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I. INTRODUCTION

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. Amend. I.

The United States military is a unique institution in that our Supreme Court permits the Department of Defense ("DoD") to employ clergy, called Chaplains, as full time members of the force. However, a non-Christian or atheist in the military might consider whether they were cut from the wrong cloth—with frequent prayers at public events, reverberating with the inspiration of Christian invocations, substituting "in His name" for "in Jesus' name," or other such litany. The crusade mounted herein concerns the DoD and constitutional limitations applicable to

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religious practices in the military, with an emphasis on the Chaplaincy and public prayer. Even with consideration of the constitutionality of the Chaplaincy, common religious practices in the military appear to run afoul of both DoD regulations and constitutional case law. These include prayers at nonreligious, mandatory events, particularly when they are recurring, as well as unit pressure, particularly from leadership, to adopt religion or religious activities.

The First Amendment is the primary guidance for determining a formative stance on the appropriate separation of church and state.[1] There are two clauses in the First Amendment that provide the legal analysis for determining the constitutionality of religious activities in the public sector, the Establishment Clause and the Free Exercise Clause.[2] The former forbids government endorsement of religion, and the latter forbids the government from infringing on an individual's personal practice of his or her religion.[3] While there is much debate over the founders' intentions for the balance between the religion clauses in the Constitution[4]—if a singular objective can even be gleaned—the Supreme Court has developed significant jurisprudence on the matter.[5] Though waxing and waning, these cases ultimately set the outermost boundaries for what role religion can play in the federal government.

One thing is for certain, the greatest threat to a realistic discussion of this issue is the continued misbranding of the debate. It is not about freedom of religion in the military. Consider the following quote to illustrate this common failure to properly frame the question. In response to the DoD's meeting

1. U.S. CONST. amend. I.
2. *Id.*
3. *Id.*
4. *See, e.g.*, John W. Whitehead, *The Conservative Supreme Court and the Demise of the Free Exercise of Religion*, 7 TEMP. POL. & CIV. RTS. L. REV. 1, 73, 79–84 (1997); Michael A. Rosenhouse, Annotation, *Construction and Application of Establishment Clause of First Amendment—U.S. Supreme Court Cases*, 15 A.L.R. FED. 2d 573, 585 (2007).
5. *See, e.g.*, McCreary Cnty. v. ACLU of Ky., 545 U.S. 844 (2005); Van Orden v. Perry, 545 U.S. 677 (2005); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000); Lee v. Weisman, 505 U.S. 577 (1992); Cnty. of Allegheny v. ACLU, 492 U.S. 573 (1989), *abrogated by* Town of Greece v. Galloway, 134 S. Ct. 1811 (2014); Lemon v. Kurtzman, 403 U.S. 602 (1971); Engel v. Vitale, 370 U.S. 421 (1962).

with Michael Weinstein, an admittedly provocative critic of religious practices in the military, Tom Perkins of the Family Research Council stated, "[w]hy would military leadership be meeting with one of the most rabid atheists in America to discuss religious freedom in the military[?]"[6] Mr. Weinstein's positions aside, the answer to Mr. Perkins question is, of course, atheists, rabid, or otherwise, have *the exact same protections* afforded under the First Amendment as do religious people. The issue is not religious freedom, but of determining the appropriate constitutional balance between the Establishment and Free Exercise Clauses. The analysis of this Article looks to determine the parameters of this balance as follows.

Section Two begins with a review of military regulations addressing religious practices among service members. In addition to DoD regulations, Air Force Instruction 1-1 ("AF 1-1") is used as a branch-specific example.[7] While it is the clearest direction the Air Force provides, it nevertheless falls short of an applicable guide. While AF 1-1 was intended to mitigate questionable religious practices, even read in a light most constitutionally favorable, this document may well fail the requirements of the First Amendment.

Section Three reviews applicable case law. The review begins with the case of *Lemon v. Kurtzman*—the leading case on the religious clauses of the First Amendment—where the Supreme Court established the *Lemon* test.[8] While Establishment Clause cases have inspired some legal scholars to believe that the *Lemon* test has been replaced,[9] a deeper reading demonstrates that *Lemon* remains applicable and useful.[10] The following Section

6. Todd Starnes, *Pentagon: Religious Proselytizing is Not Permitted*, FOX NEWS, http://radio.foxnews.com/toddstarnes/top-stories/pentagon-religious-proselytizing-is-not-permitted.html (last visited Oct. 26, 2014) (quoting Tony Perkins, President, Family Research Council) (internal quotation marks omitted).

7. U.S Air Force Instruction No. 1-1, ¶ 2.11 (2012) [hereinafter AFI 1-1], *available at* http://static.e-publishing.af.mil/production/1/af/publication/afi1-1/afi1-1.pdf.

8. 403 U.S. at 612–13.

9. *See, e.g.*, Major (ret.) David E. Fitzkee & Captain Linell A. Letendre, *Religion in the Military: Navigating the Channel Between the Religion Clauses*, 59 A.F. L. REV. 1, 11 (2007).

10. *See, e.g.*, *Lee*, 505 U.S. at 587; *Allegheny*, 492 U.S. at 620–21; *see also* Mellen v. Bunting, 327 F.3d 355, 371 (4th Cir. 2003) (applying the *Lemon*

outlines the strict scrutiny standard of review applied in free exercise cases, focusing on *Sherbert v. Verner*.[11] Next the Article reviews *Katcoff v. Marsh*, the preeminent case on the constitutionality of the military Chaplaincy.[12] There, the Second Circuit found that the Chaplaincy was constitutional insofar as its activities served the compelling interest of religious accommodation *only* where no alternative method of accommodation was available.[13] Indeed, the Supreme Court remanded the case to determine whether certain military installations actually required religious accommodation funded by the government in areas where civilian religious establishments were available.[14]

Next, the Article progresses into a judicial review of public prayer in the forum from which most of the relevant case law has developed, schools. The Supreme Court has acknowledged that prayer in primary and secondary education institutions poses a potentially high risk of coercion,[15] and the nondenominational nature of prayer is irrelevant in this determination as such activity is inherently unconstitutional.[16] Further, at least by the language of the courts, the prohibitions utilized in primary and secondary education institutions are not limited to these forums.[17] In the post-secondary educational forum, the Fourth Circuit, in *Mellen v. Bunting*, determined that military colleges suffer similar coercive issues with school-sponsored prayer as did the aforementioned schools.[18] The one limited exception to the prohibition on government sponsored religious activity is found in legislative prayer.[19]

Section Four reviews religious activity using free speech

criteria and "treating the endorsement test *as a refinement* of *Lemon*'s second prong" (emphasis added)).

11. 374 U.S. 398 (1963).
12. 755 F.2d 223, 224 (2d Cir. 1985).
13. *Id.* at 237.
14. *Id.* at 238.
15. *Lee*, 505 U.S. at 586–87.
16. *Id.* at 610; *see also* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 224–25 (1963); Engel v. Vitale, 370 U.S. 421, 430 (1962).
17. *See* Mellen v. Bunting, 327 F.3d 355, 368 (4th Cir. 2003).
18. *Id.* at 371; *accord* Anderson v. Laird, 466 F.2d 283, 295–96 (D.C. Cir. 1972).
19. *See* Town of Greece v. Galloway, 134 S. Ct. 1811, 1819 (2014); Marsh v. Chambers, 463 U.S. 783, 794–95 (1983).

analysis, focusing on *Widmar v. Vincent*, the major case on the topic.[20] This case clarified that by permitting general access to a facility, a school creates an open forum that cannot be limited as to content without a compelling government interest.[21] This Section also addresses *Greer v. Spock,* the case which clarified that a military base is *not* a public forum.[22] By analogy, Section Three addresses another area where speech has seen major restriction by the military and federal government, political speech.[23]

Section Five reviews why coercion is an inherent part of the military, which magnifies the need for special care in determining appropriate religious activity. This analysis considers the purpose underlying Article 31 of the Uniform Code of Military Justice ("UCMJ")[24] and revisits the reasoning of *Mellen*.[25]

Section Six applies the case law to military prayer. The analysis then extends into more opaque hypothetical situations, many based upon current military activities. These activities include proselytizing at work and military media outlets encouraging spiritual activity.

This Article poses a large number of questions, some rhetorical, some actual. While this Article's thesis is that the military is vulnerable to successful legal action in the future, the constitutionally permissible religious activities of the military

20. 454 U.S. 263 (1981).

21. *Id.* at 269–70.

22. 424 U.S. 828, 838 (1976).

23. *See, e.g.*, Connick v. Myers, 461 U.S. 138, 146 (1983) ("When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."); Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968) ("[A] teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."); *see also* The Hatch Act, 5 U.S.C. §§ 7321–7326 (2012) (regulating the political activities of government employees);U.S. Department of Defense Directive No. 1344.10 (2008) [hereinafter DoD Dir. 1344.10], *available at* http://www.dod.mil/dodgc/defense_ethics/ethics_regulation/1344-10.html (providing DoD "policies on political activities of members of the Armed Forces").

24. Uniform Code of Military Justice, 10 U.S.C. § 831 (2012) (prohibiting compulsory self-incrimination in the military).

25. 327 F.3d 355, 371–72 (4th Cir. 2003).

have not yet been squarely addressed.[26] Therefore, these questions serve to highlight the complexity and, in some cases, the severity of the issue of religious practices in the military.

II. CURRENT STATUS OF THE DOD ON RELIGIOUS PRACTICES

Before addressing the constitutional questions, this Section addresses the current military regulations on both the Chaplaincy and military prayer. The takeaway, in most cases, is that the regulations are vague at best. Further, many of these regulations, at the least, skirt the constitutional line and may cross it.

