neutrality requires that the law not refer to a "religious practice without a secular meaning discernible from the language or context." *Id.* A "neutral object" is one that does not "infringe upon or restrict practices" because of their religious nature. *Id.* Courts may consider the "historical background of the decision

Under the Court's free exercise jurisprudence, accommodation of religious rituals may not be appropriate in all cases. "Free exercise of religion" means absolute freedom of belief in religious doctrines and occasional freedom to express those religious beliefs through ritual. This principle of imperfect accommodation of religious rituals has found its way into the Department of Defense guidelines on religious practices as well.[297]

B. Relationship Between the Religion Clauses

In theory, the Establishment Clause and Free Exercise Clause should together promote the common goal of "religious freedom in a context of government neutrality."[298] In practice, however, the Establishment Clause and Free Exercise Clause seem to have competing ends: government neutrality toward religion under the Establishment Clause and reasonable government accommodation of religion under the Free Exercise Clause.[299] These separate goals

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under challenge, the specific series of events leading to the . . . policy in question, and the legislative or administrative history" of the policy. *Id.* at 540.

[296] *Id.* at 533. Strict scrutiny requires that the government demonstrate a challenged statute to be both "justified by a compelling interest" and "narrowly tailored to advance that interest." *Id.* The Court has warned, however, that laws that "target religious conduct for distinctive treatment" or that advance "legitimate government interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." *Id.* at 546.

[297] DEP'T OF DEFENSE, DIRECTIVE 1300.17, ACCOMMODATION OF RELIGIOUS PRACTICES WITHIN THE MILITARY SERVICES para. 3.1 (3 Feb 88) [hereinafter DoDD 1300.17] ("It is DoD policy that requests for accommodation of religious practices should be approved by commanders when accommodation will not have an adverse impact on military readiness, unit cohesion, standards, or discipline.").

[298] Winnifred Fallers Sullivan, *A New Discourse and Practice, in* LAW AND RELIGION: A CRITICAL ANTHOLOGY 35, 40 (Stephen M. Feldman ed., 2000); Allen Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J. L. & POLITICS 119, 129 (2002) (explaining that because the Free Exercise Clause "prohibited government interference with religion" and the Establishment Clause "restricted government promotion of religion," the resulting jurisprudence promoted government neutrality toward religion through the "separation of church and state"); Edward McGlynn Gaffney, Jr., *The Religion Clause: A Double Guarantee of Religious Liberty*, 1993 B.Y.U. L. REV. 189, 196 (1993) (asserting that the "Religious Liberty Clauses" are not contradictory but are "mutually reinforcing provisions" to guarantee religious liberty).

[299] Sullivan, *supra* note 298, at 39; Brownstein, *supra* note 298, at 127 (explaining that the Free Exercise Clause has been interpreted to permit government accommodation of religion but the Establishment Clause has been

have led to "parallel and independent standards for interpretation" of the respective Religion Clauses and separate tracks of jurisprudence.[300] As a result, how a case is decided often depends on "whether it is framed as a Free Exercise or an Establishment clause case"[301] in the first place.

In addition, the Court has obscured the common elements of the Religion Clauses and has "created a heightened and artificial sense of conflict" between the clauses.[302] Consider, for example, this frequently-cited anomaly: In Establishment Clause jurisprudence, the *Lemon* test requires, *inter alia*, that government actions have a valid secular purpose and that their primary purpose or effect neither advance nor inhibit religion.[303] If this same test were applied in Free Exercise Clause cases involving requests for religious accommodation, no religious accommodation would be constitutional. Allowing exceptions to government policies based on religion probably lacks a valid secular purpose and clearly has the effect of advancing the religious interests of the persons seeking the exceptions. As a result, permissible

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"interpreted to impose prophylactic constraints on government" to "guarantee religious equality as well as religious liberty"); Gaffney, *supra* note 298, at 198 (noting that the Court "has created two different standards" for Establishment Clause and Free Exercise Cause complaints).

[300] Thiemann, *supra* note 64, at 358 (criticizing the Court for avoiding "the complex but important inquiry into the interplay between the two [Establishment and Free Exercise] clauses").

[301] Sullivan, *supra* note 298, at 39; Gaffney, *supra* note 298, at 198 ("[T]he outcome of religious liberty cases will depend on the cleverness of lawyers characterizing a case as one arising under the establishment provision or the free exercise provision.").

[302] *Id.* at 359.

[303] *See supra* notes 96–110 and accompanying text (discussing the *Lemon* test).

accommodations under the Free Exercise Clause would violate the Establishment Clause under the *Lemon* test.[304]

Rather than explain the Establishment and Free Exercise Clause relationship, the Court usually opts to recognize the tension between the Religion Clauses without resolving it.[305] In any event, the separate tracks of Free Exercise Clause and Establishment Clause analysis remain firmly entrenched, with little hope for a unified theory to simultaneously apply both clauses in any one case. For example, constitutional challenges to government-sponsored public prayer, such as Army ceremonial prayers, have been analyzed under the Establishment Clause rather

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[304] *See, e.g.*, Thiemann, *supra* note 64, at 359; Gaffney, *supra* note 298, at 197; *see also* Edwards v. Aguillard, 482 U.S. 578, 617 (1987) (Scalia, J., dissenting) ("We have not yet come close to reconciling *Lemon* and our Free Exercise cases, and we typically do not really try.").

Alternatively, consider the principle of neutrality in Establishment Clause jurisprudence. If the government takes neutrality to an extreme by denying even incidental aid or benefit to religion, then its actions would "likely inhibit [religion's] free exercise." ROTUNDA & NOWAK, *supra* note 46, § 21.1, at 3; *see* Edwards v. Aguillard, 482 U.S. 578, 617 (1987) (Scalia, J., dissenting) ("While we have warned that at some point, accommodation may devolve into 'an unlawful fostering of religion,' we have not suggested precisely (or even roughly) where that point might be.") (internal citations omitted); Walz v. Tax Comm'n, 397 U.S. 664, 668–69 (1970) (explaining that the Court must chart a "neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other").

Notwithstanding such extreme situations, the neutrality itself might make genuine religious freedom more difficult to achieve. *See* ROTUNDA & NOWAK, *supra* note 46, § 21.1, at 2 (explaining that the neutrality principle, which drives the Court's Establishment Clause jurisprudence, does not help resolve the "natural antagonism" between the Establishment Clause and the Free Exercise Clause); Feldman, *supra* note 42, at 269 (noting that for the Supreme Court, whose justices have predominantly been Christian males, "'neutrality' equals Christianity"), 261–62 (observing that the Court's jurisprudence reinforces "most practices and values of the dominant Christian majority" as well as "Christian (especially Protestant) imperialism in American society").

[305] *E.g.*, McCreary County v. Am. Civil Liberties Union of Ky., 125 S. Ct. 2722, 2742 (2005) ("[S]ometimes the two [religion] clauses compete: spending government money on the clergy looks like establishing religion, but if the government cannot pay for military chaplains a good many [S]oldiers and [S]ailors would be kept from the opportunity to exercise their chosen religions."). *But see* Lee v. Weisman, 505 U.S. 577, 587 (1992) (explaining that "the principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause").

than the Free Exercise Clause,[306] and Establishment Clause jurisprudence would guide any possible challenge to the constitutionality of Army ceremonial prayers.

Recognizing the applicable legal precedents for Army ceremonial prayers, one must also understand the government actor who says these prayers: the Army chaplain. Section V will discuss the mission and roles of the Army chaplaincy.

V. The Army Chaplaincy

The chaplain serves as the command's staff expert on religious matters.[307] When chaplains pray at Army ceremonies, they pray on behalf of and with the approval of the commanders in charge of those ceremonies. Consequently, chaplains' prayers are an official government action subject to the constraints of the Establishment Clause.[308] Army ceremonial prayers would have strong constitutional basis if offering them was considered a critical function of the Army chaplaincy. Understanding the Army chaplaincy—its constitutional permissibility, its functions in the Army, and its conduct of ceremonial prayers at formal Army events—is essential to properly examine Army ceremonial prayers.

A. Constitutional Permissibility of the Army Chaplaincy

[306] *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (evaluating a challenge to public prayers before public high school football games under the Establishment Clause); Lee v. Weisman, 505 U.S. 577 (1992) (evaluating a challenge to public prayer at a public middle school graduation ceremony under the Establishment Clause).

[307] LIEUTENANT COLONEL (RET.) LAWRENCE P. CROCKER, ARMY OFFICER'S GUIDE 526 (45th ed. 1990) (noting that "the chaplain advises the commander on matters of religion, morals, and morale as affected by religion").

[308] JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW §12.1, at 470 (5th ed. 1995) ("[T]he official act of any governmental agency is direct governmental action and therefore subject to the restraints of the Constitution.").

The Chaplain's Corps is one of the oldest branches in the military,[309] and chaplains have served with the Army since 1775.[310] Chaplains were appointed to the Continental Army, and local non-Army ministers often accompanied colonial militia into their early skirmishes with British Army.[311] The only serious challenge to the constitutionality of the Army chaplaincy occurred in *Katcoff v. Marsh*.[312] Although other authors have admirably dissected this case in greater detail,[313] a brief review of it here will clarify the Army chaplaincy's constitutional basis.

The plaintiffs in *Katcoff*, who were not Soldiers, claimed that Congress's furnishing of Army chaplains violated the Establishment Clause.[314] The Second Circuit Court of Appeals admitted that "[i]f the current Army chaplaincy were viewed in isolation, there could be little doubt" that it violated the Establishment Clause under the *Lemon* test.[315] The court noted, however, that such an approach would fail to consider the Establishment Clause in light of both its "historical background" and "context"[316]—specifically, the context of free exercise obstacles

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[309] *See generally* DALE R. HERSPRING, SOLDIERS, COMMISSARS, AND CHAPLAINS: CIVIL-MILITARY RELATIONS SINCE CROMWELL 18–46 (2001) (describing the historical development of Army chaplains).

[310] U.S. DEP'T OF ARMY, TRAINING CIRCULAR 1-05, RELIGIOUS SUPPORT HANDBOOK FOR THE UNIT MINISTRY TEAM 2-5 (10 May 05) [hereinafter TC 1-05] ("The Continental Congress enacted regulations and salaries governing chaplains."); RICHARD M. BUDD, SERVING TWO MASTERS: THE DEVELOPMENT OF AMERICAN MILITARY CHAPLAINCY, 1860–1920, at 9 (2002); CROCKER, *supra* note 307, at 527 ("The organized chaplaincy in the American Army was established prior to the Declaration of Independence.").

[311] BUDD, *supra* note 310, at 9.

[312] 755 F.2d 223 (2d Cir. 1985).

[313] *See, e.g.*, Michael A. Benjamin, *Justice, Justice Shall You Pursue: Legal Analysis of Religion Issues in the Army*, ARMY LAW., Nov. 1998, at 3–5; Julie B. Kaplan, Note, *Military Mirrors on the Wall: Nonestablishment and the Military Chaplaincy*, 95 YALE L.J. 1210, 1210–12 (1986).

[314] *Katcoff*, 755 F.2d at 224.

[315] *Id.* at 232; *see supra* notes 96–110 and accompanying text (explaining the *Lemon* test).

[316] *Katcoff*, 755 F.2d at 232–33.

that Soldiers routinely faced during their military careers. As the court explained, because of the unique circumstances in which Soldiers find themselves during their military service—including deployment[317] and assignment to areas far from their homes[318]—the government must facilitate Soldiers' free exercise of religion.[319] Congress has decided to facilitate this free exercise through the Army chaplaincy.[320]

The *Katcoff* court also emphasized the longstanding existence and congressional acceptance of the Army chaplaincy. The Army chaplaincy's existence at the time of the drafting of the First Amendment gave the court "weighty evidence" that the Army chaplaincy did not violate the Founders' original understanding of the Establishment Clause.[321] Finally, the *Katcoff* court adopted a deferential posture toward the congressional determination that the Army needed chaplains at all. This decision, which fell under Congress's plenary power to make rules for the armed forces[322] and "appear[ed] reasonably relevant and necessary" to the national defense, was "presumptively valid" and was entitled to deferential judicial review.[323]

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[317] *Id.* at 228.

[318] *Id.* at 227.

[319] *Id.* at 234; *see* Benjamin, *supra* note 313, at 4.

[320] 10 U.S.C.S. § 3073 (LEXIS 2006); *see* NAT'L CONFERENCE ON MINISTRY OF THE ARMED FORCES, THE COVENANT AND THE CODE OF ETHICS FOR CHAPLAINS OF THE ARMED FORCES para. 8, *available at* http://www.ncmaf.org/policies/ PDFs/CodeofEthics-NCMAF.pdf (last visited Mar. 20, 2006) [hereinafter NCMAF COVENANT AND CODE OF ETHICS] ("I will recognize that my *obligation* is to provide for the free exercise for ministry to all members of the military services, their families and other authorized personnel.") (emphasis added).

[321] *Katcoff*, 755 F.2d at 232. This analysis mirrors the Supreme Court's rationale for upholding legislative prayers in *Marsh v. Chambers*, 463 U.S. 783 (1983). *See supra* notes 141–54 and accompanying text.

[322] U.S. CONST. art. I., § 8, cl. 13.

[323] *Katcoff*, 755 F.2d at 234.

The Supreme Court has never directly ruled on the constitutionality of Army chaplains. The Court has noted in dicta, however, that military chaplains are a permissible way for the government to enable service members' free exercise of religion.[324] Several individual justices have also mentioned chaplains in concurring and dissenting opinions, and they have also focused on the role that chaplains play in allowing service members to freely exercise religion.[325] In light of this favorable treatment, the Army chaplaincy is likely a constitutional expression of congressional war powers.

Despite the apparent constitutionality of the Army chaplaincy as an institution, "individual religious activities" in the Army may still run afoul of the Establishment Clause.[326] Thus, one must consider the specific roles and duties of the Army chaplaincy, especially with respect to conducting ceremonial prayers.

B. Roles and Duties of Army Chaplains

Although the Army Chaplain's Corps was established by statute, federal statutes say little about chaplains' roles and duties.[327] The only chaplains' duty mentioned in the Code of Federal Regulations is to perform sacraments, such as burial services and marriages.[328] The main source

[324] *See, e.g.*, *supra* note 305 (quoting McCreary County v. Am. Civil Liberties Union of Ky., 125 S. Ct. 2722 (2005)).

[325] *See infra* note 505 and accompanying text.

[326] Benjamin, *supra* note 313, at 5.

[327] Federal law does require Army chaplains to "hold appropriate religious services at least once on each Sunday" and to "perform appropriate religious burial services" for members of the Army. 10 U.S.C.S. § 3547(a) (LEXIS 2006).

[328] 32 C.F.R. § 510.1 (2006).

of information about the official duties and roles of Army chaplains is Army publications, such as administrative regulations, field manuals, and training circulars. This section will discuss the significant duties that those publications prescribe.

1. Religious Support to Soldiers

The primary mission of the Army chaplaincy is to provide religious support to all Soldiers, family members, and authorized civilians in a chaplain's area of responsibility.[329] Army chaplains and their unit ministry teams (UMTs) perform a variety of religious support activities. Chaplains conduct "all command-sponsored religious services of worship, including funerals and memorial services."[330] Chaplains also conduct rites that "normally take place apart from formal religious services, such as . . . blessings, daily prayers, and other religious ministrations."[331]

This religious support serves two functions. First, it facilitates Soldiers' free exercise rights.[332] Army policy recognizes free exercise rights for all Soldiers, subject to certain practical

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[329] U.S. DEP'T OF ARMY, FIELD MANUAL 1-05, RELIGIOUS SUPPORT para. 1-12 (Apr 03) [hereinafter FM 1-05]; TC 1-05, *supra* note 310, at 2-6 ("The primary mission of the chaplain is to perform or provide religious ministry to soldiers.").

[330] TC 1-05, *supra* note 310, at 1-5.

[331] *Id.* These "rites" presumably include Army ceremonial prayers, for no other religious support activity listed in TC 1-05 is related to ceremonial prayers. *See id.* at 1-5 to -6 (listing pastoral care and counseling, religious education, family life ministry, and institutional ministry as the other religious support activities).

