

## ARTICLES

### COERCION IN THE RANKS: THE ESTABLISHMENT CLAUSE IMPLICATIONS OF CHAPLAIN-LED PRAYERS AT MANDATORY ARMY EVENTS

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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 honored Christian military chaplains are singled out and silenced.<sup>1</sup>

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1. Am. Ctr. for L. & Justice, *Protect Military Prayer*, Oct. 24, 2005, <http://www.aclj.org/Issues/Resources/Document.aspx?ID=1976> (referencing allegations

## I. INTRODUCTION: THE AIR FORCE ACADEMY AND WHY PRAYER MATTERS

Early in 2004, faculty members at the U.S. Air Force Academy complained during an annual command climate survey of religious bias at the school.<sup>2</sup> In March 2004, a flyer promoting a special screening of the intensely religious film *The Passion of the Christ*<sup>3</sup> appeared on each plate in the cadet dining facility and prompted complaints that the Academy endorsed the film's Christian themes.<sup>4</sup> In April 2004, school officials brought a team from the Yale Divinity School to assess the Academy's "religious atmosphere."<sup>5</sup> The Yale team's report in June 2004 noted both the "stridently evangelical themes" in general Protestant religious services<sup>6</sup> and the frequent use of religion to motivate new cadets during basic training.<sup>7</sup>

In April 2005, the advocacy group Americans United for the Separation of Church and State<sup>8</sup> published a report detailing incidents of

posted online after the Air Force instituted a policy aimed at reducing evangelizing at the Air Force Academy).

2. Rob Boston, *Kingdom of Heaven?*, CHURCH & ST., June 2005, at 8, 9. The Academy responded with a training program called Respecting the Spiritual Values of all People (RSVP) to expose faculty, staff, and cadets 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." AMS. UNITED FOR THE SEPARATION OF CHURCH & STATE, REPORT OF AMERICANS UNITED FOR THE SEPARATION OF CHURCH AND STATE ON RELIGIOUS COERCION AND ENDORSEMENT OF RELIGION AT THE UNITED STATES AIR FORCE ACADEMY 12 (2005), <http://www.au.org/pdf/050428AirForceReport.pdf> [hereinafter AU AIR FORCE REPORT].

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.

6. *Id.*; David Van Biema, *Whose God Is Their Co-Pilot?*, TIME, June 27, 2005, at 61, 61; see Dick Foster, *AF: Thou Shalt Respect Diversity*, ROCKY MTN. NEWS (Denver), Aug. 30, 2005, at 5A (discussing a chaplain who explained to new cadets during Basic Cadet Training in June 2004 that people who were not born-again Christians would "burn in the fires of hell," and that new cadets should explain this to non-Christian cadets).

7. Pam Zubeck, *Task Force on Bias Faulted for Scope*, GAZETTE (Colo. Springs), May 21, 2005, at A1, available at <http://www.gazette.com/display.php?id=1307776&secid=1> (last visited Feb. 3, 2007) (describing the use of "faith language," such as "let . . . Jesus help you," 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. Ams. United for the Separation of Church & State, About AU, <http://www.au.org/site/PageServer?pagename=aboutau> (last visited Feb. 3, 2007).

“troubling religious policies and practices” at the Air Force Academy.<sup>9</sup> 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.<sup>10</sup> The report provided instances of non-Christian cadets facing “proselytization or religious harassment” by their cadet superiors.<sup>11</sup> The report also asserted that Academy policies granted favorable treatment to religion and religious organizations.<sup>12</sup>

Concerned about its general religious climate,<sup>13</sup> the Air Force published *Interim Guidelines Concerning Free Exercise of Religion in the Air Force* in August 2005.<sup>14</sup> 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.<sup>15</sup> At the same time, the guidelines allowed formal, public

9. AU AIR FORCE REPORT, *supra* note 2, at 1. Americans United 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. Boston, *supra* note 2, at 8. Michael Weinstein, a member of Americans United and a 1977 Air Force Academy graduate, whose son was then a cadet at the Air Force Academy, contacted Americans United. Van Biema, *supra* note 6, at 62. In July 2004, Weinstein alleged that some non-Jewish cadets had been accusing Jewish people of being “responsible for the execution of Jesus Christ.” *Id.* In October 2005, Weinstein filed a lawsuit alleging that the Air Force had violated the Establishment Clause through a policy of “aggressive evangelizing” at the Academy. Alan Cooperman, *A Noisy Takeoff for Air Force Guidelines on Religion*, WASH. POST, Oct. 31, 2005, at A20.

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

11. *Id.* at 5.

12. *Id.* at 9-10. For example, the Academy authorized cadets to hang crosses or other religious items in their dorm rooms, but did not allow them to hang similar nonreligious items. *Id.* Cadets also had more flexibility to leave campus for religious reasons than for nonreligious ones, such as Freethought meetings. *Id.* at 10.

13. In May 2005, the Air Force created a task force to examine the Academy’s religious climate. See Boston, *supra* note 2, at 9; Ams. United for the Separation of Church & State, *Americans Report Details Instances of Religious Favoritism at U.S. Air Force*, Apr. 28, 2005, <http://www.au.org/site/News2?abbr=pr&page=NewsArticle&id=7341>. Even this seemingly routine response created controversy, especially among Christian political-action committees like Focus on the Family. Boston, *supra* note 2, 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”). The task force described “perceptions” of pro-Christian bias at the Academy. See Foster, *supra* note 6. It also found that “inappropriate expressions of faith and instances of insensitivity had created an atmosphere of intolerance.” Laura M. Colarusso, *Lawmakers Protest Guidelines on Prayer*, AIR FORCE TIMES, Nov. 21, 2005, at 12. The task force fell short, however, of finding “overt religious discrimination.” See Foster, *supra* note 6.

14. U.S. AIR FORCE, INTERIM GUIDELINES CONCERNING FREE EXERCISE OF RELIGION IN THE AIR FORCE (2005) [hereinafter INTERIM GUIDELINES], *available at* <http://www.usafa.af.mil/superintendent/pa/religious.cfm>.

15. *Id.* § B(1).

prayer during “nonroutine military 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.”<sup>16</sup>

Although the *Interim Guidelines* appeared to set reasonable standards for a secular federal agency like the Air Force, they generated considerable controversy—especially the requirement that prayers at nonreligious military ceremonies be nonsectarian.<sup>17</sup> The noisy dissent prompted the Air Force to issue the more permissive<sup>18</sup> *Revised Interim Guidelines Concerning Free Exercise of Religion in the Air Force* in February 2006.<sup>19</sup> The *Revised Interim Guidelines* explain, in part, that “nondenominational, 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.”<sup>20</sup> 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.”<sup>21</sup>

The events at the Air Force Academy and their tumultuous aftermath highlight the complexities of religious freedom and expression in the pluralistic society of the U.S. armed forces. Chaplain-led, official prayers at formal, nonreligious, military ceremonies—including change-of-command ceremonies, graduation exercises at military-service schools, award ceremonies, and troop reviews—present a particular challenge in all the services. Such ceremonies are patriotic events and are not considered to be religious services.<sup>22</sup> Soldiers<sup>23</sup> are often required to

16. *Id.* § B(3). In addition, such prayers are not to “advance specific religious beliefs.” *Id.*

17. *See, e.g.*, Cooperman, *supra* note 9.

18. Press Release, 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](http://www.adl.org/PresRele/RelChStSep_90/4866_90.htm) (“[These revisions] reopen the door to the serious and prevalent misconduct which the [U.S. Air Force] acknowledged and said it would correct.”).

19. U.S. AIR FORCE, REVISED INTERIM GUIDELINES CONCERNING FREE EXERCISE OF RELIGION IN THE AIR FORCE (2006) [hereinafter REVISED INTERIM GUIDELINES], available at <http://www.af.mil/library/guidelines.pdf>.

20. *Id.* para. 6 (emphasis added).

21. *Id.* Unfortunately, the revised guidelines contain no corresponding provision for nonchaplain members of the Air Force who wish to avoid compulsory religious activities inconsistent with their religious beliefs. Press Release, Ams. United for the Separation of Church & 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](http://www.au.org/site/News2?abbr=pr&page=NewsArticle&id=7929&security=1002&news_iv_ctrl=1241).

22. U.S. DEP’T OF ARMY, REG. 165-1, CHAPLAIN ACTIVITIES IN THE UNITED STATES ARMY para. 4-4(h) (2004) [hereinafter 2004 AR 165-1], available at [http://www.apd.army.mil/pdffiles/r165\\_1.pdf](http://www.apd.army.mil/pdffiles/r165_1.pdf).

either participate in or provide support for these events.<sup>24</sup> Nonetheless, these events typically contain an “invocation, reading, prayer, or benediction” offered by a military chaplain.<sup>25</sup> Members of the audience and the ceremony’s participants must stand and participate—or at least appear to participate—in the chaplain’s prayer, a state-sponsored and -conducted religious exercise.<sup>26</sup> Under similar circumstances, the Supreme Court has held that such mandatory, coerced prayers violate the Establishment Clause of the First Amendment,<sup>27</sup> which forbids Congress from making any law “respecting an establishment of religion.”<sup>28</sup>

This Article examines the constitutionality of formal prayers led by Army chaplains at mandatory, nonreligious, ceremonies. Although this Article focuses on Army events, the issues it raises and the observations it makes apply with equal force to all branches of the armed forces. A military chaplain serves as a military commander’s staff expert on religious matters.<sup>29</sup> When chaplains pray at Army ceremonies, they pray on behalf of and with the approval of the Army commanders in charge of those ceremonies.<sup>30</sup> Consequently, chaplains’ prayers are an official government action subject to the constraints of the Establishment Clause.<sup>31</sup> If any person may constitutionally offer a prayer at a mandatory, nonreligious ceremony, it would be the chaplain.<sup>32</sup>

Part II of this Article explores the Supreme Court’s Establishment Clause jurisprudence, especially its cases dealing with school prayer. Part III briefly discusses the chaplaincy’s role in offering invocations, benedictions, and other prayers at Army ceremonies. Part IV considers

23. For purposes of this Article, the word “soldiers” refers to all members of the Army—enlisted service members below the grade of E-5, noncommissioned officers, warrant officers, and commissioned officers.

24. See, e.g., AU AIR FORCE REPORT, *supra* note 2, at 2; 2004 AR 165-1, *supra* note 22, § 4-4(h).

25. 2004 AR 165-1, *supra* note 22, para. 4-4(h).

26. See, e.g., AU AIR FORCE REPORT, *supra* note 2, at 2.

27. E.g., *Lee v. Weisman*, 505 U.S. 577, 599 (1992); see *infra* Part II.B (describing school-prayer jurisprudence).

28. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

29. LAWRENCE P. CROCKER, ARMY OFFICER’S GUIDE 526 (45th ed. 1990) (“[T]he chaplain advises the commander on matters of religion, morals, and morale as affected by religion.”).

30. See 2004 AR 165-1, *supra* note 22, para. 4-4(h) (noting that Army chaplains may be required to say official prayers at nonreligious “military and patriotic” ceremonies).

31. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 12.1, at 470 (6th ed. 2000) (“[T]he official act of any governmental agency is direct governmental action and therefore subject to the restraints of the Constitution.”).

32. See *infra* Part VI.B (examining the scope of chaplains’ First Amendment rights in conjunction with their official roles).

the formative socialization process for soldiers in the Army—a process which makes the school-prayer precedents particularly applicable. Part V applies Establishment Clause jurisprudential tests to analyze prayers at mandatory Army events and ceremonies and demonstrate that these prayers, like prayers at public-school graduation ceremonies and football games, violate the Establishment Clause. Part VI examines several potential lines of argument for the prayers at nonreligious Army ceremonies (some of which have successfully preserved public religious expressions in other contexts) and explains why none of these arguments demonstrably alters the unconstitutional nature of prayer at mandatory Army events. Ultimately, the Army and other branches of the armed forces should no longer sanction an activity that could coerce even one service member to participate in a government-sponsored religious activity in violation of the Establishment Clause.

## II. ESTABLISHMENT CLAUSE JURISPRUDENCE OF THE U.S. SUPREME COURT

Few areas of constitutional law are as convoluted as the U.S. Supreme Court's interpretation of the Establishment Clause.<sup>33</sup> The Court has repeatedly noted that the constitutional test for Establishment Clause violations is “not susceptible to a single verbal formulation,”<sup>34</sup> and has stated that the clause itself “is not a precise, detailed provision in a legal code capable of ready application.”<sup>35</sup> Because the Establishment Clause forbids “all laws respecting an establishment of religion,”<sup>36</sup> the Court has given the Establishment Clause a “broad interpretation.”<sup>37</sup>

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33. See, e.g., *Newdow v. Bush*, 355 F. Supp. 2d 265, 289-90 (D.D.C. 2005) (“Establishment Clause jurisprudence . . . remains complex and unresolved.”).

34. *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 591 (1989); see also, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 33 (2004) (O'Connor, J., concurring) (quoting *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring)) (“[T]he Establishment Clause . . . cannot easily be reduced to a single test. There are different categories of Establishment Clause cases, which may call for different approaches.”).

35. *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984).

36. U.S. CONST. amend. I.

37. *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.”).

A. *The Neutrality Principle and Its Branches*

If the Supreme Court's Establishment Clause jurisprudence were a tree, the neutrality principle would be its trunk.<sup>38</sup> The neutrality principle generally has required the government to pursue secular goals in a manner that does not favor religion over nonreligion and does not favor any single religion over others.<sup>39</sup> The Court's Establishment Clause jurisprudence since 1947 has moved from strict neutrality (as demonstrated by the Court's metaphor of a "wall of separation between Church and State")<sup>40</sup> to nondiscriminatory neutrality (which prohibits government preferential treatment of religion generally or of any religious sect specifically).<sup>41</sup>

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38. Cf., e.g., *McCreary County v. ACLU 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."); STEPHEN V. MONSMA, *POSITIVE NEUTRALITY: LETTING RELIGIOUS FREEDOM RING* 30 (1993) (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 nonreligion"). The neutrality principle is not universally accepted, however. See, e.g., *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); 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).

39. See, e.g., *McCreary County*, 125 S. Ct. at 2733 ("[T]he 'First Amendment mandates governmental neutrality between religion and religion, and between religion and non-religion.'" (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968))); see 5 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 21.1, at 2 (3d ed. 1999).

40. E.g., *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1879)) ("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." Ronald F. Thieman, *The Constitutional Tradition: A Perplexing Legacy*, in *LAW AND RELIGION: A CRITICAL ANTHOLOGY* 345, 359 (Stephen M. Feldman ed., 2000). The Court officially abandoned the strict-neutrality approach in 1971. See *Lemon*, 403 U.S. at 614 ("[T]otal separation [between church and state] is not possible in an absolute sense."); *Lynch*, 465 U.S. at 673 (noting that the wall metaphor is "not a wholly accurate description" of the church-state relationship). Strict neutrality is "unworkable in practice" because government regulation affects all societal institutions—even religious ones. Thieman, *supra*, at 360.

41. *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

From the trunk of the neutrality principle have grown a number of analytical branches, each posing distinct constitutional tests for certain types of Establishment Clause cases. To analyze the constitutionality of official prayers at mandatory, nonreligious, Army ceremonies, 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.

### 1. THE *LEMON* TEST

Since 1971, courts have analyzed the propriety of government aid to religious institutions under the three-prong test of *Lemon v. Kurtzman*.<sup>42</sup> In striking down statutes in Rhode Island and Pennsylvania that provided for partial state subsidization of private-school teachers' salaries,<sup>43</sup> 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;<sup>44</sup> (2) has a "primary effect . . . that neither inhibits nor advances religion"; and (3) does not create an "excessive entanglement" between government and religion.<sup>45</sup> These three criteria together became known as the *Lemon* test.<sup>46</sup> In 1997, the Court in *Agostini v. Felton* made excessive entanglement "an aspect of the inquiry into a statute's effect"

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another, or religion over irreligion, religious choice being the prerogative of individuals under the Free Exercise Clause.").

42. 403 U.S. at 612-13.

43. *Id.* at 606. The Rhode Island statute directed the State to pay teachers in nonpublic elementary schools a supplement of 15 percent of their annual salary. *Id.* at 607. Under the Pennsylvania statute, the State reimbursed nonpublic elementary and secondary schools for the costs of teachers' salaries and secular instructional materials. *Id.* at 606-07.

44. *Id.* at 612-13. 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).

45. *Lemon*, 403 U.S. at 613 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)). 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 resulting relationship between the government and religious leaders. *Lemon*, 403 U.S. at 615.

46. The first two prongs of the *Lemon* test originated in *School District of Abington Twp. v. Schempp*, 374 U.S. 203 (1963), in which the Court explained 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 also *Zelman v. Simmons-Harris*, 536 U.S. 639, 669 (2002) (O'Connor, J., concurring) (explaining that courts still use the *Lemon* test).

rather than a separate prong of the *Lemon* test.<sup>47</sup> Despite fairly widespread criticism of *Lemon*,<sup>48</sup> the Court has refused to overturn the decision.<sup>49</sup>

## 2. THE ENDORSEMENT TEST AND CEREMONIAL DEISM

A second branch of Establishment Clause jurisprudence is the endorsement test, which the Court has used in decisions concerning government involvement in public prayers<sup>50</sup> and static displays of

47. 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 students did not violate the Establishment Clause).

48. See, 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."); *Lynch v. Donnelly*, 465 U.S. 668, 688-89 (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."); Thiemann, *supra* note 40, at 358 ("[The Court's analysis in *Lemon*] has come under increasing fire, from advocates both of governmental neutrality [toward 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."). In upholding the display of a granite replica of the Ten Commandments on the grounds of the Texas statehouse, the plurality opinion in *Van Orden v. Perry* discredited the *Lemon* test and avoided using it to decide the case, noting that "just two years after *Lemon* was decided," the Court called *Lemon*'s factors "no more than helpful signposts." 125 S. Ct. 2854, 2861 (2005) (citing *Hunt v. McNair*, 413 U.S. 734, 741 (1973)).

49. See, e.g., *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722 (2005). In contrast to its hostility to the *Lemon* test in *Van Orden*, the Court 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 (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)). 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. The Court never reached the effect or excessive entanglement prongs in its analysis, but it did not indicate that the prongs were no longer good law. See *id.*; see also *Lee v. Weisman*, 505 U.S. 577, 603 n.4 (1992) (Blackmun, J., concurring) ("Since 1971, the Court has decided [thirty-one] Establishment Clause cases. In only one instance, the decision of *Marsh v. Chambers*, 463 U.S. 783 (1983), has the Court not rested its decision on the basic principles described in *Lemon*."); *Hunt* 413 U.S. at 741-49 (applying the *Lemon* test in upholding the issuance of South Carolina's state bonds for the benefit of a sectarian Baptist university, despite characterizing *Lemon*'s factors as merely "helpful signposts").