Department of Defense Directive 1304.19 lists the purposes of the Chaplaincy.[27] The regulation explains that the function of the Chaplaincy is to: (1) "advise and assist commanders in the discharge of their responsibilities"; (2) "provide for the free exercise of religion in the context of military service as guaranteed by the Constitution"; (3) "assist commanders in managing Religious Affairs"; and (4) "serve as the principal advisors to commanders for all issues regarding the impact of religion on military operations."[28] While it is unclear from the regulation whether the list is exhaustive, in actuality some practices of the military Chaplaincy extend past these primary duties.

To use the Air Force as an example, AF 1-1 gives some advice on the general application of religious practices in the military.[29] Paragraph 2.11 explains:

> Leaders at all levels must balance constitutional protections for an individual's free exercise of religion or other personal beliefs and the constitutional prohibition against governmental establishment of religion. For example, they must avoid the actual or apparent use of

26. For an excellent review of grievances filed against the military thus far, as well as a platform for a successful suit against the military, see Jeffrey Lakin, Note, *Atheists in Foxholes: Examining the Current State of Religious Freedom in the United States Military*, 9 FIRST AMEND. L. REV. 713, 735–36 (2011).

27. *See* U.S. Department of Defense Directive No. 1304.19, ¶ 4.1 (2004) [hereinafter DoD Dir. 1304.19], *available at* http://www.dtic.mil/whs/directives/corres/pdf/130419p.pdf; *accord* U.S Air Force Instruction No. 52-101 (2013), *available at* http://static.e-publishing.af.mil/production/1/af_hc/publication/afi52-101/afi52-101.pdf.

28. *See* DoD Dir. 1304.19, *supra* note 27, ¶ 4.1.

29. AFI 1-1, *supra* note 7, ¶ 2.11.

> their position to promote their personal religious beliefs to their subordinates or to extend preferential treatment for any religion.[30]

Note, the first line of the paragraph identifies two protections: (1) "an individual's free exercise of religion" and (2) "other personal beliefs."[31] What are these "other personal beliefs"? The next sentence does not clarify, but provides, what appears to be, nonexclusive examples of what leaders are prohibited from doing.[32] Leaders are prohibited from: (1) promoting "their personal religious beliefs" or (2) giving "preferential treatment for any religion."[33] To determine what is meant by "other personal beliefs," a starting point might be to ask the following questions: to an atheist, wouldn't even a nondenominational prayer promote a leader's personal religious beliefs? Indeed, would it not show favoritism to the faithful over nonreligious? Isn't it possible that "other personal beliefs," includes—and perhaps refers directly to—a lack of religious belief, particularly as juxtaposed with the prior language which accounts for religious personnels' "free exercise of religion?" Taking the analysis one step further, doesn't a nondenominational prayer appear to show military preference for Christianity when conducted at a public military event by a Christian Chaplain, in a fashion typically affiliated with Christian invocations, at the behest of the base commander or other high ranking official?

Consider the language of the Air Force's 2006 Revised Interim Guidelines Concerning Free Exercise of Religion in the Air Force:

> Voluntary participation in worship, prayer, study, and discussion is integral to the free exercise of religion. Nothing in this guidance should be understood to limit the substance of voluntary discussions of religion, or the exercise of free speech, where it is reasonably clear that the discussions are personal, not official, and they can be reasonably free of the potential for, or appearance of, coercion.

30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*

> Public prayer should not imply Government endorsement of religion and should not usually be part of routine official business. Mutual respect and common sense should always be applied, including consideration of unusual circumstances and the needs of the command. Further, non-denominational, inclusive prayer or a moment of silence may be appropriate for military ceremonies of special importance when its primary purpose is not the advancement of religious beliefs. Military chaplains are trained in these matters.[34]

An inartful drafting begs the question, is it the ceremony that cannot have the primary purpose of advancing religion or the prayer that cannot have the primary purpose of advancing religion? With regard to the former reading of the regulation, the sheer presence of the Chaplain during such an event demonstrates its religious nature. If the prayer itself does not make the event primarily religious, at what point is that threshold met? The next question is, what are "military ceremonies of special importance"?[35] Are they Military Developmental Education graduations, base-sponsored remembrances, or monthly base readiness runs? Regarding the latter reading of the regulation, when would even a nondenominational prayer *ever* have a primary purpose that was not to advance religious beliefs, particularly if conducted by a Chaplain? Perhaps a secular appeal for good tidings might have that purpose, but then why use federal funds to pay a Chaplain for that purpose? Realistically, no "prayers" are secularized, frequently concluding with "in His name" or other directly religious references. Even if the regulation is deemed to permit prayers at most Air Force events, this does not guarantee its constitutionality. Indeed, it is likely the Supreme Court would take issue with some of these practices. To expound, this analysis continues with the case law on the religion clauses.

34. Memorandum from the Sec'y, Air Force & the Chief-of-Staff, Air Force to All Major Commands on Revised Interim Guidelines Concerning Free Exercise of Religion in the Air Force (Feb. 9, 2006).

35. *Id.*

III. THE RELIGION CLAUSES

The Establishment Clause, as previously addressed, has been interpreted to prohibit a certain intermingling of government and religion, whereas the Free Exercise Clause guarantees the ability of the populace to engage in religious practices free of government intervention.[36] Determining which clause forms the basis of a court's analysis depends on whether religious activity is undertaken by a government actor (Establishment) or prohibited by a government actor (Free Exercise).[37] The former requires application of what the Supreme Court has entitled the *Lemon* test.[38] The latter requires the application of the strict scrutiny test where a government action is not religiously neutral.[39]

A. *The Establishment Clause: The* Lemon *Test*

The Court's decision in *Lemon v. Kurtzman* stemmed from constitutional challenges to state government aid that was being given to Rhode Island and Pennsylvania private, religious schools to be used for secular subjects.[40] In a stunning example of what must be termed puritan modesty, the Court explained the ambiguous line between the religion clauses, stating, "we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law."[41] The Court further stated, "[t]he language of the Religion Clauses of the First Amendment is

36. U.S. CONST. amend. I; *see also* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 876–77 (1990) ("The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all 'governmental regulation of religious beliefs as such.'" (quoting Sherbert v. Verner, 374 U.S. 398, 404 (1963))), *superseded by statute*, Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 (2012), *as recognized in* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014); Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

37. *See Smith*, 494 U.S. at 877; Harris v. City of Zion, 927 F.2d 1401, 1410 (7th Cir. 1991).

38. *See Lemon*, 403 U.S. at 612.

39. *See Smith*, 494 U.S. at 876–82; *Sherbert*, 374 U.S. at 402–03.

40. 403 U.S. at 606–07. In particular, Pennsylvania reimbursed the schools for the cost of salaries, textbooks, and instructional materials for teachers that taught secular subjects. *Id.* Rhode Island paid a fifteen percent salary increase directly to secular teachers, bypassing the schools completely. *Id.* at 607.

41. *Id.* at 612.

at best opaque."[42] However, the Court elaborated, "[i]ts authors did not simply prohibit the establishment of a state church or a state religion . . . Instead they commanded that there should be no law respecting an establishment of religion."[43] The Court noted:

> Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.[44]

Based upon this analysis, the Court held that three particular government actions were prohibited, "sponsorship, financial support and active involvement of the sovereign in religious activity."[45] In deeming the two state statutes unconstitutional, the Court explained that the appropriate test for determining a permissible law challenged under the Establishment Clause is: (1) if the law has a secular purpose;[46] (2) if its principle or primary effect neither advances nor inhibits religion; and (3) if it does not foster excessive government entanglement with religion.[47] Indeed, the Court explained that the more people that are served by programs of this nature, the greater the offense to the Establishment Clause, as political division would ensue.[48]

The argument has been made that there are independent legal tests, separate from *Lemon*, upon which the Supreme Court has relied.[49] This is unsurprising as the majority in *Lemon*

42. *Id.*

43. *Id.* (quoting U.S. CONST. amend. I) (internal quotation marks omitted).

44. *Id.* at 622.

45. *Id.* at 612 (citing Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 668 (1970)).

46. Later case law clarified that, in order to satisfy the "purpose" element, one must look at the statute through the lens of an "objective observer." *See* Fitzkee & Letendre, *supra* note 9, at 9; *see also* Harris v. City of Zion, 927 F.2d 1401, 1411–14 (7th Cir. 1991). As such, the court must be able to conceive a secular purpose such as education, health, or safety. *See id.* at 1411. If there are multiple purposes, the primary purpose must be secular. *See* Fitzkee & Letendre, *supra* note 9, at 9.

47. *Lemon*, 403 U.S. at 612–13.

48. *Id.* at 622.

49. *See, e.g.*, Fitzkee & Letendre, *supra* note 9, at 11; *see also* Mellen v. Bunting, 327 F.3d 355, 370–71 (4th Cir. 2003).

referred to the elements of the *Lemon* test independently as three tests.[50] An article offered that the Supreme Court has established a separate "endorsement test," citing *County of Allegheny v. ACLU*.[51] In *Allegheny*, the Court prohibited a crèche on public property, which read, "[g]lory to God for the birth of Jesus Christ."[52] The theory behind the two authors' contention is that in order to violate the Constitution, a law must actually and directly endorse religion.[53] However, the Court in *Allegheny* explicitly references the *Lemon* test, and it only indicates that "[i]n recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion, a concern that has long had a place in our Establishment Clause jurisprudence."[54] The Court does not discount *Lemon*, but clarifies that "despite divergence at the bottom line, . . . the government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs."[55] In other words, *at the least*, the Establishment Clause is violated by government endorsement of religion. An actual endorsement test is only derived from Justice O'Connor's concurrence in *Allegheny*.[56] Indeed later courts saw the endorsement test simply as a refinement of the second prong of the *Lemon* test.[57]

The aforementioned article also referenced a "coercion test," which it derived from *Lee v. Weisman*.[58] Dealt with in greater detail below, the claimant in *Lee* sought to enjoin a rabbi from providing a nondenominational prayer at a public school graduation ceremony.[59] The Court found the activity unconstitutional due to the quasi-obligatory nature of a

50. *Lemon*, 403 U.S. at 612–13

51. Fitzkee & Letendre, *supra* note 9, at 11 (citing Cnty. of Allegheny v. ACLU, 492 U.S. 573, 597 (1989)).

52. 492 U.S. at 599–602.

