

# HOLD THAT LINE!: THE PROPER ESTABLISHMENT CLAUSE ANALYSIS FOR MILITARY PUBLIC PRAYERS\*

## INTRODUCTION

Four-thousand midshipmen, seeking refuge from the Annapolis elements, gradually break from ranks as they shuffle deep into the bowels of Bancroft Hall. These young men and women, each one with a million thoughts racing through their weary minds, trudge down steps and through side doors until they reach the cavernous cafeteria where they all dine together daily for nine months out of the year. Their thoughts are myriad; most are probably of academics, or of military requirements, or maybe even of weekend preparations. Distracting thoughts notwithstanding, these young men and women press forward, already with one-third of their day behind them—and it's only noon.

Welcome to the noon meal at the United States Naval Academy. The midshipmen will eventually find their assigned tables and stand behind their chairs, waiting patiently for their “shipmates” to do the same and for daily announcements to be read. Finally, a member of the Navy Chaplain Corps will step to the lectern, front and center, and request that those who are willing join him in a word of prayer. Following that brief prayer, during which time midshipmen may choose either to participate or simply to stand in quiet reflection of things greater than their many individual concerns, the frenetic pace of Academy life will immediately resume.

Does this brief time of prayer violate the First Amendment's Establishment Clause?<sup>1</sup> The answer should be an emphatic “no.” This very practice (and many others like it), however, has come under direct attack because of the improper application of current Establishment Clause tests to military contexts.<sup>2</sup> This Note refutes the use of those tests and provides a proper analytical framework for public prayer in the military. To that end, two different legal solutions are discussed herein. Part I asserts that military public prayer should be afforded the same historical exemption from Establishment Clause analysis as the legislative prayer in *Marsh v. Chambers*.<sup>3</sup> Alternatively, Part II discusses the inaptness of applying current Establishment Clause

---

\* Winner of the second annual Leroy Rountree Hassell, Sr. Writing Competition, hosted by the Regent University Law Review.

<sup>1</sup> The Establishment Clause states: “Congress shall make no law respecting an establishment of religion . . .” U.S. CONST. amend. I.

<sup>2</sup> See, e.g., Letter from Deborah A. Jeon, Legal Dir., ACLU of Md., to Vice Admiral Jeffrey L. Fowler, Superintendent, U.S. Naval Acad. (May 2, 2008) (on file with author) (demanding cessation of the Naval Academy's noon meal prayer).

<sup>3</sup> 463 U.S. 783 (1983).

jurisprudential tests to a military context and proffers a new test that was formulated in *Goldman v. Weinberger*.<sup>4</sup>

### I. PUBLIC PRAYER IN A MILITARY CONTEXT IS UNIQUE AND SHOULD BE IMMUNE FROM ESTABLISHMENT CLAUSE TESTS

In *Marsh*, the Supreme Court held that a public prayer did not violate the Establishment Clause of the First Amendment when it was conducted by a chaplain during the Nebraska state legislature's opening session.<sup>5</sup> In support of its holding, the Court proffered both a historical<sup>6</sup> and a practical rationale.<sup>7</sup> While it recognized that historical tradition alone is not enough to justify the continuation of public prayer in a legislative setting, the Court used the common-sense, practical rationale to provide irrefutable evidence of the Founders' belief that the practice did not violate the Establishment Clause.<sup>8</sup>

#### A. *The Historical Rationale Supporting Military Public Prayer*

Public prayer in the military should be accorded the same treatment by the courts as historic legislative prayer. Both practices are "deeply embedded in the history and tradition of [the United States]"<sup>9</sup> and therefore satisfy the historical rationale required by *Marsh*. Several specific examples from our nation's two oldest military services, the Army and the Navy, illustrate the point.

The U.S. Army has a rich prayer tradition that dates back to the Revolutionary War:

---

<sup>4</sup> 475 U.S. 503 (1986), *superseded by statute*, 10 U.S.C. § 774 (2006). Note that this case is superseded only in the narrow factual circumstances presented therein. The underlying rationale for the holding, upon which the test in Part II is based, remains firmly intact.

<sup>5</sup> *Marsh*, 463 U.S. at 786.

<sup>6</sup> *Id.* at 792 ("In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society.").

<sup>7</sup> *Id.* ("To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country."). Factors listed in support of this practical rationale included the fact that "the individual claiming injury by the practice [was] an adult" who was "presumably not readily susceptible to religious indoctrination or peer pressure." *Id.* (internal citations omitted). These factors are nearly identical to the criteria the Supreme Court has used in its application of the coercion test, which states 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.'" *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)) (alteration in original). The inaptness of applying this test to military public prayer is discussed at length *infra* Part II.B.

<sup>8</sup> *Marsh*, 463 U.S. at 792.

<sup>9</sup> *Id.* at 786.

[George] Washington himself impressed upon the men under his command the value of Christian character, and his own example must have aided the chaplains in their difficult labors.

Public prayers were a part of the daily or Sunday routine, followed by the reading of orders, and usually the roll-call. Washington's attitude toward religion in the army was unmistakably set forth when he said: "To the distinguished character of a Patriot, it should be our highest glory to add the more distinguished character of a Christian."<sup>10</sup>

Public prayer in a military context was also alive and well during the Civil War. As one Civil War chaplain eloquently stated, "Prayer comforts the Christian, encourages the inquirer, and is relished even by the irreligious."<sup>11</sup> That same chaplain laid out explicit directions for the recitation of prayer on a daily basis: "It is . . . desirable to have evening prayers in the regiment . . . . Let the colonel order his men to be formed in a square; and then, in a short, earnest, appropriate prayer, let the chaplain commit them to the care of the Almighty."<sup>12</sup>

One specific instance serves well to illustrate the premium placed on such prayer during conflict. Prior to the onset of open hostilities between the North and the South, a Union major named Robert Anderson was charged with defending Fort Moultrie, South Carolina, against any attack from the newly seceded state.<sup>13</sup> Fearing imminent annihilation, Major Anderson moved his small command to Fort Sumter, South Carolina, on December 26, 1860, just a few months prior to its capture by the Confederates.<sup>14</sup>

At noon on December 27, the day after their arrival, Major Anderson's command hoisted the American flag over the new post in dramatic fashion.<sup>15</sup> One newspaper reported the event as follows:

A short time before noon Major Anderson assembled the whole of his little force . . . around the foot of the flag-staff. The national ensign was attached to the cord, and Major Anderson, holding the end of the lines in his hands, knelt reverently down. The officers, soldiers, and men clustered around, many of them on their knees, all deeply

---

<sup>10</sup> CHARLES KNOWLES BOLTON, *THE PRIVATE SOLDIER UNDER WASHINGTON* 158–59 (1902) (quoting JOHN WHITING, *REVOLUTIONARY ORDERS OF GENERAL WASHINGTON* 75 (N.Y. & London, Wiley and Putnam 1844)).