50. See, e.g., *Santa Fe*, 530 U.S. at 308 ("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].'" (quoting *Wallace v. Jaffree*, 472 U.S. 38, 76 (O'Connor, J., concurring))).

religious symbols on government property.<sup>51</sup> Under this test, the Court determines whether a challenged government action creates the appearance that the government is promoting or expressing favoritism towards religion.<sup>52</sup> This unconstitutional endorsement often appears to place the State's "seal of approval" on a particular religious expression or activity.<sup>53</sup>

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 . . . to a person's standing in the political community."<sup>54</sup> Endorsement makes members of the endorsed religion feel as if they are political insiders and "favored members of the political community."<sup>55</sup> At the same time, nonadherents of the endorsed

51. See, e.g., *McCreary County*, 125 S. Ct. at 2747 ("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. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 599 (1989). In *County of Allegheny*, the Court held that displaying a Christmas crèche on the grand staircase of the county courthouse violated the Establishment Clause because "no viewer could reasonably think that [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." *Id.* at 599-600.

52. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 787 (1995) (Souter, J., concurring) ("Effects matter to the Establishment Clause, and one, principal way 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 (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.'" (quoting *Wallace*, 472 U.S. at 70 (O'Connor, J., concurring))).

53. *Santa Fe*, 530 U.S. at 308; *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 . . .").

54. *County of Allegheny*, 492 U.S. at 594 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)). Because the endorsement test hinges on the appearance that the government is favoring religion, the Court asks whether a hypothetical "objective observer, acquainted with the text, legislative history, and implementation of the challenged policy or statute, would perceive it as a state endorsement of [religion]." *Santa Fe*, 530 U.S. at 308 (quoting *Wallace*, 472 U.S. at 73, 76 (O'Connor, J., concurring)); *McCreary County*, 125 S. Ct. at 2734 ("[An] objective observer . . . takes account of the traditional external signs that show up in the 'text, legislative history, and implementation of the statute,' or comparable official act" (quoting *Santa Fe*, 530 U.S. at 308)); *id.* at 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).

55. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring); see also *McCreary County*, 125 S. Ct. at 2733; *Santa Fe*, 530 U.S. at 309-10.

religion feel like outsiders to the political process.<sup>56</sup> Such effects are completely inconsistent with the principle of government neutrality toward religion.<sup>57</sup>

An important subordinate branch of the endorsement test involves a class of apparently religious government activities that the Court has deemed to not convey an unconstitutional government endorsement of religion to an objective observer. This class of activities is known as “ceremonial deism.”<sup>58</sup> The Court has “implicitly referred” to ceremonial deism since at least the early 1950s<sup>59</sup> and continues to recognize it today.<sup>60</sup>

While it is true that “no one acquires a vested or protected right in violation of the Constitution by long use,”<sup>61</sup> the Court has been reluctant to strike down longstanding government practices that refer to or

56. *County of Allegheny*, 492 U.S. at 627 (O’Connor, J., concurring); see *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.”).

57. *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”).

58. Former Yale Law School Dean Walter Rostow coined the term “ceremonial deism” in a 1962 lecture at Brown University. Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2091 (1996). 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, but 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*, THE NATION, Feb. 21, 2005, at 14, 16.

59. 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 U.S. Supreme Court sessions as permissible government interactions with religion).

60. 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 from at least 1789,” 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) (quoting *Lynch*, 465 U.S. at 674); *Lynch*, 465 U.S. at 675-77 (explaining that United States history is “replete with official 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 “we have simply interwoven the motto [“In God We Trust”] so deeply into the fabric of our civil polity that its present use may well not present that type of involvement [with religion] which the First Amendment prohibits”).

61. *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.*

acknowledge God.<sup>62</sup> Instead, the Court has, in the face of Establishment Clause challenges, upheld these activities based on their history, consequently determining that the activities “involved no significant danger of eroding government neutrality” toward religion.<sup>63</sup> The longstanding existence and “nonsectarian nature” of the activities would not “convey a message of endorsement” of religion to an objective observer.<sup>64</sup> Rather, these practices, “despite their religious roots,” are deemed to no longer be “a celebration of . . . particular religious beliefs”<sup>65</sup> 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.”<sup>66</sup> 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.<sup>67</sup>

### 3. THE COERCION TEST

The most important branch of Establishment Clause jurisprudence for evaluating official prayers at mandatory, nonreligious, Army

62. See, e.g., *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (upholding prayers before legislative sessions because of their longstanding existence in American federal politics); see *supra* notes 59-60 (listing examples of ceremonial deism).

63. *ROTUNDA & NOWAK*, *supra* note 39, § 17.3, at 1422.

64. *County of Allegheny v. ACLU*, Greater Pittsburgh Chapter, 492 U.S. 573, 631 (1989) (O'Connor, J., concurring).

65. *Id.*; see also *id.* at 657 (Kennedy, J., dissenting) (“Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage.”).

66. *Id.* at 596 n.46 (majority opinion) (quoting *Lynch*, 465 U.S. at 693).

67. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 44 (2004) (O'Connor, J., concurring) (“[S]ymbolic 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 POLITICAL EXAMINATION OF PUBLIC SCHOOL PRAYER* 178 (1989) (“The question is whether [ceremonial deism] gestures by government have enhanced the spiritual lives of American citizens . . . or have trivialized religious concepts to the point that they go unnoticed by most Americans.”).

The Court has never fully defined the category of ceremonial deism. Nevertheless, Professor Steven Epstein has listed 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) prayers 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.” Epstein, *supra* note 58, at 2104-24.

ceremonies involves 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.’”<sup>68</sup> Although coercion is not necessary for proving an Establishment Clause violation, it clearly is sufficient.<sup>69</sup> The coercion test has led the Court to strike down prayers at official school functions in which the school directly or indirectly coerced students to participate.<sup>70</sup>

### B. *School-Prayer Jurisprudence and the Coercion Test*

School-prayer cases fall into two general groups: cases involving prayer and religious activities at public elementary and high schools<sup>71</sup> and those involving such activities at public colleges and universities.<sup>72</sup> Both groups are instructive for analyzing prayers at a typical military ceremony, for the typical “military-aged” population ranges from young adults in their late teens to men and women in their early forties.<sup>73</sup>

#### 1. *ENGEL, SCHEMPP, LEE, AND SANTA FE: RELIGIOUS ACTIVITIES IN PUBLIC ELEMENTARY AND HIGH SCHOOLS*

Long before crafting the coercion test, the Supreme Court had consistently held that organized, official prayer and state-sponsored religious activity occurring during school hours on school property

68. *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (quoting *Lynch*, 465 U.S. at 678).

69. *Id.* at 604 (Blackmun, J., concurring) (“[A] violation of the Establishment Clause is not predicated on coercion.”); *id.* at 619 (Souter, J., concurring) (“Our precedents . . . simply cannot . . . support the position that a showing of coercion is necessary to a successful Establishment Clause claim.”). Justice David Souter also explained that, although the constitutional language of the Establishment Clause is not “pellucid[,] . . . virtually everyone acknowledges that the Clause bans more than formal establishments of religion in the traditional sense, that is, massive state support for religion through, among other means, comprehensive schemes of taxation.” *Id.* at 620. Nevertheless, the Court has retained the coercion test in its later Establishment Clause decisions. *See infra* notes 92-98 and accompanying text.

70. *See infra* Part II.B.

71. *See, e.g., Lee*, 505 U.S. 577; *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

72. *See, e.g., Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003); *Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997); *Chaudhuri v. Tennessee*, 130 F.3d 232 (6th Cir. 1997); *Anderson v. Laird*, 466 F.2d 283 (D.C. Cir. 1972).

73. U.S. DEP’T OF ARMY, ARMY PROFILE FY 05, at 4 (2005), *available at* <http://www.army1.army.mil/hr/demographics/FY05%20Army%20Profile.pdf> (noting that, as of Sept. 30, 2005, 68 percent of all enlisted soldiers and 34 percent of all officers were age seventeen to twenty-nine).

violates the Establishment Clause. In 1962, the Court in *Engel v. Vitale* struck down a voluntary,<sup>74</sup> nondenominational, nonsectarian, monotheistic prayer<sup>75</sup> composed by state officials and recited at the start of each school day by students in all New York public schools.<sup>76</sup> In 1963, the Court in *School District of Abington Township v. Schempp* struck down a Pennsylvania statute requiring daily Bible reading and recitation of the Lord's Prayer "at the opening of each . . . school day" but allowing any child to be excused from these activities "upon the written request of his parent or guardian."<sup>77</sup> Despite acknowledging that in the United States, "religion has been closely identified with our history and government,"<sup>78</sup> the Court found that the statute mandated government-sponsored religious ceremonies<sup>79</sup> and that these ceremonies had a purpose and primary effect of advancing religion in violation of the Establishment Clause.<sup>80</sup>

The bright-line rule of *Engel* and *Schempp* disallowed religious ceremonies as part of the official curriculum in public schools.<sup>81</sup> To resolve questions of prayer outside of the official school curriculum but within an official school activity, such as graduation ceremonies and football games, the Court focused on the state-imposed coercion that invariably accompanied such public prayer events.

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74. 370 U.S. at 438 (Douglas, J., concurring). Justice William Douglas noted that during the prayer, students were "free to stand or not stand, to recite or not recite, without fear of reprisal or even comment by the teacher or any other school official," and that "[p]rovision 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." *Id.*

75. *Id.* at 422 (majority opinion). The prayer was as follows: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Id.*

76. *Id.* at 422-23.

77. 374 U.S. 203, 205 (1963). The statute specified that "[a]t least ten verses from the Holy Bible shall be read, without comment" each day. *Id.*

78. *Id.* at 212. The Court cited specific historical examples, such as the writings of the Founding Fathers demonstrating their general belief in God and the presence of government-paid chaplains in the armed forces. *Id.* The Court also noted examples of public religious acknowledgments in the conduct of everyday government functions. *See id.* at 213.

79. *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 patently religious content of such instruction).

80. *Id.* at 223.

81. *Engel v. Vitale*, 370 U.S. 421, 424 (1962); *Schempp*, 374 U.S. at 205. *But see supra* note 79 (discussing some acceptable instances of religion in public schools).

a. *Lee v. Weisman: Graduation Ceremonies and the Coercion Test*

In *Lee v. Weisman*, the Court held that prayers at middle- and high-school graduation ceremonies were state-sponsored “religious exercises” in violation of the Establishment Clause.<sup>82</sup> First, the *Lee* Court identified significant government involvement with the prayers through the official actions of a Providence, Rhode Island, public-school principal.<sup>83</sup> The government involvement with the graduation prayer created a “state-sponsored and state-directed religious exercise in a public school.”<sup>84</sup>

Second, the Court noted that elements of the graduation ceremony itself contributed to coercion. In general, the Court reasoned that “there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools”<sup>85</sup> and that prayer exercises in public schools “carry a particular risk of indirect coercion.”<sup>86</sup> The Court concluded that, during the graduation ceremonies at issue, 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.<sup>87</sup>

82. 505 U.S. 577, 599 (1992). This decision has generated tremendous scholarly analysis and commentary, so a detailed description would likely be cumulative. Nonetheless, a summary of the decision is important for the present discussion. *See, e.g.*, Richard D. Land & Michael K. Whitehead, *Do Students Have a Prayer After Lee v. Weisman?*, 6 U. FLA. J.L. & PUB. POL’Y 231, 234-36 (1994) (providing a detailed description of *Lee*); *id.* at 242-43 (arguing that public-school graduation prayers are actually noncoercive events); Stephen M. Durden, *In the Wake of Lee v. Weisman: The Future of School Graduation Prayer Is Uncertain at Best*, 2001 BYU EDUC. & L.J. 111, 148-58 (2001) (identifying unsettled issues for graduation prayers in the wake of *Lee*, such as the role of ceremonial deism and the distinction between government and private speech). *See generally* Symposium, *Religion and the Public Schools After Lee v. Weisman*, 43 CASE W. RES. L. REV. 699 (1993); Donald N. Bersoff & David J. Glass, *The Not-So Weisman: The Supreme Court’s Continuing Misuse of Social Science Research*, 2 U. CHI. L. SCH. ROUNDTABLE 279 (1995) (criticizing *Lee*’s use of social-science data to support its coercion analysis).

83. *Lee*, 505 U.S. at 581 (noting that, for the ceremony at issue, the principal had invited a local rabbi to say an invocation and a benediction and had given the rabbi written guidelines directing the promotion of “inclusiveness and sensitivity”).

84. *Id.* at 587.

85. *Id.* at 592. *Lee* considered a specific challenge to prayers at graduations for middle and high schools, but its reasoning should apply to graduation ceremonies for all levels of the educational system below the university level.

86. *Id.*; *see also* *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) (noting that “children’s susceptibility to peer pressure” contributed to the State’s “coercive power”).

87. *Lee*, 505 U.S. at 593. Specific facets of the graduation ceremonies enhanced the coerciveness: students entered and sat as a group, apart from their families, and school officials then directed them to stand for the Pledge of Allegiance and remain standing for the invocation. *Id.* at 583.

When students conformed to pressures to participate in the prayer, the State invaded students' freedom of conscience by prescribing religious expression.<sup>88</sup> Opting out of the prayers was not a "real alternative" either.<sup>89</sup> The Court reasoned that, even if students could opt out, the State could not require an objector to "take unilateral and private action" to prevent the State's policy from violating the Establishment Clause.<sup>90</sup> Because the graduation-ceremony prayers were state-sponsored religious exercises in which the State coerced students to participate, the prayers violated the Establishment Clause.<sup>91</sup>

b. *Santa Fe Independent School District v. Doe: Pregame Public Prayers*

In *Santa Fe Independent School District v. Doe*,<sup>92</sup> the Supreme Court struck down a Texas public school district's policy of allowing student-led and -initiated prayers before home varsity football games.<sup>93</sup> 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 involved in the prayers that an "objective observer," familiar with the policy's "text, legislative history, and implementation," would perceive the policy "as a state endorsement of prayer in public schools."<sup>94</sup> Using the coercion test, the Court found that the Santa Fe School District's policy forced students "to participate in religious observances."<sup>95</sup> Although the policy in *Santa Fe* differed from that in *Lee* in two respects—the pregame prayers resulted from student referenda rather than from the independent decision of school officials,<sup>96</sup>

88. *Id.* at 592-93.

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

90. *Id.* at 596 (observing that students objecting to the prayer should not have to forfeit attending the graduation ceremony as "the price of resisting conformance to state-sponsored religious practice").

91. *Id.* at 599.

92. 530 U.S. 290 (2000).

93. *Id.* at 301.

94. *Id.* at 308 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring)). The Court noted that official school-district policy authorized the prayers and regulated their content, *id.* at 302-03; that the prayers occurred "on government property at government-sponsored, school-related events," *id.* at 302; and that the prayers were broadcast over the school's public-address system at the football stadium. *Id.* at 307.

95. *Id.* at 310; see John M. Swomley, *Myths About Voluntary School Prayer*, 35 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).

96. *Santa Fe*, 530 U.S. at 297-98. School officials merely gave students a choice about having prayers at the games and then accommodated the majority's

and they occurred at an extracurricular activity rather than at graduation ceremonies<sup>97</sup>—the Court did not find either difference to be constitutionally significant.<sup>98</sup>

2. *CHAUDHURI, TANFORD, MELLEEN, AND ANDERSON: PUBLIC-UNIVERSITY RELIGIOUS EXERCISES*

a. *Official Prayers at Public-University Commencement Exercises*

In the late 1990s, federal courts upheld formal prayers during state-university commencement ceremonies in *Chaudhuri v. Tennessee*<sup>99</sup> and *Tanford v. Brand*.<sup>100</sup> *Chaudhuri* analyzed the Tennessee State University (TSU) policy of including a formal invocation and benediction as part of its commencement ceremonies.<sup>101</sup> The university arranged for local religious leaders to offer the prayers, specifying only that the prayers be “nonsectarian” and not refer to Jesus Christ.<sup>102</sup> Professor Dilip K. Chaudhuri, a Hindu faculty member at TSU, moved for a preliminary injunction in April of 1993 to prevent all prayers at the May 1993 commencement exercises.<sup>103</sup>

On appeal from a decision granting summary judgment to the State, the Sixth Circuit Court of Appeals held that TSU’s nonsectarian

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(predictable) wishes, apparently without concern for potential violations of the minority’s religious liberty. *See id.*

97. *Id.* at 295.

98. *Id.* at 301. 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. *Id.* at 298 n.6. This policy, the Court reasoned, would “allow the student majority to control whether students of minority [religious] views are subjected to school-sponsored prayer,” thus “violat[ing] the Establishment Clause.” *Id.* at 317 & n.23. Second, the Court evaluated the coercive factors at the football games, noting that students might either feel “immense social pressure or have a truly genuine desire” to attend the games, yet not wish to hear the pregame prayers. *Id.* at 311. Further, the Court concluded that once students arrived at the stadium to watch the games, the pregame prayers had “the improper effect of coercing those present to participate in an act of religious worship.” *Id.* at 312.

99. 130 F.3d 232 (6th Cir. 1997).

100. 104 F.3d 982 (7th Cir. 1997).

101. *Chaudhuri*, 130 F.3d at 233.

102. *Id.* at 234.

103. *Id.* at 235. In response to Chaudhuri’s 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, a “spontaneous” recitation of the Lord’s Prayer by several graduating students and members of the audience interrupted the moment of silence. *Id.* A similar incident occurred 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. *Id.*

graduation prayers did not violate the Establishment Clause.<sup>104</sup> The court first applied the *Lemon* test, explaining that the TSU prayer served the valid secular purpose of “dignify[ing] or . . . memorializ[ing] a public occasion,”<sup>105</sup> did not cause “significant advancement or inhibition of religion,”<sup>106</sup> and created, “at most, *de minimis*” entanglement between the State and religion.<sup>107</sup> The court then noted that, although the TSU prayers had a “religious component,” “religious acknowledgments” were “customary at civic affairs” and had been “since well before the founding of the Republic.”<sup>108</sup>

The court also distinguished *Lee* from the facts in *Chaudhuri*. Unlike the students in *Lee*, both the students graduating from TSU and the faculty members in the audience were adults, and TSU did not force faculty members to participate in the commencement exercises.<sup>109</sup> As a result, there was “absolutely no risk” that the prayers would indoctrinate Chaudhuri or any other unwilling adult listener.<sup>110</sup>

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).<sup>111</sup> The university selected local ministers to deliver these prayers and provided loose guidance for the prayers’ content.<sup>112</sup> As in *Chaudhuri*, the court explained that the commencement exercises presented students with “no coercion—real or otherwise—to participate” in any manner.<sup>113</sup> Absent the “heightened concerns with protecting freedom of conscience from

104. *Id.* at 238-39.

105. *Id.* at 236.

106. *Id.* at 237-38.

107. *Id.* at 238. As discussed above, the third prong of the *Lemon* test forbids excessive, not *de minimis*, entanglement between the government and religion. *See supra* notes 45-49 and accompanying text.

108. *Chaudhuri*, 130 F.3d at 236.

109. *Id.* at 239.

110. *Id.* In his dissent, Judge Nathaniel R. Jones 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, Judge Jones felt that the audience likely perceived the prayers as an endorsement of Christianity and a rejection of non-Christian faiths. *Id.*

111. 104 F.3d 982, 986 (7th Cir. 1997).