53. Fitzkee & Letendre, *supra* note 9, at 11–12.

54. 492 U.S. at 592.

55. *Id.* at 597.

56. *Id.* at 627 (O'Connor, J., concurring in part and in the judgment).

57. *See, e.g.*, Mellen v. Bunting, 327 F.3d 355, 371 (4th Cir. 2003).

58. Fitzkee & Letendre, *supra* note 9, at 11–12 (citing Lee v. Weisman, 505 U.S. 577, 587 (1992)).

59. 505 U.S. at 583–84.

graduation ceremony.[60] According to proponents of the coercion test, "[t]he Court in *Lee* specifically declined to reconsider the *Lemon* test and instead used the coercion analysis to strike down the prayer."[61] To clarify, the Court in *Lee* appears to only be remarking that it would not reconsider the *Lemon* test in order to overrule *Lemon*, as requested by the petitioner in the case.[62] The intent was not to discount the *Lemon* test, but to acknowledge the violation in *Lee* to be so flagrant as to fail even the limited requirement that, "at a minimum, the Constitution guarantees that 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.'"[63] The nomenclature of the coercion test, once again, appears to derive from Justice O'Connor's concurrences.[64]

The Supreme Court has made a firmer constitutional front against certain extreme instances of government religious activity, resulting in alternate tests being derived. However, the *Lemon* test is still alive and well.

B. *Free Exercise*

Free exercise has also gleaned multiple tests. In *Reynolds v. United States*, the court reviewed a conviction against a member of the Mormon faith who violated the anti-bigamy laws in taking a second wife.[65] The defendant challenged the law on free exercise grounds.[66] The Court explained that even the founding of the United States saw constitutional protections inapplicable in instances "in violation of social duties or subversive of good order."[67] The Court, therefore, upheld the conviction on the basis

60. *Id.* at 586.

61. Fitzkee & Letendre, *supra* note 9, at 11 n.66; *see also Mellen*, 327 F.3d at 370.

62. *See Lee*, 505 U.S. at 587.

63. *Id.* (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).

64. *See* Cnty. of Allegheny v. ACLU, 492 U.S. 573, 628–29 (1989) (O'Connor, J., concurring in part and in the judgment), *abrogated by* Town of Greece v. Galloway, 134 S. Ct. 1811 (2014); *see also* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 44 (2004) (O'Connor, J., concurring in the judgment), *abrogated by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014).

65. 98 U.S. 145, 161 (1878).

66. *Id.* at 161–62.

67. *Id.* at 164.

that from its founding, polygamy was not deemed protected under the Free Exercise Clause.[68] The Court further explained the ramifications of allowing practices such as polygamy.[69] It explained that convicting citizens for polygamy who do so for religious purposes versus secular purposes introduced a new element to criminal law.[70] Further, allowing polygamy for religious purposes promised a slippery slope of protection for religious practices of even greater public concern, such as human sacrifice.[71] This case, while beginning the analysis, does not provide an easily applicable rule for future cases.[72]

The Court in *Sherbert v. Verner* provided the modern standard for most free exercise jurisprudence.[73] The case involved the denial of unemployment benefits to a Seventh Day Adventist Church member who was fired for the inability to work on Saturdays, which was part of her religious obligation.[74] The law allowed employers to preclude benefits from individuals who refused suitable work provided by the employer, and the state found that failure to accept work on Saturday fell under this preclusion.[75] The Court reversed the state's decision explaining that the petitioner's religious beliefs were not that which "posed some substantial threat to public safety, peace or order," and the state provided no compelling government interest to justify the prohibition.[76] The Court explained, "'[o]nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation.'"[77] In explaining how this burden is met by a party, the Court used the example of Sunday closing laws—which put

68. *Id.* at 165.
69. *Id.* at 166.
70. *Id.*
71. *Id.*
72. *See* Emp't Div., Dept. of Human Res. of Or. v. Smith, 494 U.S. 872, 906 (1990) (holding that Oregon could deny unemployment benefits to members of the Native American church who ingested peyote in violation of a generally applicable law against peyote, even without a compelling government interest), *superseded by statute*, Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4, *as recognized in* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).
73. 374 U.S. 398, 402–03 (1963); c*f. Smith*, 494 U.S. at 876–82.
74. *Id.* at 399–400.
75. *Id.* at 401.
76. *Id.* at 402–03.
77. *Id.* at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

Jewish merchants who could not work on Saturday at a disadvantage—as satisfying a strong state interest in a rest day for all workers.[78]

C. *The Religion Clauses and the Military Chaplaincy*

The Chaplaincy is a regular installment at many military events, frequently beginning events with a nondenominational invocation. Courts have found the Chaplaincy to be constitutional, but only for specific purposes.[79] In *Katcoff v. Marsh*, the Second Circuit reviewed a case that involved a constitutional challenge brought by two law students, claiming that the Army Chaplaincy was an unconstitutional violation of the Establishment Clause.[80] The Second Circuit explained that there is a long history of the Chaplaincy in the military.[81] Further, the fact that the military sends troops outside of their home environments, subject to deadly circumstances, necessitates Chaplains that can move with the military in order to satisfy their rights under the Free Exercise Clause.[82] The court noted, "[t]he chaplain's principal duties are to conduct religious services (including periodic worship, baptisms, marriages, funerals and the like), to furnish religious education to soldiers and their families, and to counsel soldiers with respect to a wide variety of personal problems."[83] The court reiterated its formula, explaining:

> The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious

78. *Id.* at 408 (citing Braunfeld v. Brown, 366 U.S. 599, 605 (1961)). It is interesting that the Court uses "Blue Laws" as an example of a sufficient, compelling government interest. The preceding paragraph described the requirement that a limitation on free speech must be narrowly tailored to serve a compelling governmental interest; yet, a law requiring employees receive *any* one day a week off could accomplish the same goal without unduly impacting individuals unable to work on Saturday.

79. *See, e.g.*, Katcoff v. Marsh, 755 F.2d 223, 226 (2d Cir. 1985).

80. *Id.* at 224–25.

81. *Id.* at 225.

82. *Id.* at 228, 232.

83. *Id.* at 228.

> instruction.[84]

The court continued:

> Since the program meets the requirement of voluntariness by leaving the practice of religion solely to the individual soldier, who is free to worship or not as he chooses without fear of any discipline or stigma, it might be viewed as not proscribed by the Establishment Clause.[85]

The court elaborated that, looking at the Chaplaincy according to the *Lemon* test, on its face it appeared unconstitutional.[86] However, looked at in light of the War Powers and Free Exercise Clauses, the opposite conclusion was reached.[87] Further:

> The purpose and effect of the program is to make religion, religious education, counseling and religious facilities available to military personnel and their families under circumstances where the practice of religion would otherwise be denied as a practical matter to all or a substantial number.[88]

Note however, that the court did not contend that the ability of the clergy to engage in religious activity under the Free Exercise Clause was absolute:

> If the ability of such personnel to worship in their own communities is not inhibited by their military service and funds for these chaplains and facilities would not otherwise be expended, the justification for a governmental program of religious support for them is questionable and, notwithstanding our deference to Congress in military matters, requires a showing that they are relevant to and reasonably necessary for the conduct of our national defense by the Army.[89]

84. *Id.* at 231 (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)) (internal quotation marks omitted).
85. *Id.* at 231–32.
86. *Id.* at 232.
87. *Id.* at 234–35.
88. *Id.* at 237.
89. *Id.* at 238.

The court ultimately determined that the Chaplaincy is constitutional in certain circumstances, limited to what is necessary to provide for the accommodation of military members' free exercise when those members are deprived of access to clergy due to military service.[90] Indeed, based upon the court's limited holding, the case was remanded to determine whether Chaplaincy programs were required in busy, urban areas where civilian religious establishments are available.[91]

D. Engel v. Vitale *and Progeny: Public Prayer*

In *Katcoff*, the Second Circuit held that the use of the Chaplaincy for limited purposes is constitutional.[92] While this could easily serve to satisfy the issue, it fails to address public prayers at military events. Without dispositive rulings, analysis of this issue must be derived from persuasive case law. While not in the active duty military context, the issue has been addressed with regard to public schools.

Engel v. Vitale, involved a New York public school system that directed each class to recite the prayer on a daily basis, "[a]lmighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."[93] The policy permitted those who were not interested to refrain or leave the room.[94] The Supreme Court held, "[t]here can, of course, be no doubt that New York's program of daily classroom invocation of God's blessings as prescribed in the Regents' prayer is a religious activity. It is a solemn avowal of divine faith and supplication for the blessings of the Almighty."[95] In finding this prayer unconstitutional, the Court explained:

> *[T]he constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for <u>any group of the American people</u> to recite as a part of a religious program carried on by government.* It is a matter of history that this very

90. *Id.* at 237–38.
91. *Id.* at 238.
92. *Id.*
93. 370 U.S. 421, 422 (1962).
94. *Id.* at 430.
95. *Id.* at 424.

> practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America.[96]

In response to the argument that the prayer's nondenominational nature rendered it harmless to the Establishment Clause, the Court wrote:

> The respondents' argument to the contrary, which is largely based upon the contention that the Regents' prayer is 'nondenominational' and the fact that the program, as modified and approved by state courts, does not require all pupils to recite the prayer but permits those who wish to do so to remain silent or be excused from the room, ignores the essential nature of the program's constitutional defects. *Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause*, as it might from the Free Exercise Clause.[97]

In other words, neither the nondenominational nature of a prayer, nor the voluntariness of the prayer may be considered in determining the constitutionality of government sponsored prayer. Justice Douglas adds another layer of analysis in his concurring opinion.[98] Of interest however, Justice Douglas frames the issue in terms of the *finance* of religious exercise.[99] According to Justice Douglas, the issue would be uncomplicated following the longstanding view of the Supreme Court that the government remain neutral to religion[100]—but for *Everson v. Board of Education*, which permits funding for bus transportation to students attending parochial schools.[101] Both concurring with the majority in *Engel* and disagreeing in dicta with the *Everson* decision, he explains that practices like those in the current case

96. *Id.* at 425 (emphasis added).
97. *Id.* at 430 (emphasis added); *see also* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 225 (1963).
98. *See Engel*, 370 U.S. at 437–44 (Douglas, J., concurring).
99. *Id.*
100. *Id.* at 443–44.
101. 330 U.S. 1, 26 (1947) (Douglas, J., concurring).

are impermissible in any publicly funded forum.[102]

So as to ensure there is no confusion, the ruling in *Engel* has not been limited to daily prayers.[103] Courts have applied the same standard to nonsectarian prayers conducted annually at graduations.[104] In *Lee*, briefly discussed above, a student and parent filed for injunctive relief following a failed attempt to prohibit a rabbi from providing a nondenominational prayer at the student's graduation ceremony.[105] The Court noted the quasi-

102. *Engel*, 370 U.S. at 437–44 (Douglas, J., concurring).

103. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 313 (2000); Lee v. Weisman, 505 U.S. 577, 590 (1992).

104. *See Lee*, 505 U.S. at 590.

105. *Id.* at 580–81. Note the sectarian language of the prayers in this case:

INVOCATION

God of the Free, Hope of the Brave:

> For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it.
>
> For the liberty of America, we thank You. May these new graduates grow up to guard it.
>
> For the political process of America in which all its citizens may participate, for its court system where all may seek justice we thank You. May those we honor this morning always turn to it in trust.
>
> For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.
>
> May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.

AMEN

BENEDICTION

O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement.

> Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them.

obligatory nature of graduation ceremonies, despite attendance not being required to receive a diploma.[106] It explained:

> The government involvement with religious activity in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school. Conducting this formal religious observance conflicts with settled rules pertaining to prayer exercises for students, and that suffices to determine the question before us. The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause.[107]

The Supreme Court has made clear that accommodation under the Free Exercise Clause is not a proper basis for such a program in the face of the Establishment Clause's limitations.[108] In an explanation rivaled only by the poetry of the Psalms, Justice Kennedy wrote:

> We are asked to recognize the existence of a practice of nonsectarian prayer, prayer within the embrace of what is known as the Judeo–Christian tradition, prayer which is more acceptable than one which, for example, makes explicit references to the God of Israel, or to Jesus Christ, or to a patron saint. There may be some support, as an empirical observation, to the statement of the Court of Appeals for the Sixth Circuit, picked up by Judge Campbell's dissent in the Court of Appeals in this case,

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> The graduates now need strength and guidance for the future, help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly.
>
> We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion.
>
> AMEN

Id. (internal quotation marks omitted).

106. *Id.* at 586.
107. *Id.* at 587.
108. *See id.*

> that there has emerged in this country a civic religion, one which is tolerated when sectarian exercises are not. . . . If common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself.[109]

Once again, the sectarian nature of the prayer was irrelevant to the Court's calculus.[110] In a similar vein, Justice Souter's concurring opinion explained that the Establishment Clause is equally applicable to acts favoring religion generally as it is to acts favoring one religion over another.[111]

Thus, constitutionality is not contingent on the frequency of the prayer at issue. Further, even entirely voluntary graduation ceremonies remain impermissible forums for school prayer. Finally, according to Justice Souter, the Establishment Clause, more than even requiring diversity of religious views, requires neutrality of religious views.[112]

In *Santa Fe Independent School District v. Doe*, the Court extended the prohibition even further—to entirely non-mandatory, after-school events.[113] In *Santa Fe*, the Court prohibited student-initiated and led prayer at football games.[114] While the Court accepts the notion that there is a distinction between public and private speech, they nevertheless find that the invocations at issue were "authorized by a government policy and take place on government property at government-sponsored school-related events," such that no defense of private speech existed.[115]

109. *Id.* at 589.
110. *Id.*
111. *Id.* at 609–10 (Souter, J., concurring).
112. *Id.* at 610, 617–18; *see also* Engel v. Vitale, 370 U.S. 421, 443 (1962) (Douglas, J., concurring) ("The First Amendment teaches that a government neutral in the field of religion better serves all religious interests.").
113. 530 U.S. 290, 310 (2000).
114. *Id.* at 301.
115. *Id.* at 302–03.

Therefore, at least in the school context, though the language is not nearly so narrow, religious activity sponsored by a government entity, even at entirely extracurricular events and requested by the students themselves, is unconstitutional.

The preceding two decisions serve predominantly to re-adjudicate conclusions already reached in *Engel*. Nevertheless, to acknowledge the opposing position, consider the following. Although the Court extended the Establishment Clause prohibition to include less regular recitation of prayers, yearly graduations, and football games vice daily prayer, the cases operated under a position more narrow than *Engel*, that "government may not *coerce* anyone to support or participate in religion or its exercise."[116] All of these cases, including *Engel,* could further be read as relating to school children.[117] As the Court noted, "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."[118] However, the Court never withdrew from *Engel's* broader holding that the Establishment Clause prohibits official prayers "for any group of the American people" by an instrumentality of the government, whether coercive or not.[119] The Court in *Lee* later noted that, while the concern for coercion is most pronounced in the school context, the concern is not necessarily limited to that forum.[120] Further, "[t]he First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State."[121] However broadly or narrowly these cases are read, there is also case law, at the post-secondary level, which discusses the coercive nature of military institutions.

Mellen v. Bunting, a Fourth Circuit case, dealt with the practice of prayer in a military-style institution.[122] *Mellen* involved a suit against the Virginia Military Institute ("VMI") by a

116. *Lee*, 505 U.S. at 587 (emphasis added).
117. *See Santa Fe,* 530 U.S. at 301; *Lee*, 505 U.S. at 581; *Engel*, 370 U.S. at 422.
118. *Lee*, 505 U.S. at 592.
119. *Engel*, 370 U.S. at 425.
120. 505 U.S. at 592.
121. *Id.* at 589.
122. 327 F.3d 355, 360 (4th Cir. 2003).

former cadet requesting an injunction and damages due to the superintendent's practice of supper prayer.[123] Analyzing the case under both the coercion analysis and *Lemon* test, the court issued an injunction explaining that, "[a]lthough VMI's cadets are not children, in VMI's educational system they are uniquely susceptible to coercion. VMI's adversative method of education emphasizes the detailed regulation of conduct and the indoctrination of a strict moral code."[124] The court explained that it is joined in its contention by a case decided by the Court of Appeals for the District of Columbia, *Anderson v. Laird*, which dealt with a federal requirement for military academy students to attend religious services on Sundays.[125] Without agreeing, the court noted that its sister circuits have held that traditional college students suffer less coercion than grade school children, in terms of graduation ceremonies.[126] Although the court confirmed that other circuits dealing with prayers at *civilian* higher education institutions have held differently,[127] there appeared to be no cases involving military institutions that held to the contrary. The *Anderson* case recognized by the court in *Mellen* had similar results and, perhaps, some broader implications.[128] This case involved a suit by cadets and midshipmen from West Point, the Naval Academy, and the Air Force Academy, who challenged rules requiring attendance at Protestant, Catholic, or Jewish religious services on Sundays.[129] Failure to attend had punitive repercussions, including possible expulsion.[130] The schools had an exemption for conscientious objection to attendance at services, but the court was not persuaded that this healed the constitutional violation.[131] The court noted that, insofar as a cadet may want occasionally to pray alone, they are coerced into

123. *Id.* at 362–63.
124. *Id.* at 371.
125. *Id.* at 368 (citing Anderson v. Laird, 466 F.2d 283, 284 (D.C. Cir. 1972)).
126. *Id.* (citing Tanford v. Brand, 104 F.3d 982, 985–86 (7th Cir. 1997); Chaudhuri v. Tennessee, 130 F.3d 232, 237–38 (6th Cir. 1997)).
127. *Id.* (citing *Tanford*, 104 F.3d 982; *Chaudhuri*, 130 F.3d 232).
128. 466 F.2d at 283–84.
129. *Id.* at 284.
130. *Id.*
131. *Id.* at 293.

attendance, and therefore, the action was unconstitutional.[132]

One may see fit to distinguish school prayer from military prayer. We are first introduced to the federal case law that addresses public prayer in military institutions (albeit, colleges) in the final two district court cases of the Section.[133] While not Supreme Court cases, the focus on the unique nature of the military academies is telling. As discussed in Section V, the military, similar to its academies, is a coercive institution. One's life is restricted to a much larger extent, and one's personal behavior is subject to much higher scrutiny.