<sup>11</sup> W. Y. BROWN, *THE ARMY CHAPLAIN: HIS OFFICE, DUTIES, AND RESPONSIBILITIES, AND THE MEANS OF AIDING HIM* 45 (Philadelphia, William S. & Alfred Martien 1863) (describing the function of Army Chaplains' prayers for the infirm).

<sup>12</sup> *Id.* at 98.

<sup>13</sup> See EBA ANDERSON LAWTON, *MAJOR ROBERT ANDERSON AND FORT SUMTER, 1861* 3 (1911).

<sup>14</sup> *Id.* at 5–6.

<sup>15</sup> *The Prayer at Sumter*, Vol. 5 No. 213 HARPER'S WKLY. 49 (1861), available at [http://www.sonofthesouth.net/leefoundation/major-anderson-ft-sumter\\_Dir/civil-war-prayer-fort-sumter.htm](http://www.sonofthesouth.net/leefoundation/major-anderson-ft-sumter_Dir/civil-war-prayer-fort-sumter.htm).

impressed with the solemnity of the scene. The chaplain made an earnest prayer—such an appeal for support, encouragement, and mercy, as one would make who felt that Man's extremity is God's opportunity. As the earnest, solemn words of the speaker ceased, and the men responded Amen with a fervency that perhaps they had never before experienced, Major Anderson drew the Star Spangled Banner up to the top of the staff . . . . If . . . South Carolina had at that moment attacked the fort, there would have been no hesitation upon the part of any man within it about defending that flag.<sup>16</sup>

The Army's public prayer tradition continued throughout the next few decades, striking a chord with many commanders until it reached a most unlikely adherent. General George S. Patton, commander of the U.S. Third Army during World War II and one of the country's great war heroes, saw "that one of the major training objectives of [his] office was to help soldiers recover and make their lives effective in [the] . . . realm [of] prayer."<sup>17</sup> One might think that fostering a prayerful atmosphere in his command would be the last thing a man who was prone to the utterance of obscenities<sup>18</sup> and who once was chastised by his superiors for slapping a soldier suffering from "combat fatigue" (now known as post-traumatic stress disorder)<sup>19</sup> would strive to accomplish. Nevertheless, at one point during his service, General Patton did just that. From September to December of 1944, he found his unit plagued by an "immoderate" rain that had slowed combat operations significantly.<sup>20</sup> At a loss for what to do, Patton sought divine intervention to regain the initiative.<sup>21</sup> He placed a telephone call on the morning of December 8, 1944, to the Third Army Chief of Chaplains and inquired, "[D]o you have a good prayer for weather? We must do something about those rains if we are to win the war."<sup>22</sup> The Chaplain, finding no designated prayer for weather in his prayer books, composed an original.<sup>23</sup> Upon subsequent

---

<sup>16</sup> *Id.* (internal quotations omitted).

<sup>17</sup> James H. O'Neill, *The True Story of the Patton Prayer: The Author of General Patton's Famous Third Army Prayer Reveals the Story of Its Origin, Paying Tribute Both to the General's Trust in God and to the Power of Faith-Filled Prayer*, NEW AM., Jan. 12, 2004, available at [http://findarticles.com/p/articles/mi\\_m0JZS/is\\_1\\_20/ai\\_n25081623?tag=untagg](http://findarticles.com/p/articles/mi_m0JZS/is_1_20/ai_n25081623?tag=untagg) ed.

<sup>18</sup> See, e.g., MARTIN BLUMENSON, PATTON: THE MAN BEHIND THE LEGEND 210 (1985) (describing an instance where Patton shouted at a soldier, "You are just a g--damned coward, you yellow son of a bitch"); CARLO D'ESTE, PATTON: A GENIUS FOR WAR 385 (1996) (detailing another occasion where Patton proclaimed to a soldier under his command, "You are trying to kill some German son of a bitch before he kills you").

<sup>19</sup> BLUMENSON, *supra* note 18, at 210–11.

<sup>20</sup> O'Neill, *supra* note 17.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* The prayer read:

approval by General Patton, 250,000 copies of the “Third Army Prayer” were printed and distributed to every man in the command.<sup>24</sup>

Patton was not satisfied, however, with the mere distribution of the “weather prayer.” He wanted to get to the root of the issue. After his Chief of Chaplains informed him that he “d[id] not believe that much praying [was] going on,” Patton proceeded to give his perspective on the role of prayer in a soldier’s life:<sup>25</sup>

Chaplain, I am a strong believer in prayer. There are three ways that men get what they want: by planning, by working, and by praying. Any great military operation takes careful planning, or thinking. Then you must have well-trained troops to carry it out: that’s working. But between the plan and the operation there is always an unknown. That unknown spells defeat or victory, success or failure. It is the reaction of the actors to the ordeal when it actually comes. Some people call that getting the breaks; I call it God. . . . We were lucky in Africa, in Sicily, and in Italy, simply because people [back home] prayed. But we have to pray for ourselves, too . . . . Great living is not all output of thought and work. A man has to have intake as well. I don’t know what you call it, but I call it Religion, Prayer, or God.<sup>26</sup>

Finally, in the most recent military conflict in Iraq, one unit of the First Cavalry Division was involved in a rescue mission for fellow soldiers pinned down by enemy fire.<sup>27</sup> Prior to their departure, Chaplain Ramon Pena recited the following brief prayer: “Lord, protect us. Give us the angels you have promised and bring peace to these soldiers as they go out. In the name of the Father, the Son, and the Holy Spirit.”<sup>28</sup>

The U.S. Navy also has a rich tradition of public prayer in its ranks. While the Navy was still in its infancy, the Continental Congress acknowledged the significance of religion by specifically including provisions that prohibited blaspheming the name of God and directed captains to provide for religious services on board their vessels.<sup>29</sup> The

---

Almighty and most merciful Father, we humbly beseech Thee, of Thy great goodness, to restrain these immoderate rains with which we have had to contend. Grant us fair weather for Battle. Graciously hearken to us as soldiers who call upon Thee that, armed with Thy power, we may advance from victory to victory, and crush the oppression and wickedness of our enemies and establish Thy justice among men and nations. Amen.

*Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> MARTHA RADDATZ, *THE LONG ROAD HOME* 2–3 (2007).

<sup>28</sup> *Id.* at 3.