112. *Id.* (explaining that IU recommended the prayers be “unifying and uplifting”). Indiana University is a state university in Bloomington, Indiana. *Tanford v. Brand*, 932 F. Supp. 1139, 1140 (S.D. Ind. 1996).

113. 104 F.3d at 985 (explaining that graduating IU students did not have to attend the commencement, and were free to either leave or refuse to stand during the prayers).

subtle coercive pressure in the elementary and secondary public schools,” *Lee* did not control.<sup>114</sup> Next, the court focused on the 155-year history of commencement prayers at IU, deeming them a “tolerable acknowledgment of beliefs widely held among the people of this country,”<sup>115</sup> and succinctly affirmed the district court’s *Lemon* analysis.<sup>116</sup>

Thus, two federal courts of appeals distinguished prayers at public-university commencement exercises from those at middle- and high-school graduation ceremonies. These courts focused on both the university commencement exercise itself<sup>117</sup>—which seemed more conducive to acts of individual nonparticipation in the prayers than did the graduation ceremony in *Lee*—and the relative maturity and sophistication of the college ceremonies’ audiences in concluding that the coercion test did not invalidate the commencement-prayer policies.<sup>118</sup> Neither university-prayer case, however, involved a military atmosphere, in which coercive pressures to behave in a particular way are more pronounced and opportunities for individual acts of nonparticipation are more limited.<sup>119</sup> 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*,<sup>120</sup> a unanimous panel of the Fourth Circuit Court of Appeals held that invocations before mandatory evening meals at the Virginia Military Institute (VMI), a military college operated by the Commonwealth of Virginia,<sup>121</sup> violated the Establishment Clause.<sup>122</sup> The *Mellen* court analyzed the VMI prayers both under the *Lemon* test<sup>123</sup>

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

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

116. *Id.* (concluding that IU’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 “excessive entanglement” between the state and religion).

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

118. *Chaudhuri*, 130 F.3d at 239; *Tanford*, 104 F.3d at 986.

119. *See infra* Part IV (describing the initiation of the Army socialization process and the inherent pressures on soldiers to conform to established institutional norms of conduct).

120. 327 F.3d 355 (4th Cir. 2003).

121. *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.

122. *Id.* at 360.

123. *Id.* at 372-75.

and under the school-prayer rubric of *Lee* and *Santa Fe*,<sup>124</sup> and it concluded that VMI's dinner invocations were unconstitutional.<sup>125</sup>

Although the Supreme Court has not applied *Lemon* in the school-prayer context,<sup>126</sup> the Fourth Circuit applied it in *Mellen*. First, the court found that the VMI prayer had a "plainly religious" purpose<sup>127</sup>: the challenged prayers began with a reference to a benign monotheistic deity<sup>128</sup> and either thanked God or asked for God's blessings.<sup>129</sup> 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."<sup>130</sup> Finally, because VMI had "composed, mandated, and monitored" the daily prayers, the institution had become excessively entangled with religion.<sup>131</sup> Thus, under all three prongs of the *Lemon* test, the VMI prayers violated the Establishment Clause.

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."<sup>132</sup> The court noted that VMI cadets are "uniquely susceptible to coercion" because of the school's adversative method of training.<sup>133</sup> In short, the general military setting at VMI coerced cadets to act in certain ways and follow orders without hesitation.<sup>134</sup> Like the middle-school setting in *Lee*, VMI was a formative

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124. *Id.* at 371-72; *see supra* Part II.B.1.a-b (discussing *Lee* and *Santa Fe*).

125. 327 F.3d at 376.

126. *See supra* Part II.B.1 (discussing elementary- and high-school prayer jurisprudence).

127. *Mellen*, 327 F.3d at 374. The district court, however, noted the testimony of VMI officials that the premeal prayer "expose[d] cadets to the sorts of religious expressions they can expect to experience in the military at a variety of gatherings and ceremonies." *Mellen v. Bunting*, 181 F. Supp. 2d 619, 624 (W.D. Va. 2002), *aff'd in part vacated in part*, 327 F.3d 355 (4th Cir. 2003).

128. *Mellen*, 327 F.3d at 362.

129. *Id.*

130. *Id.* at 374 (citing *Engel v. Vitale*, 370 U.S. 421, 430 (1962)).

131. *Id.* at 375. The VMI chaplain, a military officer, composed the prayers; a cadet known as the "cadet chaplain" delivered them. *Mellen*, 181 F. Supp. 2d at 623. The court of appeals 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 id.* at 375; *supra* note 47 and accompanying text (describing the effect of *Agostini* on the *Lemon* test).

132. *Mellen*, 327 F.3d at 371.

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

134. *See id.* at 371.

environment that subjected students to constant molding and development, even outside the setting of formal classroom instruction.<sup>135</sup>

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.<sup>136</sup> VMI required cadets to “remain standing and silent” during the prayers.<sup>137</sup> Although the cadets did not have to respond or participate, they were also not free to remain seated, converse with fellow cadets, or otherwise go about their business during the prayers.<sup>138</sup>

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 excessively coercive.<sup>139</sup> In contrast to a one-time graduation prayer, the VMI prayers occurred six times per week before mandatory dinners.<sup>140</sup> 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 premeal prayers from permissible university-graduation prayers.<sup>141</sup> As a result, while recognizing that VMI’s cadets were not children, the court also concluded that the VMI setting more closely resembled that of a public middle or high school than that of a public university.<sup>142</sup>

VMI students faced more formative pressures and less individual autonomy than their counterparts at comparable civilian schools.<sup>143</sup> As a result, *Lee* and *Santa Fe*’s coercion test applied to an analysis of VMI’s dinner prayers.<sup>144</sup> 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.<sup>145</sup>

Although *Mellen* is not a Supreme Court case, it stands for four important propositions. First, the age of the audience at a ceremony does

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135. *See id.* at 361.

136. *Id.* at 362.

137. *Id.*

138. *Id.*

139. *See id.* at 368 (citing *Tanford v. Brand*, 104 F.3d 982, 985-86 (7th Cir. 1997)).

140. *Id.* at 362.

141. *See id.* at 371-72.

142. *See id.* at 371.

143. *See Mellen*, 181 F. Supp. 2d at 635-36 (“[T]he adversative method exposes students to a type of pressure that is as intense, if not more intense, than what students endure at the average American high school.”).

144. *Mellen*, 327 F. 3d at 361-62.

145. *Id.* at 372.

not alone determine the applicability of *Lee* and *Santa Fe*.<sup>146</sup> Merely having an audience that is above high-school age does not prevent these cases from controlling the analysis of an Establishment Clause challenge to ceremony prayers.<sup>147</sup> Second, the formative environment of the military more closely resembles that of public middle and high schools than that of public universities.<sup>148</sup> American public universities pioneered the concept of providing postsecondary education in a vast array of academic fields.<sup>149</sup> Universities have become esteemed for their environments of intellectual freedom, which tend to produce independent-thinking graduates.<sup>150</sup> On the other hand, the lower tiers of the educational system tend to produce orderly, largely fungible pupils.<sup>151</sup> The atmosphere at these schools emphasizes order, discipline, and programmed instruction,<sup>152</sup> similar to a formative military environment.<sup>153</sup>

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146. *See id.* at 371-72.

147. *See id.*

148. *Id.* Admittedly, the VMI experience is “more restrictive and more austere than the regular military.” *Mellen*, 181 F. Supp. 2d at 622. Nonetheless, just as VMI teaches cadets to “subordinate [their] own personal desires and well-being to the good of the whole unit,” *id.* at 635, the Army also teaches these lessons to its soldiers.

149. Phillip G. Altbach, *The American Academic Model in Comparative Perspective*, in *IN DEFENSE OF AMERICAN HIGHER EDUCATION* 11, 17 (Phillip G. Altbach, Patricia J. Gumpert & D. Bruce Johnstone eds., 2001).

150. *See* Nannerl O. Keohane, *The Liberal Arts and the Role of Elite Higher Education*, in *IN DEFENSE OF AMERICAN HIGHER EDUCATION*, *supra* note 149, at 181, 184 (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).

151. *See* NOAM CHOMSKY, *CHOMSKY ON MISEDUCATION* 17 (Donaldo 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* 34 (George Allen & Unwin 1967) (1932) (“Education has at all times had a twofold aim, namely instruction and training in good conduct.”).

152. *See, e.g.*, Laura A. Jeltama, Comment, *Legislators in the Classroom: Why State Legislatures Cannot Decide Higher Education Curricula*, 54 *Am. U. L. Rev.* 215, 228-32 (2004) (noting that the main purposes of elementary and secondary schools are “value inculcation and the preparation of individuals for participation as citizens” (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986))); GRANT MILLER & TRACEY HALL, *NCAC, CLASSROOM MANAGEMENT* (2005) (discussing multiple studies which measured order in the classroom environment); *see also* RUSSELL, *supra* note 151, at 23-24 (claiming that routine in children’s lives provides a “sense of security” and is an indispensable part of education). The different approaches largely reflect 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 Erikson, Piaget, and Kohlberg).

153. *See Mellen*, 181 F. Supp. 2d at 635-36.

Third, when prayer precedes a mandatory military event, the audience's inability to avoid the event entirely and its obligation to, like the cadets at VMI, "remain standing and silent" during the prayer<sup>154</sup> undermines any attempts to characterize the prayers as voluntary.<sup>155</sup> The mere fact that the members of the audience voluntarily entered the military does not place all subsequent military activities beyond constitutional scrutiny.<sup>156</sup> Finally, for constitutional purposes, the "distinction" between mandatory attendance at a military ceremony and mandatory participation in that ceremony's religious exercises is illusory.<sup>157</sup> Compulsory attendance of religious exercises—whether in the form of chapel services, predinner prayers, or invocations and benedictions at mandatory, nonreligious, Army ceremonies—is constitutionally indistinguishable from compelled participation in these exercises.<sup>158</sup> Because freedom from such compelled religious activity is a "core value protected by the Establishment Clause," the Army may not "require an individual to engage in religious practices or be present at religious exercises."<sup>159</sup>

c. *Anderson v. Laird: Mandatory Worship at Military Colleges*

The *Mellen* decision reaffirmed an important principle of constitutional law: Citizens do not entirely forfeit their First Amendment religious-freedom rights by entering the U.S. armed forces. The Court of Appeals for the D.C. Circuit helped to establish this principle more than thirty years earlier when it struck down compulsory weekly chapel attendance for military-academy cadets in *Anderson v. Laird*.<sup>160</sup> Because *Anderson* involved the constitutionality of government-compelled attendance at religious services, it is directly relevant to the

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154. *Mellen*, 327 F.3d at 362.

155. *Id.* at 372. *But see Mellen*, 181 F. Supp. 2d at 633 (explaining that VMI allowed cadets "to fall out of formation and remain outside of the mess hall during the prayer recitation"). Despite this provision, the court still found the VMI prayer policy violated the Establishment Clause. *Id.* at 636.

156. *See Anderson v. Laird*, 466 F.2d 283, 293 (D.C. Cir. 1972) ("An individual's voluntary assumption of an employment . . . relationship with the government is not a waiver of First Amendment rights.").

157. *See id.* at 291 ("The Government's contention that there is a difference between compelling attendance [of service academy cadets] at church and compelling worship or belief is completely without merit." (citation omitted)).

158. *See id.*

159. *Id.* If the soldier were present merely to provide logistical support for the ceremony, then that soldier would not be engaging in forced worship in violation of the Establishment Clause. *See* 2004 AR 165-1, *supra* note 22, para. 3-2(a).

160. 466 F.2d at 283-84.

constitutionality of official prayers in mandatory, nonreligious, Army ceremonies.

The *Anderson* court considered regulations at the U.S. Military, Naval, and Air Force Academies that required cadets to attend “Protestant, Catholic, or Jewish chapel services” each week or face disciplinary punishment.<sup>161</sup> The court held that, through these regulations, the government forced cadets to engage in religious exercises in violation of the Establishment Clause.<sup>162</sup> The court further held that, because the regulations imposed on the cadets’ free exercise of religion restraints that were not necessary to achieve “paramount and compelling state interests,” the government violated the Free Exercise Clause as well.<sup>163</sup>

The *Anderson* court rejected two arguments in striking down the academies’ chapel-attendance rules. First, the court refused to accept that the judiciary’s traditional deference to the professional judgments of military officers insulated the chapel regulations from serious constitutional scrutiny.<sup>164</sup> The court questioned the military’s stated secular purpose for mandatory chapel attendance: to allow future military officers to “gain an awareness and respect for the force religion has” on the lives of their subordinates.<sup>165</sup> Instead, the court found that the “unmistakable religious premise” behind the regulations was to encourage religious worship by academy cadets.<sup>166</sup>

Second, although the court acknowledged that the military was a separate society, it refused to accept that coerced religious activity was a

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161. *Id.* at 284.

162. *Id.* at 285 (“Attendance at religious exercises is an activity which under the Establishment Clause a government may never compel.”).

163. *Id.* at 296. The court listed three restraints on religious free exercise that the regulations at issue imposed: (1) punishing cadets’ failure to attend “formal, group worship” each week, thereby mandating the mode of cadets’ religious expression; (2) specifying that cadets could “attend only ‘approved’ alternatives to the academy chapels” and had to first obtain both chaplain and parental permission to attend them; and (3) forbidding cadets to attend religious services “based on personal whims,” which may have discouraged cadets from forming their personal spiritual identities. *Id.* at 284, 296.

164. *See id.* at 296.

165. *Id.* at 285 (quoting *Anderson v. Laird*, 316 F. Supp. 1081, 1090 (D.D.C. 1970)).

166. *Id.* at 299 (Leventhal, J., concurring). Analyzing the origin of a government practice to assess its purpose is common in Supreme Court Establishment Clause jurisprudence. *See, e.g.*, *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722, 2745 (2005) (finding an original religious purpose in posting the Ten Commandments inside county courthouses); *Wallace v. Jaffree*, 472 U.S. 38, 59-61 (1985) (finding an original religious purpose behind Alabama’s moment-of-silence statute).

legitimate aspect of membership in this society.<sup>167</sup> The military may, because of its “unique role” in society and the necessity of accomplishing its mission,<sup>168</sup> restrict the constitutional liberties of service members, especially their rights to free exercise of religion.<sup>169</sup> Nonetheless, the court did not find a sufficient military justification for compelled religious activity despite the assertion of military officials that mandatory chapel attendance was an integral part of leadership development.<sup>170</sup> The court briefly noted that the case would have been much easier to decide, and the constitutional violation more obvious, if the military had decided to require church attendance for “all its fighting forces.”<sup>171</sup> *Anderson* demonstrates that the separate-society doctrine is not a rubber stamp for any violation of service members’ constitutional rights. Military officials must assert a plausible military need to justify such violations—especially in cases similar to *Anderson* that do “not involve programs vital to our immediate national security, or even to military operational or disciplinary procedures.”<sup>172</sup>

The Establishment Clause is, of course, only one of the First Amendment’s two Religion Clauses. The Free Exercise Clause also protects religious liberty and freedom of conscience.<sup>173</sup> A brief discussion of the relationship between the Free Exercise Clause and the Establishment Clause will complete the legal framework for analyzing the Army prayers at issue.

### III. THE RELIGION CLAUSES’ TROUBLED RELATIONSHIP

In theory, the Establishment Clause and Free Exercise Clause should together promote the common goal of “religious freedom in a context of government neutrality.”<sup>174</sup> In practice, however, these clauses

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167. *Anderson*, 466 F.2d at 294 (noting that “there is no authority for the point that [a service member’s] right to freedom of religion is abolished” because of “his entrance into military life”).

168. *Id.* at 293.

169. *Id.* at 294-95 & n.70; *see infra* Part VI.B.2.a (describing the Supreme Court’s specialized-society doctrine).

170. *Anderson*, 466 F.2d at 294 n.70 (“Although free exercise rights may have to bend to military exigencies . . . this is not authority for the military to *impose* religious exercise on its members.”); *id.* at 296 (explaining that the court was not striking down the regulations because of its superior knowledge of military affairs but instead “by virtue of [its] commission to protect basic constitutional rights”).

171. *Id.* at 293.

172. *Id.* at 296.

173. *See, e.g., id.* at 284.

174. Winnifred Fallers Sullivan, *A New Discourse and Practice*, in *LAW AND RELIGION: A CRITICAL ANTHOLOGY*, *supra* note 40, at 35, 40; Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal*

seem to have competing ends: government neutrality toward religion under the Establishment Clause and reasonable government accommodation of religion under the Free Exercise Clause.<sup>175</sup> These separate goals have led to “parallel and independent standards for interpretation” of the Religion Clauses and distinct tracks of jurisprudence.<sup>176</sup> As a result, how a court decides a case often depends on “whether it is framed as a Free Exercise or an Establishment clause case.”<sup>177</sup>

In addition, the Court has obscured the common elements of claims under the Religion Clauses and has “created a heightened and artificial sense of the conflict between the clauses.”<sup>178</sup> Consider, for example, this frequently cited anomaly: In Establishment Clause jurisprudence, the *Lemon* test requires, in part, that government actions have a valid secular purpose and that their primary purpose or effect neither advance nor inhibit religion.<sup>179</sup> If this same test were applied in Free Exercise Clause cases involving requests for religious accommodation, no religious accommodation would be constitutional.<sup>180</sup> Allowing exceptions to government policies based on religion likely lacks a valid secular purpose and clearly has the effect of advancing the religious interests of the persons seeking the exceptions.<sup>181</sup> As a result, permissible

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*Neutrality*, 18 J.L. & POL. 119, 128 (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”); accord Edward McGlynn Gaffney, Jr., *The Religion Clause: A Double Guarantee of Religious Liberty*, 1993 BYU L. REV. 189, 196 (asserting that the “Religious Liberty Clause[s]” are not contradictory but are “mutually reinforcing provisions” to guarantee religious liberty (quoting *The Williamsburg Charter*, 8 J.L. & RELIGION 5, 6 (1990))).

175. See *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005) (“While the two [Religion] Clauses express complementary values, they often exert conflicting pressures.”); Sullivan, *supra* note 174, at 39-40; Brownstein, *supra* note 174, at 126-28 (explaining that courts have interpreted the Free Exercise Clause to permit government accommodation of religion but the Establishment Clause “to impose prophylactic constraints on government” to “guarantee religious equality as well as religious liberty”); Gaffney, *supra* note 174, at 198 (noting that “the Court has created two different standards” for Establishment Clause and Free Exercise Clause claims).

176. Thiemann, *supra* note 40, at 358 (criticizing the Court for avoiding “the complex but important inquiry into the interplay between the two clauses”).

177. Sullivan, *supra* note 174, at 39; see Gaffney, *supra* note 174, 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.”).