E. Katcoff v. Marsh *and* Town of Greece v. Galloway*: The Legislative Prayer Exception*

A major exemption to the string of prohibitive case law on religious practices in government deals with legislative prayer. The major Supreme Court cases on the topic are *Marsh v. Chambers*[134] and *Town of Greece v. Galloway*.[135]

In *Marsh*, the Supreme Court upheld the Nebraska legislature's practice of beginning their sessions with a prayer by a state-funded Chaplain.[136] The Court was very particular to state that it "granted certiorari limited to the challenge to the practice of opening sessions with prayers by a State-employed clergyman."[137] The Court focused on the fact that opening sessions of legislative and other deliberative bodies with prayer have long been a part of the history and tradition of the United

132. *Id.* at 296. In deferring to the founders, the court stressed Madison's "Memorial and Remonstrance Against Religious Assessments." *Id.* at 287. They interpreted Madison's writings to oppose any relations between church and state—in any form and degree—thereby interpreting the prohibitions in the Establishment Clause as broadly as possible. *Id.*

133. *See* Mellen v. Bunting, 327 F.3d 355, 360 (4th Cir. 2003); *Anderson*, 466 F.2d. 283–84.

134. 463 U.S. 783, 784 (1983).

135. 134 S. Ct. 1811, 1816 (2014). There have been other cases that have found certain direct religious activity, other than prayer, permissible under the *Lemon* test. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 685 (1984) (permitting a crèche in its Christmas display). *But see* Cnty. of Allegheny v. ACLU, 492 U.S. 573, 601–02 (1989) (prohibiting a crèche on public property, mainly distinguishing it from *Lynch* in that it included the phrase, "Glory to God for the birth of Jesus Christ"), *abrogated by Galloway*, 134 S. Ct. 1811.

136. 463 U.S. at 795.

137. *Id.* at 786.

States.[138]

There is discussion in the media that a more recent case, *Town of Greece v. Galloway*, paves the way to more religion in government.[139] However, a review of the case demonstrates it simply extends the preexisting, narrow exemption of *Marsh*. The case involved multiple attendants of town hall meetings who objected to the use of sectarian invocations.[140] The attendants requested an injunction limiting prayers to nonsectarian material.[141] Of even greater a constitutional concern than *Marsh*, the content of the invocation typically invoked Jesus.[142] If we recall his poetic benediction in *Lee*, Justice Kennedy staunchly refused to entertain the government undertaking the task of even *nonsectarian* prayer.[143] He posed a far different theory here.[144] To defer to the media's assertions regarding this case, Justice Kennedy, who spoke for the majority, stated, in inexplicable contrast to *Lee*,

> To hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve

138. *Id. Lee*, described above, makes reference to *Marsh*, distinguishing it from the public school context because of the greater ability of legislators to "enter and leave with little comment." 505 U.S. 577, 596–97 (1992).

139. *See, e.g.*, Dahlia Lithwick, *Let Us Pray*, SLATE (May 5, 2014, 6:05 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/05/town_of_greece_v_galloway_the_supreme_court_upholds_sectarian_prayer_at.html.

140. *Galloway*, 134 S. Ct. at 1817.

141. *Id.*

142. *Id.* at 1816. The Court notes that invocations typically included the following language:

> Lord we ask you to send your spirit of servanthood upon all of us gathered here this evening to do your work for the benefit of all in our community. We ask you to bless our elected and appointed officials so they may deliberate with wisdom and act with courage. Bless the members of our community who come here to speak before the board so they may state their cause with honesty and humility. . . . Lord we ask you to bless us all, that everything we do here tonight will move you to welcome us one day into your kingdom as good and faithful servants. We ask this in the name of our brother Jesus. Amen.

Id. (internal quotation marks omitted).

143. *See Lee*, 505 U.S. at 588–89.

144. *See Galloway*, 134 S. Ct. at 1822.

> government in religious matters to a far greater degree than is the case under the town's current practice of neither editing or approving prayers in advance nor criticizing their content after the fact.[145]

The definitive language of the case is that "[a]bsent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation."[146]

The Court limited the scope of the case on the following facts, "[town] leaders maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation."[147] Indeed, the predomination of Christian prayer reflected only the predominantly Christian identity of the town's congregations from which the Chaplains came.[148]

One would be naïve to imply this case is helpful to the ultimate propositions of this Article. However, it is notably distinguishable to the substance of this Article. The Court treated *Galloway* like legislative prayer, as addressed in *Marsh*.[149] Like *Marsh*, the case was decided based upon the notion of a long-term history of legislative prayer stretching back to the framing of the Constitution.[150] Seemingly making a distinction without a difference, Justice Kennedy wrote, "*Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation. The case instead taught that the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'"[151] In sum,

145. *Id.* Strangely, Justice Kennedy references *Lee* for the proposition that a civic religion does not avoid the Establishment Clause analysis, while concurrently arguing that prayers that give greater deference to one religion do not offend the Establishment Clause. *Id.* ("Government may not mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy."). *See also Lee*, 505 U.S. at 590 ("The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted.").

146. *Galloway*, 134 S. Ct. at 1824.

147. *Id.* at 1816.

148. *Id.*

149. *Id.* at 1822; *see also* Marsh v. Chambers, 463 U.S. 783, 784 (1983).

150. *Galloway*, 134 S. Ct. at 1818.

151. *Id.* at 1819 (quoting Cnty. of Allegheny v. ACLU, 492 U.S. 573, 670

Justice Kennedy explained, "*Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted."[152] While this is a concerning method of determining constitutionality, it nevertheless appears to limit the holding to cases involving legislative prayer. The Court also makes relevant that the principal audience for the invocations is the lawmakers themselves, not the other attendants at the meeting, negating the issue of coercion.[153] The majority explained, "[t]he analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity."[154] The Court further distinguished the case from *Lee* and *Santa Fe* based upon the reasoning that coercion did not exist under the circumstances of the case currently before it.[155] All of that said, insofar as *Galloway* makes any substantive change to the case law, it is limited and certainly gives limited aid to the analysis of religious practices in the military.

The case law leaves a gap between the permissible religious activity of legislative prayer and the impermissible religious activity of prayer in primary and secondary schools, as well as military academies. This creates the question as to whether the

(1989) (Kennedy, J., concurring in part and dissenting in part)).

152. *Id.* While the author is not opposed to constitutional interpretation by reference to the founding of the United States, it is concerning that a legal position bases constitutionality on its long-term application. Indeed, slavery was deemed consistent with our Constitution by many of our founders; yet, the impermissibility of its savage disregard for the human condition extended well prior. In other words, our founding was rife with universally understood immorality, and errors made for centuries do not unilaterally become legal. Furthermore, to imply a reading of the Constitution which utilizes only the beliefs of the Founding Fathers has two additional glaring incongruities—the Founding Fathers rarely agreed on any one interpretation of any one article or amendment (for example, many of them believed in the illegality of slavery upon drafting the Constitution) and further, the likelihood that the Founding Fathers could ever have conceived of a world like the one in which we now live. Would they think differently about the Establishment Clause with regard to legislative prayer had they not all been Christian?

153. *Id.* at 1825.

154. *Id.* at 1826.

155. *Id.* at 1827 (citing Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 312 (2000); Lee v. Weisman, 505 U.S. 577, 592–94 (1992)).

broad prohibition described in *Engel* is the proper one in contexts outside of legislative sessions. That is, is the legislative context unique, or is the school context unique? Considering that the language of *Engel* is still good law, it appears more likely the former is true. Further, case law following *Marsh* has significantly limited its scope.[156] In *Allegheny*, the Court explained, "[i]n *Marsh*, the Court relied specifically on the fact that Congress authorized legislative prayer at the same time that it produced the Bill of Rights."[157] Further, Justice Blackmun's concurrence in *Lee* notes, citing *Engel* and *School District of Abington Township v. Schempp*, "it is not enough that the government refrain from compelling religious practices: It must not engage in them either."[158] Without a declaration, the concurrence in *Lee* appears to have recommended overruling *Marsh*.[159] One might also consider Justice Scalia's treatment of *Marsh* in his concurrence in *Lamb's Chapel v. Center Moriches Union Free School District*, where he said, "when we wish to uphold a practice it [the *Lemon* test] forbids, we ignore it [the *Lemon* test] entirely."[160]

A valid question might be, are military members more like legislators or students? Anyone who has ever served could far more easily analogize the military hierarchy with the latter. This will be addressed in more detail below in Section V. In any case, even some writers, who are more forgiving of religious practices in the military, caution against the use of prayer at military events.[161] If the analysis of this Article were limited solely to this, the proposition would be that it is only a matter of time before a military member successfully brings the DoD to task on this very issue.[162] A preemptive decision to appropriately apply the limited

156. *See, e.g.*, *Galloway*, 134 S. Ct. at 1819; *Santa Fe*, 530 U.S. at 319–20; *Allegheny*, 492 U.S. at 603.

157. 492 U.S. at 602.

158. 505 U.S. at 604 (Blackmun, J., concurring) (citing Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring)).

159. *See id.*

160. 508 U.S 384, 399 (1993) (Scalia, J., concurring) (citing Marsh v. Chambers, 463 U.S. 783 (1983)).

161. *See, e.g.*, Fitzkee & Letendre, *supra* note 9, at 44–45.

162. *See* Lakin, *supra* note 26, 735–37 (discussing existing cases on the topic).

functions of the Chaplaincy and eliminate public prayer could avoid that inevitability.