[332] FM 1-05, *supra* note 329, para. 1-18 ("The chaplain as a religious leader executes the religious support mission, which ensures the free exercise of religion for soldiers and authorized personnel."); TC 1-05, *supra* note 310, at 1-2 (explaining that the religious support mission "is rooted in the [F]ree [E]xercise [C]lause of the [F]irst [A]mendment and ensures this [c]onstitutional right for soldiers").

and operational constraints.[333] As described above, facilitating free exercise of service members has been the primary constitutional justification for the military chaplaincy. From at least the Civil War to the present, chaplains have been expected to serve the spiritual needs of their troops, no matter what their personal religious affiliation is.[334]

Second, commanders have long recognized that improving Soldiers' spirituality and morality increases unit discipline and effectiveness.[335] Chaplains provide comfort, counseling, and spiritual direction to Soldiers as part of the provision of religious support.[336] Under current Army guidelines, quality religious support and personal counseling is believed to enhance the "positive mental health of soldiers, unit cohesion, and morale" and is a "major component of combat stress control and battle fatigue prevention and treatment."[337] In addition, the mere presence of chaplains on the battlefield might encourage religious Soldiers by reminding them that God is accessible even during the worst earthly circumstances.[338]

2. *Participating in the Army Socialization Process*

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[333] TC 1-05, *supra* note 310, at 1-2 ("Subject to resource constraints and military necessity, all religions are entitled to RS [religious support] (except for practices that violate the Uniform Code of Military Justice [UCMJ], Command Policy, or Army Values).").

[334] HERSPRING, *supra* note 309, at 42. Chaplains must either provide this religious support themselves or arrange for someone else to provide it. FM 1-05, *supra* note 329, at 1-1.

[335] BUDD, *supra* note 310, at 96.

[336] *See* TC 1-05, *supra* note 310, at 1-5 (listing "pastoral care and counseling" as one of the six religious support activities that the UMT's religious leader performs).

[337] *Id.* at C-7; *see* CLARENCE L. ABERCROMBIE III, THE MILITARY CHAPLAIN 74 (1977) ("[Commanders] appear to prefer . . . [that] the chaplain (thereby religion) gives the soldier spiritual strength to endure the hardships of military life.").

[338] Rod Dreher, *Ministers of War: The Amazing Chaplaincy of the U.S. Military*, NAT'L REV., March 10, 2003, at 30, 31, *available at* http://find.galegroup.com, Doc. No. A97937294.

Another important role for Army chaplains is participating in the Army Socialization Process, especially with respect to training new recruits.[339] This process both changes behaviors of the Army's new members and maintains the acceptable behavior of existing members.[340] Chaplains influence Soldier behavior in two primary ways. First, chaplains help eliminate behavior the Army has deemed harmful. Chaplains convince Soldiers that disciplined, upright, obedient living is personally beneficial[341] and reinforce the military's self-image as honorable and virtuous.[342] Second, chaplains encourage acceptable behavior. Chaplains have historically motivated Soldiers to become more proficient at performing their assigned duties.[343] Chaplains have also long believed that "human effort" can transform substandard Soldiers into exemplary ones, especially through counseling and social work.[344] With the advent of explicit Army values training during Initial Entry Training, the Chaplain's Corps has also assumed a formal role in the

[339] "Army Socialization Process" is not a doctrinal expression. This paper will use "Army Socialization Process" to refer to the process by which new recruits are taught Army values and culture and by which existing Soldiers have these concepts reinforced to maintain cohesion and morale. Thus, the "stages" of the process do not exist as formal components of a formal process, and no official Army publication either lists the separate stages or defines the entire program as such. *See infra* Parts VI.A–B (discussing the Army Socialization Process).

[340] LAWRENCE B. RADINE, THE TAMING OF THE TROOPS: SOCIAL CONTROL IN THE UNITED STATES ARMY 70–71 (1977) (explaining that "chaplains are likely to be influential . . . during basic training" when they introduce trainees to Army values).

[341] *See* HERSPRING, *supra* note 309, at 6.

[342] RADINE, *supra* note 340, at 71; *see* CROCKER, *supra* note 307, at 16 (explaining that a Soldier "lives under a strong and inspiring code that . . . assures . . . loyalty to the nation, personal trustworthiness, and honor").

[343] HERSPRING, *supra* note 309, at 223; BUDD, *supra* note 310, at 96 (explaining that in the early 1900s, military chaplains began to assume the role of "teachers of morality and builders of character, as an adjunct to the promotion of discipline and efficiency among the enlisted ranks").

[344] BUDD, *supra* note 310, at 97.

socialization process for new recruits.[345] As a result, Army Chaplains "act as an adjunct to social control by justifying the military way to uncertain recruits."[346]

Thus, aside from their constitutional role of facilitating free exercise, chaplains also fill practical roles for the commander.[347] One such practical role seemingly unrelated to the chaplaincy's free exercise and religious support function is leading official prayer at Army military and patriotic ceremonies.

C. The Chaplain's Ceremonial Prayer Role

1. The Regulatory Duty from AR 165-1

The specific requirement to perform ceremonial prayers is contained in Army Regulation (AR) 165-1.[348] Neither of the detailed, field-oriented Army publications on religious support[349] explicitly mention Army ceremonial prayers. The current version of AR 165-1 distinguishes between "military and patriotic ceremonies," at which chaplains may be required to "provide an invocation, reading, prayer, or benediction," and "religious services."[350] Despite the inclusion of

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[345] *See infra* notes 380–83 and accompanying text.

[346] RADINE, *supra* note 340, at 70.

[347] The roles and duties discussed in Part V are not, of course, an exhaustive list. *See* BUDD, *supra* note 310, at xi ("[T]here has never been a consensus—within American society, within the military, among the churches, or even among the chaplains themselves—on what the role and nature of the military chaplain should be.").

[348] 2004 AR 165-1, *supra* note 34.

[349] FM 1-05, *supra* note 329; TC 1-05, *supra* note 310.

[350] 2004 AR 165-1, *supra* note 34, para. 4-4h.

chaplain-led prayers as part of the official schedule of events, the military and patriotic ceremonies "are not considered to be religious services."[351]

According to AR 165-1, Soldiers may not be compelled to attend religious services, for participation of Army personnel in religious services must be "strictly voluntary."[352] AR 165-1 does not, however, contain a similar voluntariness requirement for participation in military and patriotic ceremonies. Thus, the regulation pulls in opposite directions by forbidding Soldiers' forced participation in religious services yet tacitly allowing their forced participation in military and patriotic ceremonies that contain official, chaplain-led prayers. AR 165-1 supposedly relieves this tension by deeming the military and patriotic ceremonies, regardless of their religious overtones, to be non-religious services.

In light of the present regulatory ambiguity, a survey of the evolution of Army ceremonial prayer guidance is instructive. Earlier versions of AR 165-20, the predecessor to AR 165-1, provided the helpful explanation that military and patriotic ceremonies "will not be *conducted* as religious services but as military exercises."[353] This provision suggests that the more the conduct of the ceremonial prayers resembles a religious service, the more likely that the

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[351] *Id.*

[352] *Id.* para. 3-2a.

[353] U.S. DEP'T OF ARMY, REG. 165-20, DUTIES OF CHAPLAINS AND COMMANDERS' RESPONSIBILITIES para. 3f (18 May 66) [hereinafter 1966 AR 165-20] (emphasis added). The regulation did not define "religious services" but states that religious services "normally include but are not limited to the following activities: (1) Services of worship; (2) Religious missions; (3) Religious retreats; (4) Marriages; (5) Baptisms; (6) Funerals; and (7) Other sacraments, rites, and/or ordinances." *Id.* para. 4a. The 1976 and 1979 versions added "prayer breakfasts" and "memorial services," respectively, to the list of religious services. U.S. DEP'T OF ARMY, REG. 165-20, DUTIES OF CHAPLAINS AND COMMANDERS' RESPONSIBILITIES para. 2-1a (15 June 76) [hereinafter 1976 AR 165-20]; U.S. DEP'T OF ARMY, REG. 165-20, DUTIES OF CHAPLAINS AND COMMANDERS' RESPONSIBILITIES para. 2-1a (15 Oct 79) [hereinafter 1979 AR 165-20].

prayers are improper. To avoid the ceremony from being "conducted" as a religious service, ceremonial prayers arguably should not draw too heavily from the rituals, doctrine, or imagery of one particular sect and should not attempt to proselytize the audience. Instead, the prayers should aim to solemnize and highlight the importance of the significant military event being celebrated in the most inclusive, nondenominational means possible.

Unfortunately, the "conducted as" language is no longer part of AR 165-1's guidance. The current version of AR 165-1 has omitted, rather than replaced, this phrase, so the regulation does not provide any suggestion of how the ceremonial prayers are to be *conducted.* The regulation does still distinguish military and patriotic ceremonies from religious services, but it neither defines "religious services" nor lists examples of religious services.[354] Without any information about the characteristics of "religious services," one cannot predict at what point a ceremonial prayer, because of its overt sectarian nature, may cause the military and patriotic ceremony in which it occurs to no longer reasonably be "considered" a non-religious service—or whether such a point exists at all.

Of course, if such military and patriotic ceremonies actually became "religious services" because of the sectarian nature of their ceremonial prayers, Soldiers' participation in the ceremonies would have to be voluntary.[355] But the tension between the military need to maximize Soldier participation in Army ceremonies and the religious need to avoid compelled Soldier worship hardly justifies unclear regulatory guidance about the relationship between

[354] *Id.* Glossary, at 51–52 (defining "religious education" and "religious ministry" but not "religious services").

[355] *Id.* para. 3-2a (explaining that participation in religious services must be voluntary).

ceremonial prayers and religious services. Such vague guidance is of little help to chaplains, commanders, and the lawyers who must advise them.

From the discussion of the Army chaplaincy and its regulations, the following conclusions are clear. First, the principal function of the Army chaplaincy is to facilitate the free exercise rights of Soldiers. Second, AR 165-1 mentions ceremonial prayers, but the field manuals and training circulars of the Army chaplaincy do not. Third, the current regulatory guidance on ceremonial prayers attempts to bypass the tension between voluntary religious services and mandatory military and patriotic ceremonies containing official prayers by calling the mandatory ceremonies non-religious services.

2. *Present Guidance and Training on Offering Ceremonial Prayers*

a. *Chaplain's School and Outside Organizations*

The United States Army Chaplain's School at Fort Jackson, South Carolina, trains new Army chaplains on the "critical task" of "Providing Invocations and Benedictions for Military Ceremonies."[356] In training this task, the Army Chaplain School teaches new chaplains to follow the principles of pluralism contained in the *Covenant and Code of Ethics for Chaplains of the Armed Forces*, published by the National Conference on Ministry to the Armed Forces (NCMAF).[357] The *Covenant and Code of Ethics* instructs chaplains to focus on common

[356] U.S. Army Chaplain Center & School, Training & Development Division, Chaplain Officer 56A: The Critical Task Lists (Apr. 28, 2005), http://www.usachcs.army.mil/TASKS/OTL.htm.

[357] On both 14 Oct 05 and 28 Nov 05, I contacted the Chaplain's School via email requesting the school's training materials on this task. In response to both requests, I received a PowerPoint Presentation about the Covenant and Code of Ethics for Chaplains of the Armed Forces. Email from Chaplain (LTC) Rod A. Lindsay, Training Officer,

"beliefs, principles, and practices" when conducting "services of worship" that include persons of diverse religious groups.[358] Although Army regulations do not classify invocations at military and patriotic ceremonies to be "religious services,"[359] a similar commitment to inclusiveness should exist at these ceremonies, which are often attended by persons with a wide range of religious beliefs. The Chaplain's Corps realizes that "many religions exist side-by-side" in American society and "each [religion] is equally valid."[360] In addition, the *Covenant and Code of Ethics* forbids "proselyt[ism] from other religious bodies."[361] This principle has particular significance during mandatory Army patriotic and military ceremonies in which Soldiers who are ordered to participate or attend are unable to opt-out of the chaplain's prayer either by leaving the ceremony or not attending the ceremony at all. Before such a captive audience, the danger of unauthorized proselytism by authority figures like Army chaplains is especially pronounced.

The NCMAF's *Covenant and Code of Ethics* is consistent with guidelines for nonsectarian public prayer from other sources, such as the National Conference for Community

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Office of the Chief of Chaplains, to Major William Dobosh, Student, 54th Graduate Course (Oct. 20, 2005 11:54:00 EST) (on file with author); Email from Chaplain (LTC) Otis I. Mitchell, Executive Officer, Training Directorate, U.S. Army Chaplains' School, to Major William Dobosh, Student, 54th Graduate Course (Dec. 3, 2005 14:14:00 EST) (on file with author).

[358] NCMAF COVENANT AND CODE OF ETHICS, *supra* note 320, para. 4; Chaplain (MAJ) Scott A. Sterling, Identify the Uniqueness of Religious Support in a Joint, Interagency, and Multi-National Force (Pluralism) (n.d.) [hereinafter Pluralism Presentation] (unpublished PowerPoint Presentation, on file with author). The National Conference on Ministry to the Armed Forces (NCMAF) is a private organization founded in 1982 that brings together "representatives of all the major faith communities in the United States," including Christianity, Judaism, Islam, and Buddhism, to be "the point of contact between the armed forces and . . . religious denominations" and to "recruit, endorse and provide oversight for clergypersons who desire to serve as chaplains" in the armed forces. Nat'l Conference on Ministry to the Armed Forces, Welcome to NCMAF/ECVAC, http://www.ncmaf.org (last visited Oct. 22, 2005).

[359] *See supra* notes 350–52 and accompanying text.

[360] TC 1-05, *supra* note 310, at 1-2.

[361] NCMAF COVENANT AND CODE OF ETHICS, *supra* note 320, para. 11; Pluralism Presentation, *supra* note 358.

and Justice (NCCJ).[362] The NCCJ explains that public prayers in secular settings "should be easily shared by listeners from different faiths and traditions."[363] Furthermore, such public prayer should be inclusive, "nonsectarian," and "general," seeking the "highest common denominator" among diverse religious beliefs.[364] Public prayer at civic events should not be an opportunity for proselytism by the person offering the prayer.[365]

Neither of these external guidelines, however, is formally published by the Army. Instead, the Army-wide publications on chaplain's activities and religious support, as discussed above, do not contain explicit standards for conducting ceremonial prayers.

b. Drill and Ceremony: FM 3-21.5

A final possible source of guidance for Army ceremonial prayers is Army field manual (FM) 3-21.5, *Drill and Ceremonies*.[366] Interestingly, although the manual provides detailed instructions for various types of Army ceremonies, it does not list ceremonial prayers in the

[362] On a historical note, school officials in Providence, Rhode Island, gave the NCCJ's guidelines to the rabbi who had been invited to pray at the Nathan Bishop Middle School graduation in June 1989. Lee v. Weisman, 505 U.S. 577, 581 (1992) (stating that the NCCJ Guidelines recommended that public prayers at nonsectarian civic ceremonies be composed with "inclusiveness and sensitivity").

[363] NAT'L CONFERENCE FOR COMMUNITY AND JUSTICE, WHEN YOU ARE ASKED TO GIVE PUBLIC PRAYER IN A DIVERSE SOCIETY: GUIDELINES FOR CIVIC OCCASIONS, http://65.214.34.18/PublicPrayerBrochure.pdf (last visited Mar. 20, 2006) [hereinafter NCCJ PUBLIC PRAYER GUIDELINES].

[364] *Id.*

[365] *See id.* (explaining that "inclusive public prayer" should not be used as "an opportunity to preach, argue, or testify" but instead "remains faithful to the purposes of acknowledging divine presence, giving thanks and seeking blessing" from God).

[366] U.S. DEP'T OF ARMY, FIELD MANUAL 3-21.5, DRILL AND CEREMONIES (7 Jul 03) [hereinafter FM 3-21.5].

sequence of events for any ceremonies, even frequent ones like reviews and change-of-command ceremonies that typically contain prayers.[367]

This omission is significant. FM 3-21.5 does not even mention ceremonial prayers, let alone offer suggestions on how chaplains should conduct them. If ceremonial prayers have such a central role in both historical and current practice, one would expect them to be explicitly listed in the Army's ceremony manual. Perhaps their inclusion in ceremonies is taken for granted, but such a presumption seems inconsistent with the explicit detail in the rest of the manual[368] and the intensively regulated nature of everyday Army life.[369]

Analyzing the guidance for Army ceremonial prayers leads to two conclusions. First, the applicable Army regulations and field manuals provide scant information on how chaplains are to conduct such prayers. Second, the available resources from outside private organizations, such as the NCMAF and NCCJ, provide general guidance to chaplains offering the prayers but few specific standards. Third, perhaps the omission of specific guidance was meant to avoid excessive entanglement between the Army and religion to pass the *Lemon* test discussed above. In any event, concrete directions for conducting Army ceremonial prayers are not readily available, assuming they exist at all.