178. Thiemann, *supra* note 40, at 359.

179. See *supra* Part II.A.1 (discussing the *Lemon* test).

180. Thiemann, *supra* note 40, at 358.

181. See, e.g., *id.*, at 359.

accommodations under the Free Exercise Clause would likely violate the Establishment Clause under the *Lemon* test.<sup>182</sup>

Rather than explain the relationship between the Establishment and Free Exercise Clauses, the Court usually opts to recognize the tension between the Religion Clauses without resolution.<sup>183</sup> In any event, the separate tracks of analysis for the two clauses remain firmly entrenched, with little hope for a unified theory to simultaneously apply both clauses in any one case. For example, courts have analyzed constitutional challenges to government-sponsored public prayer—which are similar to prayers at mandatory, nonreligious, Army ceremonies—under the Establishment Clause rather than the Free Exercise Clause.<sup>184</sup> As a result,

182. See, e.g., *id.* at 358-59; Gaffney, *supra* note 174, 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 typically we 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 are “likely to inhibit [religion’s] free exercise.” *ROTUNDA & NOWAK, supra* note 39, § 21.1, at 3; see also *Edwards*, 482 U.S. at 617 (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.” (quoting *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 145 (1987))); *Walz v. Tax Comm’n*, 397 U.S. 664, 668-69 (1970) (“The Court has struggled to find 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, e.g., *ROTUNDA & NOWAK, supra* note 39, § 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); Stephen M. Feldman, *A Christian America and the Separation of Church and State*, in *LAW AND RELIGION: A CRITICAL ANTHOLOGY, supra* note 40, at 261, 269 (noting that, for the predominantly Christian-male Supreme Court, “‘neutrality’ equals Christianity”); *id.* at 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”).

183. See, e.g., *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722, 2742 (2005) (“[S]ometimes, the two clauses compete: spending government money on the clergy looks like establishing religion, but if the government cannot pay for military chaplains a good many soldiers and sailors would be kept from the opportunity to exercise their chosen religions.” (citing *Cutter v. Wilkinson*, 544 U.S. 709 (2005)); *Cutter*, 544 U.S. at 713-14 (“[T]here is room for play in the joints between’ the Free Exercise and Establishment Clauses, allowing the government to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause.” (quoting *Locke v. Davey*, 540 U.S. 712, 718 (2004))). *But see Lee v. Weisman*, 505 U.S. 577, 587 (1992) (“The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause.”).

184. 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

Establishment Clause jurisprudence would guide any possible challenge to the constitutionality of prayers at mandatory Army ceremonies as well.<sup>185</sup>

After recognizing the applicable legal precedents for analyzing official prayers at mandatory, nonreligious, Army ceremonies, one must also understand the setting in which those prayers occur. Military settings are inherently coercive and formative. A chaplain, speaking from a position of authority and on behalf of the command in an Army ceremony, may have a greater ability to exert a coercive influence over the audience than a speaker at a civilian civic event. The Army's unique social environment requires a particular legal standard for evaluating the constitutionality of chaplain-led prayers at mandatory Army ceremonies.

#### IV. THE ARMY SOCIALIZATION PROCESS

The Army socialization process<sup>186</sup> inculcates military culture and values in soldiers to form an effective fighting force with a common set of beliefs and values.<sup>187</sup> The Army's mission requires maintaining this formative environment at all times, even during ceremonies.<sup>188</sup> In light of these circumstances, ceremonial military settings contain the same sort of coercive pressures on soldiers that the middle- and high-school graduation ceremonies at issue in *Lee*<sup>189</sup> exerted on students.

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the Establishment Clause); *Lee*, 505 U.S. at 577 (evaluating a challenge to public prayer at a public-middle-school graduation ceremony under the Establishment Clause).

185. A detailed explanation of the Supreme Court's Free Exercise Clause jurisprudence is largely beyond the scope of this Article. For an analysis of important Free Exercise precedents and the evolution of the Court's understanding of the Free Exercise Clause, see Garrett Epps, *What We Talk About When We Talk About Free Exercise*, 30 ARIZ. ST. L.J. 563, 575-88 (1998).

186. Army regulations do not discuss the "socialization process," but they do discuss the "Soldierization Process," which begins when a soldier arrives at the reception battalion with Basic Combat Training, and ends at the conclusion of Advanced Individual Training (AIT) and the soldier's qualification as Military Occupational Specialty. U.S. DEP'T OF ARMY, TRAINING AND DOCTRINE COMMAND, REG. 350-6, ENLISTED INITIAL ENTRY TRAINING (IET) POLICIES AND ADMINISTRATION para. 1-5(b) (2005), available at <http://www.tradoc.army.mil/tpubs/regs/r350-6.htm> [hereinafter TRADOC REG. 350-6]. The socialization process is broader, continues until a soldier leaves the Army, and is not specifically defined in any TRADOC regulations. "Army socialization process" is not a doctrinal expression, but this Article will use it to refer to the process by which the Army teaches new recruits the Army values and culture, and by which the Army reinforces these concepts in existing soldiers to maintain unit cohesion and morale.

187. *Id.* para. 1-5(a).

188. *See id.* para 1-6(a).

189. 505 U.S. at 592-93; *see supra* notes 82-91 and accompanying text.

A. *Initiating the Army Socialization Process*

Army socialization begins in Individual Entry Training (IET), which includes both Basic Combat Training and Advanced Individual Training.<sup>190</sup> 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.<sup>191</sup>

The first prong of Army socialization immerses new recruits in the Army culture with Basic Combat Training,<sup>192</sup> which attempts to “transform volunteers into . . . competent Soldiers that live by the Army Values.”<sup>193</sup> In the early 1960s, Army psychiatrist Peter Bourne identified four stages of basic training,<sup>194</sup> which have remained largely unchanged to the present: (1) removing “civilian cues” by which a person ordinarily communicates “how one wants to be interacted with and identified,”<sup>195</sup> (2) subjecting the trainee to “insults and mortifications” to “break down

190. TRADOC REG. 350-6, *supra* note 186, at para. 1-7(a)(1). Because this Article uses “soldier” to refer to all members of the Army, the references to IET apply with equal force to officer precommissioning programs (which begin the officer socialization process), and Officer Basic Course training (which provides a common basis of knowledge and exposure to institutional culture for newly commissioned Army officers). See U.S. DEP’T OF ARMY, TRAINING AND DOCTRINE COMMAND, REG. 350-10, INSTITUTIONAL LEADER TRAINING AND EDUCATION § 3-2 (2002), available at <http://www.tradoc.army.mil/tpubs/regs/r350-10.htm> (“Precommission [programs] share a common goal that each graduate possesses the character, leadership, and other attributes essential to progressive and continuing development throughout a career of exemplary service to the Nation.”); *id.* § 3-3 (“The [Officer Basic Course] is a branch-specific qualification course that provides new second lieutenants an opportunity to acquire the leader, tactical, technical and VASA [values, attributes, skills, and actions] needed to succeed at their first duty assignment.”).

191. 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”).

192. TRADOC REG. 350-6, *supra* note 186, para. 1-7(b)(3).

193. *Id.* para. 1-5(a); 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, 68 (stating that basic training “tries to sever a recruit’s ties to his or her previous life”).

194. See LAWRENCE B. RADINE, *THE TAMING OF THE TROOPS: SOCIAL CONTROL IN THE UNITED STATES ARMY* 40 (1977) (citing Peter Bourne, *Some Observations on the Psychosocial Phenomena Seen in Basic Training*, 30 *PSYCHIATRY* 187, 187-96 (1967)).

195. *Id.* (describing the first few days of a recruit’s training as a “period of great shock and stress”); see also BURKE, *supra* note 193, at 13 (noting that the Army strips away familiar symbols of civilian individuality, such as clothes and hairstyles).

the individual's pride in himself"<sup>196</sup> while simultaneously beginning intense training,<sup>197</sup> (3) "rebuild[ing] and reorganiz[ing]" the trainee's personality,<sup>198</sup> and (4) administering a "final test of proficiency" and a graduation ceremony.<sup>199</sup> Stage four invokes the time-honored tradition of the military ceremony to signify complete membership in Army culture.<sup>200</sup>

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.<sup>201</sup> This training is meant to develop in new soldiers "an understanding of, and a willingness to live by, the Army's core values."<sup>202</sup> Chaplains have a unique role in developing soldiers' values,<sup>203</sup> because chaplains instruct soldiers on essential principles of Army socialization and provide a strong, formative influence on values and morale.<sup>204</sup> Chaplains provide elementary ethical

196. RADINE, *supra* note 194, at 40. The Army no longer teaches IET drill sergeants to break down trainees' self-pride through "insults and mortifications," but instead expects leaders to treat soldiers with respect and dignity. TRADOC REG. 350-6, *supra* note 186, para. 1-5(c). Stage two involves immersing soldiers in a challenging, "positive environment . . . [that] uses every training opportunity to reinforce essential Soldier skills, enforce standards, and develop a warrior mentality." *Id.* para. 1-6(a). In fact, the Army expressly forbids any soldiers who are assigned to IET Army installations and who are not trainees themselves from talking to IET trainees in an abusive or disrespectful manner. *See id.* para. 2-4(g) (prohibiting the use of "vulgar, sexually explicit, obscene, profane, humiliating, [or] racially, sexually, or ethnically slanted language" to degrade soldiers).

197. RADINE, *supra* note 194, at 40.

198. *Id.*

199. *Id.* (citing Bourne, *supra* note 194, at 187-96).

200. *See infra* notes 214-18 and accompanying text.

201. 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.

202. TRADOC REG. 350-6, *supra* note 186, para. 1-7(b)(3) (forming the acronym LDRSHIP for Loyalty, Duty, Respect, Selfless Service, Honor, Integrity, and Personal Courage.).

203. *See* RADINE, *supra* note 194, at 70 (noting that Army chaplains "act as an adjunct to social control by justifying the military way to uncertain recruits").

204. Chaplains influence soldier behavior in two primary ways. First, chaplains help eliminate behavior the Army has deemed harmful by convincing soldiers that disciplined, upright, obedient living is personally beneficial. *See* DALE R. HERSPRING, *SOLDIERS, COMMISSARS, AND CHAPLAINS: CIVIL-MILITARY RELATIONS SINCE CROMWELL* 6 (2001). Second, chaplains encourage acceptable behavior; they have historically motivated soldiers to become more proficient at performing their assigned duties. HERSPRING, *supra*, at 223; RICHARD M. BUDD, *SERVING TWO MASTERS: THE DEVELOPMENT OF AMERICAN MILITARY CHAPLAINCY, 1860-1920*, at 96 (2002) (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").

training, especially during IET, by instructing soldiers about the meaning and importance of the Army values.<sup>205</sup> They also train soldiers on the impact of mental, physical, and spiritual health, on “quality of life and unit readiness.”<sup>206</sup>

The third prong of Army socialization teaches soldiers to obey the words and imitate the actions of their leaders. IET instructors and drill sergeants indoctrinate trainees to respect, obey, and imitate authority figures.<sup>207</sup> Leaders set high standards for subordinates and for themselves<sup>208</sup> and hold themselves out as positive role models for their troops.<sup>209</sup> The Army teaches soldiers to respect leaders and discourages either challenging these leaders’ lawful orders or questioning their examples.<sup>210</sup> In this strictly regimented world, formative influences are palpably strong: debate, dissent, and deliberation have no place.<sup>211</sup>

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Chaplains also reinforce the military’s self-image as honorable and virtuous. RADINE, *supra* note 194, at 71; *see* CROCKER, *supra* note 29, at 16 (explaining that a soldier “lives under a strong and inspiring code that . . . assures . . . loyalty to the nation, personal trustworthiness, and honor”).

205. *See* U.S. DEP’T OF ARMY, TRAINING CIRCULAR 1-05, RELIGIOUS SUPPORT HANDBOOK FOR THE UNIT MINISTRY TEAM app. E, paras. E-1 to -7 (2005), *available at* [http://www.jrtc-polk.army.mil/Garrison/chaplain/References/tc1\\_05.pdf](http://www.jrtc-polk.army.mil/Garrison/chaplain/References/tc1_05.pdf) [hereinafter TC 1-05] (explaining the role of Army values in the “ethical reasoning process”); U.S. DEP’T OF ARMY, PAM. 165-3, CHAPLAIN TRAINING STRATEGY § 1-7(d)(6) (1998), *available at* [http://www.army.mil/usapa/epubs/pdf/p165\\_3.pdf](http://www.army.mil/usapa/epubs/pdf/p165_3.pdf) [hereinafter DA PAM 165-3] (listing “[t]each[ing] Army values” as a priority for the professional training and education of chaplains).

206. TRADOC REG. 350-6, *supra* note 186, para. 1-7(b)(7); *see* TC 1-05, *supra* note 205, app. B, paras. B-1 to -2 (discussing the chaplain’s role as a spiritual leader); *id.* at 2-1 to -7 (discussing the chaplain’s duty to provide “quality of life” advice to commanding officers); *see also infra* Part VI.B.2.b (explaining certain roles of an Army chaplain).

207. *Cf.* Larry Smith, *In the Words of Those Who Do: How We Make Marines*, PARADE, June 4, 2006, at 4 (explaining that “the underpinning of the psychology of recruit training is leadership by example” and that the drill instructor “becomes the role model, and the recruit is inspired to emulate him or her”).

208. *See, e.g.*, TRADOC REG. 350-6, *supra* note 186, para. 1-5(c) (demanding that IET soldiers be treated with dignity and respect).

209. *See* U.S. DEP’T OF ARMY, FIELD MANUAL 22-100, LEADERSHIP app. E, para. E-8 (1999) (“Leaders can promote Army values by setting the example themselves and pointing out other examples of Army values in both normal and exceptional activities.”).

210. *See* UNIF. CODE OF MIL. JUSTICE art. 89, 10 U.S.C. § 889 (2000) (making the offense of disrespect toward a superior commissioned officer punishable by up to one year of confinement and a bad-conduct discharge); *id.* art. 90(2), § 890(2) (making the offense of willfully disobeying a superior commissioned officer punishable in peacetime by up to five years of confinement and a dishonorable discharge).

211. *See* *Parker v. Levy*, 417 U.S. 733, 758-59 (1974) (“The armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself. Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command.”).

Finally, Army socialization uses ceremony and ritual. Ceremonies bond soldiers to the Army and to the nation.<sup>212</sup> They “promote discipline and morale among troops”<sup>213</sup> and “inspire a feeling of group pride expressed in perfect teamwork and instant response.”<sup>214</sup> Ceremonial reviews and parades follow detailed procedures and showcase discipline and military bearing.<sup>215</sup> Thus, the ceremonial setting gives Army leaders a formative training opportunity.<sup>216</sup> The participating soldier learns important lessons about mental toughness, attention to detail, self-control, and teamwork.<sup>217</sup> Army ceremonies are tangible reminders that participating soldiers belong to a special society, a tight-knit team, and a unique profession.<sup>218</sup> As such, the ceremonies play 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 stations. As members of the Army, soldiers face unique demands without parallel in the civilian world. For example, they must meet exacting uniform and grooming standards (both on- and off-duty)<sup>219</sup> and attend numerous

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212. Towell, *supra* note 201, at 26.

213. RADINE, *supra* note 194, at 61.

214. *Id.*; see U.S. DEP’T OF ARMY, FIELD MANUAL 3-21.5, DRILL AND CEREMONIES 10-1 (2003), available at <http://rotc.okstate.edu/pdf/FM%203-21.5%20Drill%20and%20Ceremony.pdf> [hereinafter FM 3-21.5] (“A Ceremonial parade provides an occasion for men to express pride in their performance, pride in the Regiment or Corps and pride in the profession.”).

215. See, e.g., FM 3-21.5, *supra* note 214, at 10-1 to -26 (describing procedures for military reviews).

216. See *id.* at 10-1.

217. *Id.* (“Drill helps to [conquer fear] because when it is carried out [soldiers] tend to lose their individuality and are unified into a group under obedience to orders.”).

218. Cf. Smith, *supra* note 207, at 6 (noting the outpouring of emotion when Marine recruits “receive that eagle, globe and anchor pin the day before graduation”).

219. See, e.g., U.S. DEP’T OF ARMY, REG. 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS para. 1-10(j)(1) (2005), available at [http://www.apd.army.mil/pdf/AR670\\_1.pdf](http://www.apd.army.mil/pdf/AR670_1.pdf) [hereinafter AR 670-1] (prohibiting the wear of Army uniforms in certain off-duty situations); *id.* para. 1-14(c) (forbidding the wear of body piercings by soldiers on Army installations at any time). As some commentators have aptly observed, military regulations even encompass off-duty appearance and grooming standards for service members. See, e.g., John P. Jurden, *Spit and Polish: A Critique of Military Off-Duty Personal Appearance Standards*, 184 MIL. L. REV. 1, 9-15 (2005); L.M. Campanella, *The Regulation of “Body Art” in the Military: Piercing the Veil of Service Members’ Constitutional Rights*, 161 MIL. L. REV. 56 (1999).

mandatory events during the duty day.<sup>220</sup> Soldiers constantly receive informal instruction in the Army values<sup>221</sup> from Army leaders, who are expected to continually promote those values to their subordinates.<sup>222</sup> Army leaders are also expected to teach subordinates “moral principles, ethical theory . . . and leadership attributes,”<sup>223</sup> especially by their own conduct.<sup>224</sup> 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 divide between this separate military society and the outside civilian society that it serves.<sup>225</sup> This so-called civil-military gap<sup>226</sup> 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 reinducted with civilian cultural values, reducing the insularity that IET imposed. Instead, the

220. See UNIF. CODE OF MIL. JUSTICE art. 86, 10 U.S.C. § 886 (2000) (making a soldier’s failure to arrive or stay at an appointed place of duty a criminal offense punishable by up to a one-month confinement).

221. See U.S. DEP’T OF ARMY, FIELD MANUAL 22-100, ARMY LEADERSHIP app. E, paras. E-3, -6 (1999), available at [https://atiam.train.army.mil/soldierPortal/atia/adlsc/view/public/9502-1/fm/22-100/fm22\\_100.pdf](https://atiam.train.army.mil/soldierPortal/atia/adlsc/view/public/9502-1/fm/22-100/fm22_100.pdf) [hereinafter FM 22-100].

222. See *id.* para. 1-23. In fact, the Army rates and promotes noncommissioned officers, 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).

223. FM 22-100, *supra* note 221, app. E, para. E-5.

224. *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.”).

225. See Towell, *supra* note 201, at 27.

226. In recent years, the American civil-military gap has grown wider. See Ricks, *supra* note 193, at 68. The civilian distrust of the military is now matched by a corresponding “deep-seated suspicion in the U.S. military of [civilian] society.” *Id.* at 73. 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.* at 74. Consequently, the military services have emphasized traditional values and cohesion, and have grown increasingly sickened by the relative sloppiness, selfishness, and permissiveness. See Towell, *supra* note 201, 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.”); M.G. Polivara, *Indoctrination of Cadets: The Psychological Aspect*, 10 MIL. THOUGHT 61, 62 (2001), available at [http://findarticles.com/p/articles/mi\\_m0JAP/is\\_6\\_10/ai\\_82009986](http://findarticles.com/p/articles/mi_m0JAP/is_6_10/ai_82009986).

An important aspect of efforts to mold the officer’s personality is inculcating in cadets an aspiration for moral purity and lofty ideals and feelings. This is particularly urgent in [modern times], where society displays dangerous signs of a general cultural crisis, expressed in a build-up of antihuman and inhumane values and ideals.