IV. FREE SPEECH

Some would argue that public prayer and religious speech are simple freedom of speech issues.[163] The relevant Free Speech Clause standard is as follows: in a public forum—a publicly funded place which traditionally permits a wide range of speech on any topic[164]—a law, policy, or government employee acting in their official capacity may not limit the free exchange of thought based upon its content without a "compelling state interest."[165] This is referred to as the strict scrutiny standard, similar to the test employed in free exercise cases. Is this right? Does one simply apply content-based, speech analysis to prohibiting religious speech in the military workplace? The answer lies in the Supreme Court case of *Widmar v. Vincent*, which used both the Free Speech Clause *and* the *Lemon* test to determine the constitutionality of religious speech.[166]

A. Widmar v. Vincent *and Progeny: The Intersection of Free Speech and Religion*

While the Supreme Court has ruled on federal actions

163. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 275 (1981) (quoting Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971)).

164. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). The common example is a park, the sidewalk, etc. *See id.* (quoting Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939)). Case law has also seen fit to address the process of turning a non-public forum into a limited or totally public forum based upon its regular practice. *See, e.g.*, *Widmar*, 454 U.S. at 267 ("Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. Having done so, the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms.").

165. Republican Party of Minn. v. White, 536 U.S. 765, 774–75 (2002) ("Under the strict-scrutiny test, respondents have the burden to prove that the announce clause is (1) narrowly tailored, to serve (2) a compelling state interest."); *accord* Burson v. Freeman, 504 U.S. 191, 198 (1992) ("As a facially content-based restriction on political speech in a public forum, § 2–7–111(b) must be subjected to exacting scrutiny: The State must show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" (quoting *Perry Educ. Ass'n*, 460 U.S. at 45)).

166. 454 U.S. at 271–72.

prohibiting religious activities in open forums under the Free Speech Clause, it did so *in conjunction* with the Establishment Clause's *Lemon* test.[167] In *Widmar*, the Supreme Court found it impermissible for the University of Missouri ("UMKC") to prohibit religious student groups from using its facilities under a free speech analysis.[168] The Court determined that, by permitting general access to school facilities by student groups, the school created an open forum for use by student groups.[169] By doing so, the school obligated itself to pose no prohibition on content without demonstrating that the restriction was narrowly tailored to serving a compelling government interest.[170]

Interestingly, the Court agreed that ensuring compliance with the Establishment Clause is indeed a compelling government interest.[171] However, the Court went on to find, recounting the *Lemon* test, that the school's prior equal access program—which incidentally included only religious organizations—did not create an Establishment Clause issue.[172] As per *Lemon*'s precedent, the Court explained that a government activity or policy does not pose an establishment issue where it has a secular purpose, its principal or primary impact which does not advance or inhibit religion, and it does not create excessive government entanglement with religion.[173]

However, the devil is in the details, and the Court leaves open the possibility of running afoul of the Establishment Clause, even in an open forum, in some cases. The Court explained, "[t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect."[174] The Court continued, "[a]t least in the absence of empirical evidence that religious groups will dominate UMKC's open forum, we agree with the Court of Appeals that the advancement of religion would not be the forum's 'primary effect.'"[175] Therefore, if such empirical evidence was

167. *See id.*
168. *Id.* at 266.
169. *Id.* at 267.
170. *Id.* at 269–70 (citing Carey v. Brown, 447 U.S. 455, 461 (1980)).
171. *Id.* at 270–71.
172. *Id.* at 271–72.
173. *Id.* at 271 (quoting Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971)).
174. *Id.* at 274.
175. *Id.* at 275.

available, the Court's determination may have been different. Indeed, this language mimicked the reference in *Lemon* that the larger the number of people served by the program, the greater the danger of infringing on the Establishment Clause.[176]

Another well-known example of the Court upholding religious activity on government property is *Lamb's Chapel*.[177] There, the Supreme Court deemed a New York law authorizing after-hours use of school property to local organizations to the exclusion of religious organizations unconstitutional.[178] An evangelical church filed suit following multiple denials of access to local school district facilities after hours.[179] Though the Court did not refer to the school as an open forum as it had in *Widmar*, a similar analysis was undertaken.[180] Indeed, the Court explained that insofar as the forum is opened to a certain class, the government may restrict access to those outside of the class unless "it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject."[181] Any such denial would be in violation of the Free Speech Clause of the Constitution.[182] Like *Widmar*, here, there was insufficient entanglement to justify prohibition under the Establishment Clause.[183]

With regard to the issues that form the basis of this Article, the average military base is not an open forum.[184] In *Greer v. Spock*, a suit was brought to enjoin U.S. Army Base, Fort Dix regulations, which prohibited political demonstrations and also limited the distribution of literature on base without headquarters approval.[185] The Court determined that even when civilians are entitled to free access to certain portions of a military base, the property does not become a public forum, and therefore, the

176. *Compare with Lemon*, 403 U.S. at 622.
177. 508 U.S 384, 395 (1993).
178. *Id.* at 393.
179. *Id.* at 387–89. The church wanted to broadcast a religious themed movie. *Id.*
180. *Id.* at 395; *see also Widmar*, 454 U.S. at 267.
181. *Lamb's Chapel*, 508 U.S. at 394.
182. *Id.*
183. *Id.* at 395.
184. *See* Greer v. Spock, 424 U.S. 828, 838 (1976).
185. *Id.* at 832.

regulation was constitutional.[186] As a result, an argument for a free speech right to unbridled prayer or proselytization on a military base falls short.

B. *Other Limitations on Free Speech: Political Speech*

Not buying that such an essential right as religious expression could be limited? While the issue of restricting religious speech at work has not been the topic of much Supreme Court discussion, the prohibition on political speech, deemed the core of freedom of speech protections, has been subject to significant restrictions by the federal government for some time.[187] As to the importance of political speech, consider *Garrison v. Louisiana,* where the Supreme Court explained, "speech concerning public affairs is more than self-expression; it is the essence of self-government."[188] In *NAACP v. Claiborne Hardware Co.*, the Court announced the proposition that speech on public issues occupies the "highest rung of the hierarchy of First Amendment values."[189] Moreover, the Court left no doubt in *Eu v. San Francisco Democratic Central Committee* that "the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office."[190]

Despite being placed upon the altar, consider the political speech restrictions the Supreme Court has permitted at the public workplace in *Connick v. Meyers*.[191] There, a disgruntled Assistant District Attorney in New Orleans was fired for distributing a questionnaire that was critical of the transfer policies and political behavior of the office.[192] Heavily relying upon *Pickering v. Board of Education*,[193] the Court explained that the First Amendment's

186. *Id.* at 838.
187. *See, e.g.*, Garrison v. Louisiana, 379 U.S. 64, 73 (1964).
188. *Id.* at 74–75.
189. 458 U.S. 886, 913 (1982); *accord* Carey v. Brown, 447 U.S. 455, 467 (1980).
190. 489 U.S. 214, 223 (1989) (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)).
191. 461 U.S. 138, 154 (1983).
192. *Id.* at 141.
193. 391 U.S. 563, 568 (1968). *Pickering* involved a suit by a teacher who was dismissed for writing a letter to the editor of a local paper that was critical of the school board's use of funding. *Id.* at 566–67. The Court explained that determining permissible limits on speech in public

protection of the freedom of expression—that is, ensuring a citizen's interest in commenting on matters of public concern—must be balanced against the state's interest "in promoting the efficiency of the public services it performs through its employees."[194] In upholding the assistant DA's dismissal, the Court explained:

> When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable.[195]

The Court elaborated:

> When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate. Furthermore, we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.[196]

Finally, the Court recognized that "manner, time, and place" is a relevant consideration.[197] The majority found that providing the

employment is "a balance between the interests of the [employee], as a citizen, in commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568. The Court determined that non-defamatory, however negligently false, statements made regarding the operations of a school board, where the issue is of public interest, are not a ground for dismissal, and prohibiting said speech is a violation of freedom of speech. *Id.* at 572–75. Note, the protection is not limited to firing, but also failure to rehire. *See, e.g.*, Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 286 (1977); Perry v. Sindermann, 408 U.S. 593, 599 (1972).

194. *Connick*, 461 U.S. at 142.

195. *Id.* at 146–47.

196. *Id.* at 151–52.

197. *Id.* at 152.

questionnaire at work and the fact that the process pulled both the plaintiff and her coworkers away from their work leant more credence to the government's case.[198]

Continuing the review of permissible limitations on political speech, note the ramifications of Department of Defense Directive 1344.10 ("DoD Directive 1344.10"), which puts significant limitations on political speech among military members.[199] The directive is modeled after the Hatch Act, though ultimately more restrictive, which applies to federal government employees.[200] By analogy, consider *United Public Workers of America (CIO) v. Mitchell*, a challenge to the Hatch Act's prohibition on federal employees' participation in political management and campaigns.[201] The Court found that being politically active, even in one's personal capacity, may be limited under the Constitution.[202] The Court explained, "it is accepted constitutional doctrine that these fundamental human rights are not absolutes."[203] The Court expounded upon legal bases for prohibiting certain speech:

> The evident purpose of Congress in all this class of enactments has been to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service. Clearly such a purpose is within the just scope of legislative power, and it is not easy to see why the act now under consideration does not come fairly within the legitimate means to such an end.[204]

Surely though, no such prohibition could stand the test of time. But, indeed, it has. In *United States Civil Service Commission v. National Ass'n of Letter Carriers, AFL-CIO*, the

198. *Id.*
199. DoD Dir. 1344.10, *supra* note 23.
200. The Hatch Act, 5 U.S.C. §§ 7321–7326 (2012).
201. 330 U.S. 75, 81–82 (1947). It is worth noting as the Court stresses the specific facts of the case—the main petitioner was a ward executive committeeman who was active on Election Day as a poll worker and a paymaster for the services of other party workers. *Id.* at 94.
202. *Id.* at 94–95.
203. *Id.* at 95.
204. *Id.* at 97 (quoting *Ex parte* Curtis, 106 U.S. 371, 373 (1882)) (internal quotation marks omitted).