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[367] *Id.* paras. 10-2a (listing the order of events for a review as formation of troops, presentation of command and honors, inspection, honors to the nation, remarks, march in review, and conclusion), I-2 (listing sequence of events for a change of command ceremony as prelude music, formation of troops, welcome, introduction of official party, assumption of command orders read, guidon passed, reviewing officer comments, outgoing/incoming commander comments, Branch/Army songs, conclusion, and dismissal of troops).

[368] *E.g.*, *id.* para. 10-4e(2)(a) ("Persons who were decorated [in the review] march forward, execute two *Column Lefts*, halt on line (six steps to the left of the reviewing officer), and execute a *Left Face*.")

[369] *E.g.*, U.S. DEP'T OF ARMY, REG. 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS para. 1-8b(1)(b) (3 Feb 05) [hereinafter AR 670-1] (specifying that while in uniform, female Soldiers may not wear "shades of lipstick and nail polish that distinctly contrast with their complexions, that detract from the uniform, or that are extreme").

Such vague guidance is especially problematic in a military environment. As the next section will explain, military settings are inherently coercive and formative. A chaplain, speaking from a position of authority in an Army ceremony, has a greater ability to exert a coercive influence over the audience than would a speaker at a civilian civic event. The Army's unique social environment requires a particular legal standard for evaluating the constitutionality of Army ceremonial prayers.

VI. The Army Socialization Process

The Army Socialization Process[370] inculcates military culture and values in Soldiers. This section will examine how the Army socializes both new recruits and existing members to form an effective fighting force with a common set of beliefs and values. The Army's mission requires it to maintain this formative environment in all situations, even during military and patriotic ceremonies. As discussed above, chaplains have a unique role in this formative environment and often serve as an adjunct force of social control over Soldiers.[371] In light of these circumstances, ceremonial military settings contain the same sort of coercive pressures on

[370] Army regulations *do not* discuss the "Socialization Process," but they *do* discuss the "Soldierization Process," which begins with Basic Combat training (BCT) and ends at the conclusion of Advanced Individual Training (AIT). U.S. ARMY, TRAINING AND DOCTRINE COMMAND, REG. 350-6, ENLISTED INITIAL ENTRY TRAINING (IET) POLICIES AND ADMINISTRATION para. 1-5b (15 Aug 03) [hereinafter TRADOC REG. 350-6] (explaining that the "Soldierization Process" includes Basic Training and AIT). The "Socialization Process" is broader, continues until a Soldier leaves the Army, and is not specifically defined in any TRADOC regulations. *See supra* note 339 (defining "Army Socialization Process" as it is used in this paper).

[371] *See supra* notes 339–47 and accompanying text.

Soldiers that the middle and high school graduation ceremonies at issue in *Lee v. Weisman*[372] exerted on school children.

A. Initiating the Army Socialization Process

Army socialization begins in Individual Entry Training (IET), which includes both Basic Combat Training (BCT) and Advanced Individual Training (AIT).[373] The Army socialization process uses four primary techniques: immersion in the Army culture; inculcation of Army values; exposure to positive role models; and participation in ceremonies and rituals.[374]

The first prong of Army socialization immerses new recruits in the Army culture. The immersion period is BCT, which attempts to "transform volunteers" into "competent soldiers" who "live by the Army Values . . . ."[375] In the early 1960s, Army psychiatrist Peter Bourne identified four stages of basic training, which have remained largely unchanged to the present: (1) removing "civilian cues" by which a person ordinarily communicates "how one wants to be

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[372] 505 U.S. 577 (1992); *see supra* notes 192–212 and accompanying text (analyzing and discussing *Lee*).

[373] TRADOC REG. 350-6, *supra* note 370, Glossary, at 195. Because the paper uses "Soldier" to refer to all members of the Army, the references to IET apply with equal force to Officer Basic Course training, which has a nearly identical socializing push.

[374] *See* PETER KARSTEN, SOLDIERS AND SOCIETY: THE EFFECTS OF MILITARY SERVICE AND WAR ON AMERICAN LIFE 21 (1978) (describing the process of "implanting the military ethos" to include "subordinating the recruit's self-image to the collective identity of the group," encouraging the recruit's "aggressive impulses," and teaching the recruit to "accept and follow the leadership and orders given by his superiors").

[375] TRADOC REG. 350-6, *supra* note 370, para. 1-5a; *see* CAROL BURKE, CAMP ALL-AMERICAN, HANOI JANE, AND THE HIGH-AND-TIGHT: GENDER, FOLKLORE, AND CHANGING MILITARY CULTURE 26 (2004) (describing the immersion process); Thomas E. Ricks, *The widening gap between the military and society*, ATLANTIC MONTHLY, July 1997, at 66, *available at* http://find.galegroup.com, Thomas Gale Doc. No. A19584110 (stating that basic training "tries to sever a recruit's ties to his or her previous life").

interacted with and identified";[376] (2) subjecting the trainee to "insults and mortifications" to "break down the individual's pride in himself"[377] while simultaneously beginning intense training;[378] (3) "rebuilding and reorganizing" the trainee's personality; and (4) administering a "final test of proficiency" and a graduation ceremony.[379] Stage four invokes the time-honored tradition of the military ceremony to signify to the trainee that his membership in Army culture is complete.

The second prong of Army socialization teaches the Army value system on a more chronic basis. The Army values provide a common ethical and moral base throughout the Army.[380] This training is meant to develop in new Soldiers "an understanding of, and a willingness to live by, the Army's core values: Loyalty, Duty, Respect, Selfless Service, Honor, Integrity, and Personal Courage."[381] Chaplains have a unique role in developing Soldiers' values. Chaplains provide elementary ethical training, especially during IET, by instructing

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[376] BURKE, *supra* note 375, at 13 (noting that stage one of training is a "period of great shock and stress" for recruits because familiar symbols of civilian individuality, such as civilian clothes and civilian hairstyles, are stripped away).

[377] The Army no longer teaches IET cadre to break down trainees' self-pride through "insults and mortifications." Now, leaders are expected to treat Soldiers with respect and dignity. TRADOC REG. 350-6, *supra* note 370, para. 1-5c. Step two involves immersing Soldiers in a challenging, "positive environment . . . [that] uses every training opportunity to reinforce essential soldier skills and standards." *Id.* para. 1-6a. In fact, cadre and permanent party at IET installations are expressly forbidden from talking to IET trainees in a abusive or disrespectful manner. *Id.* para 2-4g (prohibiting the use of "vulgar, sexually explicit, obscene, profane, humiliating, [or] racially, sexually, or ethnically slanted language" to degrade Soldiers).

[378] RADINE, *supra* note 340, at 40.

[379] *Id.* (quoting Peter Bourne, *Some Observations on the Psychosocial Phenomena Seen in Basic Training*, 30 PSYCHIATRY 187, 187–96 (1967)).

[380] The Army and Marine Corps added this values training in the late 1990s. Pat Towell, *Is Military's 'Warrior' Culture in America's Best Interest?*, CONG. Q. WKLY., Jan.2, 1999, at 25, 26.

[381] TRADOC REG. 350-6, *supra* note 370, para. 1-7b(3).

Soldiers about the meaning and importance of the Army values.[382] Chaplains also train Soldiers on the impact of mental, physical, and spiritual health, including spiritual and moral growth, on "quality of life and unit readiness."[383] Chaplains train soldiers on essential principles of Army socialization and provide a strong, formative influence on values and morale.

The third prong of Army socialization teaches Soldiers to obey the words and to imitate the actions of their leaders. IET cadre members teach trainees that authority figures are to be respected, obeyed, and imitated. Leaders set high standards for subordinates and for themselves, such as the demand that IET Soldiers be treated with dignity and respect,[384] and hold themselves out as positive role models for their troops. As leaders respect Soldiers, Soldiers are taught to respect leaders, and challenging these leaders' orders or questioning their examples is discouraged. In this strictly regimented world, formative influences are palpably strong. Debate, dissent, and deliberation have no place.

Finally, Army socialization uses ceremony and ritual. Ceremonies bond Soldiers to the Army and to the nation.[385] Ceremonies promote discipline and morale among troops"[386] and

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[382] *See* TC 1-05, *supra* note 310, at E-1 to -7 (explaining the role of Army values in the Ethical Decision Making Process); U.S. DEP'T OF ARMY, PAM. 165-3, CHAPLAIN TRAINING STRATEGY para. 1-7d(6) (1 Sep 98) [hereinafter DA PAM 165-3] (listing "teach Army values" as a priority for the professional training and education of chaplains).

[383] TRADOC REG. 350-6, *supra* note 370, para. 1-7b(7); *see supra* notes 329–47 and accompanying text (explaining certain roles of Army chaplains).

[384] TRADOC REG. 350-6, *supra* note 370, para. 1-5c.

[385] Towell, *supra* note 380, at 26.

[386] RADINE, *supra* note 340, at 61.

"inspire a feeling of group pride expressed in perfect teamwork and instant response."[387] Ceremonial reviews and parades follow detailed procedures and showcase discipline and military bearing.[388] Thus, the ceremonial setting gives Army leaders a formative training opportunity. The participating Soldier learns important lessons about mental toughness, attention to detail, self control, and teamwork.[389] Army ceremonies are hardly pointless exercises for their participants and organizers. Instead, they are tangible reminders that participating Soldiers belong to a special society, a tight-knit team, and a unique profession. Thus, Army ceremonies have a central role in the Army socialization process.

B. Sustaining the Army Socialization Process

The same socialization pattern continues, albeit to a lesser extent, once IET ends and Soldiers arrive at their first duty station. As members of the Army, Soldiers face unique demands without parallel in the civilian world. For example, Soldiers must meet exacting uniform and grooming standards, both on and off duty;[390] must attend numerous formations during the duty day; and must follow the orders of their superiors. Soldiers receive daily, informal instruction in the Army values.[391] At the same time, Army leaders are expected to

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[387] *Id.*; *see* FM 3-21.5, *supra* note 366, at 10-1 (explaining that a ceremonial parade "provides an occasion for [Soldiers] to express pride in their performance, pride in the Regiment or Corps and pride in the profession").

[388] *See, e.g.*, FM 3-21.5, *supra* note 366, at 10-1 to -26 (describing procedures for military reviews).

[389] *Id.* at 10-1 ("Drill helps to achieve [the conquest of fear] because when it is carried out [Soldiers] tend to lose their individuality and are unified into a group under obedience to orders.").

[390] *See, e.g.*, AR 670-1, *supra* note 369, paras. 1-10j (prohibiting the wear of Army uniforms in certain off-duty situations), 1-14c (forbidding the wear of body piercings by Soldiers on Army installations at any time).

[391] *See* U.S. DEP'T OF ARMY, FIELD MANUAL 22-100, LEADERSHIP paras. E-3, E-6 (31 Aug 99) [hereinafter FM 22-100].

constantly support and promote the Army values to their subordinates.[392] Army leaders are also expected to teach subordinates moral principles, ethical theory, and leadership attributes,[393] preferably by their own conduct.[394] Thus, in both trivial and significant ways, Army life constantly directs, forms, and develops the actions and perspectives of its members.

The effectiveness and persistence of Army socialization is perhaps best demonstrated by the growing isolation between this separate society of the military and the outside civilian society it serves.[395] This split between military and civilian society is sometimes called the "civil-military gap."[396] The civil-military gap would likely be less noticeable if Army socialization abruptly ended with IET graduation. Soldiers would then move to their permanent duty stations and gradually become re-integrated with civilian cultural values, reducing the insularity that IET had imposed and narrowing the gap between themselves and non-Army civilians. But this does not happen. Instead, the Army continually cultivates a separatist ethos in its members. The

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[392] *Id.* para. 1-23. In fact, Army noncommissioned officer are rated and promoted, in part, on their ability to do so. *See* U.S. Dep't of Army, DA Form 2166-8, NCO Evaluation Report Part IV (Oct 2001) (rating NCOs on their adherence to each of the Army values).

[393] FM 22-100, *supra* note 391, para. E-5.

[394] *Id.* para. E-8 ("Leaders can promote Army values by setting the example themselves and pointing out other examples of Army values in both normal and exceptional activities.").

[395] Towell, *supra* note 380, at 27 ("Some fear that [military socialization] works too well, fostering among military personnel a contempt for the more self-indulgent society they serve.").

[396] Over the last thirty years, the American civil-military gap has grown wider. The civilian distrust of the military is now matched by a corresponding "deep-seated suspicion in the U.S. military of [civilian] society." Ricks, *supra* note 375, at 66. Modern societal values are often "at odds with the classic military values of sacrifice, unity, self-discipline, and considering the interests of the group before those of the individual." *Id.* Consequently, the military services have emphasized "traditional values and cohesion" and grown increasingly sickened by the relative sloppiness, selfishness, permissiveness, and inferiority of civilian society. *See* Towell, *supra* note 380, at 26–27 ("Some fear that [military socialization] works too well, fostering among military personnel a contempt for the more self-indulgent society they serve."); Colonel M.G. Polivara, *Indoctrination of Cadets: The Psychological Aspect*, 10 MILI. THOUGHT 61, 62 (2001) (explaining that "inculcating in cadets an aspiration for moral purity and lofty ideals and feelings" is critical in modern times because "society displays dangerous signs of a general cultural crisis, expressed in a build-up of antihuman and inhumane values and ideals").

existence of the civil-military gap demonstrates that the Army Socialization Process is a continuous force in the lives of Soldiers.

This discussion of the Army Socialization Process demonstrates the coercive pressures that Soldiers continually face, whether they realize it or not. Indeed, the phenomenon may be easier for people outside the Army community to identify because Soldiers gradually grow accustomed to its steady drum beat of conformity. The Army social environment presents particular dangers of coerced religious activity and the perception of governmental religious endorsement. Having laid the legal, regulatory, and sociological framework for Army ceremonial prayers, it is now possible to analyze their constitutionality.

VII. The Constitutionality of Chaplain-Led Army Ceremonial Prayers

As mentioned above, challenges to government-sponsored public prayers have traditionally fallen within the Supreme Court's Establishment Clause jurisprudence.[397] The three relevant Establishment Clause tests for Army ceremonial prayers are the *Lemon* test (as refined by *Agostini v. Felton*[398]); the coercion test from *Lee v. Weisman*;[399] and the endorsement test and ceremonial deism.

A. The *Lemon/Agostini* Test

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[397] *See supra* notes 298–306 and accompanying text (describing the relationship between the Religion Clauses).

[398] 521 U.S. 203 (1997).

[399] 505 U.S. 577 (1992).

As described above, the Supreme Court since 1971 has used the three-pronged test of *Lemon v. Kurtzman*[400] to determine if a challenged governmental act violated the Establishment Clause. Under the *Lemon* test, a challenged government act complies with the Establishment Clause if it: (1) has a valid, secular purpose; (2) has a primary effect that neither inhibits nor advances religion; and (3) does not create an excessive entanglement between government and religion.[401] In 1997, the Court refined the *Lemon* test by making the "excessive entanglement" prong part of the "effect" prong.[402]

Army ceremonial prayers fail to satisfy the effect prong of the *Lemon/Agostini* test. The prayers probably do have a valid secular purpose: to solemnize the ceremony and to call the audience's attention to the important event being commemorated. The primary effect of the prayers, however, seems to be to advance religion. A government religious minister, an Army chaplain, says the official prayers. The prayers are religious expressions. No other philosophy or principle is used to solemnize the ceremonies but religion, and probably a monotheistic religion. The prayers might entice non-religious members of the audience to learn more about religion. The religious expression of prayer receives an honored place in the ceremony and has the captive attention of all in attendance.

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[400] Lemon v. Kurtzman, 403 U.S. 602 (1971); *see supra* notes 96–110 and accompanying text (describing the *Lemon* test).

[401] *Lemon*, 403 U.S. at 612–13. To assess "excessive entanglement," courts must consider the nature of the institution that received the government benefit, the nature of the government benefit given, and the relationship between the government and religious leaders that results. *Id.* at 615.

[402] *Agostini*, 521 U.S. at 233.

The prayers could also lead to excessive entanglement between the government and religion, especially if Army commanders wished to screen the chaplain's prayer before the ceremony to evaluate and regulate its content.[403] Excessive entanglement could also result if the command wanted to promote a variety of religious views in its ceremonial prayers overall, which would require a broad analysis of both the religious content of the various ceremonial prayers and the spiritual composition of the audience.[404] This excessive entanglement would compound the prayers' improper effect of advancing and promoting religion. Thus, the Army ceremonial prayers fail to satisfy the *Lemon/Agostini* test and violate the Establishment Clause.

