

2010

The God Exclusion: The Constitutional Implications of Proselytization and Religious Discrimination in the U.S. Military

Daniel H. Michaelson

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/blr>

Recommended Citation

Daniel H. Michaelson, *The God Exclusion: The Constitutional Implications of Proselytization and Religious Discrimination in the U.S. Military*, 76 Brook. L. Rev. (2011).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol76/iss2/8>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Law Review by an authorized editor of BrooklynWorks.

The God Exclusion

THE CONSTITUTIONAL IMPLICATIONS OF PROSELYTIZATION AND RELIGIOUS DISCRIMINATION IN THE U.S. MILITARY

Over the past several years, there has been increasing concern among the general public about religious discrimination and proselytization¹ in the U.S. Military.² Complaints about religious bias in the military have centered mostly on the proselytizing efforts of evangelical Christian soldiers and the pressure they have exerted on their nonevangelical counterparts to conform to Evangelical Christian ideals.³ These incidents are not uncommon. From 2005 to 2007, the Pentagon received fifty complaints of religious bias in the military.⁴ Other sources, however, maintain that religious discrimination is much more pervasive,⁵ placing the number of complaints for that time period at 11,000 or higher.⁶

Claims of religious discrimination and proselytization in the military are the result of a variety of actors. At the center of the controversy is the military chaplaincy,⁷ an institution designed to minister to the religious needs of soldiers.⁸ Although

¹ Proselytization means to convert someone to one's own religious faith. AMERICAN HERITAGE COLLEGE DICTIONARY 1119 (4th ed. 2000).

² For the purposes of this note, the Military includes the Army, Navy, Air Force, Coast Guard, and any other unit organized under the Department of Defense. 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, 3 (2007); Ira C. Lupu & Robert W. Tuttle, *Instruments of Accommodation: The Military Chaplaincy and the Constitution*, 110 W. VA. L. REV. 89, 90 (2007).

³ Heather Cook, *Service Before Self? Evangelicals Flying High at the U.S. Air Force Academy*, 36 J.L. & EDUC. 1, 1 (2007); John Milburn, *Soldiers Pressured into Christianity*, MOBILE PRESS-REGISTER (Mobile, Ala.), Dec. 29, 2007, at D5, available at 2007 WLNR 25804393.

⁴ Eric Lichtblau, *Questions Raised Anew About Religion in Military*, N.Y. TIMES, March 1, 2009, at A14, available at 2009 WLNR 3930224.

⁵ *Id.*

⁶ *Religion News Service*, LONG BEACH PRESS-TELEGRAM, May 5, 2009, at U5, available at 2009 WLNR 8867290.

⁷ Steven H. Aden, *The Navy's Perfect Storm: Has a Military Chaplaincy Forfeited Its Constitutional Legitimacy by Establishing Denominational Preferences?*, 31 W. ST. U. L. REV. 185, 187 (2004); Lupu & Tuttle, *supra* note 2, at 90.

⁸ Aden, *supra* note 7, at 186-87.

the chaplaincy program is per se constitutional,⁹ chaplains have drawn criticism for allegedly overstepping their statutorily defined duties.¹⁰ Another source of controversy is high-ranking military officials. In 2006, seven officers, including four generals, appeared in uniform to fund-raise for an evangelical Bible-study group.¹¹ Other complaints involve institutional discrimination. For instance, at the Air Force Academy, Christian cadets attending off-campus Sunday services or Bible study are given passes that do not count as leave, but non-Christian soldiers who worship on other days of the week must take leave to attend religious services.¹² Religious discrimination and proselytization also find a home in peer interaction. According to one complaint, “soldiers who are open about their non-belief can face harassment and ostracizing from fellow troops.”¹³

Behind the public debate about religion’s role in the military, these claims implicate a complex array of constitutional issues. As an entity regulated by Congress,¹⁴ the military is subject to the limitations imposed by the First Amendment to the U.S. Constitution, which states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”¹⁵ This phrase encompasses the Constitution’s two religion clauses, the Establishment Clause¹⁶ and the Free Exercise Clause.¹⁷ Proselytization in the military implicates such complex constitutional issues due, in part, to the inherent difficulty of delineating clear legal rules from the religion clauses.¹⁸ This difficulty is exacerbated by the long history of affording judicial deference to the military.¹⁹

This note analyzes how Establishment Clause jurisprudence has developed to deal with contemporary issues

⁹ *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985).

¹⁰ Aden, *supra* note 7, at 187.

¹¹ Neela Banerjee, *Solider Sues Army, Saying His Atheism Led to Threats*, N.Y. TIMES, Apr. 16, 2008, at A14, available at 2008 WLNR 7760637.

¹² Cook, *supra* note 3, at 6.

¹³ Kay Campbell, *Atheists Wonder if Fellow Troops Have Their Backs*, MOBILE PRESS-REGISTER (Mobile, Ala.), Oct. 20, 2007, at D1, available at 2007 WLNR 21287415.

¹⁴ See U.S. CONST. art. I, § 8, cl. 12, 13.

¹⁵ U.S. CONST. amend. I.

¹⁶ *Id.* (“Congress shall make no law respecting an establishment of religion . . .”).

¹⁷ *Id.* (“Congress shall make no law . . . prohibiting the free exercise [of religion].”).

¹⁸ Major Michael J. Benjamin, *Justice, Justice Shall You Pursue: Legal Analysis of Religion Issues in the Army*, ARMY LAW., Nov. 1998, at 1, 3.

¹⁹ Stephen Lewis Rabinowitz, *Goldman v. Secretary of Defense: Restricting the Religious Rights of Military Servicemembers*, 34 AM. U. L. REV. 881, 897 (1985).

of religious discrimination in the military. Part I provides background information on contemporary military life. In particular, it details some of the formal and informal complaints of religious discrimination and proselytization in the military. Part I also discusses the military culture of conformity and argues that strict adherence to military regulations and a hierarchical chain of command make military life inherently coercive. Part II analyzes the Establishment Clause standards developed by the Supreme Court. Part III examines the Establishment Clause in the context of the Constitution's other religion clause, the Free Exercise Clause. In particular, Part III discusses the constitutionality of the military chaplaincy as an institution and seeks to define proselytization in the context of the Constitution's two religion clauses. Part IV analyzes the current state of Establishment Clause controversies in the military by examining the alleged perpetrators of religious discrimination and the constitutionality of their conduct.

Ultimately, this note argues that religious discrimination and proselytization in the military should be analyzed under the Establishment Clause using what is commonly referred to as the coercion test. Under the coercion test, if the alleged incidents of religious discrimination and proselytization are true, the U.S. Military has violated the Establishment Clause and should take measures to cure the constitutional deficiency. Appropriate remedial measures include the institution and enforcement of nondiscrimination policies as well as institutional assurance that soldiers will not be subjected to proselytizing by fellow soldiers or superior officers.

I. RELIGION IN THE MILITARY ENVIRONMENT

The constitutional implications of proselytization and religious discrimination in the U.S. Military are of particular importance because contemporary controversies have become ubiquitous. The proliferation of these complaints is particularly troubling when one considers the inherently coercive nature of military life.

A. *Alleged Incidents of Misconduct*

The contemporary controversy about religion's role in the U.S. Military results in part from publicity garnered by lawsuits against the Department of Defense (DOD) and the

U.S. Air Force (USAF). In 2007, Specialist Jeremy Hall, at that time an active member of the U.S. Army and deployed in Iraq, filed suit against the DOD and his superior officer, Major Freddy Welborn.²⁰ The lawsuit sought injunctive relief from a pattern and practice of promoting religion in the Army.²¹ Hall alleged that he was discriminated against because he is an atheist.²² In his complaint, Hall claimed that on Thanksgiving Day 2006, he was castigated by a superior officer and ostracized by his peers because he chose not to participate in a premeal Christian prayer.²³ Hall also stated that Major Welborn threatened to bring charges against him under the Uniform Code of Military Justice and to bar him from reenlistment because he had organized and participated in atheist meetings.²⁴ In a sworn statement, Hall claimed that Major Welborn told him, “People like you are not holding up the Constitution and are going against what the founding fathers, who were Christian, wanted for America!”²⁵ Specialist Hall also informally complained that “soldiers who are open about their non-belief can face harassment and ostracizing from fellow troops”²⁶ In fact, Hall alleged that he received threats of “fragging” (attempts to wound or kill a fellow soldier by throwing a grenade or similar explosive)²⁷ in response to his organization of atheists.²⁸

In addition to Specialist Hall’s complaint against the DOD, there have been widespread allegations of religious discrimination and proselytization in the USAF and at the USAF Academy.²⁹ One of the most prominent incidents of religious intolerance involves the USAF Academy head football coach, who allegedly draped a banner in the team locker room

²⁰ Amended Complaint for Injunctive Relief, Military Religious Freedom Found. v. Gates, No. 07-2444-JWL (D. Kan., filed Sept. 25, 2007) [hereinafter Hall Complaint].