<sup>29</sup> Bryan J. Dickerson, *The Navy Chaplain Corps: 230 Years of Service to God and Country*, MARINE CORPS NEWS, Oct. 27, 2005, <http://www.marines.mil/unit/2ndmaw/Pages/2005/The%20Navy%20Chaplain%20Corps%20230%20Years%20of%20Service%20to%20God%20and%20Country.aspx>.

establishment of the Chaplain Corps grew out of these provisions and, not long after their enactment, the first chaplain began his service at sea.<sup>30</sup>

The Continental Navy, however, was essentially dissolved following the Revolutionary War.<sup>31</sup> But, in 1798, the Department of the Navy was created, the Chaplain Corps was re-established, and many of the traditional public prayer practices were formalized.<sup>32</sup>

Daily, as well as weekly, religious services were an integral part of life at sea. Morning and evening prayer time was a common feature of that shipboard life. Prayers were common in the whole ship . . . . The publicly announced prayers affected the whole crew except those below decks out of earshot. Everyone else, officers and men, mustered at their respective stations in response to the drum beat to quarters . . . . Those ships that had bands would have their musicians play religious hymns, all hands would uncover and the chaplain would read a short prayer . . . . The crews welcomed those breaks as it was a pause from routine work, an opportunity for a few moments of tranquility and thoughtful meditation and a chance to mingle with crewmates.<sup>33</sup>

The daily prayer tradition at sea has been carried forward to the present day, where it is usually recited over a ship's loudspeaker just before "lights out."<sup>34</sup> Additionally, the traditional burial-at-sea ceremony reserves a time for prayer.<sup>35</sup> Finally, as mentioned in the introduction, chaplains at the U.S. Naval Academy have recited a prayer prior to the commencement of its noon meal<sup>36</sup> and have promulgated other prayer traditions dating back to the institution's inception in 1845.<sup>37</sup>

---

<sup>30</sup> See *id.* (discussing Reverend Benjamin Balch, who became the first recorded chaplain to serve on an American ship at sea when he reported to the frigate *U.S.S. Boston* in October of 1778).

<sup>31</sup> *Id.*

<sup>32</sup> CHARLES J. GIBOWICZ, MESS NIGHT TRADITIONS 110 (2007).

<sup>33</sup> *Id.* at 111.

<sup>34</sup> See Robert S. Lanham, *I Love the Navy*, GOAT LOCKER, <http://www.goatlocker.org/retire/lovenavy.htm> (last visited Nov. 19, 2009); Navy Recruiting Command, Delayed Entry Program, Daily Routine, <http://www.cnrc.navy.mil/DEP/daily.htm> (last visited Nov. 19, 2009).

<sup>35</sup> See Naval Historical Ctr., Burial at Sea, <http://www.history.navy.mil/faqs/faq85-1.htm> (last visited Nov. 19, 2009).

<sup>36</sup> GIBOWICZ, *supra* note 32, at 115; see also Jacqueline L. Salmon, *ACLU Might File Suit to End Lunch Prayer*, WASH. POST, June 26, 2008, at B04.

<sup>37</sup> See, e.g., U.S.N.A. Chaplain Ctr., The Midshipman Prayer, <http://www.usna.edu/Chapel/midsprayer.htm> (last visited Nov. 19, 2009). Often recited at religious services, the text of the Midshipman Prayer is as follows:

Almighty Father, whose way is in the sea, whose paths are in the great waters, whose command is over all and whose love never faileth; let me be aware of Thy presence and obedient to Thy will. Keep me true to my best self, guarding me against dishonesty in purpose and in deed, and helping me so to live that I can stand unashamed and unafraid before my shipmates, my loved ones, and [T]hee. Protect those in whose love I live. Give me the will to do my best and to

Prominent nineteenth-century Navy Chaplain Walter Colton aptly summed up the integral role of dutiful religious tradition and the practice of prayer at sea as follows:

The Church must . . . be the friend of the sailor, the advocate of his rights, his patron under injuries, the stern rebuker of his wrongs. She must pity him when others reproach, *pray* for him when others denounce, cling to him when others forsake, and never abandon him, even though he should abandon himself.<sup>38</sup>

One last, brief example may illustrate the aptness of this summation. While crossing the Atlantic one February night in 1943, the troop carrier *Dorchester* was torpedoed by German U-boat 223.<sup>39</sup> Four embarked chaplains immediately leapt into action, passing out life jackets and “preaching calmness and bravery” to the scared soldiers who were abandoning ship.<sup>40</sup> As the life jackets began to run out, leaving men without any flotation devices, the chaplains began, one by one, to surrender theirs.<sup>41</sup> They resolved to go down with the sinking vessel and, as a symbol of solidarity and as a show of strength and confidence for the men they served, all four chaplains linked arms and “[raised voices] in prayer saying the ‘Our Father.’”<sup>42</sup>

The purpose of this Note is not to extol the virtues of prayer in military society. That determination is rightly left to Congress to delegate to the individual military services as it sees fit.<sup>43</sup> The foregoing examples are merely a few illustrations of the historical significance of public prayer in the U.S. military. This Note acknowledges that, as the Supreme Court has expressly iterated, such historical significance is not

---

accept my share of responsibilities with a strong heart and a cheerful mind. Make me considerate of those entrusted to my leadership and faithful to the duties my country has entrusted in me. Let my uniform remind me daily of the traditions of the service of which I am a part. If I am inclined to doubt, steady my faith; if I am tempted, make me strong to resist; if I should miss the mark, give me courage to try again. Guide me with the light of truth and keep before me the life of Him by whose example and help I trust to obtain the answer to my prayer, Jesus Christ our Lord. Amen.

*Id.*; see also Salmon, *supra* note 36 (“[S]ome form of prayer has been offered for midshipmen at meals since the school’s founding, in 1845 . . .”).

<sup>38</sup> WALTER COLTON, *THE SEA AND THE SAILOR, NOTES ON FRANCE AND ITALY, AND OTHER LITERARY REMAINS* 85 (N.Y., A.S. Barnes & Co. 1851), available at <http://www.archive.org/stream/seandsailornotes00coltrich> (emphasis added).

<sup>39</sup> GIBOWICZ, *supra* note 32, at 121.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> See 10 U.S.C. § 5142 (2006) (referring to the Chaplain Corps of the U.S. Navy); 10 U.S.C. §§ 3031, 3032, 3073 (2006) (establishing the Chaplain Corps of the U.S. Army and delegating the definition of its responsibilities to the Secretary of the Army).

enough: “[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees.”<sup>44</sup>

*B. The Practical Rationale Behind Military Public Prayer*

Military public prayer also closely parallels the practical rationale associated with legislative prayer in that “there is far more [present] here than simply historical patterns.”<sup>45</sup> First and foremost, that “something more” can be found in the above historical examples by looking beyond the actual specific instances and rote traditions of military prayers. The various commanders and chaplains listed above used prayer as a practical tool to boost morale and to reinforce the solemnity of particular occasions.<sup>46</sup> An obvious counterargument to this justification is that public prayer will probably not successfully boost the morale of a service member who declines to participate. This argument, however, can be rebutted quite simply—*it just doesn't matter in a military context.*

Admittedly, that assertion appears unduly harsh and insensitive toward the rights of service members who decline to participate in public prayers. Indeed, while this Note focuses on the potential Establishment Clause issues of military public prayer, the Supreme Court has stated that such analysis may not be divorced from its First Amendment counterpart—the Free Exercise Clause.<sup>47</sup> The two Clauses operate in conjunction “not only to protect the integrity of individual conscience in religious matters, but to guard against the civic divisiveness that follows when the government weighs in on one side of religious debate.”<sup>48</sup> Therefore, the fact “that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause.”<sup>49</sup>

---

<sup>44</sup> *Marsh v. Chambers*, 463 U.S. 783, 790 (1983).