*Id.*

Army continually cultivates a separatist ethos in its members.<sup>227</sup> The existence of the civil-military gap demonstrates that the Army socialization process is a continuous force in the lives of soldiers.

The effects of these coercive pressures may be easier for people outside of the Army community to identify because soldiers gradually grow accustomed to the steady drum beat of conformity.<sup>228</sup> The Army's social environment presents particular dangers of coerced religious activity and the perception of governmental religious endorsement. Having laid the legal and sociological groundwork concerning prayers at a mandatory, nonreligious Army ceremony, it is now possible to analyze their constitutionality.

#### V. THE UNCONSTITUTIONALITY OF CHAPLAIN-LED PRAYERS AT MANDATORY, NONRELIGIOUS, ARMY CEREMONIES

Challenges to government-sponsored public prayers have traditionally fallen within the Supreme Court's Establishment Clause jurisprudence. The three relevant Establishment Clause tests for prayers at Army ceremonies are the *Lemon* test, the endorsement test and ceremonial deism, and the coercion test from *Lee*.<sup>229</sup>

##### A. *The Lemon Test*

Since 1971, the Supreme Court has used the three-pronged test set forth in *Lemon* (as modified by *Agostini*) to determine if a challenged

227. See Jerald G. Bachman et al., *Distinctive Military Attitudes Among U.S. Enlistees, 1976-1997: Self-Selection Versus Socialization*, 26 *ARMED FORCES & SOC'Y* 561, 577 (2000) ("Obviously, military socialization is not limited to the first year or two of [military] service . . ."); *id.* at 578 ("[There are] increased levels of Republican Party identification among [service members] who entered military service soon after high school . . . and remained in service at least five or six years . . ."). Even the Supreme Court has recognized that the military is a specialized, "separate society" because the nation needs its service members to behave differently than civilians and to work in a more ordered, disciplined, and regimented hierarchy. See, e.g., *Parker v. Levy*, 417 U.S. 733, 743 (1974); see also *infra* Part VI.B.2.a.

228. Soldiers who do not conform may face administrative separations. See, e.g., U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS § 11-2(c) (2005), available at [http://www.apd.army.mil/pdffiles/r635\\_200.pdf](http://www.apd.army.mil/pdffiles/r635_200.pdf) (allowing an entry-level separation if a soldier fails to "adapt to the military environment"); *id.* para. 13-2(a)(1)-(6) (allowing separation for unsatisfactory performance when a soldier's commander determines that the soldier "will not develop sufficiently to participate satisfactorily in further training [and] become a satisfactory soldier," "the soldier's retention will have an adverse impact on military discipline," and that "the soldier likely will be a disruptive influence in duty assignments").

229. See *supra* Part II.A.

governmental act violated the Establishment Clause.<sup>230</sup> Prayers at mandatory, nonreligious, Army ceremonies likely have a valid secular purpose in that they solemnize the ceremony and call the audience's attention to the important event being commemorated.<sup>231</sup> Such prayers, however, fail to satisfy the effect prong of the *Lemon* test. The primary effect of the prayers is to advance religion.<sup>232</sup> A government religious minister recites the prayers, which are religious expressions. The Army does not use any other philosophy or principle to solemnize the ceremonies besides the monotheistic religious principles with which the chaplain is likely most familiar.<sup>233</sup> The prayers might entice nonreligious members of the audience to learn more about the "God" to whom the prayers are offered. Even if the "words of [the prayer] are somehow manipulated so that a deity is not mentioned,"<sup>234</sup> the religious expression of prayer has received an honored place in the ceremony and has the captive attention of all in attendance.<sup>235</sup> Consequently, including prayers in mandatory, nonreligious, Army ceremonies creates a "symbolic union" between the Army and the religious practice of prayer.<sup>236</sup>

The prayers could also lead to excessive entanglement between the government and religion, especially if Army commanders screened prayers before each ceremony to evaluate and regulate the prayers' content.<sup>237</sup> Excessive entanglement could also result if the command

230. *See supra* Part II.A.1.

231. *But see* *Weisman v. Lee*, 908 F.2d 1090, 1094-95 (1st Cir. 1990) (Bownes, J., concurring) (finding that invocations at public-school graduation ceremonies had an actual religious purpose and rejecting the assertion that these prayers were an essential means of solemnization), *aff'd* 505 U.S. 577 (1992).

232. *See Weisman v. Lee*, 728 F. Supp. 68, 71 (D.R.I. 1990) (holding that prayers at nonreligious graduation ceremonies create an "identification of the state with . . . religion in general"), *aff'd* 908 F.2d 1090 (1st Cir. 1990), *aff'd* 505 U.S. 577 (1992).

233. *Mellen v. Bunting*, 181 F. Supp. 2d 619, 624 (W.D. Va. 2002) (noting the testimony of VMI officials that the premeal prayer "expose[d] cadets to the sorts of religious expressions they can expect to experience in the military at a variety of gatherings and ceremonies"), *aff'd in part vacated in part*, 327 F.3d 355 (4th Cir. 2003).

234. *Lee*, 908 F.2d at 1097 (Bownes, J., concurring).

235. *See* UNIF. CODE OF MIL. JUSTICE art. 89, 10 U.S.C. § 889 (2000). The Army could charge a soldier with failure to obey a lawful order for refusing to obey commands during a ceremony. *See id.* The Army could also charge a soldier with going from an appointed place of duty without authority for skipping the ceremony, or leaving formation without permission. *See id.* § 886, art. 86.

236. *Lee*, 728 F. Supp. at 72.

237. *Mellen v. Bunting*, 327 F.3d 355, 375 (4th Cir. 2003) ("VMI has composed, mandated, and monitored a daily prayer for its cadets. In this way, VMI has taken a position on what constitutes appropriate religious worship—an entanglement with religious activity that is forbidden by the Establishment Clause."); *Lee*, 908 F.2d at 1095

generally promoted a variety of religious views in its prayers at ceremonies, which would require a broad analysis of both the religious content of the various prayers and the spiritual composition of the audience.<sup>238</sup> This excessive entanglement would compound the prayers' improper effect of advancing and promoting religion. Thus, formal prayers at Army ceremonies fail to satisfy the *Lemon* test and violate the Establishment Clause.

### B. *The Endorsement Test and Ceremonial Deism*

When Army chaplains stand before an audience of soldiers at a mandatory Army ceremony, they stand as military leaders whose actions those soldiers have been trained to follow. They also represent their commander and the Army, because they may only pray at the ceremony with appropriate approval.<sup>239</sup> Unlike the comments of an invited guest speaker—from which the Army can simply disclaim endorsement—the chaplain at an Army ceremony speaks for the Army and not as an individual.<sup>240</sup> The prayer at such a ceremony, despite its ostensible nondenominational or voluntary character, “necessarily implicates religion.”<sup>241</sup> Under these circumstances, an objective observer could reasonably conclude that both the commander and the Army endorsed the religious beliefs conveyed by the chaplain's prayer. A reasonable, objective soldier with different religious beliefs may feel like an outsider, who is not fully part of this spiritual Army community.<sup>242</sup> Such a perception of religious endorsement is inconsistent with religious neutrality that all agencies of the federal government must follow under the Establishment Clause.<sup>243</sup>

Despite this apparent endorsement of religion through formal prayers at mandatory, nonreligious ceremonies, the Army would likely

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(Bownes, J., concurring) (finding that the school principal's choosing of the cleric and monitoring of the prayers' content amounted to excessive entanglement).

238. See *Lee v. Weisman*, 505 U.S. 577, 617 (1992) (Souter, J., concurring) (explaining that the goal of promoting diverse religious views would force 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”).

239. 2004 AR 165-1, *supra* note 22, para. 4-5(b) (“Chaplains will coordinate, integrate, and supervise all chaplain activities . . . subject to the approval of the commander . . .”).

240. See *id.* § 1-4(d); CROCKER, *supra* note 29, at 526 (“[T]he chaplain advises the commander on matters of religion, morals, and morale as affected by religion.”).

241. See *Lee*, 728 F. Supp. At 72.

242. Cf. *id.* at 73 (“Schoolchildren who are not members of the religions sponsored . . . may feel as though the school and government prefer beliefs other than their own.”).

243. See *supra* notes 38-41 and accompanying text.

argue that the prayers are ceremonial deism—government acts that have become so ubiquitous and secular as to lose their religious connotation and no longer present a risk of unlawful government endorsement of religion.<sup>244</sup> Formal prayers at mandatory Army ceremonies do not properly fall within the class of ceremonial deism because they have too much religious significance and tend to contain sectarian rather than nondenominational, nonproselytizing content.<sup>245</sup> Even if the prayers can be considered ceremonial deism, the underlying assumptions of that doctrine could produce undesirable consequences in the Army community and should not guide Army policy.

### C. *The Lee Coercion Test*

A third test for Establishment Clause violations is the coercion test. While applying the coercion test in public elementary- and secondary-school settings, the Supreme Court has remained mindful of the “heightened concerns with protecting freedom of conscience from subtle coercive pressure” in these environments,<sup>246</sup> and has conceded that such coercion “may not be limited” to public elementary- or high-school settings.<sup>247</sup> If the military environment is substantially similar to the school settings in *Lee* and *Santa Fe*, formal prayers at mandatory, nonreligious, Army ceremonies could present similar dangers of indirect coercion, and the coercion test should apply.<sup>248</sup>

The *Lee* Court assessed the coercive nature of the graduation-ceremony prayers at issue in light of the age, and corresponding impressionability, of the student audience.<sup>249</sup> In several respects, the Army treats its members paternalistically, as if soldiers are not sophisticated enough to protect themselves. For example, the Army intensively regulates commercial solicitation of service members on military installations.<sup>250</sup> It also reserves the power to place commercial

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244. *See supra* notes 58-67 and accompanying text.

245. *Cf. Marsh v. Chambers*, 463 U.S. 783, 818 (1983) (Brennan, J., dissenting) (explaining that one problem with offering prayers before legislative sessions is that the prayers “can easily turn obviously and narrowly sectarian”).

246. *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

247. *Id.*

248. *See id.* at 593 (giving the “susceptibility [of adolescents] to pressure from their peers toward conformity” as a key reason for protecting them from subtle coercion).

249. *Id.* at 593.

250. U.S. DEP’T OF ARMY, REG. 210-7, COMMERCIAL SOLICITATION ON ARMY INSTALLATIONS § 2-8(f) (1986), *available at* [http://www.army.mil/usapa/epubs/pdf/r210\\_7.pdf](http://www.army.mil/usapa/epubs/pdf/r210_7.pdf) (listing forbidden solicitation practices, such as soliciting without appointment in housing areas and offering rebates to “promote transaction or to eliminate competition”).

establishments “off-limits” to soldiers because of “undesirable conditions that may adversely affect” soldiers or their family members, such as lack of discipline, alcohol abuse, and sexually transmitted disease.<sup>251</sup> In light of this paternalistic tendency, it seems inconsistent to expose soldiers to coerced religious activity and expect them both to resist this coercion and to handle possible feelings of exclusion.

The age of the audience, however, is not the only important factor in determining if *Lee*’s coercion test should apply.<sup>252</sup> As the *Mellen* court reasoned, the formative military environment at VMI’s mandatory dinners presented the same types of coercive forces as *Lee*’s graduation ceremonies.<sup>253</sup> Thus, the key similarity between the *Lee* graduation prayers and prayers at mandatory, nonreligious, Army ceremonies is the formative environment in which both occur. The Army mission relies on forming a cohesive unit through the indoctrination of Army values and immersion in Army culture. Socialization begins during IET, where the coercive environment is more overt, but it continues during every moment of Army life in subtle ways.<sup>254</sup>

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, forming a cornerstone of military culture and image.<sup>255</sup> At these premier events—in which soldiers realize their place in the specialized, separate society—the Army officially conducts public prayers through a government-paid minister on behalf of all the people in attendance.<sup>256</sup> In this highly structured environment, the direct and indirect formative pressures are powerful.<sup>257</sup> As such, the reasoning of *Lee* applies as much here as it did in the

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251. U.S. DEP’T OF ARMY, REG. 190-24, ARMED FORCES DISCIPLINARY CONTROL BOARDS AND OFF-INSTALLATION LIAISON AND OPERATIONS paras. 2-4(b), 2-6 (2006), available at [http://www.army.mil/usapa/epubs/pdf/r190\\_24](http://www.army.mil/usapa/epubs/pdf/r190_24).

252. *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.

253. *Mellen v. Bunting*, 327 F.3d 355, 371-72 (4th Cir. 2003).

254. See *supra* Part IV (describing the Army socialization process).

255. See TRADOC REG. 350-6, *supra* note 186, para. 1-7(b)(8) (“Develop in the IET soldier the knowledge, understanding, and appreciation of Army customs, heritage, and traditions.”); FM 3-21.5, *supra* note 214, 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”).

256. See Scott Poppleton, Op-Ed., *What the Military Shouldn’t Preach*, WASH. POST, Mar. 13, 2006, at A15.

257. See *id.*

formative and inherently coercive environment of public elementary and high schools.<sup>258</sup>

Despite their inclusion in mandatory, nonreligious, Army ceremonies, the official prayers are government-sponsored religious exercises in which the Army forces soldiers to participate.<sup>259</sup> On the deeply personal matter of when, how, and if soldiers pray to their supreme deity or deities, formal prayers at mandatory Army ceremonies foreclose their religious freedom and dictate the time, place, and manner of their prayer. Under *Anderson*, the government may not compel members of the military to attend religious exercises.<sup>260</sup> Pursuant to *Lee*, prayer is a religious exercise, even if it occurs as a small part of a secular, nonreligious ceremony.<sup>261</sup> Reading these two decisions together leads to an inescapable conclusion: by including prayers at mandatory ceremonies, the Army coerces soldiers to participate in religious exercises 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.<sup>262</sup> Similarly, in *Santa Fe*, the football games at which prayers occurred were mandatory only for football players and students involved in activities that supported the football team.<sup>263</sup> All other students had an unassailable right to opt out of the prayers by skipping the games.<sup>264</sup> In contrast, Army ceremonies present far fewer choices to soldiers who are ordered to participate. Opting out of the event to avoid the official prayer is not—and will likely never be—a viable option in the Army.<sup>265</sup> 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.

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258. See *Lee*, 505 U.S. at 598. While other segments of society are moving away from such public religious expressions, official prayers at nonreligious Army ceremonies enhance the military's sense of self-isolation and the civil-military gap. See Poppleton, *supra* note 256 ("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?").

259. See *supra* note 235 and accompanying text.

260. *Anderson v. Laird*, 466 F.2d 283, 285 (D.C. Cir. 1972).

261. *Lee v. Weisman*, 505 U.S. 577, 598 (1992); see also *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000) ("[T]he religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer.").

262. *Lee*, 505 U.S. at 583.

263. *Santa Fe*, 530 U.S. at 311.

264. See *id.*

265. There is no opt-out provision in the very detailed Drill and Ceremony field manual. See FM 3-21.5, *supra* note 214.

Unfettered religious excusals would likely present a formidable challenge to producing a sizable formation of ceremony participants.

Thus, commanders would face an undue administrative screening requirement for each opt-out request. Even with help from chaplains, commanders would likely have neither the time nor the qualifications to perform such an inquiry.<sup>266</sup> 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.<sup>267</sup> An opt-out provision at service schools would present the same obstacles discussed above, perhaps even to a greater degree; given the short duration of these courses, assessing the sincerity of opt-out requests of students drawn from an Army-wide population would be even more difficult.<sup>268</sup> For a number of reasons, then, soldiers cannot simply skip Army ceremonies to avoid hearing and participating in the prayer.

Second, the students in *Lee* were not technically obligated to stand and participate in the graduation prayer.<sup>269</sup> In contrast, soldiers at Army ceremonies must stand in formation, and the Uniform Code of Military Justice forbids and establishes punishments for unilateral, divergent action.<sup>270</sup> Like the VMI cadets during premeal prayers in *Mellen*, soldiers must “remain standing and silent” during the prayers but do not have to respond or otherwise participate.<sup>271</sup> They may not leave the formation, talk with fellow soldiers, or otherwise go about their business during the official, formal prayer.<sup>272</sup> During the chaplain-led prayers at these

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266. See U.S. DEP’T OF ARMY, REG. 600-20, ARMY COMMAND POLICY § 2-1(b) (2006), available at [http://www.usapa.army.mil/pdffiles/r600\\_20.pdf](http://www.usapa.army.mil/pdffiles/r600_20.pdf) (“Commanders are responsible for everything their command does or fails to do.”).

267. See, e.g., TRADOC REG. 350-6, *supra* note 186, para. 1-6(a) (“IET begins with the Soldier’s arrival at the [Reception Battalion], and continues through AIT or OSUT [One Station Unit Training] graduation.”); *Id.* para. 2-1(a)(5) (“Graduation from OSUT/AIT signifies the successful completion of the first five phases of the Soldierization program.”).

268. As a practical matter, a service-school student-detachment commander typically has a more superficial relationship with the soldiers than a commander in more traditional units does. The student-detachment commander’s lack of familiarity with individual troops would make the difficult screening of opt-out requests even more burdensome.

269. See *Lee v. Weisman*, 505 U.S. 577, 593 (1992). 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. See *id.*

270. See *supra* note 210 and accompanying text.

271. *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. See *id.* at 371-72.

272. See U.S. DEP’T OF ARMY, INITIAL ENTRY TRAINING SOLDIER’S HANDBOOK, PAM. 600-4, at 1-15 (2006), available at <http://www.tradoc.army.mil/tpubs/pams/p600->

mandatory events, soldiers must participate in a coerced, public display, just like the students in *Lee* and *Mellen*. More significantly, the coerced display of participation occurs “by force of law and threat of penalty,”<sup>273</sup> the oldest and narrowest definition of religious establishment.<sup>274</sup>

The university-graduation-prayer cases, *Chaudhuri* and *Tanford*, are easily distinguishable from the incidents involving chaplain-led prayers at mandatory ceremonies. Army ceremonies occur in a coercive, formative environment far removed from the relatively free-spirited college environments considered in those two cases. The soldiers at Army ceremonies are admittedly not schoolchildren, but they are also not in the atmosphere of intellectual freedom and social permissiveness common at public universities<sup>275</sup>—even during formal graduation ceremonies.<sup>276</sup>

Under *Lee*’s coercion test, soldiers ordered to participate in Army ceremonies that contain official prayers are coerced into taking part in government-sponsored religious exercises. The Army does not allow them 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 silently endure the religious expression that they did not request and might find offensive. This absence of choice violates the Establishment Clause under *Lee*’s coercion test.<sup>277</sup>

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4.pdf (describing the origin of formations); *id.* at 4-2 (noting that drill accomplishes the objectives of “teamwork, confidence, pride, alertness, attention to detail, esprit de corps, and discipline”).

273. *Cutter v. Wilkinson*, 544 U.S. 709, 729 (2005) (Thomas, J., concurring) (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 52 (2004) (Thomas, J., concurring)).

274. *See id.*

275. *See supra* notes 148-50 and accompanying text.