²¹ Injunctive relief was partially sought pursuant to the First Amendment to the United States Constitution. *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Banerjee, *supra* note 11 (Major Welborn contends that the contents of Hall’s complaint are false. Nevertheless, Hall, now with a different unit, claims that backlash against him have continued. Since the filing of the complaint, one sergeant has physically threatened Hall and another sergeant allegedly told Hall that he was “not entitled to religious freedom because he had no religion at all.”).

²⁶ Campbell, *supra* note 13.

²⁷ John Ayto, OXFORD DICTIONARY OF SLANG 103 (Oxford Univ. Press 1998).

²⁸ Campbell, *supra* note 13.

²⁹ Fitzkee & Letendre, *supra* note 2, at 3.

that read, “I am a Christian first and last, I am a member of Team Jesus.”³⁰ Despite the negative publicity garnered by this action, the football coach publically affirmed his position, stating that “[r]eligion is what we’re all about at the Academy.”³¹ Further examples of religious discrimination and proselytization at the USAF Academy include an alleged incident in which a history professor required students to pray before allowing them to begin a final exam,³² and, more generally, the ostracizing of cadets who chose not to attend chapel services.³³ These are only a few examples of what has been described as the Academy’s general preference for Christians over non-Christians.³⁴

In 2005, after growing frustrated with the USAF’s reaction to informal complaints of religious discrimination, Michael Weinstein, a former USAF Academy cadet, filed an action against the USAF.³⁵ Weinstein sought permanent injunctive relief so that “[n]o member of the USAF, including a chaplain, [would be] permitted to evangelize, proselytize, or in any related way attempt to involuntarily convert, pressure, exhort, or persuade a fellow member of the USAF to accept their own religious beliefs while on duty.”³⁶ The lawsuit alleged a “severe, systematic, and pervasive” pattern of religious discrimination.³⁷ Thus, like the Hall complaint, the Weinstein complaint charged that religious discrimination had become institutionalized.³⁸ In particular, the lawsuit alleged, among other things, that cadets were encouraged by chaplains to convert fellow cadets, that cadets were forced to participate in nonsecular prayers at Academy events, that non-Christian and nonreligious cadets were persistently harassed with slurs, and that during Basic Cadet Training, an Air Force chaplain once

³⁰ Cook, *supra* note 3, at 8.

³¹ *Id.*

³² *Id.* at 7.

³³ *Id.* at 6.

³⁴ *See generally id.* at 6-8; Banerjee, *supra* note 11; Milburn, *supra* note 3.

³⁵ Amended Complaint for Violation of Constitutional Rights para. 30, Weinstein v. U.S. Air Force, No. CIV-05-1064 JP/LAM (D.N.M. Oct. 31, 2005) [hereinafter Weinstein Complaint]. The suit has been dismissed without prejudice as to Weinstein, but an appeal is likely. Cook, *supra* note 3, at 1 n.1.

³⁶ Weinstein Complaint, *supra* note 35, para. 18.

³⁷ *Id.*

³⁸ Cook, *supra* note 3, at 1; Kenneth J. Schweiker, *Military Chaplains: Federally Funded Fanaticism and the United States Air Force Academy*, 8 RUTGERS J.L. & RELIGION, Fall 2006, at 14-15.

told cadets that if they refused to proselytize, they would “burn in the fires of hell.”³⁹

Although much of the controversy about religion in the military has focused on the Hall and Weinstein complaints, and on activity at the USAF Academy, additional allegations suggest a widespread problem. For example, nine midshipmen of the U.S. Naval Academy have lobbied to eliminate mandatory lunchtime prayer at the Naval Academy.⁴⁰ The DOD has also come under fire for allowing two fundamentalist Christian organizations exclusive access to several military bases.⁴¹ One soldier claimed that, upon returning from a tour of duty in Iraq, he was forced to attend “a ceremony that began and ended with a Christian prayer.”⁴² More recently, a soldier complained that his unit was forced to choose between attending a Christian rock concert or cleaning their barracks.⁴³ Complaints about religious discrimination and proselytization in the U.S. Military thus implicate a broad spectrum of military personnel and institutions.

B. Coercive Nature of the Military

Complaints about religious discrimination and proselytization in the military are particularly disquieting considering the unique nature of military life. Courts have consistently recognized that “[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian.”⁴⁴ One of the principal ways military life differs from civilian life is that unit cohesiveness is achieved through socialization—a policy of each branch of the U.S.

³⁹ Weinstein Complaint, *supra* note 35, paras. 14-17, 19.

⁴⁰ *Religion's Place in Annapolis*, VA. PILOT & LEDGER STAR, June 30, 2008, available at 2008 WLNR 12258162. The lunchtime prayer is a tradition that involves a chaplain leading grace. Although midshipmen are not required to pray, all midshipmen must stand and bow their heads during the pre-meal ritual. Josh Mitchell, *Mealtime Prayer Again Under Fire—ACLU Threatens to Take Legal Action Against Academy*, BALT. SUN, June 26, 2008, at 1A, available at 2008 WLNR 11998565.

⁴¹ *Is it Legal? Church and State*, 57 NEWSLETTER ON INTELLECTUAL FREEDOM 24, Jan. 1, 2008, available at 2008 WLNR 8924032.

⁴² Lichtblau, *supra* note 4.

⁴³ Steve Szkotak, *Troops: Skipping Christian Concert Got Us Punished*, ASSOCIATED PRESS, Aug. 20, 2010, available at http://huffingtonpost.com/2010/08/21/troops-skipping-christian_n_690032.html.

⁴⁴ *Anderson v. Laird*, 437 F.2d 912, 914 (7th Cir. 1971) (quoting *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953)); accord *Cook*, *supra* note 3, at 14.

Military.⁴⁵ For example, “service before self” is a core concept at the USAF.⁴⁶ This model requires that personal interests be subordinate to USAF regulations.⁴⁷ The Virginia Military Institute (VMI) has a comparable philosophy. There, first-year cadets are collectively rewarded when one cadet contributes to VMI objectives and collectively punished when one cadet detracts from those objectives.⁴⁸ Similarly, the U.S. Army aims for a common ethical and moral base throughout its units.⁴⁹ Military socialization is thus built on the notion that each soldier is part of a larger unit.⁵⁰ This ideal is epitomized in the U.S. Army’s former slogan, “An Army of One.”⁵¹

A key facet of military socialization is strict adherence to codes of conduct.⁵² Each branch of the U.S. Military institutes its own regulations. In the Army, for instance, all soldiers must adhere to exacting uniform and grooming standards.⁵³ Regulations are also in place at military colleges and universities. At the USAF Academy, codes of conduct structure almost every aspect of a cadet’s life.⁵⁴ For example, all cadets must dine at the Academy mess hall; cadets are required to spend Saturday mornings studying; and first-year cadets are not allowed to wear civilian clothing without approval from their Commandant—even when on leave or on the weekend.⁵⁵ Similarly, codes and regulations control what cadets at VMI do most hours of the day.⁵⁶ In particular, cadets at VMI are required to regularly participate in drills and to join in traditional dining ceremonies, and first-year cadets are subjected to hazing rituals.⁵⁷ The implicit message articulated by these rules is that

⁴⁵ William J. Dobosh, Jr., *Coercion in the Ranks: The Establishment Clause Implications of Chaplain-Led Prayers at Mandatory Army Events*, 2006 WIS. L. REV. 1493, 1522.

⁴⁶ Cook, *supra* note 3, at 14.

⁴⁷ *Id.*

⁴⁸ *Mellen v. Bunting*, 327 F.3d 355, 361 (4th Cir. 2003).

⁴⁹ Dobosh, *supra* note 45, at 1524.

⁵⁰ *Id.* at 1526.

⁵¹ Captain Eugene Y. Kim, *The Judge Advocate Recruiting Office: The Gateway to Service*, ARMY LAW., June 2004, at 38.

⁵² Cook, *supra* note 3, at 14.

⁵³ Dobosh, *supra* note 45, at 1526.

⁵⁴ Cook, *supra* note 3, at 14.

⁵⁵ *Id.* at 14-15.

⁵⁶ *Mellen v. Bunting*, 327 F.3d 355, 361-63 (4th Cir. 2003).