<sup>45</sup> *Id.*

<sup>46</sup> For morale-boosters, see, e.g., *supra* notes 17–28 and accompanying text (discussing General George Patton and the Third Army prayer). For commemoration of a solemn occasion, see, e.g., Naval Historical Ctr., *supra* note 35 (delineating procedures for burials at sea).

<sup>47</sup> The Free Exercise Clause, in conjunction with the Establishment Clause, states: “Congress shall make no law respecting the establishment of religion, or *prohibiting the free exercise thereof* . . .” U.S. CONST. amend. I (emphasis added). Indeed, the two religion clauses often compete. *McCreary County v. ACLU*, 545 U.S. 844, 875 (2005). For instance, the government is required to allow for a chaplain corps in the military to provide for the free exercise rights of service members despite its apparent Establishment Clause violation. *Id.* (citing *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005)).

<sup>48</sup> *McCreary County*, 545 U.S. at 876 (citing *Wallace v. Jaffree*, 472 U.S. 38, 52–54 & n.38 (1985)).

<sup>49</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (quoting *Lee v. Weisman*, 505 U.S. 577, 587 (1992)).



The Court has also stated, however, that “[w]hile the 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.*”<sup>50</sup> While the Supreme Court has not abdicated its role as ultimate adjudicator concerning service members’ individual rights,<sup>51</sup> it has acknowledged that “[t]he responsibility for setting up channels through which . . . grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. *The military constitutes a specialized community governed by a separate discipline from that of the civilian.*”<sup>52</sup> Moreover, in no other context has the Court recognized greater deference to Congress than in instances pertaining to what rights are available to service members—this is largely due to the war-making authorities of the government.<sup>53</sup>

It is imperative that service members’ rights are subordinate to the good of the whole service so that the above-mentioned goals of mission readiness and effectiveness are met.<sup>54</sup> Accordingly, every legislative body from the Continental Congress to the current Congress has delegated to the individual services the power to develop and implement their religious traditions as they see fit.<sup>55</sup> A large part of those religious traditions has been public prayer, which has existed in the military for as long as the individual branches themselves have existed.<sup>56</sup> If at any point Congress felt such prayers were violations of the Establishment Clause, it could have expressly limited them. It has not done so; to the contrary, Congress has both explicitly and implicitly endorsed the

---

<sup>50</sup> *Parker v. Levy*, 417 U.S. 733, 758 (1974) (emphasis added).

<sup>51</sup> *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981).

<sup>52</sup> *Orloff v. Willoughby*, 345 U.S. 83, 93–94 (1953) (emphasis added).

<sup>53</sup> *Rostker*, 453 U.S. at 64–66 (citing *Middendorf v. Henry*, 425 U.S. 25, 43 (1976)).

<sup>54</sup> *See generally* *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (“The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission[,] the military must foster instinctive obedience, unity, commitment, and esprit de corps.”).

<sup>55</sup> *See supra* note 43; *see also* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 598, 119 Stat. 3136, 3283 (2005) (authorizing service academy superintendents to institute prayers at their discretion at mandatory events); Instruction 1730.7D from the Sec’y of the Navy on Religious Ministry Within the Dep’t of the Navy, § 6(d) & Enclosure 1 (Aug. 8, 2008) (“[C]ommanders shall determine whether religious elements as defined in enclosure (1) shall be included in command functions.” (emphasis added)) [hereinafter *SECNAVINST 1730.7D*]; Naval Historical Ctr., Rules for the Regulation of the Navy of the United Colonies of North-America, Art. II, Nov. 28, 1775, available at <http://www.history.navy.mil/faqs/faq59-5.htm> (“The Commanders of the ships of the Thirteen United Colonies are to take care that divine service be performed twice a day on board, and a sermon preached on Sundays, unless bad weather or other extraordinary accidents prevent it.”).

<sup>56</sup> *See, e.g., supra* notes 10 & 29 and accompanying text.

practice.<sup>57</sup> In one instance of explicit endorsement of military public prayer, Congress specifically provided for the practice at service academies at the discretion of their commanding officers.<sup>58</sup> By continuing to delegate the specifics of religious practice to the individual services and their respective Chaplain Corps, as well as by addressing at least one specific instance of prayer itself, Congress has repeatedly endorsed the use of public prayer in a military context.<sup>59</sup>

Both the doctrine of judicial deference to the war-making authorities and the corresponding congressional delegation of religious activities to the individual services serve as support systems for military commanding officers who are charged with the care, management, and performance of their units as a whole.<sup>60</sup> These units must maintain a heightened state of readiness in order to maximize mission effectiveness. Congress has given commanders significant discretionary authority to determine the means necessary to achieve these crucial ends.<sup>61</sup> For example, commanders are free to require attendance at, or participation in, any number of activities calculated to improve unit cohesion and boost individual morale.<sup>62</sup> Public prayer in the military is irrefutably one of many such activities that commanding officers have used to accomplish those stated goals.<sup>63</sup> Even though a few service members may detest the occasional proffered prayer in a public setting, just as some may deplore the “mandatory fun” activities described above, commanders should not be deprived of the opportunity to use proven techniques that improve unit cohesion and individual morale *as a*

---

<sup>57</sup> See *supra* note 55.

<sup>58</sup> National Defense Authorization Act for Fiscal Year 2006 § 598(a). The pertinent text states:

The superintendent of a service academy may have in effect such policy as the superintendent considers appropriate with respect to the offering of a voluntary, nondenominational prayer at an otherwise authorized activity of the academy, subject to the United States Constitution and such limitations as the Secretary of Defense may prescribe.

*Id.*

<sup>59</sup> See *supra* note 55 and accompanying text.

<sup>60</sup> It should also be noted that the judicial deference doctrine is extended to the military itself as well as to the Congress. See *Cafeteria & Rest. Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 890–94 (1961).

<sup>61</sup> See *supra* note 55 and accompanying text.

<sup>62</sup> Those who are familiar with the military will recognize these activities as “mandatory fun.” Popular “fun” activities include unit picnics, softball tournaments, and the occasional golf outing.

<sup>63</sup> See, e.g., GIBOWICZ, *supra* note 32, at 111 (“[A]ll hands [on a navy ship] would uncover and the chaplain would read a short prayer . . . The crews welcomed those breaks as it was a pause from routine work, an opportunity for a few moments of tranquility and thoughtful meditation and a chance to mingle with crewmates.”).