B. The *Lee* Coercion Test

A second test for Establishment Clause violations is the coercion test.[405] The Supreme Court has applied the coercion test in public elementary and secondary school settings, mindful of the "heightened concerns with protecting freedom of conscience from subtle coercive pressure" in these environments, especially the risk that students will face indirect coercion to participate in religious exercises.[406] Further, the Court has conceded that this indirect coercion, while being "most pronounced" in schools, "may not be limited" to those settings.[407] If the

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[403] Mellen v. Bunting, 327 F.3d 355, 375 (4th Cir. 2003) (holding that VMI "composed, mandated, and monitored a daily prayer for its cadets" and took "a position on what constitute[d] appropriate religious worship," which created excessive entanglement).

[404] *See* Lee v. Weisman, 505 U.S. 577, 617 (1992) (Souter, J., concurring) (explaining that such a goal forces the government to make "wholly inappropriate judgments about the number of religions the State should sponsor and the relative frequency with which it should sponsor each").

[405] *See supra* notes 192–233 and accompanying text.

[406] Lee v. Weisman, 505 U.S. 577, 592 (1992).

[407] *Id.*

Army ceremonial prayers occur under circumstances similar to the school settings in *Lee* and *Santa Fe Independent School District v. Doe*,[408] the prayers could present the dangers of indirect coercion that the Court identified in those decisions. If so, the coercion test from those decisions should apply to the analysis of Army ceremonial prayers as well.

The *Lee* Court assessed the coercive nature of the school graduation ceremony prayers at issue in light of the age, and corresponding impressionability, of the student audience. The age of the audience, however, is not the only important factor in determining if *Lee*'s coercion test should apply.[409] As the *Mellen* court reasoned, the formative environment of a military college presented the same coercive forces as the *Lee* graduation ceremonies did.[410] Thus, the key similarity between the *Lee* graduation prayers and Army ceremonial prayers is the formative environment in which both prayers occur. As described above, the Army mission relies on forming a cohesive unit that has been indoctrinated with the Army values and has been immersed in Army culture. Socialization begins during Individual Entry Training, where the coercive environment is most overt, but continues during every moment of Army life in subtler ways.[411]

An Army ceremony highlights the culmination of such socializing forces through a public display of unit solidarity and teamwork, conducted according to Army-wide rules, which forms a cornerstone of military culture and image. At these premier events—in which Soldiers

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[408] 530 U.S. 290 (2000).

[409] *Lee* expressly *avoided* the question of whether the Establishment Clause would be violated by forcing "mature adults" to choose between "participating [in the state-sponsored religious exercise], with all that implies" and protesting the exercise. *Lee*, 505 U.S. at 593.

[410] Mellen v. Bunting, 327 F.3d 355, 371–72 (4th Cir. 2003); *see supra* notes 258–85 and accompanying text (discussing *Mellen*).

[411] *See supra* notes 370–96 and accompanying text.

unmistakably realize their place in the Army's specialized, separate society—the Army officially conducts public prayers through a government-paid minister on behalf of all the people in attendance. In this highly structured environment, the direct and indirect formative pressures are powerful. As such, the reasoning of *Lee* applies as much here as it did in the formative, inherently coercive environment of public elementary and high schools.[412] Despite their inclusion in ostensibly non-religious, military-and-patriotic Army ceremonies, the official prayers are government-sponsored religious exercises in which Soldiers are forced to participate. On the deeply personal matter of when, how, and if Soldiers pray to their God, Army ceremonial prayers foreclose Soldier's religious freedom and dictate the time, place, and manner of their prayer. Thus, including prayers at mandatory Army ceremonies coerces Soldiers to participate in a religious exercise in violation of the Establishment Clause.

In fact, Army ceremonies are even more coercive than the graduation ceremonies in *Lee* and the football games in *Santa Fe*. First, in *Lee*, students did not have to attend the ceremony to graduate.[413] Similarly, in *Santa Fe*, the football games at which prayers occurred were mandatory only for football players and students involved activities that supported the football team.[414] All other students had an unassailable right to opt out of the prayers by skipping the games. In contrast, Army ceremonies present far fewer choices to Soldiers who are ordered to

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[412] When other segments of society are moving away from such public religious expressions, ceremonial prayers enhance the military's sense of self-isolation and the civil/military gap. *See* Lieutenant Colonel (Ret.) Scott Poppleton, USAF, Op-Ed., *What the Military Shouldn't Preach*, WASH. POST, Mar. 13, 2006, at A15, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/03/12/AR2006031200994_pf.html ("I have often asked myself as I listened to the "official prayers": . . . What gives the U.S. military the right or the wisdom to preach in uniform?").

[413] *Lee*, 505 U.S. at 583 ("The parties stipulate that attendance at graduation ceremonies is voluntary.").

[414] *Santa Fe*, 530 U.S. at 311.

participate. Opting out of the event to avoid the official prayer is not and will never be a viable option in the Army. Allowing Soldiers to opt-out of ceremonies on religious grounds would force commanders and their chaplains to either assess the sincerity and validity of opt-out requests or face a flood of opt-out petitions. Army ceremonies require maximum Soldier participation, and unfettered religious excusals would clearly undermine this valid military need.

Thus, commanders would face an undue administrative screening requirement for each opt-out request. Even with the help of chaplains, commanders have neither the time nor the qualifications to perform such an inquiry. In other contexts, opt-out provisions would require an excessive shift in policy as well. For example, Soldiers enrolled in service schools ordinarily must attend the graduation ceremony to complete course requirements. An opt-out provision at service schools would present the same obstacles discussed above, perhaps even to a greater degree.[415] For a number of reasons, then, Soldiers cannot simply skip Army ceremonies to avoid hearing and participating in the ceremonial prayer.

Second, students in *Lee* were not technically obligated to stand and participate in the graduation prayer.[416] Soldiers at Army ceremonies have no similar choice. Soldiers participating in ceremonies must stand in formation, and unilateral, divergent action is forbidden

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[415] *See, e.g.*, TRADOC REG. 350-6, *supra* note 370, paras. 1-6a ("IET begins with the Soldier's arrival at the RECBN [Reception Battalion], and continues through AIT or OSUT [One Station Unit Training] graduation."), 2-1a(5) ("Graduation from OSUT/AIT signifies the successful completion of the first five phases of the Soldierization program."); U.S. Army Military Police School, One Station Unit Training (OSUT): Training Phases (Dec. 6, 2005), http://www.wood.army.mil/ usamps (listing AIT Graduation as a mandatory event in the Military Police OSUT Program). As a practical matter, a commander of a service school student detachment typically has a more superficial relationship with her Soldiers than a commander in more traditional units does. The student detachment commander's lack of familiarity with her troops will make the difficult screening of opt-out requests even more burdensome.

[416] *Lee*, 505 U.S. at 593. The Court noted that peer pressure and indirect coercion would likely encourage dissenters to stand, and by standing they would appear to be taking part in the prayer. *Id.*

and punishable under the Uniform Code of Military Justice.[417] Like the VMI cadets during pre-meal prayers in *Mellen*, Soldiers must "remain standing and silent" during the ceremonial prayers but do not have to respond or otherwise participate.[418] They may not leave the formation, talk with fellow Soldiers, or otherwise go about their business during the official ceremonial prayer. Soldiers at ceremonies must stand respectfully during the prayer in a coerced, public display of participation, just like the students in *Lee* and *Mellen*.

The university graduation prayer cases of *Chaudhuri v. Tennessee*[419] and *Tanford v. Brand*[420] are easily distinguishable. Army ceremonies occur in a coercive, formative environment far removed from the free-spirited college environments being considered in those two cases. The Soldiers at Army ceremonies are admittedly not school children, but they are also not in the atmosphere of intellectual freedom and social permissiveness common at public universities, even during formal graduation ceremonies.[421]

Under *Lee*'s coercion test, Soldiers ordered to participate in Army ceremonies that contain official prayers are coerced by the Army into taking part in government-sponsored

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[417] If a Soldier refused to obey commands during a ceremony, he could be charged with failure to obey lawful order. UCMJ arts. 92 (2005). If the Soldier skipped the ceremony or left the formation without permission he could be charged with going from an appointed place of duty without authority. *Id.* art. 86.

[418] Mellen v. Bunting, 327 F.3d 355, 362 (4th Cir. 2003). The court found this limited autonomy insufficient to remove the VMI prayers from the *Lee* rubric. *Id.* at 371.

[419] 130 F.3d 232 (6th Cir. 1997); *see supra* notes 237–49 and accompanying text.

[420] 104 F.3d 982 (7th Cir. 1997); *see supra* notes 250–57 and accompanying text.

[421] *E.g.*, *Chaudhuri*, 130 F.3d at 237 (explaining that it was unreasonable to "suppose that an audience of college-educated adults could be influenced unduly" by Tennessee State University's nonsectarian graduation prayers); *Tanford*, 104 F.3d at 985 (noting that graduating students did not have to attend the ceremony at all and that those who did attend were allowed to leave during the prayers or refuse to stand when the prayers were being said).

religious exercises. Soldiers are not allowed to opt out of the prayers in particular or the ceremony in general to minimize this coercive effect. Instead, dissenting Soldiers have no alternative but to accept the religious expression that they did not request and might find offensive. Such an option violates *Lee*'s coercion test under the Establishment Clause.[422]

C. The Endorsement Test and Ceremonial Deism

When an Army chaplain stands before an audience of Soldiers at a mandatory Army ceremony, he stands as a military leader whose actions those Soldiers have been trained to follow.[423] He also represents his commander and the Army, for he may only pray at the ceremony with their approval. Under these circumstances, an objective observer could reasonably conclude that both the commander and the Army endorsed the religious beliefs that the chaplain's prayer conveyed. Soldiers with different religious beliefs may feel as if they are outsiders from and not fully part of this Army community. Such a perception of religious endorsement is inconsistent with the Establishment Clause principle of neutrality that the federal government generally, and the Army in particular, must follow.[424]

Despite this apparent endorsement of religion through the Army ceremonial prayers, the prayers could be considered examples of ceremonial deism—government acts that have become so ubiquitous and secular as to lose their religious connotation and no longer present a risk of

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[422] Lee v. Weisman, 505 U.S. 577, 596 (1992) (noting that the State could not require an objector to "take unilateral and private action" to prevent the State's policy from violating the Establishment Clause); *see supra* notes 203–12 (discussing the unsatisfactory range of choices for students who objected to the graduation prayers in *Lee*).

[423] *See supra* note 384 and accompanying text.

[424] *See supra* notes 111–28 (describing the endorsement test).

unlawful government endorsement of religion.[425] Because the Army chaplaincy was created during the same era as the congressional chaplaincy, the ceremonial prayers of Army chaplains seem to have historical roots similar to the sort of legislative prayers upheld in *Marsh v. Chambers*.[426] If Army ceremonial prayers can be classified as ceremonial deism, then they would not create the impermissible perception of government endorsement of religion and would not violate the Establishment Clause. For reasons explained more fully in the next section, however, Army ceremonial prayers do not properly fall within the class of ceremonial deism. Even if they do fall within that class, the underlying assumptions of both the doctrine of ceremonial deism and the Court's decision in *Marsh* could produce undesirable consequences in the Army community and should not guide Army policy.

VIII. Examination of Counterarguments in Favor of Army Ceremonial Prayer

A. *De Minimis* Violation

One argument for preserving Army ceremonial prayers hinges on the prayers' supposed *de minimis* impact on the audience. The prayers occur only in conjunction with significant, albeit mandatory, Army events, such as change of command ceremonies, reviews, and service school graduations. Such Army ceremonies are not everyday events for the average soldier. According to the *de minimis* argument, even when Soldiers are forced to participate in these ceremonies, the ceremonies' religious expressions are minor and brief. In addition, because Army chaplains must comply with official guidance from the National Conference for Ministry

[425] *See supra* notes 129–40 (defining ceremonial deism).

[426] Marsh v. Chambers, 463 U.S. 783 (1983); *see supra* Part III.C.2 (discussing *Marsh* and legislative prayers).

to the Armed Forces for offering the ceremonial prayers, the prayers' content will be inclusive and non-proselytizing. Any denomination-specific religious overtones that might drift into these prayers will be virtually unnoticeable, making the overall "religious" nature of the military and patriotic Army ceremony slight.[427]

The "litigation corollary" to this *de minimis* argument urges petitioners who oppose Army ceremonial prayers to neither complain to Army authorities nor file lawsuits challenging the prayers' lawfulness. Soldiers who disagree with the prayers should simply "maintain[] respect for the religious observances of others."[428] Such silence will allow the chain of command or the courts to resolve more important issues than frivolous challenges to the harmless, *de minimis* religious expressions of the Army ceremonial prayers.

The *de minimis* argument displays a remarkable callousness toward religious minorities, which in the United States means callousness toward non-Christians. It allows members of the dominant Christian majority to judge the degree of harm and offense that non-Christians might feel from being coerced to participate in a religious exercise based on Christian beliefs, rituals, and imagery. The *de minimis* argument has an obvious inherent inconsistency as well. If the prayers truly have a negligible religious impact on non-believers, then the omission of the prayers would have a negligible impact on believers as well. Thus, it should make little difference to proponents if the ceremonial prayers were allowed to continue or were immediately ceased. The fact that the prayers apparently *do* matter to their proponents belies the central

[427] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 639 (1992) (Scalia, J., dissenting) (criticizing the Court's description of the graduation invocation and benediction as the State's "performance of a formal religious exercise," which "has a sound of liturgy to it, summoning up images of the principal . . . showing the rabbi where to unroll the Torah").

[428] *Id.* at 638 (adding that to maintain this respect is "a fundamental civic virtue").

assertion of the *de minimis* argument: that the prayers are minor, insignificant events to the ceremony's audience and participants. Whether a violation is *de minimis* or not depends on the perspective of the particular observer, and what is "trifling" to a member of the majority religion may not seem so harmless to a non-member.[429]

The litigation corollary of the *de minimis* argument is particularly puzzling. It seems to assume that if the courts are crowded with frivolous Establishment Clause complaints, then other plaintiffs with more significant claims will be denied access to justice. While it may be true that crowded court dockets lead to long delays in resolving civil suits, it seems doubtful that such congestion will prevent claims from being filed at all. Furthermore, the Federal Rules of Civil Procedure can summarily dispose of truly frivolous claims without imposing an excessive burden on the judicial system.[430]

The *de minimis* argument is at least as old as the earliest Supreme Court school prayer cases. The Court considered forms of it in both *Engel v. Vitale*[431] and *School District of Abington Township v. Schempp*.[432] In *Engel*, defenders of the challenged New York school prayer statute argued that daily prayer "seem[ed] relatively insignificant when compared to the governmental encroachments upon religion which were commonplace 200 years ago."[433] Furthermore, the New York prayer was "so brief and general" that it presented "no danger to

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[429] LEVY, *supra* note 47, at 242.

[430] *E.g.*, FED. R. CIV. P. 12(b)(6) (allowing judgment on the pleadings for a "failure to state a claim upon which relief can be granted").

[431] 370 U.S. 421 (1962); *see supra* notes 174–78 and accompanying text (discussing *Engel*).

[432] 374 U.S. 203 (1963); *see supra* notes 179–88 and accompanying text (discussing *Schempp*).

[433] *Engel*, 370 U.S. at 436.

religious freedom" through government establishment of religion.[434] Similarly, the proponents of the Pennsylvania statute at issue in *Schempp*, which mandated daily Bible reading and Christian prayer in Pennsylvania public schools, urged the Court to hold that the religious practices under consideration were "relatively minor encroachments on the First Amendment" and were unworthy of judicial redress.[435]

In both *Engel* and *Schempp*, the Court swiftly dismissed *de minimis* arguments with the cautionary words of James Madison, the author of the First Amendment: "It is proper to take alarm at the first experiment on our liberties."[436] As the Court warned, "The breach of neutrality [toward religion] that is today a trickling stream may all too soon become a raging torrent . . . ."[437] In response to a similar argument concerning school graduation prayers in *Lee v. Weisman*,[438] the Court explained:

> [The graduation prayer] is, we concede, a brief exercise during which the individual can concentrate on joining its message, meditate on her own religion, or let her mind wander. But the embarrassment and the intrusion of the religious exercise cannot be refuted by arguing that these prayers, and similar ones to be said in the future, are of a *de minimis* character. To do so would be an affront to the rabbi who offered them and to all those for whom the prayers were an essential and profound recognition of divine authority.[439]

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[434] *Id.*

[435] *Schempp*, 374 U.S. at 225.