⁵⁷ *Id.*

deviation is not tolerated. "In this strictly regimented world, . . . debate, dissent, and deliberation have no place."⁵⁸

The types of military regulations previously mentioned are primarily enforced through a hierarchical chain of command. Socialization teaches soldiers to obey the commands of their authority figures.⁵⁹ This process trains soldiers to respect institutional leadership and discourages soldiers from challenging authority.⁶⁰ This culture of conformity is continually reinforced by military leaders, who are expected to persistently convey and promote military values to their subordinates.⁶¹ While this type of indoctrination may ultimately develop unit cohesiveness, mandated adherence to regimented codes of conduct raises the issue of voluntariness. To be sure, enlistment in the various branches of the U.S. Military is done by choice. But the decision to enlist does not eliminate the possibility of coercion while serving in the military.⁶² As the Supreme Court has recognized, "[P]eer group pressure to conform to established practices is a forceful form of coercion."⁶³ Voluntary participation in military activities is thus circumscribed by the coercion inherent in the military's chain of command structure.⁶⁴ Subordinates have no real ability to tell their commanding officer they are not interested in obeying that commander's orders.⁶⁵ This dynamic magnifies the risk of coerced religious activity and government-enforced preference for certain religions or religion generally.⁶⁶

II. ESTABLISHMENT CLAUSE JURISPRUDENCE

The Establishment Clause of the First Amendment to the U.S. Constitution states that "Congress shall make no law respecting an establishment of religion."⁶⁷ Eleven years after its ratification, Thomas Jefferson famously articulated the notion that the First Amendment establishes a "wall of . . . separation

⁵⁸ Dobosh, *supra* note 45, at 1525.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Anderson v. Laird*, 466 F.2d 283, 295 (D.C. Cir. 1972).

⁶³ *Id.* at 296.

⁶⁴ Schweiker, *supra* note 38, at 36.

⁶⁵ *Id.*

⁶⁶ Dobosh, *supra* note 45, at 1528.

⁶⁷ U.S. CONST. amend. I.

between church and state.”⁶⁸ Although seemingly absolute in its terms, there are few areas of constitutional law that are as complex as those implicated by the Establishment Clause of the First Amendment.⁶⁹ In fact, as Chief Justice Burger wrote, “[W]e can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law. . . . Total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable.”⁷⁰ This inherent line-drawing difficulty is exacerbated in the military context because courts often defer to military policies that purport to “enhance military readiness and promote national safety.”⁷¹

The Establishment Clause is typically implicated when the government takes action that is perceived to help or advance religion.⁷² The overarching idea is that the government may not favor one religion over another or generally favor religion over nonreligion; rather, a government stance on religion must be neutral.⁷³ To that end, the Supreme Court has established three tests for Establishment Clause controversies.

A. *The Lemon Test*

The Supreme Court established the predominant Establishment Clause standard in *Lemon v. Kurtzman*.⁷⁴ In *Lemon*, the Court emphasized that there are “[t]hree main evils against which the Establishment Clause was intended to afford protection: ‘sponsorship, financial support, and active involvement of the sovereign in religious activity.’”⁷⁵ To safeguard against these types of government intrusion, the Court articulated a conjunctive three-prong test. Under the

⁶⁸ Letter from Thomas Jefferson to the Danbury Baptist Ass’n of Conn. (Jan. 1, 1802) (on file with the Thomas Jefferson Papers at the Library of Congress), available at <http://www.loc.gov/exhibits/religion/danburys.jpg>.

⁶⁹ Benjamin, *supra* note 18, at 3; Dobosh, *supra* note 45, at 1499.

⁷⁰ *Lemon v. Kurtzman*, 403 U.S. 602, 612, 614 (1971).

⁷¹ Aden, *supra* note 7, at 196; Rabinowitz, *supra* note 19, at 897.

⁷² *Fitzkee & Letendre*, *supra* note 2, at 8.

⁷³ *McCreary Cnty. v. ACLU*, 545 U.S. 844, 860 (2005) (“The touchstone for our analysis is the principle that the First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.” (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968))).

⁷⁴ *Katcoff v. Marsh*, 755 F.2d 223, 233 (2d Cir. 1985) (citing *Lemon v. Kurtzman*, 403 U.S. 602 (1971)). The *Lemon* decision struck down Rhode Island and Pennsylvania statutes that provided state subsidization of private-school (including parochial-school) teachers’ salaries. *Lemon*, 403 U.S. at 606-07.

⁷⁵ *Lemon*, 403 U.S. at 612 (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 668 (1970)).

Lemon test, a law or governmental action that is religiously neutral on its face does not violate the Establishment Clause if (1) it has a secular purpose,⁷⁶ (2) its principal or primary effect is one that neither advances nor inhibits religion,⁷⁷ and (3) it does not foster an excessive government entanglement with religion.⁷⁸ A challenged action or law is constitutional only if all three prongs are satisfied.⁷⁹

⁷⁶ *Id.* at 612-13. The first prong of the *Lemon* Test, whether there is a secular purpose, involves an inquiry into the subjective intentions of the government or government agent. *Mellen v. Bunting*, 327 F.2d 355, 372 (4th Cir. 2003). The Supreme Court has held that purpose is determined by looking at the text of the statute or government action at issue as an “objective observer.” *McCreary Cnty. v. ACLU*, 545 U.S. 844, 863 (2005) (quoting *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)). If there is more than one legitimate purpose, one of which is not secular, the analysis shifts to what the primary or predominant purpose is. *Id.* at 860 (“When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government’s ostensible object is to take sides.”); see also *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987). That said, singular, or even multiple, “purposes” are difficult to ascertain. See *McCreary Cnty.*, 545 U.S. at 863. As a result, courts are typically deferential to a state’s asserted secular purpose and it is usually only when a government’s stated purpose is found to be a sham or the law or action at issue is explicitly religious that it is overturned. Emilie Kraft Bindon, *Entangled Choices: Selecting Chaplains for the United States Military*, 56 ALA. L. REV. 247, 261-62 (2004). The first prong of the *Lemon* Test is therefore a relatively low hurdle to overcome. Fitzkee & Letendre, *supra* note 2, at 9 (noting that the Supreme Court has invalidated governmental action for improper purpose under the Establishment Clause in only five cases since *Lemon* was decided in 1971).

⁷⁷ *Lemon*, 403 U.S. at 612-13. The second prong, whether the principle or primary effect is one that advances or inhibits religion, is arguably “the most significant part of the *Lemon* test” and is often “the crux” of an Establishment Clause controversy. Fitzkee & Letendre, *supra* note 2, at 10. Unlike the determination of whether there is a secular purpose, analysis of the “effects” prong is an objective determination that measures “whether, irrespective of government’s actual purpose, the practice under review . . . conveys a message of endorsement or disapproval.” *Mellen*, 327 F.3d at 374 (citing *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985)). This prong ostensibly targets statutes or government action whose primary or predominant effect advances religion but whose purpose could not otherwise be identified. The “effects” prong does not, however, target statutes or government action whose secondary or tertiary effect incidentally advances religion, Fitzkee & Linell, *supra* note 2, at 10, because the Supreme Court’s holdings “do not call for a total separation between church and state,” *Lemon*, 403 U.S. at 614.

⁷⁸ *Lemon*, 403 U.S. at 613. The third and final prong of the *Lemon* Test, whether government action has fostered an excessive entanglement with religion, looks at the extent to which government intrudes into church matters or to the extent to which government allows religious entities to influence governmental matters. Fitzkee & Linell, *supra* note 2, at 10. Because there cannot be an absolute separation of church and state, government entanglement exists on a spectrum, “with some entanglements . . . more egregious than others.” Bindon, *supra* note 76, at 263. Thus, in evaluating whether there is an excessive entanglement with religion, courts take a comprehensive approach and examine such factors as “the character and purposes of the institutions that are benefited [and] the nature of the . . . resulting relationship between the government and the religious authority.” *Lemon*, 403 U.S. at 615. The Supreme Court has “permitted the States to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials. Bus transportation, school lunches,

The *Lemon* test has been widely criticized since *Lemon* was decided in 1971⁸⁰—even by members of the Supreme Court.⁸¹ In fact, the Court has explicitly declined to limit Establishment Clause controversies to a single standard.⁸² In the years since *Lemon* was decided, the Supreme Court has applied other tests in Establishment Clause controversies.⁸³ And in some instances, the Court has ignored the *Lemon* test altogether.⁸⁴ Nevertheless, *Lemon* has yet to be overturned.⁸⁵

B. *The Endorsement Test*

The Supreme Court clouded the waters of Establishment Clause jurisprudence in 1989, when it decided *County of Allegheny v. ACLU*. At issue in that case was the constitutionality of two different holiday displays, a crèche and a menorah, located on public property.⁸⁶ The Court framed the issue of constitutionality as whether the government had appeared to have taken a position on questions of religious belief.⁸⁷ The Court emphasized that “whether the key word is endorsement, favoritism, or promotion,” the essential Establishment Clause principle is the same.⁸⁸

public health services, and secular textbooks supplied in common to all students [have been held] not . . . to offend the Establishment Clause.” *Id.* at 616-17.

⁷⁹ Fitzkee & Linell, *supra* note 2, at 8-9.

⁸⁰ See, e.g., Chaudhuri v. Tennessee, 130 F.3d 232, 236 (6th Cir. 1997); Dobosh, *supra* note 45, at 1502; Fitzkee & Linell, *supra* note 2, at 11.