*whole*.<sup>64</sup> Commanders should have all the tools that they desire at their disposal to ensure the maximum level of performance of their units.

The above discussion more than satisfies the “something more” rationale required by the Court in the second half of the *Marsh* analysis. The Supreme Court has recognized that military service members’ rights are analyzed differently than those of their civilian counterparts and has given significant deference to Congress’s war-making authority in stating what those rights actually are. Furthermore, Congress has both explicitly and implicitly delegated management of religious activities (and, in at least one specific instance, the practice of public prayer itself) to the individual services.

\* \* \*

Military public prayer should be accorded the same exemption from Establishment Clause scrutiny as legislative prayer. Historical examples of military public prayer are myriad, and the numerous practical applications of the practice more than satisfy the criteria set forth in *Marsh*. In the event one does not find this argument persuasive, Part II will discuss the appropriate analytical framework for a military public prayer question.

## II. WHAT’S ONE MORE TEST?

The Supreme Court has “repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in [the] sensitive area [of Establishment Clause cases].”<sup>65</sup> To that end, the Court has formulated three different tests that it may apply to the myriad of different contexts in which Establishment Clause cases may fall.<sup>66</sup> As this Part will show, these tests are inappropriate when applied to military regulations. Therefore, if the Court decides that the *Marsh* analysis is inapplicable to military public prayer, it should refrain from applying the three Establishment Clause tests to the military context. After explaining the inaptness of applying the three current Establishment Clause tests in a military context, this Part will proffer the appropriate test as described

---

<sup>64</sup> The purpose of analogizing military public prayer with “mandatory fun” activities is *not* to promote mandatory prayer. I am by no means asserting that a public prayer should be mandatory. Rather, the analogy is made to underscore the military’s historic pattern of subjugating individual preferences to the good of the whole. The fact that military public prayer is *not* mandatory probably makes it *less* detestable in the eyes of many than those aforementioned activities that *are* mandatory.

<sup>65</sup> *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984).

<sup>66</sup> See *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (the Coercion test); *Lynch*, 465 U.S. at 690–91 (O’Connor, J., concurring) (the Endorsement test); *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (citing *Walz v. Tax Comm’r*, 397 U.S. 664, 674 (1970); *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968)) (the *Lemon* test).

by the D.C. Circuit Court of Appeals and later affirmed by the Supreme Court in *Goldman v. Weinberger*.<sup>67</sup>

#### A. *The Lemon Test—Soured*

The most widely used (and much maligned) Establishment Clause test is that which was delineated in *Lemon v. Kurtzman*.<sup>68</sup> When addressing the question of whether a particular government regulation or act violates the Establishment Clause, the three-prong *Lemon* test requires (1) that the statute have a valid secular purpose, (2) that its primary effect will neither inhibit nor advance religion, and (3) that it will not foster excessive government entanglement with religion.<sup>69</sup> The Supreme Court has sometimes relegated the test to mere non-determinative “factors” that may be selectively applied to a question of constitutionality rather than as a bright-line rule that requires all three of the prongs to be met.<sup>70</sup> While the Supreme Court has never settled on one single application of the *Lemon* test, it is clear that the test has not been overruled.<sup>71</sup>

One of the preeminent cases that applied only the first prong of *Lemon* was *Wallace v. Jaffree*.<sup>72</sup> In *Wallace*, the constitutionality of three Alabama statutes was challenged: one that authorized a one-minute period of silence in public schools for meditation, another that authorized a period of silence for meditation and prayer, and still another that authorized teachers to lead willing students in prayer acknowledging an “Almighty God.”<sup>73</sup> In support of the state’s position, state Senator Donald

---

<sup>67</sup> 475 U.S. 503 (1986).

<sup>68</sup> 403 U.S. 602 (1971); see, e.g., *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring) (“Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again . . .”).

<sup>69</sup> *Lemon*, 403 U.S. at 612–13 (citing *Walz*, 397 U.S. at 674; *Allen*, 392 U.S. at 243).

<sup>70</sup> See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 314 (2000) (acknowledging the three prongs of *Lemon* but addressing only whether the regulation had a “valid secular purpose” in its analysis (quoting *Lemon*, 403 U.S. at 612)); see also *Lamb’s Chapel*, 508 U.S. at 399 (Scalia, J. concurring) (“Sometimes, we take a middle course, calling [the *Lemon* test’s] three prongs ‘no more than helpful signposts.’” (quoting *Hunt v. McNair*, 413 U.S. 734, 741 (1973))).

<sup>71</sup> The words of the Tenth Circuit from the latter half of 2008 are quite telling on this point: “the *Lemon* test clings to life because the Supreme Court . . . has never explicitly overruled the case. While the Supreme Court may be free to ignore *Lemon*, this court is not.” *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1030 n.14 (10th Cir. 2008) (internal citations omitted).

<sup>72</sup> 472 U.S. 38 (1985).

<sup>73</sup> *Id.* at 40.

Holmes testified that the legislation had no other purpose than to return voluntary prayer to public schools.<sup>74</sup>

In its holding, the Court made clear that *Lemon's* first prong alone may be dispositive and that “no consideration of the second or third criteria is necessary if a statute does not have a clearly secular purpose.”<sup>75</sup> The appropriate question to answer when determining whether a statute is in violation of the first prong is “whether [the] government’s actual purpose is to endorse or disapprove of religion.”<sup>76</sup> Where the “answer to either question [is yes] . . . the challenged practice [should be rendered] invalid.”<sup>77</sup> In *Wallace*, the Court had no problem finding that the first prong of the *Lemon* test had been violated where the very sponsor of the legislation in question admitted that there was no secular purpose for the statutes.<sup>78</sup> As such, the Court found that the statutes were unconstitutional without analyzing *Lemon's* second or third prong.<sup>79</sup>

In *Widmar v. Vincent*, the Court analyzed all three prongs in holding that an equal access policy with regard to religious groups at a public university was constitutional.<sup>80</sup> In that case, the University of Missouri at Kansas City enacted a regulation which banned a religious group from using the school facilities to conduct its meetings.<sup>81</sup> The university justified its regulation based on “a compelling interest in maintaining strict separation of church and State,” which was “derive[d] . . . from the Establishment Clause[.]”<sup>82</sup>

Both the district court and court of appeals found that although the first (valid secular purpose) and third (excessive government entanglement) prongs were not violated by an equal access policy, such a policy would have had the primary effect of advancing religion and, therefore, would have violated the second prong.<sup>83</sup> The Supreme Court agreed with the lower courts’ analysis of the first and third prongs, but took exception to the holding that an equal access policy with regard to religious groups would violate the second prong.<sup>84</sup> The Court held that

---

<sup>74</sup> *Id.* at 43.

<sup>75</sup> *Id.* at 56.