[436] *Id.*; *Engel*, 370 U.S. at 436.

[437] *Schempp*, 374 U.S. at 225.

[438] 505 U.S. 577 (1992)

[439] *Id.* at 594.

The *de minimis* argument has failed to validate public school prayers in the past, and similarly it would not validate Army ceremonial prayers today.

B. Free Exercise Rights of the Majority of the Military Audience

Another argument for preserving Army ceremonial prayers asserts that the prayers are an important religious ritual for most of the Soldiers participating in or attending the ceremony. Eliminating the prayers would unlawfully restrict the majority's free exercise of religion.[440] This argument initially appears somewhat convincing, especially in light of the Court's lack of clarity in explaining how the Free Exercise Clause and Establishment Clause interrelate.[441] Upon closure scrutiny, however, it too fails to adequately justify official prayers at Army military and patriotic ceremonies.

1. Public Prayer Cases Are Establishment Clause Cases

An initial response to this argument stems from how the Court would likely classify the issue of Army ceremonial prayers. The Supreme Court's jurisprudence on the First Amendment's Religion Clauses has developed separate analytical models for the Free Exercise Clause and the Establishment Clause, respectively.[442] Although all religion cases really involve

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[440] *See* Brownstein, *supra* note 298, at 130 ("Restrictions on religious expressions might be both challenged on free exercise grounds and defended, if the speech received government support or communicated a message of endorsement, on Establishment Clause grounds."); Swomley, *supra* note 222, at 306 (noting that public prayer advocates insist that protection of the interests of minority religious groups has "made it impossible for the majority to practice their religion").

[441] *See supra* Part IV.B. (describing the relationship between the Free Exercise Clause and Establishment Clause).

[442] *See supra* notes 298–306 and accompanying text.

both clauses, the Court has tended to frame its analysis under either the Establishment Clause or the Free Exercise Clause exclusively. Cases challenging public prayer, especially school prayer, have traditionally been classified as Establishment Clause cases.[443] Thus, a challenge to Army ceremonial prayers would likely be resolved under Establishment Clause, rather than under Free Exercise Clause, reasoning. Adhering to its Establishment Clause jurisprudence, the Court would likely minimize the significance of the free exercise rights being asserted and uphold the principle that government must not sponsor, conduct, or coerce participation in religious exercises.[444]

2. *Majority Preferences and Fundamental Rights*

Majority preferences must not determine the scope of fundamental rights, especially rights that minority groups assert.[445] Majority preferences do, however, often dictate the scope of governmental accommodation of religious expression and ritual. Accommodation of public religious expression tends to favor the dominant religious group; i.e., the group that commands majority control of governmental institutions.[446] This group can use its majority status both to

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

[444] As a practical matter, the free exercise argument overlooks a fundamental tenet of Free Exercise Clause jurisprudence: While the government may not interfere with or regulate religious beliefs, it *may* reasonably regulate religious rituals and practices, such as public prayer. *See supra* Part IV.A (discussing Free Exercise Clause jurisprudence). Forbidding public prayer, even if it infringes the right of a particular group to practice its religion, might be permissible. For purposes of this discussion, however, I will avoid this topic entirely and instead will try to expose more significant flaws with the free exercise argument.

[445] *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 317 n.23 (2000) (holding that "the [School] District's decision to allow the student majority to control whether students of minority views are subjected to a school-sponsored prayer violates the Establishment Clause"); Cammack v. Waihee, 944 F.2d 466, 468 (1991) (Reinhardt, J., dissenting) (denying rehearing and rehearing en banc) (criticizing the "growing willingness to accept the imposition of majoritarian control at the expense of individual rights").

[446] *See* Employment Division of Or. v. Smith, 494 U.S. 872, 890 (1990) (noting that "it may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are

promote its own religious expressions (under the auspices of government action) and to block public religious expressions of minority religious groups,[447] even to the point of criminalizing rituals central to the expression of the minority faith.[448]

In the political process, minority religious groups are relatively powerless to prevent either the suppression of their own rituals or the promotion and public accommodation of the majority's religion. From the minority religion's perspective, the motive behind public religious expressions—whether in the form of static displays, government recognition of religious holidays, or prayers at ostensibly secular, military and patriotic ceremonies—is to "show . . . [that] [t]his is Christian country."[449]

Recognizing the inadequacies of majority rule to protect minority rights, the Supreme Court has long pledged to subject to "more searching judicial scrutiny" laws that disadvantaged

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not widely engaged in"); Johnathan E. Nuechterlein, *The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause*, 99 YALE L. J. 1127, 1144 n.89 (1990) ("Most establishment clause cases, however, involve state advancement of mainstream religions.").

[447] LEVY, *supra* note 47, at 204 (noting that the Establishment Clause "is supposed to protect the minority" because the "majority does not need it").

[448] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 525–29 (1993) (describing how the city council of Hialeah, Florida, enacted local ordinances to ban animal sacrifice, a Santeria religious ritual, in response to the planned opening of a Santeria church, school, cultural center, and museum in the city).

[449] Frankel, *supra* note 170, at 639; *see also* Lee v. Weisman, 505 U.S. 577, 630 (1992) (Souter, J., concurring) (quoting Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841, 844 (1992)) (claiming that Providence, Rhode Island, school officials brought prayer into graduation ceremonies "precisely because some people want a symbolic affirmation that government approves and endorses their religion, and because many of the people who want this affirmation place little or no value on the costs to religious minorities"). When such majorities minimize and overlook minority rights, aggrieved parties can appeal to the courts for vindication of their rights. Viewed in this light, perhaps *Lee* is not so much an act of "social engineering" by the Court, Lee v. Weisman, 505 U.S. 577, 632 (1992) (Scalia, J., dissenting), as it is a check on the power of the majority to infringe minority's rights.

"discrete and insular minorities" who were not adequately protected by the political process.[450] As the Court has explained:

> Finally, we cannot accept that the concept of neutrality, which does not permit a State to require a religious exercise even with the consent of the majority of those affected, collides with the majority's right to free exercise of religion. While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to *anyone*, it has never meant that a majority could use the machinery of the State to practice its beliefs.[451]

These statements indicate that the First Amendment's Religion Clauses mainly protect religious minorities. If religious issues were subject to referenda and if the majority could regulate free exercise rights and require taxpayer support of official State churches, then members of minority religious groups would be consistently outvoted and could find their religions forever repressed. The First Amendment's Religion Clauses protect religious minorities from such oppression by removing religious issues from the political process.

Consequently, the mere fact that a majority of the mandatory participants at an Army ceremony might *want* a prayer included in the ceremony should *not* decide the issue.[452] Allowing majority rule to dictate the degree to which religious minorities may avoid coercive religious exercises contradicts Establishment Clause jurisprudence and the fundamental

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[450] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (noting that "prejudice against discrete and insular minorities," which "tends seriously to curtail the operation of those political processes ordinarily relied upon to protect minorities," may trigger heightened judicial scrutiny); *see* Murdoch v. Pennsylvania, 319 U.S. 105, 115 (1943) ("Freedom of press, freedom of speech, and freedom of religion are in a preferred position.").

[451] Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 225–26 (1963).

[452] *See* Frankel, *supra* note 170, at 640 (suggesting that the Religion Clauses must provide "a respectful accommodation of *minority* consciences, where that is possible, without neglect of compelling needs to the contrary").

protections of minority civil rights under the Constitution. Courts "do not count heads before enforcing the First Amendment."[453]

3. *The Minority's Free Exercise Right to* Not *Pray*

The free exercise rights of the majority of the ceremonial audience do not trump the free exercise rights of the minority.[454] The free exercise rights of the majority to pray are directly offset by the free exercise rights of members of the audience[455] who do not wish to pray either in the manner that the chaplain selects or at all.[456] The Court considered free exercise arguments in *Santa Fe Independent School District v. Doe*,[457] where proponents of the school district's pre-game prayer policy argued that the students offering the prayers had a free exercise right to pray.[458] The Court responded that accommodating the free exercise of religion "does not supersede fundamental limitations imposed by the Establishment Clause."[459] By subjecting a

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[453] McCreary County v. Am. Civil Liberties Union of Ky., 125 S. Ct. 2722, 2747 (2005) (O'Connor, J., concurring) ("It is true that many Americans find the [Ten] Commandments in accord with their personal beliefs. But we do not count heads before enforcing the First Amendment.").

[454] Swomley, *supra* note 222, at 307 (asserting that all people have right to be "free from coercion in their religious belief and practice").

[455] Assume, *arguendo*, that this group is smaller than the group who desires prayer.

[456] *See Air Force Troubling Guidelines*, *supra* note 33 ("It appears that the Air Force does not understand that all prayer, including so-called 'inclusive prayer,' is an inherently religious activity for which not all staff and cadets wish to be subject to.").

[457] 530 U.S. 290 (2000).

[458] *Id.* at 302.

[459] *Id.* (quoting Lee v. Weisman, 505 U.S. 577, 587 (1992)).

captive audience at varsity football games to religion via pre-game invocations, the school district's policy violated the Establishment Clause.[460]

The Court rejected similar free exercise arguments in *Lee*, holding that the "principle that government *may* accommodate the free exercise of religion" does not override the "fundamental limitations" of the Establishment -Clause, such as the prohibition on government-sponsored religious exercises.[461] As in *Lee* and *Santa Fe*, subjecting a captive audience at an Army ceremony to official prayer would amount to a coercive, government-sponsored religious exercise in violation of the Establishment Clause.[462]

Just as the freedom of speech contains the right to be free from government-compelled speech,[463] so too does the free exercise of religion include the right to be free from government-compelled religious expressions, such as public prayers.[464] Free exercise rights should not allow a religious sect to control the "worship and actions of persons who have no past or present relationship to the sect,"[465] especially when such control occurs through government action. It is impossible to adequately quantify the deleterious effect that compelled religious exercises might

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[460] *Id.* (explaining that despite the Free Exercise Clause, the Establishment Clause mandates that "government may not coerce anyone to participate in religion or its exercise").

[461] *Lee*, 505 U.S. at 587 (emphasis added).

[462] Frankel, *supra* note 170, at 642 ("Every kind of public prayer and compelled deference to others' prayers is an affront to the conscience of the nonreligious and to the adherents of religions that omit or eschew prayer.").

[463] *E.g.*, Wooley v. Maynard, 430 U.S. 705 (1977) (holding that no private person could be required to endorse governmental positions absent the most compelling circumstances).

[464] Epps, *supra* note 54, at 588. Professor Epps proposes the following test: "If I am determining my own belief, worship, and behavior, I am in the realm of free exercise; if I seek to control yours and to enlist the state in that I effort, I have become its enemy." *Id.* at 586–87.

[465] *Id.* at 588.

have on the morale of non-Christian Soldiers[466] and the corresponding impact on unit effectiveness and cohesion. The benefits of preserving a tradition that could cause such unneeded divisiveness[467] among troops or the alienation of any Soldier seem dubious.

Moreover, through the Army chaplaincy, Soldiers have the opportunity to worship as they choose in voluntary religious services.[468] The additional free exercise benefits from official prayer at mandatory military and patriotic ceremonies do not outweigh the drawbacks of compelling all Soldiers to participate in majority religion traditions. Justice Brennan's observations about the legislative prayers in *Marsh v. Chambers*[469] is equally true in this context: "Rather we are faced here with the regularized practice of conducting official prayers, on behalf of the entire legislature . . . . If this is free exercise, the Establishment Clause has no meaning whatsoever."[470]

C. Free Speech and Free Exercise Rights of Chaplains

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[466] *Cf.* Cammack v. Waihee, 944 F.2d 466, 468 (1991) (Reinhardt, J., dissenting) (denying rehearing and rehearing en banc) (observing that "so many adherents of the majority religion fail to comprehend the psychological effect that the state's endorsement of that religion has upon children [with different religious beliefs]").

[467] *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 42 (2004) (O'Connor, J., concurring) (admitting that it is difficult to "imagine a brief solemnizing reference to religion that would adequately encompass every religious belief expressed by any citizen of this Nation"); Poppleton, *supra* note 412, at A15 (proposing that a moment of silence should be used in place of prayer "if a solemn occasion is appropriate at a military ceremony").

[468] 2004 AR 165-1, *supra* note 34, para. 3-2a.

[469] 463 U.S. 783 (1983).

[470] *See id.* at 812–13 (Brennan, J., dissenting) ("We are not faced here with the right of the legislature to allow its members to offer prayers during the course of general legislative debate.").

Another popular argument in favor of Army ceremonial prayers suggests that Army chaplains have an absolute First Amendment right, under either freedom of speech[471] or the free exercise of religion,[472] to both offer ceremonial prayers and to determine the prayers' form and content, regardless of the setting in which that prayer may occur.[473] Therefore, forbidding the prayers or regulating the prayers' content unlawfully infringes chaplains' constitutional liberties.

1. The Establishment Clause and Religious Speech

Only in recent years has the Supreme Court probed the relationship of the Free Speech and Establishment Clauses, especially in the context of religious activities involving public schools or public school students.[474] For example, prayer advocates assert that student-led

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[471] *See* American Center for Law & Justice, *ACLJ Calls Revised Air Force Guidelines on Religion "Appropriate and Constitutional"—Prayer by Chaplains to be Protected*, Feb. 9, 2006, http://www.aclj.org/news/Read.aspx?ID=2129 (praising the *Revised Interim Guidelines Concerning Free Exercise of Religion in the Air Force* as "an important move by the Air Force to protect the free speech rights of chaplains to pray according to their faith"); Colarusso, *supra* note 19, at 12 (describing a letter to President Bush from several members of Congress in October 2005 that urged him to protect "military chaplains' right of free speech" in response to the initial *Interim Guidelines Concerning Free Exercise of Religion in the Air Force*).

[472] *See* Tarron Lively, *Chaplain Ends 18-Day Fast*, WASH. TIMES, Jan. 8, 2006, at 9, *available at* http://ebird.afis.mil/ebfiles/ e20060108410324.html (describing a Navy chaplain's water-only fast to protest restrictions under Navy regulations on him saying sectarian Christian prayers at non-religious public events and military ceremonies, which he claimed violated his "religious liberty").

[473] The relationship between the Free Speech and Establishment Clauses has been the subject of considerable scholarly work. *See, e.g.*, Brownstein, *supra* note 298; Allen Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values—A Critical Analysis of "Neutrality Theory" and Charitable Choice*, 13 NOTRE DAME J. L. ETHICS & PUB. POL'Y 243, 276–78 (1999); Allen Brownstein, *On School Vouchers and the Establishment Clause: Evaluating School Voucher Programs Through a Liberty, Equality, and Free Speech Matrix*, 31 CONN. L. REV. 871, 928–29 (1999). *See generally* STEVEN P. BROWN, TRUMPING RELIGION: THE NEW CHRISTIAN RIGHT, THE FREE SPEECH CLAUSE, AND THE COURTS (2002) (providing overview of federal court cases since 1980 that analyzed religious speech arguments). A detailed discussion of this topic is largely beyond the scope of this paper. This paper shall describe the key tenets of the argument and some counterarguments, but it shall not provide exhaustive treatment of this complex issue.

[474] *See* McCreary County v. Am. Civil Liberties Union of Ky., 125 S. Ct. 2722, 2742 (2005) ("[L]imits on governmental action that might make sense as a way to avoid establishment could arguably limit freedom of speech when the speaking is done under government auspices."); Epps, *supra* note 54, at 576 ("The Court has recently made clear that religious speech must be considered first and foremost as speech.").

prayer is not "state-sponsored worship" but is "merely the exercise of student free speech."[475] The argument continues that if the government blocked private religious speech but allowed private non-religious speech, the government would be imposing a content-based speech regulation.[476] The Court has consistently held that the government may not treat private religious and non-religious speech differently concerning access to public funds or public facilities merely to avoid the perception of a government endorsement of the religious speech's message.[477] Thus, when government grants public funding for or opens public property to private religious speech, this speech is not deemed to be state action that would trigger the Establishment Clause.[478]

2. *Inadequacies of the Chaplain Rights Argument*

The free speech argument asserts that because their official ceremonial prayers are religious speech, Army chaplains alone should determine the prayers' content. If the chaplains' ceremonial prayers on Army installations could be considered "religious speech," then Army-

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[475] Swomley, *supra* note 222, at 302; Jay Sekulow, Right to Pray in Public (Sept. 18, 2001), http://www.aclj.org/Issues/ Resources/Document.aspx?ID=412 ("It is a fundamental proposition of constitutional law that religious speech is protected by the First Amendment.").