⁸¹ One example is Justice Rehnquist who wrote in a dissenting opinion to *Wallace v. Jaffree* that the *Lemon* test “has no more grounding in the history of the First Amendment than does the wall theory upon which it rests.” *Jaffree*, 472 U.S. at 110 (Rehnquist, J., dissenting); see also *McCreary Cnty.*, 545 U.S. at 900 (Scalia, J., dissenting); *Bd. of Educ. v. Grumet*, 512 U.S. 687, 712 (1994) (O’Connor, J., concurring).

⁸² *Katcoff v. Marsh*, 755 F.2d 223, 233 (2d Cir. 1985).

⁸³ See *Lee v. Weisman* 505 U.S. 577, 644 (1992) (Scalia, J., dissenting); *Cnty. of Allegheny v. ACLU*, 492 U.S. 573 (1989).

⁸⁴ See *Marsh v. Chambers*, 463 U.S. 783 (1983).

⁸⁵ See *McCreary Cnty.*, 545 U.S. at 859 (“Ever since *Lemon v. Kurtzman* summarized the three familiar considerations for evaluating Establishment Clause claims, looking to whether government action has ‘a secular legislative purpose’ has been a common, albeit seldom dispositive, element of our cases.”).

⁸⁶ *Cnty. of Allegheny*, 492 U.S. at 579, 588.

⁸⁷ *Id.* at 594.

⁸⁸ *Id.* at 593 (internal quotation marks omitted). Under that standard, the Court held that the crèche was unconstitutional because, standing alone inside the main entrance of the county courthouse, it had an unmistakably clear religious meaning. *Id.* at 598. On the other hand, the Court held that the display of the menorah was constitutional. *Id.* at 614. Unlike the crèche, which stood alone, the eighteen-foot menorah was displayed with a forty-five-foot Christmas tree. *Id.* at 617. The Court thus reasoned that the dual-display failed to give the appearance that the county was taking a position on anything other than the secular celebration of the winter holidays. *Id.* at 616.

The crux of this new analysis—known today as the endorsement test—is whether a reasonable and informed observer would view the government’s action as an endorsement of religion.⁸⁹ In fashioning this additional Establishment Clause standard, the Court’s main concern was that the endorsement of any one religion would effectively elevate its members to an “insider” status⁹⁰ while relegating nonadherents to the position of secondary citizens.⁹¹ Thus, if government has endorsed one religion over another—or, more generally, religion over nonreligion—it has violated the principle of neutrality that is fundamental to the Establishment Clause.⁹² Many courts, however, view the endorsement test as a mere refinement of the *Lemon* test’s “effects” prong.⁹³ Others have chosen to ignore the endorsement test altogether and have continued to use the *Lemon* standard.⁹⁴

C. *The Coercion Test*

Although the majority opinion in *County of Allegheny* is famous for its adaption of a new constitutional standard, Justice Kennedy’s opinion, concurring in part and dissenting in part, is also significant. Kennedy reasoned that coercion is central to any Establishment Clause analysis because it would be difficult for government to “establish a religion without some measure of more or less subtle coercion, be it in the form of taxation to supply the substantial benefits that would sustain a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing.”⁹⁵ Kennedy concluded that “[a]bsent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal.”⁹⁶

⁸⁹ Fitzkee & Linell, *supra* note 2, at 12.

⁹⁰ Dobosh, *supra* note 45, at 1503-04.

⁹¹ *Id.* at 1504.

⁹² *Id.*

⁹³ See, e.g., Mellen v. Bunting, 327 F.3d 355, 371 (4th Cir. 2003); Cook, *supra* note 3, at 19; see also Fitzkee & Linell, *supra* note 2, at 12 (noting that some courts have questioned whether the endorsements test is part of the *Lemon* analysis); Deanna N. Pihos, *Assuming Maturity Matters: The Limited Reach of the Establishment Clause at Public Universities*, 90 CORNELL L. REV. 1349, 1357 (2005).

⁹⁴ See *Tanford v. Brand*, 104 F.3d 982, 986 (7th Cir. 1997); *Chaudhuri v. Tennessee*, 130 F.3d 232, 233 (6th Cir. 1997).

⁹⁵ *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 659-60 (1989).

⁹⁶ *Id.* at 662.

In 1992, the Supreme Court formally adopted Justice Kennedy's coercion analysis in *Lee v. Weisman*.⁹⁷ That case shifted the focus of Establishment Clause jurisprudence with respect to school prayer and introduced what is now commonly known as the coercion test.⁹⁸ The issue in *Lee* was whether a graduation ceremony at a Rhode Island middle school violated the Establishment Clause because the benediction and invocation, which were led by a rabbi, had religious content.⁹⁹ Justice Kennedy, writing for the majority, stated that there "are heightened concerns with protecting freedom of conscience from subtle coercive pressure in elementary and public schools."¹⁰⁰ The *Lee* Court was particularly concerned that, given the students' ages and the social pressure to attend graduation, there was no real alternative to standing and listening to the religious speech.¹⁰¹ Although the pressure was both subtle and indirect, it was also "as real as any overt compulsion."¹⁰²

Despite Justice Kennedy's belief that coercion is an essential element of all Establishment Clause controversies, the *Lee* holding was explicitly limited to primary and secondary education.¹⁰³ In *Santa Fe Independent School District v. Doe*, an example of an application of the coercion test, the Court struck down a Texas public school district's policy of using student referenda to decide whether religious prayers would be included at graduation and before football games.¹⁰⁴ Although the prayers in *Santa Fe* were chosen by students—unlike *Lee* where the school superintendent had decided the prayer

⁹⁷ 505 U.S. 577, 579 (1992).

⁹⁸ Prior to the introduction of the coercion test, the Supreme Court had consistently held that organized and official prayer at schools violates the Establishment Clause. Dobosh, *supra* note 45, at 1507. In 1962, the Supreme Court in *Engel v. Vitale* struck down a requirement that New York public school students recite a religious prayer at the start of each school day. 370 U.S. 421 (1962). The next year, the Court struck down a Pennsylvania statute requiring daily Bible reading at the beginning of the school day. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963). The common thread of these cases was the Court's concern that prayer was an official part of the public school curriculum. Dobosh, *supra* note 45, at 1508. The Court denied the opportunity to overturn *Lemon* because the issue before the Court could be decided outside the *Lemon* framework. *Lee*, 505 U.S. at 587.

⁹⁹ The invocation started, "God of the Free, Hope of the Brave." The benediction began, "O God, we are grateful to You . . ." and ended, "We give thanks to You, Lord . . ." *Lee*, 505 U.S. at 580-82 (1992).

¹⁰⁰ *Id.* at 592.

¹⁰¹ *Id.* at 593. "[A]bsence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years." *Id.* at 595.

¹⁰² *Id.* at 593.

¹⁰³ *Id.*

¹⁰⁴ 530 U.S. 290 (2000).

policy—the Court found this distinction constitutionally insignificant.¹⁰⁵ In both cases, the school prayer had the “improper effect of coercing those present to participate in an act of religious worship.”¹⁰⁶ Since *Lee*, the Supreme Court has upheld all state-sponsored religious activities in nonprimary and nonsecondary schools.

1. Prayer at Public Universities

Consistent with the Supreme Court’s limitation of the *Lee* holding, two federal courts have upheld formal prayers during public university graduations. In *Tanford v. Brand*, the Seventh Circuit rejected an Establishment Clause challenge to Indiana University’s invocation and benediction at graduation.¹⁰⁷ The dispositive issue for the *Tanford* court was that the students were adults, rather than younger students, and that attendance at the ceremony was not at all compulsory.¹⁰⁸ The Sixth Circuit adopted a similar stance in *Chaudhuri v. Tennessee*, where a Tennessee State University faculty member challenged the use of prayer and moments of silence at university events.¹⁰⁹ Echoing the reasoning of *Tanford*, the *Chaudhuri* court concluded that college-educated adults would not be unduly influenced by the prayers.¹¹⁰

2. Prayer at Military Colleges

For the *Tanford* and *Chaudhuri* courts, the age of the students was the dispositive factor; because the students were adults, religious speech at school events was not coercive.¹¹¹ The prayers at issue in those cases, however, were outside of a

¹⁰⁵ Dobosh, *supra* note 45, at 1510.

¹⁰⁶ *Santa Fe Indep. Sch. Dist.*, 505 U.S. at 312.

¹⁰⁷ The nonsectarian prayers at issue were delivered by local clergy and were substantively similar to those at issue in *Lee*. *Tanford v. Brand*, 104 F.3d 982, 985-86 (7th Cir. 1997).

¹⁰⁸ *Id.* at 985. The court also rejected the plaintiffs’ argument that the prayers violated the *Lemon* Test. In upholding the constitutionality of the prayers, the court held that the invocation and benediction served the legitimate secular purpose of solemnizing the occasion. *Id.* at 986.

¹⁰⁹ *Chaudhuri v. Tennessee*, 130 F.3d 232, 233 (6th Cir. 1997).