276. *See, e.g., Chaudhuri v. Tennessee*, 130 F.3d 232, 237 (6th Cir. 1997) (explaining that it was unreasonable to “suppose that an audience of college-educated adults could be influenced unduly” by TSU’s nonsectarian graduation prayers); *Tanford v. Brand*, 104 F.3d 982, 985 (7th Cir. 1997) (noting that graduating students did not have to attend the ceremony and that those who did attend could leave or refuse to stand during the prayers).

277. *See 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 also supra* notes 85-90 (discussing the unsatisfactory range of choices for students who objected to the graduation prayers in *Lee*).

## VI. EXAMINATION OF COUNTERARGUMENTS IN FAVOR OF PRAYER AT ARMY CEREMONIES

There are three primary arguments used in attempts to justify formal, chaplain-led prayers at mandatory, nonreligious, Army ceremonies<sup>278</sup>: First, the prayers promote vital free exercise rights for the majority of the military audience. Second, eliminating the prayers would unlawfully infringe either the free speech or free exercise rights of military chaplains. Third, the prayers fall within the class of ceremonial deism as acceptable religious activities conducted by government actors. None of these arguments, however, is convincing.

### A. *Free Exercise Rights of the Majority of the Military Audience*

One argument for the justification of formal prayers at mandatory Army ceremonies asserts that these prayers are an important religious ritual for most of the soldiers participating in or attending the ceremony.<sup>279</sup> Eliminating the prayers would thus unlawfully restrict the majority's free exercise of religion. While this argument initially appears somewhat convincing—especially in light of the Supreme Court's lack of clarity in explaining how the Free Exercise Clause and Establishment Clause interrelate<sup>280</sup>—it ultimately fails to adequately justify official prayers at mandatory Army ceremonies.

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278. A fourth possible argument is that the danger is de minimis. According to this argument, even when the Army forces soldiers to participate in these ceremonies, the ceremonies' religious expressions are minor and brief. *See Engel v. Vitale*, 370 U.S. 421, 436 (1962) (noting that defenders of the challenged New York school-prayer statute argued that the daily prayer was "so brief and general" that it presented "no danger to religious freedom" through government establishment of religion). The de minimis argument is at least as old as the earliest Supreme Court school-prayer cases. The Court considered forms of it in *Engel* and *Schempp*. In both *Engel* and *Schempp*, the Court swiftly dismissed this type of argument with the cautionary words of James Madison, the author of the First Amendment: "[I]t is proper to take alarm at the first experiment on our liberties." *Engel*, 370 U.S. at 436; *School Dist. Of Abington Twp. V. Schempp*, 374 U.S. 203, 225 (1963). The de minimis argument would be equally unsuccessful here.

279. *See Brownstein, supra* note 174, at 130 ("Restrictions on religious expression might be both challenged on free exercise or free speech grounds, and defended, if the speech received government support or communicated a message of government endorsement, on Establishment Clause grounds."); Swomley, *supra* note 95, 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").

280. *See supra* Part III.

## 1. PUBLIC-PRAYER CASES ARE ESTABLISHMENT CLAUSE CASES

The Supreme Court has developed separate analytical models for the Free Exercise Clause and the Establishment Clause.<sup>281</sup> Although all religion cases actually involve both clauses, the Court has tended to frame its analysis under one or the other, but not both.<sup>282</sup> The Court has traditionally classified cases challenging public prayer, especially school prayer ones, as Establishment Clause cases.<sup>283</sup> Thus, it would likely resolve a challenge to formal prayers at Army ceremonies under Establishment Clause reasoning. Adhering to its jurisprudence, the Court would likely minimize the significance of the asserted free exercise rights and uphold the principle that government must not sponsor, conduct, or coerce participation in religious exercises.<sup>284</sup>

## 2. MAJORITY PREFERENCES AND FUNDAMENTAL RIGHTS

Majority preferences must not determine the scope of fundamental rights, especially rights minority groups assert.<sup>285</sup> 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 politically dominant religious group.<sup>286</sup> This group can use its majority status both to promote its own religious

281. *See id.*

282. *See supra* note 175-77 and accompanying text.

283. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 584 (1992); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000).

284. 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 Epps, supra* note 185, at 588-92 (discussing permissible limitations on free exercise). Forbidding public prayer, even if it infringes the right of a particular group to practice its religion, might be permissible. *See id.* This Article, however, will not address this topic and will instead try to expose more significant flaws with the free exercise argument.

285. *See Santa Fe*, 530 U.S. at 316 n.23 (“[T]he [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 from denial of rehearing and rehearing en banc) (“[The] growing willingness to accept the imposition of majoritarian control at the expense of individual rights [is disturbing].”).

286. *See Employment Div. v. Smith*, 494 U.S. 872, 890 (1990) (“[I]t may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are 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.”).

expressions (under the auspices of government action) and to block public religious expressions of minority religious groups,<sup>287</sup> even to the point of criminalizing rituals central to the expression of non-Christian minority faiths.<sup>288</sup>

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 of the majority religion—whether in the form of static displays, government recognition of religious holidays, or prayers at ostensibly secular ceremonies—is to show unequivocally that “[t]his is Christian country.”<sup>289</sup>

Recognizing the inadequacies of majority rule to protect minority rights, the Supreme Court has long pledged to subject laws that disadvantaged “discrete and insular minorities” who are not adequately protected by the political process to “more searching judicial scrutiny.”<sup>290</sup> As the Court has explained,

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287. See LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 204 (2d ed. 1994) (noting that the Establishment Clause “is supposed to protect the minority” because the “majority does not need it”); see *Santa Fe*, 530 U.S. at 304 (“[T]he majoritarian process . . . guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced.”).

288. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525-29 (1993) (describing how the city council 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).

289. Marvin E. Frankel, *Religion in Public Life—Reasons for Minimal Access*, 60 GEO. WASH. L. REV. 633, 639 (1992); see also *Lee v. Weisman*, 505 U.S. 577, 630 (1992) (Souter, J., concurring) (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.’” (quoting Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841, 844 (1992))). When such majorities minimize and overlook minority rights, aggrieved parties can appeal to the courts for vindication of their rights. See, e.g., 28 U.S.C. § 1331 (2000) (giving federal district courts “original jurisdiction of all civil actions arising under the Constitution”); 42 U.S.C. § 1983 (2000) (allowing civil action for the deprivation of any rights “secured by the Constitution” against defendants acting “under color of any statute, ordinance, regulation, custom, or usage” of any state). Viewed in this light, perhaps *Lee* is not so much an act of “social engineering” by the Court, 505 U.S. at 632 (Scalia, J., dissenting), as it is a check on the power of the majority to infringe on and dictate the scope of the minority's fundamental rights.

290. *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,

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.<sup>291</sup>

Therefore, the First Amendment's Religion Clauses primarily protect religious minorities. After all, the majority religious group, with access to and control of the political process,<sup>292</sup> could preserve its religious freedom without the shield of the First Amendment. Similarly, if religious issues were subject to referenda and the majority could regulate free exercise rights and require taxpayer support of official state churches, then the majority could consistently outvote members of minority religious groups, and forever repress their religions. The Religion Clauses protect religious minorities from such oppression by preventing majoritarian politics from determining the scope of minority religious freedoms.

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.<sup>293</sup> Allowing majority rule to dictate the degree to which religious minorities may avoid coercive religious exercises contradicts Establishment Clause jurisprudence and the fundamental protections of minority civil rights under the Constitution. Courts "do not count heads before enforcing the First Amendment."<sup>294</sup>

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115 (1943) ("Freedom of press, freedom of speech, freedom of religion are in a preferred position.").

291. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 225-26 (1963) (citation omitted).

292. See Epps, *supra* note 185, at 588-89 ("[T]he major external limit [to the Free Exercise Clause] is the Establishment Clause, which forbids political majorities from hijacking the machinery of government to coerce religious conformity." (citation omitted)).

293. See Frankel, *supra* note 289, 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").

294. McCreary County v. ACLU of Ky., 125 S. Ct. 2722, 2747 (2005) (O'Connor, J., concurring).

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.<sup>295</sup> The free exercise rights of the majority to pray are directly offset by the free exercise rights of members of the audience<sup>296</sup> who do not wish to pray—either in the manner that the chaplain selects or at all.<sup>297</sup> The Supreme Court considered free exercise arguments in *Santa Fe*, in which proponents of the school district's pregame-prayer policy argued that the students offering the prayers had a free exercise right to pray.<sup>298</sup> The Court responded that accommodating the free exercise of religion “does not supersede the fundamental limitations imposed by the Establishment Clause.”<sup>299</sup> By subjecting a captive audience at varsity football games to religion via pregame invocations, the school district's policy violated the Establishment Clause.<sup>300</sup>

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.<sup>301</sup> As in *Lee* and *Santa Fe*, subjecting a captive audience at an Army ceremony to official prayer amounts to a coercive, government-sponsored religious exercise in violation of the Establishment Clause.<sup>302</sup>

Just as the freedom of speech contains the right to be free from government-compelled speech,<sup>303</sup> the free exercise of religion includes the right to be free from government-compelled religious expressions,

295. Swomley, *supra* note 95, at 307 (asserting that all individuals have the “right to be free from coercion in their religious belief and practice”).

296. This Article assumes, for the sake of argument, that the objecting group is smaller than the group which desires formal prayer.

297. See *Ams. United for the Separation of Church & State*, *supra* note 13 (“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.”).

298. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000).

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

300. *Id.* at 302-03 (explaining that, despite the Free Exercise Clause, the Establishment Clause mandates that “government may not coerce anyone to participate in religion or its exercise” (quoting *Lee*, 505 U.S. at 587)).

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

302. See *Frankel*, *supra* note 289, 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.”).

303. See, e.g., *Wooley v. Maynard*, 430 U.S. 705, 714-17 (1977) (holding that no private person could be required to endorse governmental positions absent the most compelling circumstances).

such as public prayers.<sup>304</sup> 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,”<sup>305</sup> especially when such control occurs through government action.<sup>306</sup> It is impossible to adequately quantify the deleterious effect that compelled religious exercises might have on the morale of non-Christian soldiers<sup>307</sup> and the corresponding impact on unit effectiveness and cohesion. As such, the benefits of preserving a tradition that could cause such unneeded divisiveness<sup>308</sup> 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.<sup>309</sup> The additional free exercise benefits from official prayer at mandatory, nonreligious ceremonies do not outweigh the drawbacks of compelling all soldiers to participate in majority-religion traditions. Justice William J. Brennan, Jr.’s observations about the legislative prayers in *Marsh v. Chambers*<sup>310</sup> are equally valid in this context: “[W]e are faced here with

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304. See Epps, *supra* note 185, at 588. Professor Garrett 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.

305. *Id.* at 588.

306. See *id.* (“The primary legal meaning of ‘free exercise,’ like that of free speech, must protect the choice of individual citizens to refrain from as well as to engage in speech, ritual, and religiously motivated behavior without coercion by the state.”).

307. Cf. *Cammack v. Waihee*, 944 F.2d 466, 468 (1991) (Reinhardt, J., dissenting from denial of rehearing and rehearing en banc) (“[M]any 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].”).

308. 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 256 (proposing that a moment of silence should be used in place of prayer “if a solemn occasion is appropriate at a military ceremony”).

309. 2004 AR 165-1, *supra* note 22, para. 3-2(a).

310. 463 U.S. 783 (1983). In *Marsh*, the Supreme Court upheld Nebraska’s practice of opening each day’s session of the Nebraska Legislature with a public prayer by a state-funded chaplain, explaining that “[t]o invoke Divine guidance on a public body entrusted with making the laws” was not “an ‘establishment’ of religion or a step toward establishment.” *Id.* at 792. Such a prayer was “simply a tolerable acknowledgment of beliefs widely held among the people of this country,” to open “sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country.” *Id.* at 786. The Court gave tremendous weight to the historical acceptance of legislative prayers, see *id.*, especially the practices of the First Congress. *Id.* at 790. Because the First Congress created the congressional chaplaincy soon after drafting the First Amendment and allowed those chaplains to open daily sessions of Congress with prayer, legislative prayer presumably was consistent with the First

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.”<sup>311</sup>

### B. *Free Speech and Free Exercise Rights of Chaplains*

Another popular argument in favor of prayers at Army ceremonies suggests that Army chaplains have an absolute First Amendment right (under either freedom of speech<sup>312</sup> or the free exercise of religion<sup>313</sup>) both to offer prayers and to determine the prayers’ form and content, regardless of the setting in which those prayers may occur.<sup>314</sup> Therefore, forbidding the prayers or regulating their content impermissibly infringes chaplains’ constitutional liberties.

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Amendment. *Id.* at 788. Consequently, the Court found Nebraska’s nearly identical practice constitutional as well. *Id.* at 795.

311. *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.”).

312. *See, e.g.*, Am. Ctr. for Law & Justice, *ACLJ Calls Revised Air Force Guidelines on Religion “Appropriate and Constitutional”* (Feb. 9, 2006), <http://www.aclj.org/news/Read.aspx?ID=2129> (praising the *Revised Interim Guidelines* 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 13, at 12 (describing an October 2005 letter sent to President George W. Bush from a member of Congress that urged protection of “military chaplains’ right of free speech” in response to the initial *Interim Guidelines*).

313. *See, e.g.*, Tarron Lively, *Chaplain Ends 18-Day Fast*, WASH. TIMES, Jan. 8, 2006, at A9 (describing a Navy chaplain’s water-only fast to protest restrictions under Navy regulations on his recitation of sectarian Christian prayers at nonreligious public events and military ceremonies, which he claimed violated his “religious liberty”).

314. The relationship between the Free Speech and Establishment Clauses has been the subject of considerable scholarly work. *See, e.g.*, Brownstein, *supra* note 174; Alan E. 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); Alan E. Brownstein, *Evaluating School Voucher Programs Through a Liberty, Equality, and Free Speech Matrix*, 31 CONN. L. REV. 871, 928-29 (1999); Thomas R. McCoy, *A Coherent Methodology for First Amendment Speech and Religion Clause Cases*, 48 VAND. L. REV. 1335, 1374-83 (1995); Michael McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 177-80 (1992). *See generally* STEVEN P. BROWN, TRUMPING RELIGION: THE NEW CHRISTIAN RIGHT, THE FREE SPEECH CLAUSE, AND THE COURTS 62-119 (2002) (providing an overview of federal court cases since 1980 that analyzed religious speech arguments). While this Part will describe the key tenets of the argument and some counterarguments, an exhaustive treatment of this complex topic is beyond the scope of this Article.

## 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.<sup>315</sup> For example, prayer advocates assert that student-led prayer “is not state-sponsored worship, but merely the exercise of student free speech.”<sup>316</sup> Further, the argument continues, if the government blocked private religious speech but allowed private nonreligious speech, the government would be imposing a content-based speech regulation.<sup>317</sup> The Court has consistently held that the government may not treat private religious and nonreligious speech differently in terms of access to public funds or public facilities merely to avoid the perception of government endorsement of the religious speech’s message.<sup>318</sup> Thus, when the government grants public funding for or opens public property to private religious speech, the Supreme Court does not deem this speech to be state action that would trigger the Establishment Clause.<sup>319</sup>

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315. See *McCreary County v. ACLU 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 185, at 576 (“The Court has recently made clear that religious speech must be considered first and foremost as speech.”).

316. Swomley, *supra* note 95, at 302; see also Jay Sekulow, *Right to Pray in Public* (Sept. 18, 2001), <http://www.aclj.org/news/read.aspx?ID=287> (“It is a fundamental proposition of constitutional law that religious speech is protected by the First Amendment.”).

317. To pass constitutional muster, such content-based speech regulations must be narrowly tailored to achieve a compelling government interest. See, e.g., *NOWAK & ROTUNDA*, *supra* note 31, § 16.10, at 1002.

318. See, e.g., *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 845-46 (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. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 387-89, 396-97 (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 nonreligious groups to use the premises for a variety of social, civic, recreational, and political functions); *Widmar v. Vincent*, 454 U.S. 263, 277-78 (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).

319. See *Brownstein*, *supra* note 174, at 145; *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).

## 2. INADEQUACIES OF THE CHAPLAIN-RIGHTS ARGUMENT

The free speech argument asserts that, because their official prayers at mandatory Army ceremonies are religious speech, Army chaplains alone should determine the prayers' content. If the chaplains' prayers at nonreligious Army events could be considered "religious speech," then Army-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 they are members of the U.S. armed forces. 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. Finally, existing restrictions on all types of private speech at Army ceremonies justify evenhanded restriction of prayer at these ceremonies as well.

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 represent a specialized society, separate and distinct from civilian society.<sup>320</sup> The Court has also recognized that the military is not a "deliberative body," because it relies on the discipline and obedience of its members and the authority of commanders over their subordinates.<sup>321</sup> Consequently, the Supreme Court defers to reasonable military judgments in matters involving the administration and operation of the armed forces.<sup>322</sup> This deference is similar to that given to the professional judgment of other specialized executive branch officials.<sup>323</sup>

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320. See, e.g., *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 225-27 (discussing the civil-military gap).

321. *Parker*, 417 U.S. at 744 ("[An army] is the executive arm. Its law is that of obedience." (quoting *In re Grimley*, 137 U.S. 147, 153 (1890))); see *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."); *Jurden*, *supra* note 219, at 21-26 (discussing the development of jurisprudence centered on a recognition of and deference to military custom and military necessity).

322. *Chappell*, 462 U.S. at 301 ("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." (quoting *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981))); *Orloff*, 345 U.S. at 94 ("Orderly government requires that the judiciary be . . . scrupulous not to interfere with legitimate Army matters . . .").

323. See, 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

As the Court explained in the 1986 *Goldman v. Weinberger* decision, this deference even extends to military decisions affecting the free exercise rights of service members.<sup>324</sup> Captain S. Simcha Goldman was an ordained rabbi serving as an Air Force clinical psychologist.<sup>325</sup> Pursuant to his religious beliefs—but contrary to the Air Force’s uniform regulation—Goldman wore his yarmulke at all times.<sup>326</sup> In April 1981, Goldman’s commander ordered him to comply with the uniform regulation concerning his yarmulke wear.<sup>327</sup> Goldman refused to follow the order and sued Secretary of Defense Caspar W. Weinberger and Air Force officials to enjoin enforcement of the uniform regulation, alleging that it violated his First Amendment right to the free exercise of religion.<sup>328</sup>

The Court began its analysis by repeating its specialized society doctrine<sup>329</sup> and its deferential standard for reviewing military regulations challenged on First Amendment grounds.<sup>330</sup> The Court reasoned that service members had less personal autonomy within the military community than they generally would have had in civilian life.<sup>331</sup> The Court then concluded that the military may “reasonably and evenhandedly regulate” the wear of religious apparel to preserve military discipline and uniformity.<sup>332</sup> Because the Air Force’s uniform regulation met this standard, the Court held that the regulation did not violate the Free Exercise Clause.<sup>333</sup>

Although Congress overturned *Goldman’s* holding that military regulations do not have to reasonably accommodate the wear of certain

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which are peculiarly within the province of the legislative and executive 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 appropriate deference to prison officials, we have determined that prison regulations alleged to infringe constitutional rights are judged under a ‘reasonableness’ test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights.”).