[476] To pass constitutional muster, such content-based speech regulations must be narrowly tailored to achieve a compelling government interest. *See* NOWAK & ROTUNDA, *supra* note 308, § 16.10, at 1002.

[477] *E.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 843 (1995) (holding that the University of Virginia's refusal to disburse money from the student activity fund for the publication of a student religious newspaper amounted to unconstitutional viewpoint discrimination of religious speech); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 388 (1993) (striking down a school board policy that denied a church after-school access to public school premises to show religious films but that allowed non-religious groups to use the premises for a variety of social, civic, recreational, and political functions); Widmar v. Vincent, 454 U.S. 263, 277 (1981) (holding that a public university's exclusion of student religious groups from facilities available to other student groups constituted unlawful content-based speech regulation).

[478] Brownstein, *supra* note 298, at 145; *see, e.g.*, Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 767 (1995) (holding that "purely private religious speech connected to the State only through its occurrence in a public forum" cannot run afoul of the Establishment Clause).

imposed, content-based restrictions on such speech would likely be unconstitutional. This argument is ultimately unconvincing for three reasons. First, Army chaplains have reduced free speech rights because of their membership in the U.S. armed forces.[479] Second, Army chaplains have free exercise rights in their official capacities only to the extent that these rights enhance the free exercise rights of Soldiers.[480] Finally, existing restrictions on all types of private speech at Army ceremonies justify evenhanded restriction of prayer (religious speech) at these ceremonies as well.[481]

a. The Specialized Society Doctrine

Like all members of the armed forces, clergy serving as Army chaplains do not have the same constitutional rights as their civilian counterparts. The Court has long held that the armed forces are a specialized society, separate and distinct from civilian society.[482] The Court has also recognized that the military is not a "deliberative body," but instead relies on discipline, obedience, and the unwavering authority of commanders over their subordinates.[483] Consequently, the Supreme Court defers to reasonable military judgments in matters involving

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[479] *See infra* Part VIII.C.2.a.

[480] *See infra* Part VIII.C.2.b.

[481] *See infra* Part VIII.C.2.c.

[482] Parker v. Levy, 417 U.S. 733, 743 (1974) ("[T]he military is, by necessity, a specialized society separate from civilian society."); Orloff v. Willoughby, 345 U.S. 83, 94 (1953) ("The military constitutes a specialized community governed by a separate discipline from that of the civilian."); *see also supra* notes 395–96 (discussing the civil-military gap).

[483] Chappell v. Wallace, 462 U.S. 296, 300 (1983) ("[N]o military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting."); *Parker*, 417 U.S. at 744 (quoting *In re* Grimley, 137 U.S. 147, 153 (1890)) ("[An army] is the executive arm. Its law is that of obedience.").

the administration and operation of the armed forces.[484] The deference the Court gives military judgment is similar to the deference it gives to the professional judgment of other specialized Executive Branch officials.[485]

As the Court explained in its 1986 decision *Goldman v. Weinberger*,[486] this deference even extends to military decisions affecting the free exercise rights of service members. Captain Goldman was an ordained rabbi serving as an Air Force clinical psychologist.[487] Pursuant to his religious beliefs but contrary to the Air Force's uniform regulation, Goldman wore his yarmulke at all times, even when he was in uniform and indoors.[488] In April 1981, Goldman's commander ordered him to comply with the uniform regulation concerning his yarmulke wear.[489] Goldman refused to follow the order and sued Secretary of Defense Weinberger and Air Force officials to

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[484] *Chappell*, 462 U.S. at 301 (quoting Rostker v. Goldberg, 453 U.S. 57, 64–65 (1981)) ("The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference."); *Orloff*, 345 U.S. at 94 (explaining that the judiciary must "be . . . scrupulous not to interfere with legitimate Army matters").

[485] *E.g.*, Turner v. Safley, 482 U.S. 78, 85 (1987) (explaining that prison administration "requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the [political] branches of government," which calls for a "policy of judicial restraint"); O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987) ("To ensure that courts afford the proper deference to prison officials, we have determined that prison regulations alleged to infringe constitutional rights are adjudged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights.").

[486] 475 U.S. 503 (1986).

[487] *Id.* at 504–05.

[488] *Id.* at 505. Air Force Regulation (AFR) 35-10 forbade such indoor wear of headgear, even religious headgear, while in uniform. *Id.*

[489] *Id.*

enjoin enforcement of the uniform regulation, alleging that it violated his First Amendment right to the free exercise of religion.[490]

The Court began its analysis by repeating its "specialized society" doctrine[491] and its deferential standard for reviewing military regulations challenged on First Amendment grounds.[492] The Court reasoned that service members had less personal autonomy within the military community than they generally would have had in civilian life.[493] The Court then concluded that the military may "reasonably and evenhandedly regulate" the wear of religious apparel to preserve military discipline and uniformity.[494] Because the Air Force's uniform regulation met this standard, the Court held that the regulation did not violate the Free Exercise Clause.[495]

Goldman's holding that military regulations do not have to reasonably accommodate the wear of certain religious attire has been legislatively overturned.[496] *Goldman*'s analysis of the

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[490] *Id.* at 506. Goldman asserted, without dispute, that wearing the yarmulke was an act of "silent devotion akin to prayer . . . ." *Id.* at 509.

[491] *Id.* at 506–07.

[492] *Id.* at 507 ("[W]hen evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.").

[493] *Id.*

[494] *Id.* at 510.

[495] *Id.*

[496] *See* 10 U.S.C.S. § 774(a) (LEXIS 2006) (allowing members of the armed forces to wear "neat and conservative" items of religious apparel while in uniform); DoDD 1300.17, *supra* note 297, paras. 3.2.7.1, 3.2.7.2 (defining both "religious apparel" and "neat and conservative" as used in 10 U.S.C. § 774). In fact, DoDD 1300.17 specifically addresses the *Goldman* facts, stating: "For example, unless [it was not "neat and conservative"], a Jewish yarmulke may be worn with the uniform whenever a military cap, hat, or other headgear is *not* prescribed." *Id.* para. 3.2.7.3 (emphasis added).

free exercise rights of service members, however, is still good law. In 1990, the Court cited *Goldman* as an example of its evolving Free Exercise Clause jurisprudence in certain cases of religious accommodation.[497] In a broader sense, the principle that "there is a difference between the [First Amendment] rights of a civilian and the rights of a service member" also remains undeniable due the military's urgent and unchanged mission.[498]

Thus, the First Amendment liberties of service members, including Army chaplains, may be infringed by reasonable military regulations. Even if service members have colorable claims that a superior officer has violated their constitutional rights, generally available legal remedies will not be available to them.[499] If the Army were to reasonably determine that official ceremonial prayers had a negative impact on morale and unit cohesion that outweighed the benefits to chaplains' free exercise of religion from saying these prayers, courts would deferentially review this determination and likely uphold it.

b. Chaplains Promote Soldiers' Free Exercise Rights, Not Their Own

Concerns about chaplains' free exercise rights largely miss the point. In their official capacity, Army chaplains speak and act on behalf of the government and serve as state agents.

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[497] Employment Div. of Or. v. Smith, 494 U.S. 872, 884 (1990) ("In *Goldman v. Weinberger*, 475 U.S. 503 (1986), we rejected application of the *Sherbert* test to military dress regulations that forbade the wearing of yarmulkes."). In *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court held that government regulations burdening religious practices must be narrowly tailored to achieve a compelling state interest. *Id.* at 406; *see supra* note 293.

[498] *E.g.*, United States v. Brown, 45 M.J. 389, 396 (C.A.A.F. 1996) (explaining that the expression of service members' First Amendment rights must not "impact on discipline, morale, espirit de corps, and civilian supremacy [over the military]").

[499] *See* Chappell v. Wallace, 462 U.S. 296, 304 (1983) (holding that service members alleging a deprivation of their constitutional rights by superior officers had no remedy for monetary damages under a "*Bivins*-type" claim).

Therefore, a chaplain's official speech, such as his official prayer during a mandatory Army military and patriotic ceremony, is state action rather than private speech.[500] At the same time, the Establishment Clause mandates that government not conduct religious activities or compel citizens to participate in religious observances.[501] Courts have granted Army chaplains a limited exception to this general prohibition, allowing them to conduct religious observances in their official capacity so that Soldiers' free exercise rights will not be frustrated.[502]

Thus, to the extent that Army chaplains have publicly-financed free exercise rights at all, they have such rights only to facilitate Soldiers' free exercise of religion.[503] This purpose is echoed in official Army publications,[504] Supreme Court opinions,[505] and lower federal court

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[500] *See supra* notes 307–08.

[501] *See supra* notes 85–95 (explaining the neutrality principle), 192–233 (explaining the coercion test) and accompanying text.

[502] *See supra* notes 312–25 and accompanying text (discussing *Katcoff v. Marsh*).

[503] *See* HERSPRING, *supra* note 309, at 42 ("Indeed, if any thread runs through the history of the Chaplain's Corps from the Civil War to the present, it is the idea that chaplains serve their troops, regardless of what their religious orientation might be.").

[504] *E.g.*, 2004 AR 165-1, *supra* note 34, para. 1-4c ("[T]he Army chaplaincy . . . is an instrument of the U.S. Government to ensure that soldier's religious 'free exercise' rights are protected."); FM 1-05, *supra* note 329, para. 1-12 ("The mission of the UMT [Unit Ministry Team] is to provide and perform religious support to [S]oldiers, families, and authorized civilians as directed by the commander."); TC 1-05, *supra* note 310, at 1-3 ("The UMT and the chaplain are required by public law to conduct religious services for [S]oldiers in their assigned command."), 2-6 ("The primary mission of the chaplain is to perform or provide religious ministry to [S]oldiers.").

[505] *E.g.*, Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 296–97 (1963) (Brennan, J., concurring) ("There are certain practices, conceivably violative of the Establishment Clause, the striking down of which might seriously interfere with certain religious liberties also protected by the First Amendment. Provisions for churches and chaplains at military establishments for those in the armed services may afford one such example."); *id.* at 306 (Goldberg, J., concurring) ("Government must inevitably take cognizance of the existence of religion and, indeed, under certain circumstances the First Amendment may require that it do so. And it seems clear to me from the opinions in the present and past cases that the Court would recognize the propriety of providing military chaplains . . . ."); *id.* at 309 (Stewart, J., dissenting) ("Spending federal funds to employ chaplains for the armed forces might be said to violate the Establishment Clause. Yet a lonely soldier stationed at some faraway outpost could surely complain that a government which did *not* provide him the opportunity for pastoral guidance was affirmatively prohibiting the free exercise of his religion.").

opinions.[506] Chaplains acting in their official capacity must place the free exercise interests of their Soldiers ahead of their own. Thus, the critical issue for assessing Army ceremonial prayers should be how these prayers affect Soldiers' free exercise rights, not how regulating the prayers affects chaplains' free exercise rights.

AR 165-1 already protects chaplains' free exercise rights during Army ceremonies by providing that Army chaplains will not be forced to pray at such ceremonies "if doing so would be in variance with the tenets or practices of their faith group."[507] If an Army chaplain objects to the requirement that his prayers be inclusive and non-proselytizing, he may simply decline to pray. When a chaplain prays in his official capacity at an Army military and patriotic ceremony, his sectarian prayer may be perceived as an Army endorsement of his sect in violation of the Establishment Clause.[508] Thus, if a chaplain wishes to pray at an Army ceremony, however, he must follow the AR 165-1 and NCMAF guidelines.

Of course, a chaplain may, in some circumstances, have a nearly absolute free exercise right to be "able to pray to whomever [his] faith tradition demands,"[509] such as during voluntary religious services for Soldiers. In the course of these services, chaplains may openly express their religious beliefs, pray in sectarian ways, and passionately evangelize the congregation. But in the inherently coercive setting of a mandatory Army ceremony, Establishment Clause

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[506] Katcoff v. Marsh, 755 F.2d 223, 234 (2d Cir. 1985) (explaining that the U.S. Government had an obligation to facilitate free exercise rights for soldiers who faced obstacles to worship because of their military service).

[507] 2004 AR 165-1, *supra* note 34, para. 4-4h.

[508] *See supra* notes 111–28 and accompanying text (explaining the endorsement test).

[509] Julian Duin, *White House to push military on Jesus prayer*, WASH. TIMES, Jan. 23, 2006, at A1.

restrictions on forcing religious activity must take priority.[510] Further, recall that AR 165-1 even has a penalty-free opt-out provision to protect chaplains' free exercise interests at ceremonies, but it fails to list a corresponding opt-out provision for Soldiers.

Attacking the nominal free exercise limitations on Army chaplains during Army ceremonies implies that chaplains should be allowed to pray in any manner they wish, regardless of the context or the audience. Such an absolute guarantee is inconsistent with the rights afforded to other Army members and is unwarranted in light of existing regulations.

c. Existing Content-Neutral Speech Restrictions at Army Ceremonies

In religious speech cases since 1980, the Court has held that the government may not lawfully restrict religious groups from accessing a non-public forum because of the religious nature of those groups' speech.[511] These decisions would not, however, provide a safe harbor for Army ceremonial prayers. The ceremonies containing the prayers will likely occur on Army installations. Because an Army installation is a non-public forum, [512] government restriction on the prayers would have to be reasonable and viewpoint neutral to pass constitutional muster.[513]

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[510] *See* Lee v. Weisman, 505 U.S. 577, 587 (1992) (explaining that "the principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause").

[511] *See supra* notes 477–78 and accompanying text.

[512] United States v. Albertini, 472 U.S. 675, 686 (1985) ("Military bases generally are not public fora . . . ."); Greer v. Spock, 424 U.S. 828, 838 (1976) ("The notion that federal military installations . . . have traditionally served as a place for free public assembly and communication of thoughts by private citizens is thus historically and constitutionally false.").

[513] Lamb's Chapel v. Moriches Union Free Sch. Dist., 508 U.S. 384, 392–93 (1993) (quoting Perry Educ. Assoc. v. Perry Local Educators' Assoc., 460 U.S. 37, 46 (1983)). The reasonableness of the restrictions depends on the "purposes served by the [non-public] forum." *Id.* at 393.

Official chaplain-led prayer during an Army military and patriotic ceremony constitutes official government action, not merely private speech that the government has allowed.[514] Under the line drawing of the aforementioned religious speech cases, chaplain-led ceremonial prayers do not qualify as *private* speech worthy of special protection.

Furthermore, at an Army ceremony, the Army regulates all speech, regardless of its religious content. For example, Soldiers may not spontaneously recite a poem or burst into song during a change-of-command ceremony. Thus, Army ceremonial prayers are readily distinguished from recent religious speech cases, in which content-based restrictions denied access to government institutions or funding to religious groups but granted such access to similarly situated non-religious groups.[515] The Army has not opened the door to unfettered non-religious speech during Army ceremonies, so it also is not compelled to allow religious speech during these events. Because existing restrictions on speech at Army ceremonies lawfully limit religious and non-religious speech alike, restricting the official prayers at mandatory Army ceremonies could not be characterized as content-based speech regulation subject to a presumption of unconstitutionality and strict judicial scrutiny.

D. Historical Prayer and Ceremonial Deism

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[514] *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 770 (1995) (holding that private religious expression that occurs in a traditional or designated public forum "cannot violate the Establishment Clause").

[515] Brownstein, *supra* note 298, at 144.

Under *Marsh v. Chambers*[516] and *Van Orden v. Perry*,[517] longstanding historical practices that merely acknowledge religious traditions in the United States constitute ceremonial deism and do not violate the Establishment Clause.[518] Arguably, chaplain-led prayers at Army ceremonies are such longstanding, traditional religious practices.[519] Like the Congressional chaplaincy, the Army chaplaincy existed in 1791 when the Bill of Rights was drafted.[520] The First Congress did not attempt to curtail the Army chaplaincy or its activities in light of the First Amendment, which demonstrates that Congress believed that the Army chaplaincy did not violate the Establishment Clause.[521] As a result, Army ceremonial prayers offered by Army chaplains deserve the same constitutional deference as legislative prayers offered by congressional chaplains.

Admittedly, the historical prayer argument is the strongest basis for preserving Army ceremonial prayers. If a court accepted that the Army prayers either had a special historical niche or had become secular expressions of ceremonial deism—devoid of all religious meaning and unable to create the perception of government endorsement of religion—then they would withstand Establishment Clause scrutiny. As this section will explain, however, *Marsh* and the

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[516] Marsh v. Chambers, 463 U.S. 783, 792 (1983).