<sup>76</sup> *Id.* at 56 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring)).

<sup>77</sup> *Id.* at 56 & n.42 (quoting *Lynch*, 465 U.S. at 690 (O’Connor, J., concurring)).

<sup>78</sup> *Id.* at 56–57.

<sup>79</sup> *Id.* at 59–61 (quoting *Lynch*, 465 U.S. at 690–91 (O’Connor, J., concurring)).

<sup>80</sup> 454 U.S. 263, 271, 273 (1981).

<sup>81</sup> *Id.* at 265.

<sup>82</sup> *Id.* at 270 (internal quotations omitted).

<sup>83</sup> *Id.* at 271–72.

<sup>84</sup> *Id.* at 273. The Court agreed that, because the University had already provided a forum in which many different ideas were exchanged, it would not give the appearance of

since the university had already provided an open forum to many different points of view, the primary effect of such a forum would not be to advance religion.<sup>85</sup> According to the Court, while a particular religious group may in fact benefit from access to the forum, such a benefit was “incidental” and, therefore, not violative of the prohibition on advancement of religion.<sup>86</sup>

These two cases illustrate the complex and sporadic application of the troublesome *Lemon* test. Regardless of whether it is applied in whole or in part, it is not suited for analysis of public prayer in a military context. First, the Second Circuit noted when it addressed the constitutionality of maintaining a military chaplaincy that, “[when] viewed in isolation, there could be little doubt that it would fail to meet the *Lemon v. Kurtzman* conditions.”<sup>87</sup> No one could argue with a straight face that such an institution as military chaplaincy would not have the “immediate purpose . . . [of] promot[ing] religion,”<sup>88</sup> thereby making it violative of *Lemon*. Military public prayer would certainly suffer the same fate if subjected to the *Lemon* analysis.

As the Second Circuit aptly noted:

[N]either the Establishment Clause nor statutes creating and maintaining the Army chaplaincy may be interpreted as if they existed in a sterile vacuum. They must be viewed in the light of the historical

---

endorsing religion if it allowed religious groups the same access and therefore would not violate the first prong of *Lemon*. *Id.* at 271 n.10. Similarly, the Court agreed that attempting to exclude all religious groups from meeting in university facilities might risk excessive entanglement with such religion; the school would be compelled to “monitor group meetings to ensure compliance with the rule [forbidding religious worship and religious speech].” *Id.* at 272 n.11.

<sup>85</sup> *Id.* at 273.

<sup>86</sup> *Id.* at 273–74 (citing *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973)).

<sup>87</sup> *Katcoff v. Marsh*, 755 F.2d 223, 232 (2d Cir. 1985). See also *Everson v. Board of Education*, 330 U.S. 1, 15–16 (1947), which defined the Establishment Clause as such: The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.

<sup>88</sup> *Katcoff*, 755 F.2d at 232.

background of their enactment to the extent that it sheds light on the purpose of the Framers of the Constitution.<sup>89</sup>

To analyze the unique, historical practice that is military public prayer in a “sterile vacuum” would be just as inappropriate for two reasons, both of which were discussed previously. First, the judicial deference accorded military regulations, described in Part I.B, requires a full analysis of the entire historical context of a regulation rather than a rote application of legal rules.<sup>90</sup> Second, military service members are not accorded the same level of individual rights as their civilian counterparts.<sup>91</sup> Therefore, applying *Lemon* to a military regulation that pertains to service members, just as a court would do with a government regulation that pertains to regular citizens, would fail to account for the disparity in the level of rights accorded to each group. An application of *Lemon* to a military regulation authorizing public prayer would be tragically under-inclusive and would ignore the judiciary’s own recognition of deference to the judgment of both the Congress and the military. It is a small wonder that no court has used the *Lemon* test in analyzing whether a military regulation violates the Establishment Clause.<sup>92</sup>

### B. The Coercion Test: Another Poor Choice

Yet another Establishment Clause test employed by the courts is the Coercion test, formulated in the Supreme Court’s holding in *Lee v. Weisman*.<sup>93</sup> This test states that “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.’”<sup>94</sup>

---

<sup>89</sup> *Id.* (citing *Walz v. Tax Comm’r*, 397 U.S. 664, 680 (1970) (Brennan, J., concurring); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 212–14 (1963)).

<sup>90</sup> *See supra* note 53 and accompanying text.

<sup>91</sup> *See supra* notes 50–52 and accompanying text.

<sup>92</sup> *See, e.g., Katcoff*, 755 F.2d at 233 (refusing to apply *Lemon* or any other Establishment Clause test when determining the constitutionality of the military chaplaincy). Some may counter with the fact that *Lemon* was applied by the Fourth Circuit Court of Appeals in *Mellen v. Bunting* where the court held the Virginia Military Institute’s (“VMI”) supper prayer was unconstitutional. 327 F.3d 356, 372 (4th Cir. 2003) (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971)). That argument is deficient because VMI is *not* a federal military institution. It is operated by the commonwealth of Virginia and its students are not subject to military regulations. Therefore, application of Establishment Clause tests in that circumstance is more appropriate than in those pertaining to the military. *See id.* at 375 n.13 (“[W]e are not called upon to address whether, or to what extent, the military may incorporate religious practices into its ceremonies. The Virginia General Assembly, not the Department of Defense, controls VMI.”).

<sup>93</sup> 505 U.S. 577, 587 (1992).

<sup>94</sup> *Id.* (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)) (alterations in original).

In *Lee*, the issue before the Court was whether prayers offered by a member of the clergy at middle school graduation exercises violated the Establishment Clause.<sup>95</sup> In holding that the prayers were unconstitutional, the Court found it particularly troubling that the decision to include prayers at the ceremony was made by the school principal alone, who then proceeded to appoint and collaborate with the designated clergy member, advising him that the prayers should be nonsectarian in nature.<sup>96</sup> Such a degree of school involvement “put school-age children who objected in an untenable position.”<sup>97</sup>

This test was also applied, in conjunction with *Lemon*, in the Fourth Circuit’s holding in *Mellen v. Bunting*.<sup>98</sup> In that case, the court held that a supper prayer conducted at the Virginia Military Institution (“VMI”), similar in structure to the one described above at the Naval Academy, was unconstitutional because of the institution’s “coercive atmosphere.”<sup>99</sup> The court recognized that although VMI cadets were not school-age children (as in *Lee*), “they [were] uniquely susceptible to coercion” because of the “educational system.”<sup>100</sup>

The Coercion test is inappropriate in military public prayer contexts because its application has been rightly limited to instances where highly impressionable youths would likely be coerced into participating in a religious exercise against their wills.<sup>101</sup> While it would appear that impressionable youths and military service members are two very similar groups when it comes to the risk of coercion, such an analogy is inapt for several reasons.