¹¹⁰ *Id.* at 237. The court also subjected the prayers to the *Lemon* Test. In doing so, the court held that the prayers passed all three prongs of the standard. In particular, the court stated that “[n]o reasonable observer could conclude that [Tennessee State University], merely by requesting a moment of silence at its functions, places its stamp of approval on any particular religion or religion in general.” *Id.* at 237-38.

¹¹¹ Dobosh, *supra* note 45, at 1511.

military context.¹¹² Two federal circuit courts have struck down religious activity at military colleges, however. In *Anderson v. Laird*, the D.C. Circuit Court of Appeals held as unconstitutional a military regulation requiring cadets at the U.S. Military Academy, U.S. Naval Academy, and USAF Academy to attend religious services on Sundays.¹¹³ The *Anderson* court rejected the regulation in three important ways. First, the court refused to defer to military judgment on the necessity of the regulations.¹¹⁴ While the court recognized the military's need to regulate its day-to-day operations and to ascertain the essential characteristics of fitness for duty,¹¹⁵ it affirmed its jurisdiction to decide issues of constitutional significance.¹¹⁶ Second, although the court recognized that individuals necessarily give up certain freedoms when they enter the military, it held that enlistment could not be conditioned on soldiers' relinquishment of their religious freedoms.¹¹⁷ Third, the court emphasized, "[T]he fact that attendance at the military academies is voluntary does not eliminate the possibility of coercion."¹¹⁸ More significantly, however, it was of no importance that some cadets could be excused because of conscientiously held beliefs;¹¹⁹ as instituted, the policy was per se unconstitutional.¹²⁰

The Fourth Circuit reached a similar conclusion in *Mellen v. Bunting*, where the panel rejected the notion that citizens entirely forfeit their freedoms by entering the military.¹²¹ The issue in *Mellen* was the constitutionality of a "supper prayer" at VMI.¹²² In a unanimous decision, the *Mellen* court held that "VMI's supper prayer exacts an unconstitutional toll on the

¹¹² See *Chaudhuri*, 130 F.3d at 233; *Tanford*, 104 F.3d at 983.

¹¹³ *Anderson v. Laird*, 466 F.2d 283, 284 (D.C. Cir. 1972). Cadets were required to attend Protestant, Catholic, or Jewish Chapel services. Failure to attend one of these three services would result in punishment. *Id.*

¹¹⁴ *Id.* at 296.

¹¹⁵ *Id.* at 294-95.

¹¹⁶ *Id.* at 296.

¹¹⁷ *Id.* at 294. "To decline to apply the [Establishment] Clause absolutely . . . is to create a loophole in the scope of its protection which the Supreme Court simply does not admit." *Id.* at 290.

¹¹⁸ *Id.* at 295.

¹¹⁹ *Id.* at 293.

¹²⁰ *Id.* at 296.

¹²¹ See *Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003).

¹²² Each day, prior to supper, a short prayer is given that gives thanks or asks for God's blessing. *Id.* at 362. VMI is a state-sponsored military college whose primary goal is to prepare its cadets for military service. *Id.* at 360-61.

consciences of religious objectors.”¹²³ Central to its holding was the coercive nature of VMI’s strict codes of conduct,¹²⁴ which were, in many respects, similar to military regulations.¹²⁵ To accomplish the school’s mission of training soldiers, VMI uses an adversative method of training that is “predicated on the importance of creating doubt about previous beliefs and experiences in order to create a mindset conducive to the values VMI attempts to impart.”¹²⁶ As such, although the students in question were not children, the court found that they were “uniquely susceptible to coercion.”¹²⁷ The *Mellen* court thus rejected the rigidity of *Chaudhuri* and *Tanford*, which focused strictly on the age of the students in question.¹²⁸

Importantly, the *Mellen* court used the *Lee* coercion test as its primary authority. While the *Mellen* court accepted *Lemon*’s prevalence in Establishment Clause jurisprudence and acknowledged that it has not been overturned, it concluded that the coercion test should be the initial point of analysis in the context of school prayer.¹²⁹ In striking down VMI’s mealtime prayer policy, the court thus emphasized the coercive nature of the institution’s educational mission.¹³⁰

III. BALANCING ESTABLISHMENT AND FREE EXERCISE

The second religion clause of the First Amendment is the Free Exercise Clause. Interpreted as a limitation on the Establishment Clause, the Free Exercise Clause states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”¹³¹ The Free Exercise Clause’s essential purpose is to protect the individual right to practice any religion or to choose not to practice religion at all.¹³² The fundamental question implicated

¹²³ *Id.* at 372.

¹²⁴ Cook, *supra* note 3, at 16.

¹²⁵ *Mellen*, 327 F.3d at 361.

¹²⁶ *Id.* (quoting *United States v. Virginia*, 766 F. Supp. 1407, 1421 (W.D. Va. 1991)) (internal quotation marks omitted).

¹²⁷ *Id.* at 371. Essential to the court’s conclusion was that the communal dining experience was essentially obligatory. *Id.* at 372. All first year cadets are required to attend supper at the mess hall and, although all other cadets can opt to eat elsewhere, the only alternatives are vending machines and ordering pizza. *Id.* at 361 n.3.

¹²⁸ *Id.* at 371.

¹²⁹ *Id.* at 370-71.

¹³⁰ *Id.* at 371.

¹³¹ U.S. CONST. amend. I.

¹³² Schweiker, *supra* note 38, at 7.

by issues of religious speech is therefore whether the speech is protected under the Free Exercise Clause or prohibited by the Establishment Clause.¹³³ In theory, the Establishment Clause and the Free Exercise Clause work in tandem to promote the common end of “religious freedom in the context of government neutrality.”¹³⁴ In practice, however, the two clauses have competing and sometimes irreconcilable interests.¹³⁵ Tension between the two clauses arises when the government’s efforts to avoid the endorsement of religion also prohibits private religious practice.¹³⁶ As a result, the disposition of a case involving religious speech often turns on whether the court frames the issue as an Establishment Clause controversy or a Free Exercise controversy.¹³⁷

A. *The First Amendment and the Military Chaplaincy*

The tension between the Free Exercise Clause and the Establishment Clause is exemplified by the existence of the military chaplaincy. Exercising its power under Article I, Section 8 of the Constitution, Congress created a military to provide for a national defense.¹³⁸ In doing so, Congress also directed that the military’s peace establishment consist of all organizations and persons necessary to aid soldiers in battle.¹³⁹ As part of this directive, Congress has specifically authorized a military chaplaincy¹⁴⁰ to meet the religious needs of the members of the U.S. Military.¹⁴¹ A funded division of the U.S. Military,¹⁴² the military chaplaincy consists of three separate institutions: the Chaplains Corps of the Army, the Chaplains Corps of the Navy, and the Air Force Chaplains Service.¹⁴³ The codes of conduct vary somewhat by institution based on each service’s particular mission, but all three groups function under the auspices of the DOD, the agency given statutory authorization to implement the

¹³³ Christian M. Keiner, *Preaching from the State’s Podium: What Speech Is Proselytizing Prohibited by the Establishment Clause?*, 21 *BYU J. PUB. L.* 83, 83 (2007).

¹³⁴ Dobosh, *supra* note 45, at 1519.

¹³⁵ Cook, *supra* note 3, at 25; Dobosh, *supra* note 45, at 1519.

¹³⁶ Cook, *supra* note 3, at 25.

¹³⁷ Dobosh, *supra* note 45, at 1519-20.

¹³⁸ U.S. CONST. art. I, § 8, cl. 1.

¹³⁹ 10 U.S.C. § 3062(d) (2006); *Katcoff v. Marsh*, 755 F.2d 223, 225 (2d Cir. 1985).

¹⁴⁰ 10 U.S.C. § 3073 (2006).

¹⁴¹ *Id.* § 3547 (2006); *Katcoff*, 755 F.2d at 226.

¹⁴² *Katcoff*, 755 F.2d at 229.

¹⁴³ “Navy Chaplains also serve the Marine Corps, Coast Guard and the Merchant Marine.” Lupu & Tuttle, *supra* note 2, at 116.

chaplaincy.¹⁴⁴ According to DOD Directive 1304.19(4.1), military chaplaincies are “established to advise and assist commanders in the discharge of their responsibilities to provide for the free exercise of religion in the context of military service as guaranteed by the Constitution”¹⁴⁵ The directive further states that military chaplaincies

[s]hall serve a religiously diverse population. Within the military, commanders are required to provide comprehensive religious support to all authorized individuals within their areas of responsibility. Religious Organizations that choose to participate in the Chaplaincies recognize this command imperative and express willingness for their Religious Ministry Professionals (RMPs) to perform their professional duties as chaplains in cooperation with RMPs from other religious traditions.¹⁴⁶

The legal conflict over the existence of the military chaplaincy thus centers on whether the government is simply allowing soldiers to freely exercise their First Amendment religious rights or whether, by creating and funding the military chaplaincy, it has established a nonneutral preference for religion in violation of the First Amendment.