[517] Van Orden v. Perry, 125 S.Ct. 2854, 2861 (2005) (plurality opinion).

[518] *See supra* notes 129–40 (discussing ceremonial deism), 141–54 (discussing *Marsh*), 155–60 (discussing *Van Orden*) and accompanying text.

[519] *See, e.g.*, Lee v. Weisman, 506 U.S. 577, 633–36 (1992) (Scalia, J., dissenting) (collecting historical examples of prayers and acknowledgments of God at public ceremonies in the United States).

[520] BUDD, *supra* note 310, at 9; CROCKER, *supra* note 307, at 527 ("The organized chaplaincy in the American Army was established prior to the Declaration of Independence."); TC 1-05, *supra* note 310, at 2-6 ("On July 29, 1775, the Continental Congress provided for the appointment of chaplains for the Armed Forces.").

[521] Marsh v. Chambers, 463 U.S. 783, 786–91 (1983); *see supra* notes 144–47 and accompanying text.

entire doctrine of ceremonial deism have inherent philosophical flaws. Even if these significant issues are ignored, Army ceremonial prayers do not properly fit within the class of ceremonial deism. Finally, the context and setting in which Army ceremonial prayers occur prevents *Marsh* from controlling their Establishment Clause analysis.

1. Marsh*'s Questionable Interpretation and Use of Historical Evidence*

The historical record on which *Marsh* relies does not provide unambiguous indications of the intent of the First Amendment's drafters. This criticism targets the theoretical underpinnings of *Marsh* and, by extension, *Van Orden*[522] and *Lynch v. Donnelly*.[523] The tendency to rely on the history of the Religion Clauses to decipher their meaning is troubling because the historical evidence sometimes points in opposite directions.[524] Indeed, the congressional debate on the text of the Bill of Rights was unusually vague by standards of modern legislative history and offers little specific interpretive assistance on the Founders' initial understanding of constitutional

[522] Van Orden v. Perry, 125 S. Ct. 2854, 2861–63 (2005) (plurality opinion) (collecting historical examples of acknowledgments of religion by the federal government).

[523] Lynch v. Donnelly, 465 U.S.668, 675–679 (1984) (collecting historical examples of "official references to the value and invocation of Divine guidance in deliberations and pronouncements" of national leaders).

[524] ROTUNDA & NOWAK, *supra* note 46, § 21.2, at 8 (noting that "there is no clear history as to the meaning of the clauses"); *see* McCreary County v. Am. Civil Liberties Union of Ky., 125 S. Ct. 2722, 2745 (2005) ("Historical evidence thus supports no solid argument for changing course [in Establishment Clause jurisprudence] . . . .").

freedoms.[525] This historical ambiguity has even found its way into Supreme Court Establishment Clause decisions.[526]

Marsh also rests on the debatable assumption that the statutes of early Congresses, especially the First Congress, provide strong evidence about how modern courts should interpret the First Amendment. This assumption allows early legislators to serve as de facto jurists, interpreting the First Amendment without a case or controversy[527] and within the sometimes chaotic realm of legislating.[528] Like other legislative bodies, the First Congress could easily have been influenced to pass legislation by "the passions and exigencies of the moment, the pressure

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[525] LEVY, *supra* note 47, at 84 (observing that congressional debate over the Bill of Rights "occurred on a level of abstraction so vague as to convey the impression that Americans of 1787–88 had only the most nebulous conception of the meaning of the particular rights they sought to ensure").

[526] *Compare* McCreary County v. Am. Civil Liberties Union of Ky., 125 S. Ct. 2722, 2748–50 (2005) (Scalia, J., dissenting) *with* Lee v. Weisman, 505 U.S. 577, 612–26 (Souter, J., concurring) (1992). In *McCreary County*, Justice Scalia explains that the model of "the relationship between church and state" adopted in America did not require that religion be "strictly excluded from the public forum." *McCreary County*, 125 S. Ct. at 2748 (Scalia, J., dissenting). Instead, the words and actions of the Founders demonstrated a willingness to publicly and officially acknowledge God, based on their belief that "morality was essential to the well-being of society and that encouragement of religion was the best way to foster morality." *Id.* at 2749. In *Lee*, however, Justice Souter examined the history of the Establishment Clause and concluded that the Framers "simply did not share a common understanding of the Establishment Clause . . . ." *Lee*, 505 U.S. at 626 (Souter, J., concurring). Thus, history does not "warrant[] reconsideration of the settled principle that the Establishment Clause forbids support for religion in general no less than support for one religion or some." *Id.* at 616.

[527] U.S. CONST. art. III, § 2 (extending "the judicial power" of federal courts to various types of cases and controversies).

[528] The task of interpreting the Establishment Clause falls to the Supreme Court rather than to the political branches of government. Legislators "are trying to find solutions on a near term basis" because of political re-election pressures. FENWICK, *supra* note 137, at 112. Supreme Court justices, appointed for life, are "more apt to emphasize the long-term effect than the short-term solution." *Id.* at 113; *accord* Marsh v. Chambers, 463 U.S. 783, 815 (1983) (Brennan, J., dissenting) (stating that the Court, not Congress, is charged with the role of "detached observer engaged in unpressured reflection").

of constituencies and colleagues, and the press of business" and not exercise "sober constitutional judgment" about its constitutionality.[529]

Furthermore, the decisions of early Congresses have sometimes proven to be unsound from the outset. For example, ten years after proposing the First Amendment, Congress passed the Alien and Sedition Acts, which legalized political censorship.[530] Fortunately, modern free speech doctrine rightly rejects this concept, despite ancient congressional desires to the contrary.[531] In other important constitutional areas as well—including the prohibition on cruel and unusual punishment, protections against unreasonable searches and seizures, and guarantees of equal protection under the law—the practices in place at the time of a particular guarantee of rights did not "fix forever the meaning of that guarantee."[532] Longstanding practices should also not fix the meaning of the Establishment Clause.[533] Decisions such as *Marsh* that would tend to do so should be either distinguished or, when their application as precedent is unavoidable, limited to their facts.

2. *Religious Practices Are Not Secular Acts*

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[529] *Marsh*, 463 U.S. at 814–15 (Brennan, J., dissenting).

[530] Lee v. Weisman, 505 U.S. 577, 626 (1992) (Souter, J., concurring); LEVY, *supra* note 47, at 235 ("Not everything done by the founding generation can be accepted as constitutional.").

[531] *Lee*, 505 U.S. at 626 (Souter, J., concurring).

[532] *Marsh*, 463 U.S. at 816, 816 n.35 (Brennan, J., dissenting); LEVY, *supra* note 47, at 149 ("The Constitution is not a static document whose meaning is fixed timelessly.").

[533] Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 236 (1963) (Brennan, J., concurring) ("A more fruitful inquiry . . . is whether the [challenged] practices . . . tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent.").

The existence of religious traditions in America is hardly surprising. When the American Revolution began, most of the colonies had established official churches,[534] which legalized pervasive religious influence over the public sector. The trend continued after the American Revolution, and religion became part of the "fabric of the federal government from its very first days."[535] As the Court itself has explained, examples of "official acts that endorsed Christianity specifically" are prevalent in United States history.[536] Ceremonial deism exempts from serious constitutional scrutiny such longstanding practices despite their possible incompatibility with pluralistic, contemporary American society.[537]

The overwhelmingly Christian composition of early America has produced American governmental practices consistent with Christian theology. The convenient union between Christian-infused government activities and Christianity's general cultural dominance has precluded, rather than instructed, any serious Establishment Clause inquiry. Thus, when modern challenges to these longstanding activities arise, referring to the widespread acceptance of the

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[534] Engel v. Vitale, 370 U.S. 421, 428 n.10 (1962) (explaining that the Anglican Church (Church of England) was the established church in the colonies of Maryland, Virginia, North Carolina, South Carolina, and Georgia, and received "substantial support" from New York and New Jersey; and that the Congregationalist Church was "officially established" in Massachusetts, New Hampshire, and Connecticut); LEVY, *supra* note 47, at 2; Epstein, *supra* note 129, at 2099–2100.

[535] Epstein, *supra* note 129, at 2101 (citing, for example, religious references in the Articles of Confederation of 1781 and the First Congress's provision of Army chaplains).

[536] County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Ch., 492 U.S. 573, 604–05 (1989).

[537] *See* KENNETH JANDA ET AL., THE CHALLENGE OF DEMOCRACY: GOVERNMENT IN AMERICA 478–79 (8th ed. 2005) (explaining that in a 2002 poll by the Pew Research Center for People and the Press, 59% of respondents in the United States agreed that religion was "very important," the highest such percentage of any industrialized Western nation polled); Religious Affiliations: Comparing the U.S. and the World (Dec. 11, 2005), http://www.religioustolerance.org/compuswrld.htm (listing 76.5% of the United States population as being affiliated with Christianity; 13.2% with no religious affiliation; 1.4% with Judaism; 0.5% with Islam, Buddhism, and Agnosticism, respectively; 0.4% with Atheism and Hinduism, respectively; 0.3% with Unitarian Universalism; 0.15% with Wicca; and less than 0.1% with Spiritualist, Native American Spirituality, Baha'i Faith, New Age, Sikhism, Church of Scientology, Humanism, Secularism, and Taoism, respectively).

activities or their historical place in American society dodges substantive analysis with predictable, pro-Christian results.[538] Christian-based government activities and expressions are, in essence, swept under the rug of ceremonial deism.[539]

The Court's recitation of official acknowledgments of religion throughout this nation's history is also troubling because it suggests that a government practice must be constitutional if it has existed for some time.[540] Critics have called the appeal to historical examples of official acknowledgments of religion part of a larger "assault on all secular public institutions."[541] The assault relies on the questionable assertion that the United States was founded on Christian principles rather than Deist ones, and it encourages the government to be more openly pro-Christian in keeping with these alleged Christian roots.[542]

The reliance on longstanding existence and historical acceptance does not account for practical obstacles that might have prevented challenges of these practices from being brought sooner.[543] It also does not allow the understanding of constitutional protections to evolve as

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[538] Feldman, *supra* note 42, at 262 (asserting that a reliance on history "tends to give a constitutional imprimatur to the preexisting symbols and structures of American society," which are Christian symbols); *see* LEVY, *supra* note 47, at 235 ("The founder's preference for Protestant Christianity has not only passed out of date; it had no constitutional basis originally.").

[539] LEVY, *supra* note 47, at 240.

[540] Jacoby, *supra* note 61, at 74 (stating that this suggestion "plays neatly into the Christian right's version of history").

[541] *Id.*

[542] Allen, *supra* note 129, at 14.

[543] Van Orden v. Perry, 125 S. Ct. 2854, 2897 (2005) (Souter, J., dissenting) (listing cost of litigation and "risk of social ostracism" as reasons that a suit challenging the Texas monument of the Ten Commandments was not filed sooner).

American society changes.[544] Uncontroversial practices in eighteenth century America, when the only detectable religious diversity was between different sects of Protestant Christianity, may not seem as innocuous today.[545] Deeming a religious (i.e., Christian) expression to be "secular" conveniently removes the expression from its religious roots,[546] preserves American traditions[547] and helps the Court maintain its legitimacy with the American public.[548] None of these results seems consistent with conscientious, independent judicial review.

Furthermore, secularizing Christian-based religions activities and expressions may offend non-Christians and Christians alike. Non-Christians might perceive such activities and expressions as "decidedly Christian."[549] The constant repetition of these so-called secular expressions persistently reminds them that the government favors Christianity and views Christians in an unfairly positive light. At the same time, Christians might reasonably question whether certain religious words or expressions can ever lose their sacred meaning no matter how

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[544] LEVY, *supra* note 47, at 149 ("The Constitution, which serves a nation whose history had made it increasingly democratic and heterogeneous, is equally dynamic."), 238 ("The establishment clause should be far broader in meaning now than was when adopted.").

[545] *See* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 240–41 (1963) (Brennan, J., concurring) ("[P]ractices which may have been objectionable to no one at the time of Jefferson and Madison may today be highly offensive to many persons, the deeply devout and the nonbelievers alike.").

[546] MONSMA, *supra* note 63, at 43 ("Religion is secularized and what appears to be support for religion is said to be support for just another nonreligious aspect of U.S. life.").

[547] *Id.* at 214.

[548] Justice Scalia made this assertion in his dissent in *McCreary County*, accusing the Court of not consistently applying "enforced neutrality" because the Court could not go "too far down the road of an enforced neutrality" without losing "the willingness of the people to accept its interpretation of the Constitution as definitive, in preference to the contrary interpretation of the democratically elected branches." McCreary County v. Am. Civil Liberties Union of Ky., 125 S. Ct. 2722, 2752 (2005) (Scalia, J., dissenting).

[549] Feldman, *supra* note 42, at 267. In this way, ceremonial deism "normalizes many common forms of Christian societal domination . . . ." *Id.*

often they are repeated.[550] Some believers may even find the suggestion that personally meaningful religious statements can somehow become secular expression to be insulting and demeaning to their beliefs.[551] In any event, merely calling an apparently religious expression "secular" does not necessarily make it so.

3. *The Religious Significance of Army Ceremonial Prayers*

Practices that qualify as ceremonial deism do not convey a message of religious endorsement to a reasonable observer but are instead "generally understood as a celebration of patriotic values rather than particular religious beliefs."[552] Thus, such practices typically avoid denominational, sectarian references and lack profound religious significance.[553] If the experience of other military services is any indication of sentiment within the Army, however, Army ceremonial prayers have too much religious significance to be fairly classified as ceremonial deism.

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[550] As Justice Thomas has noted, "[W]ords such as 'God' have religious significance. . . . Telling either nonbelievers or believers that the words 'under God' have no meaning contradicts what they know to be true." Van Orden v. Perry, 125 S. Ct. 2854, 2866 (2005) (Thomas, J., concurring). *Accord* Van Orden v. Perry, 125 S. Ct. 2854, 2879 (2005) (Stevens, J., dissenting) ("Attempts to secularize what is unquestionably a sacred text defy credibility and disserve people of faith.").

[551] Marsh v. Chambers, 463 U.S. 783, 811 (1983) (Brennan, J., dissenting) ("If upholding the practice [of legislative prayer] requires the denial of the [religious significance of the prayers], I suspect that many supporters of legislative prayer would feel that they had been handed a pyrrhic victory."); MONSMA, *supra* note 63, at 43 (explaining that the notions that references to God either have no significant religious content or merely serve a secular purpose are "insulting to sensitive believers"); *see* Berg, *supra* note 63, at 23 (noting that when the government endorses a religious message, the message "is likely to be watered down or otherwise distorted to suit the government's interests").

[552] County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Ch., 492 U.S. 573, 630–31 (1989) (O'Connor, J., concurring); *see supra* notes 129–40 and accompanying text (describing ceremonial deism).

[553] Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 42 (2004) (O'Connor, J., concurring) (listing "absence of reference to a particular religion" as an aspect of ceremonial deism).

The reaction to the Air Force's initial *Interim Guidelines Concerning Free Exercise of Religion in the Air Force*[554] demonstrates many groups perceive military ceremonial prayers as far more than bland, secular, patriotic statements. The initial *Interim Guidelines* required that Air Force ceremonial prayers be brief, nonsectarian, and not advance "specific religious beliefs."[555] This requirement unleashed a torrent of protest that has continued to the present. On 25 October 2005, Rep. Walter Jones (R-N.C.) sent a letter to President Bush asking for an executive order to protect "military chaplains' right of free speech" in response to the *Interim Guidelines*.[556] The Jones letter called the guidelines' nonsectarian prayer requirement a "euphemism declaring that prayers will be acceptable only so long as they censor Christian beliefs."[557] In November 2005, Rep. Todd Akin (R-Mo.) sent a letter to Air Force Secretary Michael Wynne and asked that Air Force chaplains "be allowed to pray according to their faiths."[558] In December 2005, a Navy chaplain staged a public fast to protest similar guidelines in Navy regulations concerning prayers at non-religious ceremonies.[559] In March 2006, two Christian seminaries warned that they might stop sending their graduates to serve as military

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[554] INTERIM GUIDELINES, *supra* note 21; *see supra* notes 21–24 (discussing *Interim Guidelines*).

[555] INTERIM GUIDELINES, *supra* note 21, para. B(3).

[556] Colarusso, *supra* note 19, at 12.