First, as discussed at length above, military service members are not accorded the same level of individual rights as civilians—young students included.<sup>102</sup> Service members’ rights are secondary to the

---

<sup>95</sup> *Id.* at 580.

<sup>96</sup> *Id.* at 587–88.

<sup>97</sup> *Id.* at 590.

<sup>98</sup> 327 F.3d 355, 371–72 (4th Cir. 2003) (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971)); see also *supra* note 94 and accompanying text.

<sup>99</sup> *Mellen*, 327 F.3d at 371–72.

<sup>100</sup> *Id.* at 371.

<sup>101</sup> See, e.g., *Lee v. Weisman*, 505 U.S. 577, 593 (1992) (“We do not address whether [the choice to dissent from a voluntary religious activity] is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position.”); *Chaudhuri v. Tennessee*, 130 F.3d 232, 239 (6th Cir. 1997) (“[T]he obvious difference between [a doctor of philosophy] and children at an impressionable stage of life ‘warrants a difference in constitutional results.’” (quoting *Edwards v. Aguillard*, 482 U.S. 578, 584 n.5 (1987))); *Tanford v. Brand*, 104 F.3d 982, 985–86 (7th Cir. 1997) (holding that “the special concerns underlying the Supreme Court’s decision in *Lee* [were] absent” where an invocation and benediction were offered at a college graduation).

<sup>102</sup> See *supra* notes 50–52 and accompanying text.



overall good of the unit, and are defined by congressional statute, military regulation, and ultimately by their commanding officer.<sup>103</sup> Second, unlike the school principal in *Lee* who controlled all aspects of the prayer at issue, military commanding officers have been given *express authority* by both Congress<sup>104</sup> and internal military regulation<sup>105</sup> to provide for public prayers within their units. Finally, by definition, even the youngest service member is older than the “impressionable youths” the Coercion test seeks to protect, and has already shown the aptitude to make the enormous life-changing decision to enter the military.<sup>106</sup> Furthermore, the Fourth Circuit’s assertion in *Mellen* that the academy’s military environment makes an individual “uniquely susceptible to coercion,”<sup>107</sup> is not dispositive. The assumption that service members would allow themselves to be coerced into practicing a voluntary prayer against their will is not only a direct affront to their character and self-determination, but it also ignores the fact that the young men and women who chose to join the service *voluntarily consented* to the limitations on their rights discussed earlier in this Note by undertaking their oaths of enlistment.<sup>108</sup>

### C. The Endorsement Test: Not a Chance

The final test used by the courts to analyze whether a particular government regulation violates the Establishment Clause is the Endorsement test. The Endorsement test, best outlined in Justice O’Connor’s concurring opinion in *Lynch v. Donnelly*, is a derivative of the first (secular purpose) and second (primary effect) prongs of *Lemon*.<sup>109</sup> The two-part rule is both subjective and objective: it subjectively analyzes the government’s “inten[t] to convey a message of endorsement or disapproval of religion”<sup>110</sup> and then objectively discerns “whether, irrespective of government’s actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.”<sup>111</sup> Under the

---

<sup>103</sup> See *supra* notes 43 & 50–53 and accompanying text.

<sup>104</sup> See *supra* note 43 and accompanying text; see also National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 598, 119 Stat. 3136, 3283 (2005) (authorizing service academy superintendents to institute prayers at their discretion at mandatory events).

<sup>105</sup> See, e.g., SECNAVINST 1730.7D, *supra* note 55 at § 6(d) & Enclosure 1.

<sup>106</sup> See 10 U.S.C. § 505(a) (2006) (delineating the minimum age of enlistment not requiring parental approval as eighteen years old).

<sup>107</sup> *Mellen v. Bunting*, 327 F.3d 355, 371 (4th Cir. 2003).

<sup>108</sup> See U.S. Army Ctr. of Military History, Oath of Enlistment and Oaths of Office, <http://www.history.army.mil/html/faq/oaths.html> (last visited Nov. 19, 2009).

<sup>109</sup> *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring).

<sup>110</sup> *Id.* at 691.

<sup>111</sup> *Id.* at 690.

test, “[a]n affirmative answer to either [the objective or subjective prong] should render the challenged practice [unconstitutional].”<sup>112</sup>

The Endorsement test is typically used in contexts where the constitutionality of a government sponsored religious display is called into question.<sup>113</sup> For example, in *County of Allegheny v. American Civil Liberties Union*, the Court held a crèche display unconstitutional under the objective prong because the government “sen[t] an unmistakable message that it support[ed] and promot[ed] the Christian praise to God that is the crèche’s religious message.”<sup>114</sup> In that case, a Pennsylvania county’s standalone crèche display conveying the words “Glory to God in the Highest!” had the effect of endorsing Christianity to the exclusion of other religions because there was “nothing in the context of the display [that] detract[ed] from the crèche’s religious message.”<sup>115</sup> Because the crèche by itself had the effect of conveying a religious message, the Court found that the absence of other mitigating displays in the surrounding area demonstrated an unequivocal favoritism toward Christianity.<sup>116</sup>

Like the two previous tests, the Endorsement test is also inapt when applied to military public prayer. First, as stated above, the test is applied in instances of static displays which simply are not at issue in military public prayer contexts.<sup>117</sup> Second, the government, through military public prayer, certainly does not “favor[] or prefer[]” one particular religious belief over another.<sup>118</sup> Prayers are recited by chaplains representing over one hundred different denominations and faith groups.<sup>119</sup> Therefore, military public prayer is unlike the crèche display in *County of Allegheny* because, when taken as a whole, an enormous range of religions (and denominations within religions) are represented by those reciting the prayers. No single religious faith is “favored or preferred” and, thus, government cannot be accused of endorsing religion.

---

<sup>112</sup> *Id.*

<sup>113</sup> *See, e.g., County of Allegheny v. ACLU*, 492 U.S. 573, 600 (1989); *Lynch*, 465 U.S. at 690 (O’Connor, J., concurring).

<sup>114</sup> *County of Allegheny*, 492 U.S. at 600.

<sup>115</sup> *Id.* at 598.

<sup>116</sup> *Id.*

<sup>117</sup> *See supra* note 115 and accompanying text.

<sup>118</sup> *County of Allegheny*, 492 U.S. at 593 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O’Connor, J., concurring)).

<sup>119</sup> U.S. Navy, Careers & Jobs, Chaplain, <http://www.navy.com/careers/officer/chaplain/> (last visited Nov. 19, 2009); *see also* E-mail from United States Naval Academy, Public Affairs, to Benjamin D. Eastburn (July 17, 2008, 02:22 EST) (on file with author) (describing the U.S. Naval Academy’s Chaplain Corps contingent of five Protestant chaplains, two Roman Catholic chaplains, and one Jewish rabbi who each offer the aforementioned noon-meal prayer on a rotational basis and who are proficient at “accommodat[ing] all faiths in the Brigade of Midshipmen”).