Although the Supreme Court has never addressed the military chaplaincy’s constitutionality,¹⁴⁷ the Second Circuit, in *Katcoff v. Marsh*, upheld it as constitutionally valid.¹⁴⁸ The court’s first reason for doing so was based on the holding of *Marsh v. Chambers*,¹⁴⁹ a Supreme Court decision upholding the constitutionality of a chaplain-led prayer before sessions of the Nebraska legislature.¹⁵⁰ The dispositive issue in *Marsh* was that the prayer, having been performed for over one hundred years, was a deeply rooted tradition in the state.¹⁵¹ Although the prayer took a step towards government establishment of religion,¹⁵² the Court noted that the practice was part of Nebraska’s social fabric, which alleviated the Court’s fears about any proselytizing

¹⁴⁴ *Id.*

¹⁴⁵ DOD Directive No. 1304.19(4.1) (June 11, 2004).

¹⁴⁶ *Id.* at 4.2.

¹⁴⁷ Aden, *supra* note 7, at 189.

¹⁴⁸ In that case, two Harvard law students, neither of which was a member of the U.S. Military, challenged the existence of the Army chaplaincy as a federally funded program under the Establishment Clause. *Katcoff v. Marsh*, 755 F.2d 223, 224-25 (2d Cir. 1985).

¹⁴⁹ *See generally id.* at 237-38.

¹⁵⁰ *Marsh v. Chambers*, 463 U.S. 783, 783 (1983).

¹⁵¹ *Id.* at 790.

¹⁵² *Id.* at 795.

effects.¹⁵³ In *Marsh*, the Supreme Court thus adopted a historical exception to the *Lemon* test.¹⁵⁴ Relying on the reasoning of *Marsh*, the *Katcoff* court noted a similar unbroken tradition of chaplains in the military and concluded that the military chaplaincy fit within that historical exception.¹⁵⁵

The *Katcoff* court's second reason for upholding the military chaplaincy was deference to military judgment on the issue.¹⁵⁶ The court's analysis acknowledged that the military chaplaincy, viewed in isolation, would fail to meet the criteria of *Lemon*.¹⁵⁷ However, the court also held that the chaplaincy must be viewed in the context of the War Powers Clause of Article I, Section 8.¹⁵⁸ Under the War Powers Clause, "[j]udges are not given the task of running the Army" because the military is a unique "community governed by a separate discipline from that of the civilian [Thus, w]hile members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections."¹⁵⁹ The *Katcoff* court thus stated that military decisions are presumptively valid and that any doubt about the constitutionality of a military policy should be treated with judicial comity.¹⁶⁰ The permissibility of the chaplaincy program, therefore, hinged on whether, after considering practical alternatives, the institution was relevant and necessary to a national defense.¹⁶¹ In the military's opinion, soldiers turn to religion to cope with the trauma of being uprooted from their homes, thousands of miles away, to wage war.¹⁶² According to the military, the chaplaincy is an integral part of maintaining a national defense.¹⁶³

Under the view of religion as an integral part of national defense, chaplains provide a vital resource to soldiers.¹⁶⁴ Thus, as the *Katcoff* court's third basis for upholding

¹⁵³ *Id.*

¹⁵⁴ *Katcoff*, 755 F.2d at 232.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 234.

¹⁵⁷ *Id.* at 232.

¹⁵⁸ *Id.* at 233.

¹⁵⁹ *Id.* at 233-34.

¹⁶⁰ *Id.* at 234.

¹⁶¹ *Id.* at 235.

¹⁶² *Id.* at 228.

¹⁶³ *Id.* at 237-38.

¹⁶⁴ The *Katcoff* court stated:

the chaplaincy institution, the court reasoned that, without the chaplaincy, soldiers would be deprived of their Free Exercise Clause right to freely practice religion.¹⁶⁵ Because the military requires soldiers to live on bases that are often far from their religious communities and where organized worship is not always available,¹⁶⁶ the court reasoned that the Free Exercise Clause actually requires the military to institute a chaplaincy program.¹⁶⁷ The provision of churches and chaplains at military establishments, according to the court, is therefore an “appropriate accommodation between the two Clauses.”¹⁶⁸

In its ruling, the *Katcoff* panel addressed the existence of the program as an all-or-nothing proposition.¹⁶⁹ As such, the court’s holding was limited in several important ways. First, the court assumed the chaplaincy met the requirement of voluntariness because it determined that the chaplaincy allowed soldiers to freely decide whether to worship without the fear of discipline or stigma.¹⁷⁰ Second, and more importantly, the court explicitly stated that “[n]o chaplain is authorized to proselytize soldiers or their families.”¹⁷¹ It would seem, then, that *Katcoff* restricts chaplains to an inherently passive role—tending to the spiritual needs of soldiers that seek chaplain services on their own volition, rather than actively influencing soldiers to change their religious beliefs.¹⁷² Ultimately, the court’s decision, while deferential to military judgment on matters of national defense, also maintained

The 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. In addition the chaplain, because of his close relationship with the soldiers in his unit, often serves as a liaison between the soldiers and their commanders, advising the latter of racial unrest, drug or alcohol abuse, and other problems affecting the morale and efficiency of the unit, and helps to find solutions.

Id. at 228.

¹⁶⁵ *Id.* at 234.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ Aden, *supra* note 7, at 197.

¹⁷⁰ *Katcoff*, 755 F.2d at 231-32; Aden, *supra* note 7, at 194.

¹⁷¹ *Katcoff*, 755 F.2d at 228.

¹⁷² Aden, *supra* note 7, at 193.

jurisdiction to decide matters involving the military chaplaincy, which, as an institution, remains a government agent.¹⁷³

B. Defining Proselytization in the Context of the Religion Clauses

In constitutional controversies involving religious speech, a basic inquiry by courts is whether the religious speech in question is a proselytizing message, as proselytizing lies at the nexus of the two religion clauses.¹⁷⁴ Like the military chaplaincy, the question is whether the religious speech at issue is simply a form of free exercise or whether it is an impermissible form of government establishment of religion.¹⁷⁵ This question is asked because many courts have essentially adopted a “no proselytizing” rule.¹⁷⁶ While there is some consensus that the Establishment Clause is violated when government-sponsored proselytizing occurs, the determination of constitutionality ultimately turns on how the court frames the legal issue.¹⁷⁷ These determinations are complicated because the Supreme Court has failed to define proselytization.¹⁷⁸

*Rosenberger v. Rector and Visitors of the University of Virginia*¹⁷⁹ is a prominent example of a case in which the Supreme Court did not believe that the delivery of a religious message was proselytizing. There, the Supreme Court held that it was constitutionally impermissible for the University of Virginia to fund the printing costs of all its student publications except the Christian newspaper.¹⁸⁰ The denial of

¹⁷³ *Id.* at 207; Richard D. Rosen, *Katcoff v. Marsh at Twenty-Two: The Military Chaplaincy and the Separation of Church and State*, 38 U. TOL. L. REV. 1137, 1178 (2007).

¹⁷⁴ Keiner, *supra* note 133, at 83.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 83-85. See *Marsh v. Chambers*, 463 U.S. 783, 794-95 (1983) (prayer in question was not unconstitutional because there was no indication the prayer was used to exploit, proselytize, or disparage any faith or belief); see also *Van Orden v. Perry*, 545 U.S. 677, 692 (2004) (Scalia, J., concurring) (“[T]here is nothing unconstitutional in a State’s favoring religion generally, honoring God through public prayer and acknowledgment, or, in a *nonproselytizing* manner, venerating the Ten Commandments.” (emphasis added)); *Baz v. Walters*, 782 F.2d 701, 709 (7th Cir. 1986) (Veteran’s Administration must assure existence of a chaplaincy does not create Establishment Clause problems because of proselytizing); *Katcoff v. Marsh*, 755 F.2d 223, 228 (2d Cir. 1985) (“No chaplain is authorized to proselytize . . .”).

¹⁷⁷ Keiner, *supra* note 133, at 83.

¹⁷⁸ *Id.* at 85.

¹⁷⁹ 515 U.S. 819 (1995).

¹⁸⁰ The University, a public institution, chose not to fund the Christian newspaper because of a University policy that prohibited funding a publication that

funds to the Christian newspaper, the Court reasoned, was improper even though the newspaper's editors "committed the paper to a two-fold mission: to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means."¹⁸¹ As Justice Souter noted in his dissent, until *Rosenberger*, the Court had never "upheld direct state funding of the sort of proselytizing published in [the Christian newspaper] and, in fact, [had] categorically condemned state programs directly aiding religious activity."¹⁸² *Rosenberger* thus exemplifies the centrality of judicial framing to the ultimate disposition of religious speech controversies: the majority did not view the publication of the pamphlet as proselytizing, but the dissenting members of the court did.