[557] Cooperman, *supra* note 9, at A20.

[558] Colarusso, *supra* note 19, at 12 (noting that the Akin letter was signed by forty-two other Congressmen).

[559] Lively, *supra* note 472, at 9.

chaplains because of perceived "restrictions placed on their clergy's right to pray."[560] The controversy does not show signs of relenting.

The requirement that prayers at military ceremonies be nonsectarian and inclusive is neither novel nor recently crafted. This requirement is consistent with the principles of pluralism in the *Covenant and Code of Ethics for Chaplains of the Armed Forces*[561] from the National Conference on Ministry to the Armed Forces (NCMAF). The *Covenant and Code of Ethics*, which is trained at military chaplain's schools,[562] instructs chaplains to focus on common "beliefs, principles, and practices" when conducting "services of worship" that may include persons from diverse religious groups.[563] If such guidance applies at religious worship services, where chaplains' free speech and free exercise rights are at their peak, it also applies at non-religious military and patriotic ceremonies.

Nevertheless, the reaction to the nonsectarian prayer provision indicates that the prayers being offered at military ceremonies do have religious significance, at least for the chaplains who are leading them.[564] If these prayers were genuine examples of ceremonial deism that lacked any

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[560] Bryant Jordan, *Seminaries threaten to stop sending chaplains to the military*, ARMYTIMES.COM, Mar. 6, 2006, http://www.armytimes.com/story.php?f=1-292925-1579644.php (listing Bob Jones University Seminary and Temple Baptists Seminary as the authors of the cautionary letter).

[561] NCMAF COVENANT AND CODE OF ETHICS, *supra* note 320, para. 4.

[562] *See Air Force Backs Down on Policy Allowing Chaplains to Evangelize*, CHURCH & STATE, Nov. 2005, at 18, 18 (stating that the NCMAF guidelines are distributed at the Air Force Chaplain's School at Maxwell Air Force Base, AL.); Lively, *supra* note 472, at 9 (explaining that Navy policy requires that chaplains' prayers at public events demonstrate "sensitivity to the needs of all those present"); *see also supra* notes 356–61 and accompanying text (describing the NCMAF importance to Army chaplain training).

[563] NCMAF COVENANT AND CODE OF ETHICS, *supra* note 320, para. 4.

[564] *See* Julia Duin, *Army Silences Chaplain After Criticism*, WASH. TIMES, Feb. 14, 2006, at A1 (describing a Fort Drum chaplain's insistence that his prayer at a Soldier's memorial service in December 2005 conclude with "in the name of Jesus").

religious connotation, then the initial *Interim Guidelines* would have been easily accepted. In fact, one might wonder why the NCMAF has not composed a uniform prayer for use at all non-religious military and patriotic ceremonies. The prayer would serve the purpose of solemnizing the event and would not try to "create a spiritual communion" or "invoke divine aid."[565] It would also help eliminate instances of blatant sectarian proselytism during official ceremonial prayers and would provide military chaplains with much-needed predictability.

The lack of such a standard ceremonial prayer and the vitriolic response to the Air Force's requirement that ceremonial prayers be nondenominational and nonsectarian convincingly demonstrates these prayers' continued religious significance. They are not harmless, non-endorsing acts of ceremonial deism. Indeed, they present much more danger of creating the perception of government religious endorsement and coercing service member participation in a government-sponsored religious exercise than do activities already safely within the ambit of ceremonial deism. Therefore, ceremonial deism does not justify preserving official, chaplain-led prayers at mandatory, military and patriotic Army ceremonies.

4. Marsh*'s Limited Applicability*

Finally, although *Marsh* preceded *Lee*, and arguably the graduation prayers being challenged in *Lee* were longstanding historical practices, *Lee* did adopt *Marsh*'s rationale.

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[565] *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 42 (2004) (O'Connor, J., concurring) ("Any statement that has as its purpose placing the speaker or listener in a penitent state of mind, or that is intended to create a spiritual communion or invoke divine aid, strays from the legitimate secular purposes of solemnizing an event and recognizing a shared religious history.").

Similarly, although *Marsh* would also precede a future challenge to Army ceremonial prayers, *Marsh* would not control the Establishment Clause analysis of these prayers.

Lee did not apply *Marsh*'s rationale for two reasons. First, prayers in public school lack the same degree of historical ubiquity as the legislative prayers in *Marsh*. As the Court noted in *Edwards v. Aguillard*,[566] the *Marsh* analysis "is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted."[567] The Fourth Circuit Court of Appeals used similar reasoning in *Mellen v. Bunting*.[568] General Bunting, the VMI Superintendent, argued that "prayer during military ceremonies and before meals is part of the fabric of our society" and "the drafters of the First Amendment" did not intend to prohibit such prayer.[569] The *Mellen* court, however, was not persuaded. It explained that *Marsh*'s favorable treatment of prayers at the start of daily legislative sessions rested in large part on the "unique history" of such prayers, especially their adoption by the First Congress shortly after it drafted the First Amendment in 1791.[570] Furthermore, the *Mellen* court believed that subsequent Supreme Court decisions applied *Marsh* "only in narrow circumstances."[571] The court then decided that the VMI pre-meal

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[566] 482 U.S. 578 (1987).

[567] *See id.* at 583 n.4 (1987) (invalidating a Louisiana statute that criminalized the teaching of evolution in Louisiana public schools). An appeal to historical practices also failed to sustain the challenged prayer in *Engel v. Vitale*, 370 U.S. 421 (1962), in which proponents argued that the daily prayers allowed students to "shar[e] in the spiritual heritage" of the United States. *Id.* at 445 (Stewart, J., dissenting).

[568] 327 F.3d 355 (4th Cir. 2003); *see supra* notes 258–80 and accompanying text (discussing *Mellen*).

[569] *Mellen*, 327 F.3d at 369.

[570] *Id.* (quoting Marsh v. Chambers, 463 U.S. 783, 791(1983)); *see supra* notes 141–54 and accompanying text (discussing *Marsh*).

[571] *Mellen*, 327 F.3d at 369; *see* County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Ch., 492 U.S. 573, 602 (1989) (explaining that *Marsh* "relied specifically on the fact that Congress authorized legislative prayer at

prayer did not "share *Marsh*'s 'unique history.'"[572] As a result, the *Mellen* court did not apply *Marsh*, but instead it relied on *Lemon* and *Lee* to strike down the practice of official prayer before mandatory VMI dinners.[573]

Because the Army chaplaincy is older than the congressional chaplaincy, ceremonial prayers by Army chaplains have a stronger claim to *Marsh*'s "unique history" than the VMI prayers or the statute at issue in *Edwards*. The critical distinction, however, is the purpose for which the respective chaplaincies were created. From its inception, the congressional chaplaincy has offered prayers to start each day's session of Congress.[574] The roles of congressional chaplains have historically focused on purely religious activities, such as coordinating prayers by guest chaplains, arranging memorial services for members and staff, and providing spiritual counseling to the congressional community.[575] Thus, if the First Congress approved of congressional chaplains, then it also probably approved of the legislative prayers those chaplains ineluctably would provide.

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the same time that it produced the Bill of Rights" and declining to extend *Marsh* to the Christmas Nativity display at issue).

[572] *Mellen*, 327 F.3d at 370.

[573] *Id.* at 370–74.

[574] *Marsh*, 463 U.S. at 788 (noting that "the practice of opening sessions [of Congress] with prayer has continued uninterrupted since [the First Congress]").

[575] MILDRED AMER, HOUSE AND SENATE CHAPLAINS 2 (2005), http://www.senate.gov/reference/resources/pdf/RS20427.pdf (noting that congressional chaplains "perform ceremonial, symbolic, and pastoral duties," including conducting Bible studies and prayer meetings, presiding over the weddings and funerals of members, and serving as "spiritual counselors to Members, their families, and staff"); Office of the Clerk, U.S. House of Representatives, Chaplains of the House (1789 to Present) (Sept. 12, 2005), http://clerk.house.gov/histHigh/Congressional_History/chaplains.html (listing such religious duties as arranging for guest chaplains to offer the opening prayers and conducting memorial services).

On the other hand, the Army chaplaincy historically had a variety of functions, such as preserving the rights of Soldiers to freely practice their religions and encouraging Soldiers in battle.[576] Saying prayers at Army ceremonies was not an indispensable part of either of these crucial roles, but it instead added formality and solemnity to military and patriotic Army events. Regulatory guidance for Army chaplains conducting such ceremonial prayers reflected this reality for the latter half of the 20th century.[577]

In light of on-going military campaigns, the essential roles of modern chaplains is largely consistent its Revolutionary War origins—accompanying troops into combat, providing comfort to mortally wounded Soldiers, and counseling the wounded and grieving.[578] These roles are consistent with the First Congress's expectations about the Army chaplaincy. The role of Army chaplains offering ceremonial prayers is not necessarily as consistent with these expectations, and therefore it is not worthy of the same judicial deference as the role of congressional chaplains offering legislative prayers. Thus, it does not follow as directly that simply because the First Congress approved of Army chaplains, it also approved of official, chaplain-led prayers during the Army's non-religious military and patriotic ceremonies.

The second reason that the *Lee* Court did not apply *Marsh* to public school prayers is the vast difference between the contexts in which legislative prayers and public school prayers

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[576] *See supra* notes 329–38 and accompanying text (discussing primary roles of chaplains).

[577] U.S. DEP'T OF ARMY, REG. 165-1, CHAPLAIN ACTIVITIES IN THE UNITED STATES ARMY para. 4-5d (31 Aug 89); U.S. DEP'T OF ARMY, REG. 165-20, DUTIES OF CHAPLAINS AND RESPONSIBILITIES OF COMMANDERS para. 4-5d (10 May 85); 1979 AR 165-20, *supra* note 353, para. 2-1a; 1976 AR 165-20, *supra* note 353, para. 2-1a; 1966 AR 165-20, *supra* note 353, para. 3f.

[578] Dreher, *supra* note 338, at 33 (quoting Chaplain (COL) Vincent Inghilterra, USA) ("I've seen about 75 kids on the threshold of eternity. That keeps me motivated, because I'm concerned about eternal life.").

occur.[579] The *Lee* Court noted the "inherent differences" between public school graduations and state legislative sessions.[580] The legislative sessions at issue in *Marsh* involved responsible, mature adults who were free to "enter and leave" the legislative chambers during the daily invocation,[581] not impressionable public school children who were effectively unable to leave the graduation ceremony. The prayers in *Marsh* occurred before each daily legislative session, none of which had as much significance as a school graduation ceremony.[582] The prayer exercises before legislative sessions in *Marsh* had far less "influence and force" than the formal prayer exercise at school graduations.[583] Finally, in *Marsh*, legislators tried to "invoke spiritual inspiration entirely for their own benefit without directing a religious message at the citizens" they represented.[584] In *Lee*, school officials tried to solemnize the graduation ceremony for the benefit of the graduating students and, in the process, conducted a coercive religious exercise in a formative, pedagogical environment.[585]

The Court has not retreated from this distinction between school and non-school settings, even in recent decisions that stressed the historical, longstanding nature of an activity with religious meaning. For example, in 2005, while upholding the display of a granite Ten Commandments monument on the grounds of the Texas statehouse, the Court distinguished that

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[579] Lee v. Weisman, 505 U.S. 577, 597 (1992); *see supra* notes 192–212 and accompanying text (discussing *Lee*).

[580] *Lee*, 505 U.S. at 597.

[581] *Id.*

[582] *Id.* (calling graduation the "one school event most important for the students to attend").

[583] *Id.*

[584] *Id.* at 630 n.8 (Souter, J., concurring).

[585] *Id.* at 586–87 (majority opinion).

display from Ten Commandments displays in public school classrooms.[586] The Court reaffirmed that it would remain "particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools."[587] The Court recognized the "particular concerns that arise in the context" of these schools and concluded that the Texas monument was "quite different from the prayers involved in [*School District of Abington Township v.*] *Schempp* and *Lee v. Weisman*."[588] Thus, the environment in which religious expressions occur and the composition of the audience that observes them still matter in Establishment Clause jurisprudence. And because the Army's formative environment more closely resembles a public school than a legislative chamber, *Lee*, not *Marsh*, would control a constitutional analysis of chaplain-led, official prayers at Army military and patriotic ceremonies. Thus, *Marsh*'s reliance on history would not undercut *Lee*'s invalidation of such Army prayers.[589]

IX. Conclusion and Recommendations

The current practice of offering official, chaplain-led prayers during mandatory Army military and patriotic ceremonies violates the Establishment Clause. Under the *Lemon* test, such prayers have the impermissible primary effect of advancing religion and create excessive entanglement between government and religion.[590] Under the *Lee* coercion test, such prayers force an unwilling, captive audience of Soldiers to participate in a government-sponsored,

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[586] Van Orden v. Perry, 125 S. Ct. 2854, 2863 (2005) (plurality opinion).

[587] *Id.* at 2863–64 (quoting Edwards v. Aguillard, 482 U.S. 578, 583–84 (1987)).

[588] *Id.* at 2864.

[589] *See supra* Part VII.B (analyzing Army ceremonial prayers under *Lee*).

[590] *See supra* notes 400–04 and accompanying text.

government-conducted religious exercise.[591] Further, such prayers do not qualify as ceremonial deism because of their patent religious character and enduring religious significance.[592] They are readily distinguishable from prayers before legislative sessions and do not share the same unique history as those invocations. No counterargument for preserving these Army ceremonial prayers compels a different conclusion about their unconstitutional nature.[593]

This observation about Army ceremonial prayers leads to a simple recommendation: Discontinue official prayers at mandatory Army ceremonies. These prayers have nominal potential benefits but large potential costs. The most significant cost is the adverse effect on the morale and dignity of Soldiers who are forced to participate unwillingly in a government-sponsored, government-conducted religious ceremony.[594] Removing such prayers does not indicate that the Army is buckling to a mere heckler's veto. Instead, it clearly signifies that the Army wants all of its Soldiers, regardless of their personal religious beliefs, to feel like fully accepted members of the Army team.

The Army values do not include prayer or religious expression because religion is a matter for each Soldier's individual conscience. Preserving religion and prayer as private activities maintain the religious liberty of all and prevent dominant religious groups from using the machinery of the government to impose their dogma and modes of worship on other people.

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[591] *See supra* notes 405–22 and accompanying text.

[592] *See supra* notes 423–26 and accompanying text.

[593] *See supra* notes 427–589 and accompanying text (examining possible counterarguments in favor of Army ceremonial prayers).

[594] *See* Poppleton, *supra* note 412, at A15 ("We ask members of our military to give up many of their freedoms when they serve—their personal freedom of religion should not be one of them.").

If the military is, as it perceives itself to be, superior to the civilian society it serves, then the military's actions should set the standard for fairness and equitable treatment. By allowing ceremonial prayers, the Army is not setting any such standard. Rather, the Army is clinging to the notion that Christian-based, monotheistic prayer should be a formal part of non-religious public events. This notion, from a by-gone era when official discrimination of and hostility towards religious minorities was widespread, is antithetical to American religious pluralism.

If solemnizing the event is indispensable, the ceremony narrator could simply ask members of the audience to pause thoughtfully in a moment of silence rather than asking a chaplain to lead a potentially offensive prayer.[595] And if the Army instead insists on using ceremonial prayers, it should either adopt the standards for such prayers listed in the Air Force's initial *Interim Guidelines*[596]—requiring ceremonial prayers to be brief, nonsectarian, and not tending to advance any specific religion—or draft a uniform prayer for use at all Army ceremonies. This uniform prayer could become a genuine example of ceremonial deism as it is repeated at numerous ceremonies over the course of many years, gradually gaining historical longevity and losing religious significance with each successive recitation. On the other hand, the status quo—where chaplains have only vague guidance about the ad hoc prayers they must compose for each separate ceremony—is prone to constitutional abuses. Our Soldiers deserve, and American society expects, much more from the Army.

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[595] *See* NCCJ PUBLIC PRAYER GUIDELINES, *supra* note 363 (noting that "inclusive public prayer . . .considers other creative alternatives, such as a moment of silence"). A full discussion of moment of silence legislation and court cases is complex and is well beyond the scope of this paper. At a minimum, however, a regulation allowing a moment of silence at the ceremony must not have the purpose of endorsing silent prayer under circumstances where audible prayer would be impermissible. *See* Wallace v. Jaffree, 472 U.S. 38, 61 (1985) (striking down a statute requiring a moment of silence at the start of each school day in Alabama public schools).

[596] *See supra* notes 21–24 and accompanying text.