Court reviewed a constitutional challenge to the same provision of the Hatch Act as vague and overbroad.[205] In addition to the specifics of the case, the Court expounded that they would even find a statute that stated the following constitutional:

> [I]n plain and understandable language, the statute forbade activities such as organizing a political party or club; actively participating in fund-raising activities for a partisan candidate or political party . . . initiating or circulating a partisan nominating petition or soliciting votes for a partisan candidate for public office; or serving as a delegate.[206]

All of these legal prohibitions, the Court need not have specified, included acting in one's personal capacity. Therefore, free speech restrictions are not limited to activities on the job, but also on one's personal time as well. While the issue has not been addressed by the Supreme Court, DoD Directive 1344.10's prohibitions also include "[s]peak[ing] before a partisan political gathering, including any gathering that promotes a partisan political party, candidate, *or cause*."[207] Does this elucidation confirm the righteousness of these rules? Of course not. However, considering the altar upon which political speech sits, there is reason to believe that religious practices, an area similarly protected by the Constitution, may be subject to similar limitation under the First Amendment as it relates to the military. It should come as no surprise then, that proselytizing at work would likely receive reduced free speech protection.

V. COERCION AND THE MILITARY

One of the underlying principles of this discussion is the issue of coercion. Certainly, it appears clear that coercion is not necessary in order to fail the *Lemon* test.[208] Coercion, as a lone component of Establishment Clause analysis, "fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of

205. 413 U.S. 548, 579–80 (1973).
206. *Id.* at 556.
207. DoD Dir. 1344.10, *supra* note 23, ¶ 4.1.2.5 (emphasis added).
208. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

disapproval to others."[209] However, coercive practices pose so significant an Establishment Clause violation and are so frequently discussed in jurisprudence, that some argue there has been a separate coercion test developed.[210] The military, as argued below, is particularly prone to the type of coercion which precedent on religious practices by government entities sought to curtail. Further, perhaps more than civilian institutions, coercion and endorsement are directly linked, as the rank on a uniform (endorsement) breeds conformity from others (coercion).[211]

To begin, consider the principles underlying Article 31 of the UCMJ.[212] In the civilian criminal justice system, following *arrest*, or the equivalent thereof, the *police* must provide a rights advisement to a suspect only when the police are questioning a suspect.[213] However, the military system requires that a subject receive a rights advisement before being questioned by *any military member*, so long as the subject is only *suspected* of committing a crime, regardless of arrest or custody.[214] The notion is that the military structure is such that military members feel so compelled to follow orders that a *Miranda* warning is not sufficient to protect their 5th Amendment rights. Therefore, a rights advisement must be provided, not upon custodial interrogation (the civilian standard), but *as soon as they are suspected of a crime*.[215] This principle is not found in civilian law enforcement. Military defense attorneys often file unlawful command influence motions against military prosecutors, following announcements by installation commanders to "get tough on crime" or commercials indicating zero tolerance policies. Article 31 embodies this inherent and undeniable aspect of

209. Cnty. of Allegheny v. ACLU, 492 U.S. 573, 627–28 (1989) (O'Connor, J., concurring), *abrogated by* Town of Greece v. Galloway, 134 S. Ct. 1811 (2014).

210. *See, e.g.*, Fitzkee & Letendre, *supra* note 9, at 12.

211. Indeed, a close reading of *Santa Fe* shows that endorsement and coercion can be interrelated. 530 U.S. 290, 310–13 (2000). There, the majority explained that the sheer existence of prayer at a football game was coercive. *Id.* at 311–12. Though individuals need not attend, peer pressure to conform was sufficient to strip the activity of a sufficient level of voluntariness to avoid running afoul of the Constitution. *Id.*

212. UCMJ, 10 U.S.C. § 831 (2012).

213. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966).

214. 10 U.S.C. § 831.

215. *Id.*

military life. Yet, we are willing to negate the influence of public prayer or proselytizing at work, so long as they are not in the chain of command? The logic is ineffable. There is simply too much coercion inherent in the system to disregard the impact both down and across the military rank structure.

Further, consider how the court in *Mellen* explained the coercive nature found at the Virginia Military Institute identifying that "obedience and conformity remain central tenets of the school's educational philosophy."[216] The terms "obedience" and "conformity" are frequently used in describing the military environment, and it would not be a stretch to apply a similar description to military events. Noteworthy in particular, while cadets are free to withdraw from their academies, a military member is not free to withdraw from the military until the end of their obligation.[217] While cadets may be subjected to "adversative method[s] of education,"[218] military members may be ordered into live gunfire. In no uncertain terms, ideally at the least, a superior orders and the subordinate follows. Further, in terms of the influence of contemporaries, superiors may be a military member's only human interaction, and the people one must trust to ensure their safety. In addition to the threat of solitude for failing to conform, compliance could mean the difference between life and death. A military member does not remove their uniform to go to lunch or take a smoke break. A military member does not put on civilian clothing at the end of the day and shed the requirement to act according to the rules, regulations, and customs of the service—a fact that they are persistently reminded of. As previously discussed, free expression restrictions acknowledge this in both the civilian-federal, as well military, contexts. Why would the religious clauses operate any differently?

VI. APPLICATION

Step one in this analysis is attribution. At what point are an individual's actions subject to constitutional limitation? Consider the language found in *Lee,* "[a] school official, the principal,

216. 327 F.3d 355, 371 (4th Cir. 2003).

217. U.S. Armed Forces, *Enlistment/Reenlistment Document*, *available at* http://dtic.mil/whs/directives/infomgt/forms/eforms/dd0004.pdf (last visited Oct. 28, 2014).

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

decided that an invocation and a benediction should be given; this is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur."[219] One's right, *as an individual*, to practice his religion freely has received significant protection.[220] The sovereign is not limited to the federal "Governmental Trinity," but extends through the veins of subcomponents and employees, in this case the DoD and its leadership. When one puts on his police or military uniform or steps over the threshold of the Capitol Building as a federal employee, he transforms into an agent of the government. In this alter ego they are not performing in their individual capacity, but as government actors that are subject to the limitations of the Establishment Clause.[221] What legal scholar could argue that the actions of a base commander, unit commander, first sergeant, or supervisor of a unit in uniform be treated differently than the actions in *Lee*?

Some would argue for applying the objective observer standard—that is derived from civilian school-prayer cases—to the military in order to determine whether an individual is operating as a representative of the government.[222] After all, the Supreme Court has explained, "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[223] However, the objective observer standard does not necessarily recognize the coercion to conform, vertically and horizontally along the chain, inherent in the military. For this reason, the objective observer would not necessarily be the appropriate standard to apply.

The next issue is whether religious activity as it exists in the military today must be permitted under the Free Exercise Clause. Air Force Academy Professor David Fitzkee wrote, "some major world religions—notably Christianity, the largest religion in the United States and the military—encourage their members to

219. 505 U.S. 577, 587 (1992).
220. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 302 (2000).
221. *See Lee*, 505 U.S. at 587.
222. *See, e.g.*, Fitzkee & Letendre, *supra* note 9, at 31.
223. *Santa Fe*, 530 U.S. 290 at 302.

convert nonbelievers to their faith."[224] He further notes, "leaders (and those complaining) must recognize that the First Amendment protects proselytizing."[225] Some would argue that free exercise requires permitting proselytizing in military organizations, as mandated by many world religions.[226] As the author cannot claim the sentiment as his own, credit is given to fictional character President Josiah Bartlet from the West Wing television show:

> I'm interested in selling my youngest daughter into slavery as sanctioned in Exodus 21:7. She's a Georgetown sophomore, speaks fluent Italian, always cleaned the table when it was her turn. What would a good price for her be? My chief of staff, Leo McGarry, insists on working on the Sabbath. Exodus 35:2 clearly says he should be put to death. Am I morally obligated to kill him myself or is it okay to call the police? Here's one that's really important cause we've got a lot of sports fans in this town: touching the skin of a dead pig makes one unclean. Leviticus 11:7. If they promise to wear gloves can the Washington Redskins still play football? Can Notre Dame? Can West Point? Does the whole town really have to be together to stone my brother, John, for planting different crops side by side? Can I burn my mother in a small family gathering for wearing garments made from two different threads?[227]

Clauses of this nature are not unique to the Judeo-Christian faith systems. Indeed many religious texts contain commands that American society rightfully does not apply. The concern for a veritable, carte blanche right to apply religious practices in any forum does not belong exclusively to Hollywood and fictional characters. Recall the explanation of the Court in *Reynolds* that, if such an expansive view of the Free Exercise Clause were taken, even human sacrifice may have to be permitted.[228]

224. David E. Fitzkee, *Religious Speech in the Military: Freedoms and Limitations*, U.S. ARMY WAR COLL. Q. PARAMETERS, Autumn 2011, at 59, 64, *available at* http://strategicstudiesinstitute.army.mil/pubs/parameters/Articles/2011autumn/Fitzkee.pdf.

225. *Id.*

226. *See, e.g.*, *id.*

227. *West Wing: The Midterms* (NBC television broadcast Oct. 18, 2000).

228. 98 U.S. 145, 166 (1878).

The moral to be taken is, "[t]he principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause."[229] There is a certain point when the religious expression of one, as a government employee, triggers the prohibition on government endorsement designed to protect the religious beliefs of all. That being said, the courts have explained that a compelling government interest is required to prohibit religious activity by the government.[230] In *Widmar*, the Supreme Court clarified that observance of the Establishment Clause is a compelling government interest.[231] Therefore, a prohibition of religious activity in the military workplace would not be inherently invalid under free exercise as it would be in furtherance of a compelling governmental interest, that is, maintaining the Establishment Clause.