324. 475 U.S. 503, 509-10 (1986).

325. *Id.* at 504-05.

326. *Id.* at 505. Air Force Regulation 35-10 forbade such indoor wear of headgear, even religious headgear, while in uniform. *Id.*

327. *Id.*

328. *Id.* at 506. Goldman asserted, without dispute, that wearing the yarmulke was an act of “silent devotion akin to prayer.” *Id.* at 509.

329. *Id.* at 506-07.

330. *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.”).

331. *Id.*

332. *Id.* at 510.

333. *Id.*

religious attire,<sup>334</sup> the *Goldman* analysis of the free exercise rights of service members is still binding precedent. In 1990, the Court cited *Goldman* as an example of its evolving Free Exercise Clause jurisprudence in certain cases of religious accommodation.<sup>335</sup> In a broader sense, the principle that “[t]here is a difference between the [First Amendment] rights of a civilian and the rights of a servicemember” also remains undeniable due to the military’s urgent and unchanged mission.<sup>336</sup>

Thus, reasonable military regulations may infringe the First Amendment liberties of service members, including Army chaplains. 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.<sup>337</sup> If the Army were to reasonably determine that formal prayers at mandatory Army ceremonies had a negative impact on morale and unit cohesion that outweighed the benefits to chaplains’ free exercise of religion from saying these prayers, then courts would deferentially review and likely uphold this determination.

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334. See 10 U.S.C. § 774(a)-(b) (2000) (allowing members of the armed forces to wear “neat and conservative” items of “religious apparel” while in uniform); DEPT OF DEFENSE, DIRECTIVE 1300.17, ACCOMMODATION OF RELIGIOUS PRACTICES WITHIN THE MILITARY SERVICES § 3.2.7.1-2 (1988), available at <http://www.dtic.mil/whs/directives/corres/html/130017.htm> [hereinafter DoDD 1300.17] (defining both “religious apparel” and “neat and conservative”). In fact, Directive 1300.17 specifically addresses the *Goldman* facts: “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.* § 3.2.7.3.

335. *Employment Div. v. Smith*, 494 U.S. 872, 884 (1990) (“In *Goldman* . . . we rejected application of the *Sherbert* test to military dress regulations that forbade the wearing of yarmulkes.”). In *Sherbert v. Verner*, the Court held that government regulations burdening religious practices must be narrowly tailored to achieve a compelling state interest. 374 U.S. 398, 406 (1963).

336. *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, esprit de corps, and civilian supremacy” over the military).

337. 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 “*Bivens*-type” claim). *Bivens* created a federal cause of action for private citizens alleging constitutional violations by agents of the federal government. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971); see also 28 U.S.C.S. § 2679(b)(2) (LEXIS 2006) (extending only qualified immunity, rather than absolute immunity, to federal employees sued for violating the Constitution or federal statutes).

*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. Therefore, a chaplain's official speech, such as an official prayer during a mandatory Army ceremony, is state action rather than private speech.<sup>338</sup> At the same time, the Establishment Clause mandates that the government not conduct religious activities or compel citizens to participate in religious observances.<sup>339</sup> Courts have granted Army chaplains a limited exception to this general prohibition, allowing them to conduct religious observances in their official capacity so that military service does not unduly frustrate soldiers' free exercise rights.<sup>340</sup>

Thus, to the extent that Army chaplains have publicly financed free exercise rights, they have such rights only to facilitate the soldiers' free exercise of religion.<sup>341</sup> This is echoed in official Army publications<sup>342</sup> and various court opinions.<sup>343</sup> Chaplains acting in their official capacity

338. The chaplain serves as the command's staff expert and proxy for religious matters. *See* CROCKER, *supra* note 29, at 526 (“[T]he chaplain advises the commander on matters of religion, morals, and morale as affected by religion.”).

339. *See supra* Part II.B.

340. *See* Katcoff v. Marsh, 755 F.2d 223, 228 (2d Cir. 1985).

341. *See* HERSPRING, *supra* note 204, at 42 (“Indeed, if any thread runs through the history of the chaplains’ 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.”).

342. *See, e.g.*, 2004 AR 165-1, *supra* note 22, para. 1-4(c) (“[T]he Army chaplaincy . . . is an instrument of the U.S. Government to ensure that soldiers’ religious ‘free exercise’ rights are protected.”); U.S. DEP’T OF ARMY, FIELD MANUAL 1-05, RELIGIOUS SUPPORT § 1-12 (2003), *available at* [http://www.dmv.state.pa.us/paarnng/lib/paarnng/fm\\_1-05.pdf](http://www.dmv.state.pa.us/paarnng/lib/paarnng/fm_1-05.pdf) (“The mission of the [Unit Ministry Team] is to provide and perform religious support to soldiers, families, and authorized civilians as directed by the commander.”); TC 1-05, *supra* note 205, at 1-3 (“The [Unit Ministry Team] and the chaplain are required by public law to conduct religious services for soldiers in their assigned command.”); *id.* § 2-6 (“The primary mission of the chaplain is to perform or provide religious ministry to soldiers.”).

343. *See, 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.” (citations omitted)); *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 . . . that the Court would recognize the propriety of providing military chaplains . . .”); *id.* at 309 (Stewart, J., dissenting) (noting that, although “[s]pending federal funds to employ chaplains for the armed forces might be said to violate the Establishment Clause,” service members stationed away from their homes “could surely complain that a government which did *not* provide [them] the opportunity for pastoral

must place the free exercise interests of their soldiers ahead of their own. Thus, the critical issue for assessing formal prayers at Army ceremonies is how allowing these prayers affects the soldiers' free exercise rights, not how regulating them affects the chaplains' free exercise rights.

*Army Regulation 165-1* already protects chaplains' free exercise rights during Army ceremonies by providing that they 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."<sup>344</sup> If Army chaplains object to the requirement that their prayers be inclusive and nonproselytizing, then they may simply decline to pray. When they pray in their official capacity at a mandatory ceremony, their sectarian prayers may be perceived as an Army endorsement of their sect in violation of the Establishment Clause.<sup>345</sup> Thus, if chaplains wish to pray at an Army ceremony, they must follow *Army Regulation 165-1* and National Conference on Ministry to the Armed Forces guidelines.<sup>346</sup>

Of course, chaplains may, in some circumstances, have a nearly absolute free exercise right to be "able to pray to whomever 'their faith tradition' demands,"<sup>347</sup> such as during voluntary religious services for soldiers. In the course of these services, chaplains may speak in whatever manner their religious traditions permit.<sup>348</sup> In the inherently coercive setting of a mandatory Army ceremony, however, Establishment Clause restrictions against forcing religious activity must take priority.<sup>349</sup> Further, while *Army Regulation 165-1* has a penalty-free opt-out provision to protect a chaplain's free exercise interests at ceremonies, it fails to list a corresponding opt-out provision for soldiers.<sup>350</sup>

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guidance was affirmatively prohibiting the free exercise of [their] religion"); *see also Katcoff*, 755 F.2d at 234 (explaining that the government had an obligation to facilitate free exercise rights for soldiers who faced obstacles to worship because of their military service).

344. 2004 AR 165-1, *supra* note 22, para. 4-4(h).

345. *See supra* Part II.A.2.

346. NAT'L CONFERENCE ON MINISTRY TO 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> [hereinafter NCMAF].

347. Julian Duin, *White House to Push Military on Jesus Prayer*, WASH. TIMES, Jan. 23, 2006, at A1.

348. 2004 AR 165-1, *supra* note 22, para. 4-4(e) ("Chaplains are authorized to conduct rites, sacraments, and services as required by their respective denomination. Chaplains will not be required to take part in worship when such participation is at variance with the tenets of their faith.").

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

350. *See* AR 165-1, *supra* note 22, para. 4-4(e).

Attacking the nominal free exercise and free speech limitations on Army chaplains during mandatory ceremonies implies that they 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 nonpublic forum because of the religious nature of those groups' speech.<sup>351</sup> These decisions would not, however, provide a safe harbor for formal prayers at Army ceremonies, which will likely occur on Army installations. Because an Army installation is a nonpublic forum,<sup>352</sup> government restriction on the prayers would have to be reasonable and viewpoint-neutral to pass constitutional muster.<sup>353</sup> Official chaplain-led prayer during a mandatory Army ceremony constitutes official government action, not merely private speech that the government has allowed.<sup>354</sup> Under the religious-speech cases, chaplain-led formal prayers at nonreligious Army ceremonies do not qualify as private speech worthy of special protection.

Furthermore, at an Army ceremony, the Army regulates all speech, regardless of religious content. For example, soldiers would certainly be disciplined if they were to spontaneously recite a poem or burst into song during a change-of-command ceremony. Thus, these chaplain-led prayers at nonreligious events are readily distinguishable from recent religious-speech cases in which content-based restrictions denied to religious groups access to government institutions or funding, but granted such access to similarly situated nonreligious groups.<sup>355</sup> The Army has not opened the door to unfettered nonreligious speech during

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351. See *supra* note 318 and accompanying text.

352. *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 reservations . . . have traditionally served as a place for free public assembly and communication of thoughts by private citizens is thus historically and constitutionally false.").

353. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-93 (1993) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)). The reasonableness of the restrictions depends on the "purpose[s] served by the [nonpublic] forum." *Id.* at 393.

354. 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").

355. *Brownstein*, *supra* note 174, at 144.

its ceremonies, so it is not compelled to allow religious speech during these events. Because existing restrictions on speech at Army ceremonies lawfully limit both religious and nonreligious speech, restricting the official prayers at mandatory Army ceremonies could not reasonably be characterized as content-based speech regulation subject to a presumption of unconstitutionality and strict judicial scrutiny.

### C. *Historical Prayer and Ceremonial Deism*

Under *Marsh v. Chambers* and *Van Orden v. Perry*, longstanding historical practices that merely acknowledge religious traditions in the United States constitute ceremonial deism and do not violate the Establishment Clause.<sup>356</sup> Arguably, chaplain-led prayers at Army ceremonies are such longstanding traditional practices of religion.<sup>357</sup> Like its congressional counterpart, the Army chaplaincy existed at the drafting of the Bill of Rights in 1791.<sup>358</sup> 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.<sup>359</sup> As a result, so the argument goes, prayers offered by Army chaplains at nonreligious ceremonies deserve the same constitutional deference as legislative prayers offered by congressional chaplains.

Admittedly, the historical-prayer argument presents the strongest justification for continuing formal prayers at nonreligious Army ceremonies. Prayers at Army ceremonies, however, do not properly fit within the class of ceremonial deism.<sup>360</sup> Finally, the context and setting

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356. See 463 U.S. 783, 792 (1983); 125 S. Ct. 2854, 2861 (2005) (plurality opinion); see also Part II.A.2 (discussing ceremonial deism).

357. See, e.g., *Lee v. Weisman*, 505 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).

358. BUDD, *supra* note 204, at 9-10; CROCKER, *supra* note 29, at 527 (“The organized chaplaincy in the American Army was established prior to the Declaration of Independence.”); TC 1-05, *supra* note 205, at 2-6 (“On July 29, 1775, the Continental Congress provided for the appointment of chaplains for the Armed Forces.”).

359. *Marsh*, 463 U.S. at 786-91.

360. This Article does not attempt broader criticism of the theoretical underpinnings of the doctrine of ceremonial deism, because other authors have expertly completed such criticism already. See, e.g., Epstein, *supra* note 58, at 2124-53 (using Establishment Clause jurisprudence to invalidate activities accepted as core ceremonial deism); Arnold H. Loewy, *The Positive Reality and Normative Virtues of a “Neutral” Establishment Clause*, 41 BRANDEIS L.J. 533, 541-42 (calling ceremonial deism an “annoying and pernicious phrase”); Andrew Rotstein, *Good Faith? Religious-Secular Parallelism and the Establishment Clause*, 93 COLUM. L. REV. 1763, 1772-73 (1993) (noting that expressions of ceremonial deism have “largely become hollow gestures . . . with only a literary or historical connection to theology”); Jennifer Gresock, *No Freedom*

in which these prayers occur prevents *Marsh* from controlling their Establishment Clause analysis.

### 1. RELIGIOUS PRACTICES ARE NOT SECULAR ACTS

The existence of religious traditions in America is hardly surprising. By the commencement of the American Revolution, most of the colonies had established official churches,<sup>361</sup> thus legalizing pervasive, formal religious influence over the public sector. The trend continued, and religion became part of the “fabric of the federal government from its very first days.”<sup>362</sup> As the Court itself has explained, examples of “official acts that endorsed Christianity specifically” are prevalent in United States history.<sup>363</sup> Ceremonial deism exempts such longstanding practices from serious constitutional scrutiny despite their possible incompatibility with pluralistic, contemporary American society.<sup>364</sup>

The overwhelmingly Christian composition of the politically significant population of early America has produced governmental practices consistent with Christian theology. The convenient union between Christianity-infused government activities and Christianity’s general cultural dominance has precluded, rather than instructed, any serious Establishment Clause inquiry. As such, when modern challenges

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*from Religion: The Marginalization of Atheists in American Society, Politics, and Law*, 1 MARGINS 569, 589-609 (2001) (explaining that ceremonial deism shuns atheists from American society and validates government practices that would otherwise run afoul of the Establishment Clause).

361. The Anglican Church 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. *Engel v. Vitale*, 370 U.S. 421, 428 n.10 (1962). The Congregationalist Church was “officially established” in Massachusetts, New Hampshire, and Connecticut. *Id.* See generally LEVY, *supra* note 287, at 2; Epstein, *supra* note 58, at 2099-2100.

362. Epstein, *supra* note 58, at 2101 (citing, for example, religious references in the Articles of Confederation and the First Congress’s provision for Army chaplains).

363. *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 604-05 (1989).

364. A 2002 poll by the Pew Research Center for People and the Press found 59 percent of respondents in the United States agreed that religion was “very important,” the highest such percentage of any industrialized Western nation polled. See KENNETH JANDA ET AL., *THE CHALLENGE OF DEMOCRACY: GOVERNMENT IN AMERICA* 478-79 (8th ed. 2005); Religious Affiliations: Comparing the U.S. and the World (Dec. 11, 2005), <http://www.religioustolerance.org/compuswrlld.htm> (noting that 76.5 percent of the United States’ population is affiliated with Christianity; 13.2 percent with no religion; 1.4 percent with Judaism; 0.5 percent each with Islam, Buddhism, and Agnosticism; 0.4 percent each with Atheism and Hinduism; 0.3 percent with Unitarian Universalism; 0.15 percent with Wicca; and less than 0.1 percent each with Spiritualist, Native American Spirituality, Baha’I Faith, New Age Sikhism, Church of Scientology, Humanism, Secularism, and Taoism).

to these longstanding activities arise, referring to the widespread acceptance of the activities or to their historical place in American society dodges substantive analysis with predictable, pro-Christianity results.<sup>365</sup> Thus, courts conveniently sweep Christianity-based government activities and expressions under the rug of ceremonial deism.<sup>366</sup>

The Court's recitation of official acknowledgments of religion throughout U.S. history is also troubling because it suggests that a government practice must be constitutional if it has existed for some time.<sup>367</sup> Critics have called the appeal to historical examples of official acknowledgments of religion part of a "larger assault on all secular public institutions."<sup>368</sup> The assault relies on the questionable assertion that the Framers founded the United States on Christian principles rather than deist ones, and it encourages the government to be more openly pro-Christian in keeping with these purported roots.<sup>369</sup>

The reliance on longstanding existence and historical acceptance does not account for the practical obstacles that might have prevented challenges of these practices from being brought sooner;<sup>370</sup> it also does not allow the understanding of constitutional protections to evolve as

365. See Feldman, *supra* note 182, at 262 (asserting that a reliance on history "tends to give a constitutional imprimatur to the preexisting symbols and structures of American society—to the symbols and structures of Christian domination"). But see LEVY, *supra* note 287, at 235 ("The founders' preference for Protestantism or Christianity has not only passed out of date; it had no constitutional basis originally.").

366. LEVY, *supra* note 287, at 240.

367. Susan Jacoby, *Original Intent*, MOTHER JONES, Dec. 2005, at 28, 74 (stating that this suggestion "plays neatly into the Christian right's version of history").

368. *Id.*

369. See Allen, *supra* note 58, at 14. One can only call the United States a "Christian" nation at its founding by ignoring the non-Christian religions of the thousands of aboriginal Native American tribes. If these multiple faith groups are taken into account, the pluralistic nature of the United States from its inception is undeniable. Both Allen and this Article use "pluralistic" in a broad sense; it is not limited to those who are politically significant. Scholars such as Howard Zinn have paved the way by refusing to "accept the memory of states as our own" in telling the history of the United States—demolishing the pretense that only the victors represent the nation as a whole. See HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES: 1492-PRESENT 8-11 (3d ed. 2005). This Article proceeds in the same spirit of scholarship, asserting that it is only fair to consider the multitude of inhabitants. After all, not every Christian was politically empowered at the Founding, and yet they are readily taken into account when citing the alleged Christian character of the nation.

370. See *Van Orden v. Perry*, 125 S. Ct. 2854, 2897 (2005) (Souter, J., dissenting) (listing the cost of litigation and the "risk of social ostracism" as reasons why a plaintiff did not file a suit challenging the Texas monument of the Ten Commandments sooner).

American society changes.<sup>371</sup> Instead, the historical-prayer argument fails to recognize that, while the Framers created lofty philosophical ideals for the American government, the social and political realities of eighteenth-century America produced an imperfect manifestation of these principles. Uncontroversial practices from that period, when the vast majority of elected officials and voters were Protestant Christians, may not seem as innocuous today.<sup>372</sup> Perhaps modern sensibilities concerning religious minorities can move America nearer to the Founders' ideals, provided that the Founders' practices do not create an artificial ceiling for determining what the Establishment Clause means and what it should allow.<sup>373</sup> Deeming Christian religious expression to be "secular" conveniently removes the expression from its religious roots,<sup>374</sup> preserves American traditions,<sup>375</sup> and helps the Court maintain its legitimacy with the American public.<sup>376</sup> None of these results seems consistent with conscientious, independent judicial review.

Furthermore, secularizing Christianity-based religious activities and expressions may offend both non-Christians and Christians. Non-Christians might perceive such activities and expressions as "decidedly Christian."<sup>377</sup> 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, devout Christians might reasonably believe that certain

371. See LEVY, *supra* note 287, at 149 ("The Constitution, which serves a nation whose history had made it increasingly democratic and heterogeneous, is equally dynamic."); *id.* at 238 ("The establishment clause should be far broader in meaning now than it was when adopted.").

372. 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 in the time of Jefferson and Madison may today be highly offensive to many persons, the deeply devout and the nonbelievers alike.").

373. See Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353 (2006) (discussing various philosophies of constitutional interpretation, including his own consequentialist approach). See generally CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* (2005).

374. See MONSMA, *supra* note 38, 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.").

375. See *id.* at 214.

376. Justice Antonin 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. ACLU of Ky.*, 125 S. Ct. 2722, 2752 (2005) (Scalia, J., dissenting).