Despite the Supreme Court's failure to adequately define proselytization, some federal circuit courts have developed proselytization as a legal principle.¹⁸³ The Third Circuit has stated that "[c]ontext is essential. . . . There is a marked difference between expression that symbolizes individual religious observance, such as wearing a cross on a necklace, and expression that proselytizes a particular view."¹⁸⁴ The Fourth Circuit has also defined proselytizing as distinct from the similar concept of passively advancing one's own religion.¹⁸⁵ In one case, for example, a Fourth Circuit panel stated that, "to 'proselytize' on behalf of a particular religious belief necessarily means to seek to 'convert' others to that belief, whereas to 'advance' a religious belief means simply to 'forward, further, [or] promote' the belief."¹⁸⁶ Justice Stevens

"primarily promotes or manifests a particular belief in or about a deity or an ultimate reality." *Id.* at 823 (internal quotation marks omitted).

¹⁸¹ *Id.* at 826. (internal citation omitted). The dispositive issue for the Court was, however, the University's regulation requiring public officials to scan student publications for their religious content. *Id.* at 845. According to the Court, this action denied a legitimate right to religious speech and ultimately risked "fostering a pervasive bias [and] hostility [towards] religion." *Id.* at 846. Further, the Establishment Clause did not require the University to deny eligibility based on the publication's viewpoint; the University had distanced itself enough from the contents of the publication so that there was no reasonable fear or appearance that the government had endorsed the speech in question. *Id.* at 841-42, 861. In fact, to deny the student publication money based on its religious content actually upset the notion of government neutrality central to Establishment Clause jurisprudence. *Id.* at 846.

¹⁸² *Id.* at 874-75 (Souter, J., dissenting) (internal citations omitted).

¹⁸³ Keiner, *supra* note 133, at 101.

¹⁸⁴ Walz v. Egg Harbor Twp. Bd. of Educ., 342 F.3d 271, 278-79 (3d Cir. 2003).

¹⁸⁵ Keiner, *supra* note 133, at 102.

¹⁸⁶ Wynne v. Great Falls, 376 F.3d 292, 300 (4th Cir. 2004) (internal quotation marks omitted).

has also noted this distinction, albeit in dissent: “Distinguishing speech from a religious viewpoint, on the one hand, from religious proselytizing on the other, is comparable to distinguishing meetings to discuss political issues from meetings whose principle purpose is to recruit new members to join a political organization.”¹⁸⁷ The common analytical thread of these opinions, including *Rosenberger*, is the extent to which the government actor, as the purveyor of the religious message, seeks to convert. Thus, as one author noted, “Proselytizing is expressive activity which a reasonable observer would perceive attempts to convert the audience from one religious belief, or lack of a belief, to another religious belief, or lack thereof.”¹⁸⁸

IV. THE UNCONSTITUTIONALITY OF PROSELYTIZATION AND RELIGIOUS DISCRIMINATION IN THE U.S. MILITARY

Although courts have yet to apply the coercion test outside the primary or secondary school context, coercion analysis is ripe for Establishment Clause controversies in the military context. Applying the coercion test, the incidents of proselytization and religious discrimination, if true, are unconstitutional.

A. *Adoption of Coercion Analysis for Military Establishment Clause Controversies*

The complexity of the Establishment Clause has produced a variety of standards for evaluating the constitutionality of a state law or action. These standards are often applied inconsistently, sporadically, and sometimes, even concurrently.¹⁸⁹ In lieu of this complex patchwork, the coercion test should be used to analyze all claims of religious discrimination and proselytizing in the U.S. Military. The coercion analysis is appropriate given both the inherently coercive nature of military life and the prevalence of religious discrimination claims in the U.S. Military. Further, the application of the coercion test in these circumstances is

¹⁸⁷ *Good News Club v. Milford Central School*, 533 U.S. 98, 128 (2001) (Stevens, J. dissenting).

¹⁸⁸ Keiner, *supra* note 133, at 104.

¹⁸⁹ See *supra* Part II.A.

entirely consistent with current Establishment Clause jurisprudence.¹⁹⁰

In attempting to establish the dividing line between church and state, the *Lemon* Court emphasized that the Establishment Clause's purpose was to afford protection from state sponsorship of religion, state financial support of religion, and active state involvement in private religious activity.¹⁹¹ Similarly, the *Lee* Court stated that the Establishment Clause was intended to prevent religious activity from becoming so pervasive that it becomes, in effect, state-sponsored or state-directed.¹⁹² Although these standards are somewhat amorphous, most claims of religious discrimination in the military implicate the evils that, according to the *Lemon* and *Lee* Courts, the Establishment Clause was intended to prevent.

The seminal case supporting the application of the coercion test in Establishment Clause military controversies is *Mellen v. Bunting*. In *Mellen*, the Fourth Circuit moved away from the view of student age as the focal point in Establishment Clause challenges to school prayers.¹⁹³ In contrast to *Chaudhuri* and *Brand*, the *Mellen* court focused on the entire context in which the students' claims were raised.¹⁹⁴ The dispositive issue for the court was not the students' age but their enrollment in a school whose adversative-model curriculum made them "uniquely susceptible to coercion."¹⁹⁵ By rejecting the rigidity of a bright-line limitation based on age, the Fourth Circuit moved towards a broad-based and thorough analysis of government neutrality towards religion.

The analysis applied in *Mellen* not only examines the constitutional issue through a more comprehensive perspective than the *Tanford* and *Chaudhuri* approaches, but is consistent with the holding in *Lee*. Although *Lee* was limited to primary and secondary education,¹⁹⁶ the decision did not answer the question of whether a state action could coerce mature adults

¹⁹⁰ See *supra* Part II.

¹⁹¹ *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)).

¹⁹² *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

¹⁹³ See *Mellen v. Bunting*, 327 F.3d 355, 371 (4th Cir. 2003) (acknowledging that "cadets are not children").

¹⁹⁴ *Id.* at 371-72.

¹⁹⁵ *Id.* at 371.

¹⁹⁶ *Lee*, 505 U.S. at 593. In fact, in *Chaudhuri* and *Tanford*, the Sixth and Seventh Circuits used this reasoning to support their conclusion that mature adults are not susceptible to coercion. *Chaudhuri v. Tennessee*, 130 F.3d 232, 238 (6th Cir. 1997); *Tanford v. Brand*, 104 F.3d 982, 985-86 (7th Cir. 1997).

in an educational setting.¹⁹⁷ More importantly, in concluding that primary- and secondary-school students are vulnerable to coercion, Justice Kennedy used age merely as an *indication* of susceptibility, not as a *proxy* for susceptibility.¹⁹⁸ At no point in *Lee* did Kennedy state that younger students are always susceptible to coercion while older students are never susceptible to coercion. The critical analytical point is thus the degree to which those affected are vulnerable to forced religious practices. While age may be an indication of vulnerability, it is by no means dispositive.

Given the importance of context in Establishment Clause challenges, the coercion test is also an appropriate standard outside the school-prayer context. While *Lee* may be limited to circumstances involving school prayer,¹⁹⁹ its language does not foreclose the possibility that other environments may also be coercive. In penning the opinion, Justice Kennedy actually spoke in broad terms about the constitutional guarantees against government coercion of religion.²⁰⁰ In fact, a critical aspect of Kennedy's reasoning was his view that the "objecting student had no real alternative to avoid" attending the religious ceremony.²⁰¹ Coercion analysis is thus ripe for controversies involving the military given the uniquely coercive nature of military socialization and the chain of command hierarchy.²⁰² This standard is especially appropriate in the context of proselytizing. Proselytizing is coercive by its very nature because its objective is to convert people from one religious belief to another (or from nonbelief to belief) by convincing them to follow the conveyed religious message.²⁰³

¹⁹⁷ "We do not address whether [it] is acceptable if the affected citizens are mature adults . . ." *Lee*, 505 U.S. at 593.

¹⁹⁸ *See id.*

¹⁹⁹ "The sole question presented is whether a religious exercise may be conducted at a graduation ceremony in circumstances where . . . young graduates who object are induced to conform." *Id.* at 599.

²⁰⁰ "Divisiveness . . . can attend any state decision respecting religion . . ." *Id.* at 587-88; "[T]he Establishment Clause . . . guarantees at a minimum that a government may not coerce anyone to support or participate in religion or its exercise . . ." *Id.* at 577.

²⁰¹ *Id.* at 598.

²⁰² *See supra* Part I.B.

²⁰³ Keiner, *supra* note 133, at 104.

B. *Application of Coercion Analysis to Proselytization in the Military*

Although coercion analysis is the proper test for Establishment Clause controversies involving the military, the alleged religious discrimination and proselytizing discussed in Part I are not necessarily unconstitutional. When legal controversies involve the establishment of religion in the military, there are countervailing considerations of First Amendment Free Exercise rights and deference to military decisions that implicate national defense. There are also mitigating factors, such as voluntariness.²⁰⁴ Taken together, these competing interests create somewhat of a balance in controversies over religion in the military. The military chaplaincy, for instance, is per se constitutional despite the fact that it constitutes a form of state-funded organized religion.²⁰⁵ Reports of religious discrimination and proselytization in the military, however, suggest that this equilibrium has shifted in recent years.