Moving to specific examples, when and to what extent is public prayer appropriate in the military? Might one doubt the constitutionality of an Air Force Network ("AFN") commercial, done by a Colonel military Chaplain, encouraging members to "flex their faith muscles"? What prohibits a commander from encouraging military members to read the New Testament? What about a member encouraging another member to convert to Christianity, or regularly citing scripture at work?

Prayer has received a great deal of coverage in this Article. If the *Mellen* standard applies here, then, insofar as the military employs "detailed regulation of conduct and the indoctrination of a strict moral code," prayer at mandatory military events is inherently coercive.[232] It, therefore, fails the *Lemon* test and, further, is *de jure* coercive under the coercion test recommended by Justice O'Connor[233] and addressed by the Fourth Circuit in

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

230. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 402–03 (1963).

231. 454 U.S. 263, 275 (1981).

232. Mellen v. Bunting, 327 F.3d 355, 371 (4th Cir. 2003); *see also* Anderson v. Laird, 466 F.2d 283 (D.C. Cir. 1972).

233. *See* Cnty. of Allegheny v. ACLU, 492 U.S. 573, 628–29 (1989) (O'Connor, J., concurring in part and in the judgment), *abrogated by* Town of Greece v. Galloway, 134 S. Ct. 1811 (2014); *see also* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 44 (2004) (O'Connor, J., concurring in the judgment), *abrogated by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014).

Mellen.[234] However, consider the ramifications of these prayers even without presumptive coerciveness. In an organization that inserts religion into public events, imagine the ramifications when all but a few members of the audience bow their heads in observance of a prayer? Must an atheist military member negate their views and observe the prayer or else chance the wrath of their religious commander or supervisor? Even if not deemed *de jure* coercive, it is indeed coercive-in-fact.

Under a free speech analysis, *Greer* clarifies that a military base is not a public forum.[235] Therefore, a compelling government interest in limiting public prayer is not necessary. However, for purposes of argument, this review will still utilize that higher standard. In *Widmar*, the Court explained that a government agency may pose no prohibition on content without demonstrating that the regulation is narrowly tailored to serving a compelling government interest.[236] As stressed on multiple occasions, the Court agreed that ensuring compliance with the Establishment Clause is indeed a compelling government interest.[237] Therefore, insofar as prayer at mandatory military events is in violation of the Establishment Clause, there is no free speech violation even under the higher standard.

Professor Fitzkee comments:

> Proselytizing violates the Establishment Clause if military members are misusing their official position to advance, favor, endorse, or coerce religion. This might apply to members of the chain of command proselytizing subordinates on duty or to service providers proselytizing customers while providing a service.[238]

Clearly then, some private speech in the workplace is prohibited by the Constitution. However, with all due respect to Professor Fitzkee, the strict facts given in his example are not necessary to fail the *Lemon* test. All that is required to be deemed

234. 327 F.3d at 365.
235. 424 U.S. 828, 838 (1976).
236. 454 U.S. at 269–70.
237. *Id.* at 271.
238. Fitzkee, *supra* note 224, at 67; *accord* Fitzkee & Letendre, *supra* note 9, at 30 ("The Establishment Clause is violated if it appears to the reasonable observer that the government, through its employee's speech, is coercing or endorsing religion.").

unconstitutional is that a government actor, in this case at work or in uniform, engages in activity which does not have a secular purpose, *or* has the primary purpose of advancing or inhibiting religion, *or* results in excessive government entanglement with religion.[239] Any individual proselytizing at work, leadership or not, would appear to be in violation. Rank and position in the military might only serve to *extend* the restriction outside of work.

Returning to the hypotheticals, a commander instructing his subordinates to read the New Testament, in-and-of-itself appears to fail all three elements of the *Lemon* test. Perhaps a scenario similar to that found in *Lynch v. Donnelly*[240] could help to explain the situation. The commander could have encouraged members to read sections of the New Testament and other secular and religious texts as professional development insofar as they implicate the tenets of leadership. However, minus extenuating circumstances such as these, there is no secular purpose in such an instruction. There is no purpose other than advancing religion. This activity excessively involves the government in religion, particularly considering the commander's rank and position.

With regard to the AFN commercial, the argument, though debatable, could be that there is a secular purpose for flexing one's faith muscles, that is, to ensure military readiness. However, the *primary* purpose must be secular, which is not the case here. In any case, the action has the obvious intended effect of advancing religion. Placing the commercial on AFN creates the clear impression of government entanglement with religion. Encouraging other military members to convert to Christianity poses an even clearer violation, particularly when encouraged by a member of superior rank or position, thereby resulting in coercion.

Moving the analysis slightly, consider if a relatively low ranking military member in a customer service-orientated field answered every phone call with, "Jesus saves, how can I help you?" What if a noncommissioned officer ("NCO") did the same? The unit commander? All of these actions would appear to fail the *Lemon* test, and the higher the rank of the speaker, the more likely the act is to qualify as coercion. Regular recitation of scripture at work could result in the same issues. One step

239. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).
240. 465 U.S. 668, 671–72 (1984).

further into the gray, imagine that a low ranking member likes to tell others in the office about the sermon he heard over the weekend in the break room on Mondays or encourages colleagues to attend Church. Now, what if an NCO did it? The commander? While a little more difficult, again, it appears that somewhere the Constitution has been violated. A prohibition on any of these activities would not be deemed impermissible under free exercise as there is a compelling interest in maintaining the Establishment Clause.[241]

However, what about free speech analysis? In *Connick*, the Court made it clear that in the public workplace, a court must balance an individual's interest in commenting on public concerns against the government's interest in conducting the public services it performs.[242] The former is subject to significant limitation when the employee's communication does not relate to a matter of community concern.[243] A commander's belief in the Bible is of personal, not community, concern. Proselytizing co-workers suffers from the same shortcoming. Could such proselytizing impact the "efficiency of the public services"[244] that the military performs? It certainly could. Is the singular opinion of one, or few members, on his own religion or religious mandate to spread the word "[a] matter of political, social, or other concern to the community?"[245] It is certainly not, unless we are, once and for all to declare the United States a country of singular religious background for which Americans are free to indoctrinate the masses as they see fit. This is not without precedence. It is quite common in many Middle Eastern countries. The Islamic Brotherhood would then find itself among rivals for religious dominion of world governments. The type of close working relationship described in *Connick* is inherent in most military career fields. This fact is almost inevitable due to the military hierarchy, where supervisors, first sergeants, and commanders are involved with their members personal lives on a daily basis. It is all the more so in deployed locations, where the court in *Katcoff* has expressed perhaps the greatest need for the military

241. *See Widmar v. Vincent*, 454 U.S. 263, 270 (1981).
242. 461 U.S. 138, 142 (1983).
243. *Id.* at 146.
244. *Id.* at 142.
245. *Id.* at 146.

Chaplaincy.[246]

This is all supported by the case law on political speech. In *Mitchell*, the Court clarified that being politically active, even in one's personal capacity, may be limited under the Constitution.[247] How could it be constitutional to prohibit an individual from soliciting votes for a candidate or speaking about partisan causes, but not to prohibit them from soliciting votes for Allah or discussing the position of the Gospels?

VII. CONCLUSION

In the era of the professional military, one must note that most Fortune 500 companies are not beginning their events with invocations and neither should the military. It is easy, particularly in a bureaucracy, to find solace in historical consistency. A common theme in many areas of the military is that tradition should be respected or, short of tradition, a certain practice has always been conducted a particular way. The cases of *Katcoff, Engel, Lee*, and *Santa Fe* all support the proposition that "preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere."[248] One thing is for certain: a cautioned approach to military prayer is the most reasonable tack in order to avoid stumbling upon the prohibitions of *Lemon*.

It is difficult to argue with the old adage, "if it ain't broke, don't fix it." However, with regard to religious practices in the military, it is broken. It has been for some time. In fact, this perhaps underscores the coercive nature of compliance, which is inherent in the DoD, that there have not been more lawsuits for religious practices therein. The military workplace applies the social pressures acknowledged in school cases to an exponentially greater extent, creating the very coercion feared in *Lee*.[249] The punishment for failure to conform in the military can put one's livelihood, and ultimately life, at risk. Due to these inherent truths of military life, more so than other federal institutions, the

246. 755 F.2d 223, 228, 232 (2d Cir. 1985).
247. 330 U.S. 75, 103 (1947).
248. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 310 (2000) (citing Lee v. Weisman, 505 U.S. 577, 589 (1992)).
249. *See Lee*, 505 U.S. at 587.

military is likely falling afoul of even the more universally accepted coercion case law.

Widmar stands for the proposition that complying with the Establishment Clause is a sufficiently compelling government interest.[250] *Connick* acknowledges that free expression must be balanced against the interest in effectively operating a public office,[251] and *Mitchell*, as well as *United States Civil Service Commission*, has validated restrictions on speech similar to the ones proposed here.[252] Therefore, under any standard known to law, prayers should be limited to actual religious events. Further, at the least, commanders, NCOs, and military media establishments should not be proselytizing, and peer proselytizing should be kept outside of the workplace. Finally, repercussions taken against a member for failure to adopt a "preferred" religious practice should be eliminated with the utmost alacrity and earnestness.

250. 454 U.S. 263, 271 (1981).
251. 461 U.S. 138, 142 (1983).
252. U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers AFL-CIO, 413 U.S. 548, 556 (1973); *Mitchell*, 330 U.S. at 82.