377. Feldman, *supra* note 182, at 267. In this way, ceremonial deism "normalizes many common forms of Christian societal domination" *Id.*

religious expressions can never lose their sacred meaning and become secular expressions of solemnization simply by repeated usage in public, nonreligious ceremonies or government functions.<sup>378</sup> Some believers may even find the suggestion of such a phenomenon—that is, personally meaningful religious statements somehow being secularized—to be an insulting and demeaning proposition.<sup>379</sup> In any event, merely calling an apparently religious expression “secular” does not necessarily make it so.<sup>380</sup>

## 2. THE RELIGIOUS SIGNIFICANCE OF PRAYERS AT NONRELIGIOUS ARMY CEREMONIES

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.”<sup>381</sup> Thus, such practices typically avoid denominational, sectarian references and lack profound religious significance.<sup>382</sup> Recent events demonstrate, however, that prayers at military ceremonies have too much religious significance to be fairly classified as ceremonial deism.

The reaction to the Air Force’s initial *Interim Guidelines* demonstrates that many groups perceive these prayers as far more than bland, secular, patriotic statements. The *Interim Guidelines* required that

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378. As Justice Clarence Thomas has noted, “words 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, 2866-67 (2005) (Thomas, J., concurring); *see also id.* at 2879 (Stevens, J., dissenting) (“Attempts to secularize what is unquestionably a sacred text defy credibility and disserve people of faith.”).

379. *See 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 38, 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 Thomas Berg, The Church-State Battle: Finding the Right Solution*, CHRISTIAN L., Fall 2005, at 22, 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”).

380. *See Marsh*, 463 U.S. at 819 (Brennan, J., dissenting) (noting that prayer, no matter its purported “nonsectarian” nature, is “serious theological business”).

381. *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 630-31 (1989) (O’Connor, J., concurring); *see supra* Part II.A.2.

382. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 42 (2004) (O’Connor, J., concurring) (listing “[a]bsence of reference to [a] particular religion” as an aspect of ceremonial deism).

prayers at Air Force events be brief and nonsectarian, and not advance “specific religious beliefs.”<sup>383</sup> This requirement unleashed a torrent of protest that has continued to the present. In response to the guidelines, Representative Walter Jones (R-N.C.) sent a letter to President George W. Bush on October 25, 2005, asking for an executive order to protect the “military chaplains’ right of free speech.”<sup>384</sup> In December 2005, a Navy chaplain staged a public fast to protest similar guidelines in Navy regulations concerning prayers at nonreligious ceremonies.<sup>385</sup> In March 2006, two Christian seminaries warned that they might stop sending their graduates to serve as military chaplains because of the perceived “restrictions placed on [the] clergy’s right to pray.”<sup>386</sup> The 2007 National Defense Authorization Act proposes amending relevant portions of Title 10 of the United States Code to give all military chaplains “the prerogative to pray according to the dictates of the Chaplain’s conscience, except as must be limited by military necessity.”<sup>387</sup> The controversy does not show signs of relenting.<sup>388</sup>

The requirement that prayers at military ceremonies be nonsectarian and inclusive is not novel. This requirement is consistent with the principles of pluralism in the *Covenant and Code of Ethics for Chaplains of the Armed Forces* from the National Conference on Ministry to the Armed Forces.<sup>389</sup> Military chaplains’ schools use the *Covenant and Code of Ethics*<sup>390</sup> to instruct chaplains to focus on common “beliefs,

383. INTERIM GUIDELINES, *supra* note 14, § B(3).

384. Colarusso, *supra* note 13, at 12. In November 2005, Representative 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.” *Id.*

385. Lively, *supra* note 313.

386. Bryant Jordan, *Seminaries Threaten to Stop Sending Chaplains to Military*, ARMYTIMES.COM (Mar. 6, 2006), <http://www.armytimes.com/legacy/new/1-292925-1579644.php> (listing Bob Jones University Seminary and Temple Baptists Seminary as the authors of the cautionary letter).

387. John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2006).

388. See, e.g., William H. McMichael, *Navy Chaplain at Center of Prayer Controversy to Be Court-Martialed*, ARMYTIMES.COM (May 21, 2006), <http://www.armytimes.com/legacy/new/1-292925-1814225.php> (explaining that Chaplain Gordon Klingenschmitt faced criminal charges after he disobeyed an order not to participate in a news conference on March 30, 2006, that protested the Navy’s policy on public prayer at nonreligious Navy ceremonial events); Alan Cooperman, *Navy Chaplain Guilty of Disobeying an Order*, WASH. POST, Sept. 15, 2006, at A3 (explaining that a Navy court-martial found Klingenschmitt guilty on September 14, 2006).

389. NCMAF, *supra* note 346, para. 8.

390. See *Air Force Backs Down on Policy Allowing Chaplains to Evangelize*, CHURCH & ST., Nov. 2005, at 18, 18 (stating that students at the Air Force Chaplain’s School at Maxwell Air Force Base receive the National Conference on Ministry to the Armed Forces’ guidelines); Lively, *supra* note 313, at 9 (explaining that Navy policy

principles, and practices” when conducting “services of worship” that may include people from diverse religious groups.<sup>391</sup> If such guidance applies at religious worship services—where chaplains’ free speech and free exercise rights are at their peak—then it also applies at nonreligious mandatory 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.<sup>392</sup> If these prayers were genuine examples of ceremonial deism that lacked any religious connotation, then there would have been little resistance to the Air Force’s *Interim Guidelines*. In fact, one might wonder why the National Conference on Ministry to the Armed Forces has not composed a uniform prayer for use at all nonreligious ceremonies. In theory, a uniform prayer would serve the purpose of solemnizing events without trying to “create a spiritual communion” or “invoke divine aid.”<sup>393</sup> It would also help eliminate instances of blatant sectarian proselytism during chaplain-led prayers at mandatory Army events and would provide military chaplains with much-needed predictability.

The lack of such a standard prayer for nonreligious military events and the vitriolic response to the Air Force’s *Interim Guidelines* convincingly demonstrate the continued religious significance of prayers at nonreligious military ceremonies. They are not harmless, nonendorsing acts of ceremonial deism; instead, they are serious theological, religious expressions. They present a much greater danger of creating the perception of government endorsement and of coercing service-member participation in a government-sponsored religious exercise than activities already safely within the ambit of ceremonial deism. Therefore, ceremonial deism does not justify preserving official chaplain-led prayers at mandatory Army ceremonies.

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encourages that chaplains’ prayers at public events demonstrate “sensitivity to the needs of all those present”).

391. NCMAF, *supra* note 346, para. 5.

392. See Julia Duin, *Army Silences Chaplain After Prayer 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”).

393. 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.”).

## 3. MARSH'S LIMITED APPLICABILITY

Finally, although *Marsh* preceded *Lee* and the graduation prayers being challenged in *Lee* were arguably longstanding historical practices,<sup>394</sup> *Lee* did not adopt *Marsh*'s rationale.<sup>395</sup> Similarly, *Marsh* would not control any future Establishment Clause analysis of formal prayers at nonreligious Army events.<sup>396</sup> *Lee* did not apply *Marsh*'s rationale for two reasons: (1) prayers in public schools do not have the same historical stature as legislative prayers, and (2) the settings and audiences for public school and legislative prayers are vastly different.

First, prayers in public school lack the same degree of historical ubiquity as the legislative prayers in *Marsh*.<sup>397</sup> As the Supreme Court noted in *Edwards v. Aguillard*, 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."<sup>398</sup> The Fourth Circuit Court of Appeals used similar reasoning in *Mellen*.<sup>399</sup> General Josiah Bunting, III, 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.<sup>400</sup> 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.<sup>401</sup>

Furthermore, the *Mellen* court believed that subsequent Supreme Court decisions applied *Marsh* "only in narrow circumstances."<sup>402</sup> The court then decided that the VMI premeal prayer did not "share *Marsh*'s

394. See *Lee v. Weisman*, 505 U.S. 577, 581 (1992).

395. *Id.* at 596-97.

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

397. See *id.* at 595-97; see also *Edwards v. Aguillard*, 482 U.S. 578, 583 n.4 (1987). The *Edwards* Court struck down a Louisiana statute that criminalized the teaching of evolution in public schools. *Id.* at 582.

398. *Edwards*, 482 U.S. at 583 n.4. An appeal to historical practices also failed to preserve the challenged prayer in *Engel v. Vitale*, in which proponents argued that the daily prayers allowed students to "share in the spiritual heritage" of the United States. 370 U.S. 421, 445 (1962) (Stewart, J., dissenting).

399. See 327 F.3d at 369-70; see *supra* Part II.B.2.b.

400. *Mellen*, 327 F.3d at 369.

401. *Id.* at 369-70 (quoting *Marsh v. Chambers*, 463 U.S. 783, 791 (1983)).

402. *Id.* at 369; see *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 602 (1989) (explaining that *Marsh* "relied specifically on the fact that Congress authorized legislative prayer at the same time that it produced the Bill of Rights" and declining to extend *Marsh* to the Christmas Nativity display at issue).

‘unique history.’”<sup>403</sup> As a result, the *Mellen* court instead relied on *Lemon* and *Lee* to strike down the practice of official prayer before mandatory VMI dinners.<sup>404</sup>

Because the Army chaplaincy is older than its congressional equivalent, chaplain-led prayers at nonreligious Army events have a stronger claim to *Marsh*’s “unique history” than the VMI prayers or the statute at issue in *Edwards*.<sup>405</sup> The critical distinction, however, is the purpose behind the creation of the respective chaplaincies. From its inception, the congressional chaplaincy has offered prayers to start each day’s session of Congress.<sup>406</sup> 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.<sup>407</sup> Thus, if the First Congress approved of congressional chaplains, then it also likely approved of the legislative prayers those chaplains ineluctably would provide.

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.<sup>408</sup> Saying prayers at Army ceremonies was not an indispensable part of either of these crucial roles, but it instead added formality and solemnity to Army events. Regulatory guidance for Army chaplains conducting such prayers reflected this reality for the latter half of the twentieth century.<sup>409</sup>

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403. *Mellen*, 327 F.3d at 370.

404. *See id.* at 370-74.

405. *See, e.g., Marsh*, 463 U.S. at 788-89; *Edwards*, 482 U.S. at 580-81.

406. *Marsh*, 463 U.S. at 788. Because performing invocations before each daily session had been the role of chaplains for the Continental Congress as well, the First Congress had a clear expectation of the role of congressional chaplains after 1791. *See id.* at 783-84.

407. MILDRED AMER, HOUSE AND SENATE CHAPLAINS 2 (2006), <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), [http://clerk.house.gov/histHigh/Congressional\\_History/chaplains.html](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).

408. *See supra* notes 340-43 and accompanying text (discussing the primary roles of chaplains).

409. *See, e.g.,* U.S. DEP’T OF ARMY, REG. 165-1, CHAPLAIN ACTIVITIES IN THE UNITED STATES ARMY § 4-5(d) (1989); U.S. DEP’T OF ARMY, REG. 165-20, DUTIES OF CHAPLAINS AND RESPONSIBILITIES OF COMMANDERS § 4-5(d) (1985); U.S. DEP’T OF ARMY, REG. 165-20, DUTIES OF CHAPLAINS AND COMMANDERS’ RESPONSIBILITIES § 2-1(a) (1979); U.S. DEP’T OF ARMY, REG. 165-20, DUTIES OF CHAPLAINS AND COMMANDERS’

In light of ongoing military campaigns, the essential roles of modern chaplains are largely consistent with their Revolutionary War origins—accompanying troops into combat, providing comfort to mortally wounded soldiers, counseling the wounded and grieving, and preserving soldiers free exercise rights in austere, remote locations.<sup>410</sup> These roles are also consistent with the First Congress’s expectations regarding the Army chaplaincy. The offering of formal prayers at nonreligious Army events is not as consistent with these expectations, and therefore it is not worthy of the same judicial deference as the offering of legislative prayers by congressional chaplains. Thus, it does not directly follow that, simply because the First Congress approved of Army chaplains, it also approved of official chaplain-led prayers during the Army’s nonreligious mandatory 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 and public-school prayers occur.<sup>411</sup> The *Lee* Court noted the “obvious differences” between public-school graduations and state legislative sessions.<sup>412</sup> The legislative sessions at issue in *Marsh* involved mature, sophisticated adults who were free to “enter and leave” the legislative chambers during the daily invocation<sup>413</sup>—not impressionable and unsophisticated public-school students who were effectively unable to leave the graduation ceremony.<sup>414</sup> The legislators in *Marsh* debated and voted on “whether and where” to have prayers, but graduating students “ha[d] the prayers imposed on them” by school officials.<sup>415</sup> Moreover, the prayers in *Marsh* occurred before each daily legislative session,<sup>416</sup> which lacked the significance of a school

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RESPONSIBILITIES § 2-1(a) (1976); U.S. DEP’T OF ARMY, REG. 165-20, DUTIES OF CHAPLAINS AND COMMANDERS’ RESPONSIBILITIES § 3(f) (1966) (on file with the Wisconsin Law Review).

410. *Katcoff v. Marsh*, 755 F.2d 233, 227-28 (2d Cir. 1985); Rod Dreher, *Ministers of War*, NAT’L REV., Mar. 10, 2003, at 30, 33 (“I’ve seen about 75 kids on the threshold of eternity. That keeps me motivated, because I’m concerned about eternal life.” (quoting Chaplain Vincent Inghilterra)); Kristin Henderson, *In the Hands of God*, WASH. POST MAG., Apr. 30, 2006, at 8, 41-42 (describing chaplains’ ministry to seriously wounded soldiers at combat-support hospitals in Iraq).

411. *Lee v. Weisman*, 505 U.S. 577, 597 (1992).

412. *Id.*

413. *See id.*

414. *See id.*

415. *Weisman v. Lee*, 908 F.2d 1090, 1096 (1st Cir. 1990) (Bownes, J., concurring), *aff’d* 505 U.S. 577 (1992).

416. *Marsh v. Chambers*, 463 U.S. 783, 784 (1983).

graduation ceremony.<sup>417</sup> Finally, in *Marsh*, legislators tried to “invoke spiritual inspiration entirely for their own benefit without directing any religious message at the citizens” they represented.<sup>418</sup> 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.<sup>419</sup>

The Supreme Court has not retreated from this distinction between school and nonschool settings, even in recent decisions that stressed the historical, longstanding nature of an activity with religious meaning.<sup>420</sup> Because the Army’s formative environment more closely resembles a public school than a legislative chamber, *Lee* would control a constitutional analysis of official chaplain-led prayers at mandatory Army ceremonies. Thus, *Marsh*’s reliance on history would not undercut *Lee*’s invalidation of such Army prayers.

## VII. CONCLUSION AND RECOMMENDATIONS

The current practice of offering official chaplain-led prayers during mandatory, nonreligious, Army 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. Pursuant to the *Lee* coercion test, such prayers force a captive audience of soldiers to participate in a government-sponsored and -conducted religious exercise. Further, such prayers do not qualify as ceremonial deism because of their patently religious character and enduring religious significance. 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 prayers at nonreligious Army events compels a different conclusion about their unconstitutional nature.

These observations about chaplain-led prayers at mandatory Army ceremonies necessitate a simple recommendation: discontinue official prayers at mandatory Army ceremonies. These prayers have nominal potential benefits but large potential costs—the most significant cost

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417. See *Lee*, 505 U.S. at 597 (calling graduation the “one school event most important for the student to attend”); *Lee*, 908 F.2d at 1096 (Bownes, J., concurring) (noting that a prayer during the graduation ceremony “takes on special significance”).

418. *Lee*, 505 U.S. at 630 n.8 (Souter, J., concurring).

419. *Id.* at 586-87 (majority opinion).

420. See, e.g., *Van Orden v. Perry*, 125 S. Ct. 2854, 2863-64 (2005) (plurality opinion) (upholding the display of a granite Ten Commandments monument on the grounds of the Texas statehouse but distinguishing that display from Ten Commandments displays in public-school classrooms and from “the prayers involved in *Schempp* and *Lee*”).

being the adverse effect on the morale and dignity of soldiers who are forced to participate in a government-sponsored and -conducted religious ceremony.<sup>421</sup> Removing such prayers would not indicate that the Army is buckling to a heckler's veto; instead, it would clearly signify the Army's desire to have all of its soldiers, regardless of personal religious beliefs, 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 maintains the religious liberty of all and prevents dominant religious groups from using the machinery of the government to impose their dogma and modes of worship on others. If the military is, as it arguably 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 such prayers, however, the Army is clinging to the notion that Christianity-based prayer should be a formal part of nonreligious public events. This notion, from a bygone era of widespread official discrimination and hostility towards religious minorities, is antithetical to American religious pluralism.

If solemnizing an event is indispensable, the ceremony narrator could simply ask members of the audience to pause thoughtfully in a moment of silence in place of a potentially offensive chaplain-led prayer.<sup>422</sup> If the Army still insists on using prayers to solemnize mandatory events, it should either adopt the standards for such prayers listed in the Air Force's *Interim Guidelines*<sup>423</sup>—requiring these prayers to be brief, nonsectarian, and not religion-specific—or draft a uniform prayer for use at all Army ceremonies. Assuming that the drafting of

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421. Cf. Poppleton, *supra* note 256 (“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.”).

422. See Nat'l Conference for Cmty. & Justice, *When You Are Asked to Give Public Prayer in a Diverse Society: Guidelines for Civic Occasions*, <http://65.214.34.18/PublicPrayerBrochure.pdf> (“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 beyond the scope of this Article. 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 in which audible prayer would be impermissible. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 40, 61 (1985) (striking down a statute requiring a moment of silence at the start of each school day in Alabama public schools).

423. See U.S. DEP'T OF NAVY, SECNAV INSTRUCTION 1730.7C, RELIGIOUS MINISTRY WITHIN THE DEPARTMENT OF THE NAVY § 6(c) (2006) (explaining that “religious elements for a command function,” other than worship services, should ordinarily “be non-sectarian in nature” and that chaplains may choose whether to participate “based on his or her faith constraints”).

such a prayer would not itself violate the Establishment Clause,<sup>424</sup> 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 perceived religious significance with each successive recitation. In any event, the uniform prayer is the least desirable alternative to the status quo. The current operating environment—in which chaplains have only vague guidance about the ad hoc prayers they must compose for each separate ceremony—is highly prone to constitutional abuses. American society expects much more from its armed forces.

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424. Courts would likely not approve of the government drafting prayers, even for use in nonreligious ceremonies. *See, e.g., Lee*, 505 U.S. at 590 (“[S]chool officials [may not] assist in composing prayers as an incident to a formal exercise for their students.”); *Mellen v. Bunting*, 181 F. Supp. 2d 619, 637 (W.D. Va. 2002) (holding that the VMI chaplain’s drafting of premeal prayers was excessive entanglement between the government and religion), *aff’d in part vacated in part*, 327 F.3d 355 (4th Cir. 2003). Courts might also classify such drafting as an activity that fostered excessive entanglement between the government and religion in violation of the *Lemon* test.