A common argument against judicial intervention in military policy is the deference historically given to military judgment.²⁰⁶ For example, a critical aspect of the Second Circuit's decision in *Katcoff*, upholding the constitutionality of the military chaplaincy, was that "military decisions reasonably relevant and necessary to furtherance of our national defense . . . should be treated as presumptively valid and . . . should be resolved as a matter of judicial comity in favor of deference to the military's exercise of its discretion."²⁰⁷ But this deference is not absolute. In striking down a requirement that cadets at military colleges attend Sunday religious services, the D.C. Circuit noted that "while an individual's freedoms may of necessity be abridged upon his entrance into military life, there is no authority for the point that his right to freedom of religion is abolished."²⁰⁸ More broadly, the court held that individual

²⁰⁴ See *Katcoff v. Marsh*, 755 F.2d 223, 233-34 (2d Cir. 1985).

²⁰⁵ See generally *id.*

²⁰⁶ Rabinowitz, *supra* note 19, at 925; see also *Katcoff*, 755 F.2d at 234; *Rostker v. Goldberg*, 453 U.S. 57, 64-68 (1981).

²⁰⁷ *Katcoff*, 755 F.2d at 233-34.

²⁰⁸ The D.C. Circuit further noted:

Personal freedoms of conduct and appearance have been accommodated to the military's perceived need to establish procedures best suited to regulate its day-to-day operations, duty assignments and call-up orders; to determine a reservist's discharge of his duties; to regulate physical appearance; and to ascertain "the essential characteristics of fitness for duty." This deference to

constitutional freedoms cannot be sacrificed for the sake of military interests.²⁰⁹ Thus, to the extent that chaplaincy proselytization efforts or other questionable practices are reasonably relevant to securing a national defense, these practices are unconstitutional nonetheless.

The concept of voluntariness is related to this idea. Couched in *Katcoff's* rationale regarding judicial deference to military decisions was the notion that individuals who enter the military necessarily forgo freedoms they may have otherwise enjoyed as regular citizens, such as the right to travel whenever or wherever one wants.²¹⁰ The Fourth and D.C. Circuits, on the other hand, have explicitly stated that the voluntary choice to enroll at military universities or to enlist in the military does not abrogate constitutional guarantees.²¹¹ Essentially, the government may not condition enrollment or enlistment on unconstitutional conditions.²¹² Thus, like judicial deference to military discretion, the argument that soldiers surrender their right to religious freedom when they enter the military is tempered by constitutional guarantees.

As with judicial deference to military discretion and the relinquishment of individual freedoms through voluntary service, free exercise of religion in the military has its limitations. Assuming the truth of the chaplaincy proselytizing complaints, the chaplaincy program is a prime example of an institution that runs afoul of the Establishment Clause despite the right to free exercise.²¹³ In light of the Second Circuit's holding in *Katcoff* that "no chaplain is authorized to proselytize soldiers or their families,"²¹⁴ it is clear that individual chaplains have overstepped their constitutional authority by preaching to

military decisionmaking has been justified by the military's role, its mandate to prepare for the waging war, and the necessity for our national security. However, deference has inherent limitations which have also been fully recognized in judicial decision.

Anderson v. Laird, 466 F.2d 283, 294-95 (D.C. Cir. 1972).

²⁰⁹ *Id.* at 295.

²¹⁰ *Katcoff*, 755 F.2d at 233.

²¹¹ *Anderson*, 466 F.2d at 293; *Mellen v. Bunting*, 327 F.3d 355, 372 (4th Cir. 2003).

²¹² *Anderson*, 466 F.2d at 293.

²¹³ See *Dobosh*, *supra* note 45, at 1560 (arguing that "[t]he current practice of offering chaplain-led prayers during mandatory, nonreligious, Army ceremonies violates the Establishment Clause").

²¹⁴ *Katcoff*, 755 F.2d at 228; see also *Rosen*, *supra* note 173, at 1178 (noting that the *Katcoff* decision did not "give the military leadership a blank check to administer the chaplaincy or religious practices in the armed forces without regard to the Establishment Clause").

cadets at military universities to convert fellow cadets.²¹⁵ Chaplain-led prayers in the military and at military universities have thus become analogous to the religious-oriented graduation speeches at primary and secondary schools that the Supreme Court has consistently deemed unconstitutional.²¹⁶

Like chaplains, the actions of most other purveyors of religious discrimination in the military are constitutionally suspect under coercion analysis. Unlike chaplaincy policies, however, the practices of other actors are unconstitutional not simply because they seek to proselytize or discriminate based on religious beliefs, but because they amount to overt coercion in the context of military socialization and a strict chain of command structure, where there is little tolerance for dissent. Individual deviation from the group was impractical at best when, for example, the USAF Academy head football coach invoked Jesus's name in the team locker room or a USAF Academy professor required students to pray before taking final exams.²¹⁷ A soldier's options are similarly limited during religious ceremonies upon return from tours of duty and the Naval Academy's mealtime prayer.²¹⁸

More ominous, however, are the actions of those higher within the chain of command.²¹⁹ In the military, a "subordinate does not have the realistic ability to tell her or his commanding officer that she or he is not interested in her or his religious propaganda for fear of reprisals."²²⁰ As a result, subordinates are uniquely vulnerable to coercion. Any religious discrimination or proselytization by superior officers, then, should be unconstitutional.

The allegations of systematic peer ostracism and harassment is the more difficult issue.²²¹ Unlike institutional discrimination or the proselytizing efforts of superior officers, peer discrimination does not necessarily create a coercive environment similar to those discussed so far. When soldiers hold the same rank within the chain of command, the fear of

²¹⁵ Weinstein Complaint, *supra* note 35, paras. 14-17.

²¹⁶ Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000); Lee v. Weisman, 505 U.S. 577 (1992); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963); Engle v. Vitale, 370 U.S. 421 (1962).

²¹⁷ See *supra* Part I.A-B.

²¹⁸ See *supra* Part I.A-B.

²¹⁹ See *supra* Part I.A (detailing an alleged circumstance where a soldier was threatened with sanctions by his superior because he was an atheist).

²²⁰ Schweiker, *supra* note 38, at 26.

²²¹ See *supra* Part I.A.

reprisal for rejecting religious propaganda is likely not the same. But when peer groups within the military organize for religious objectives, an essentially institutionalized form of religious practice results. Peer-organized proselytization has the potential to be just as coercive as formal institutionalized religious practices.²²² For this reason, it should not be tolerated.

CONCLUSION

State establishment of religion has long been a convoluted area of constitutional law; this is particularly true when controversies involve the military. Nevertheless, there is significant precedent supporting the use of coercion analysis in Establishment Clause controversies that involve the military. Under the coercion test, if a person or group of people is particularly susceptible to coercion, the state must forebear on promoting action that is not neutral towards religion. Without this protection, “citizens are subjected to state-sponsored religious exercises, [and] the State [has disavowed] its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people.”²²³

The extension of the coercion test to matters involving the military is apt given the increasing concern in recent years about religious discrimination and proselytization in the U.S. Military. Using coercion analysis, it is evident that much of the religious discrimination and proselytization discussed in Part I, if true, is unconstitutional. To cure these constitutional infirmities, the military should ensure that its universities, superior officers, and overall practices promote religion only in a neutral manner. This goal can be accomplished by implementing nondiscrimination policies and regulations to be enforced in conjunction with existing laws on religious neutrality.²²⁴ Moreover, for military chaplains to practice within

²²² In *Santa Fe*, where a student-elected prayer before football games was ruled unconstitutional, the Supreme Court held that peer-organized proselytization can have “the improper effect of coercing those present to participate in an act of religious worship.” *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000).

²²³ *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

²²⁴ See DOD Directive No. 1304.19(4.2) (June 11, 2004). The directive states that military chaplaincies:

[s]hall serve a religiously diverse population. Within the military, commanders are required to provide comprehensive religious support to all authorized individuals within their areas of responsibility. *Id.* Religious Organizations that choose to participate in the Chaplaincies recognize this command imperative and express willingness for their Religious Ministry

the bounds of the Establishment Clause, they must serve as a passive utility to soldiers who request their services and should lead services only when attendance is truly noncompulsory. More generally, the military should incorporate religious components into military life only if it unambiguously dissociates itself from the advancement of particular religions and creates a zero-tolerance policy for coercive attempts to achieve religious conformity.

Daniel H. Michaelson[†]

Professionals (RMPs) to perform their professional duties as chaplains in cooperation with RMPs from other religious traditions.

Id.

[†] J.D. Candidate, Brooklyn Law School, 2011; B.A., Union College, 2006. I would like to thank the editors and staff of the *Brooklyn Law Review* for their time and assistance with this note. I would also like to thank my mother, father, and Sasha LoPresti, without whom none of my accomplishments would be possible.