*D. “Legitimate Military Ends”: The Right Test*

If the *Marsh* exception and the three current Establishment Clause tests do not apply to military public prayer regulations, how *are* they to be analyzed? Whatever test is used, it should embrace the spirit, if not the letter, of the rationale discussed in Part I above. Namely, it should not deprive commanders of the necessary means of boosting individual and unit morale so that they may ensure the highest level of readiness possible. Additionally, it should be flexible enough to allow traditional military ceremonies to continue to commemorate the solemnity of an occasion with a word of prayer. Perhaps unwittingly, the Supreme Court has already impliedly endorsed such a test in its decision in *Goldman v. Weinberger*.<sup>120</sup>

Although *Goldman* was a case deciding an individual’s Free Exercise rights, the definitive rule that was proffered by the D.C. Circuit Court of Appeals and assented to by the Supreme Court is sufficiently broad to apply to all types of constitutional challenges to a military regulation. The rule states: “[A] military regulation must be examined to determine *whether ‘legitimate military ends are sought to be achieved’ and whether it is ‘designed to accommodate the individual right to an appropriate degree.’*”<sup>121</sup> As the D.C. Circuit also articulated, this rule “does not require a ‘balancing’ of the individual and military interests on each side.”<sup>122</sup>

Why should this test be preferred for analyzing military public prayer over the other Establishment Clause tests? After all, on its face it appears to assert the same desired goal that the three other tests proclaim: ensuring individual rights are not violated by an unconstitutional governmental recognition of religion. There are two distinct modifiers attached to the Legitimate Ends test, however, that make it appropriate for military public prayer contexts.

1. “Legitimate Military Ends,” with Individual Rights Accommodated to an “Appropriate Degree”

The Legitimate Ends test’s first distinguishing feature is that it necessarily allows for infringement on individual rights. As stated above in Part I.B, the Supreme Court has found it impossible to divorce the Establishment Clause analysis from the other clauses contained in the First Amendment.<sup>123</sup> The Court has stated, however, that the relationship between the Establishment Clause and the other clauses is

---

<sup>120</sup> 475 U.S. 503, 506 (1986).

<sup>121</sup> *Id.* (emphasis added) (quoting *Goldman v. Sec’y of Def.*, 734 F.2d 1531, 1536 (D.C. Cir. 1984)).

<sup>122</sup> *Sec’y of Def.*, 734 F.2d at 1536.

<sup>123</sup> *See supra* notes 47–49 and accompanying text.

analyzed differently in a military context than it is in a civilian setting.<sup>124</sup> As will be shown, the “accommodat[ion of] individual right[s] to an appropriate degree”<sup>125</sup> language contained in the Legitimate Ends test allows for much greater leeway in restricting individual service members’ rights and, therefore, is more appropriate to apply to a military public prayer context.

A prime illustration of the different (and more stringent) application of the interplay between First Amendment individual rights and the Establishment Clause in a civilian context was displayed by the Supreme Court in *Widmar v. Vincent*.<sup>126</sup> As detailed above in Part II.A, the University of Missouri at Kansas City’s principal argument was that allowing religious groups to use its facilities would violate the second prong of *Lemon* (i.e., that it would have the primary effect of advancing religion).<sup>127</sup> The Court, while tacitly admitting the validity of the university’s reasoning, nevertheless stated that such an interest was not “sufficiently compelling to justify content-based discrimination against . . . religious speech.”<sup>128</sup> In other words, while the government’s *end sought to be achieved* (the “greater separation of church and State”<sup>129</sup>) was valid, the regulation was nevertheless improper due to the limitation on the free speech rights of certain individuals employed by the university.<sup>130</sup>

In contrast, the Court in *Goldman* applied the Legitimate Ends test where a Jewish Air Force chaplain was prohibited from wearing his yarmulke by Air Force uniform regulations.<sup>131</sup> In response to the prohibition, the chaplain contended that the regulation violated his First Amendment free exercise rights.<sup>132</sup> The Court held that since the *end sought to be achieved* by the Air Force (uniformity amongst its service members) was legitimate, a free exercise limitation on one of its service members was acceptable.<sup>133</sup>

---

<sup>124</sup> See *Parker v. Levy*, 417 U.S. 733, 758 (1974) (“While the 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.”).

<sup>125</sup> *Goldman*, 475 U.S. at 506 (quoting *Sec’y of Def.*, 734 F.2d at 1536).

<sup>126</sup> 454 U.S. 263 (1981).

<sup>127</sup> *Id.* at 270–71.

<sup>128</sup> *Id.* at 276 (internal quotations omitted).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*; see also *Carey v. Brown*, 447 U.S. 455, 464–65 (1980) (“[E]ven the most legitimate goal may not be advanced in a constitutionally impermissible manner.”).

<sup>131</sup> *Goldman v. Weinberger*, 475 U.S. 503, 505 (1986), *superseded by statute*, 10 U.S.C. § 774 (2006).

<sup>132</sup> *Id.* at 506.

<sup>133</sup> *Id.* at 509–10.

Such an obvious difference between the military's and the government's abilities to restrict individuals' rights may leave one to wonder if the military simply has a blank check to run roughshod over the First Amendment rights of its service members. Of course, that is not the case, which is why the Court wisely appended the Legitimate Ends test with the requirement of "accommodat[ing] . . . individual right[s] to an appropriate degree."<sup>134</sup> So, what exactly is that "appropriate degree" in a military public prayer context?

*a. Applying the "Appropriate Degree" Language*

It remains to be seen how the Court will define such an ambiguous phrase; however, it means at least this: "The essence of military service 'is the subordination of the desires and interests of the individual to the needs of the service.' . . . [M]ilitary life do[es] not, [however,] . . . render entirely nugatory in the military context the guarantees of the First Amendment."<sup>135</sup> Such a nominal view of individual rights is a vast departure from typical stringent requirements imposed by courts when safeguarding individual rights from governmental regulations and clearly distinguishes the Legitimate Ends test from other Establishment Clause tests.<sup>136</sup>

There is no question that attaching this modifying phrase to the Legitimate Ends test is meant to both restrict and expand the application of military regulations. It is meant to expand in that, as explained above, it is a departure from the requirements typically imposed by the courts that a governmental regulation is greatly limited in its ability to restrict a civilian's individual First Amendment rights.<sup>137</sup> It is meant to restrict in that it does not give the military *carte blanche* to completely crush its service members' rights in the name of its own interests.<sup>138</sup> In actual application, however, there are probably very few instances in which the Court will flex its otherwise constrained muscles to overturn a military regulation in the name of individual rights.

---

<sup>134</sup> *Id.* at 506 (quoting *Goldman v. Sec'y of Def.*, 734 F.2d 1531, 1536 (D.C. Cir. 1984)).

<sup>135</sup> *Id.* at 507 (quoting *Orloff v. Willoughby*, 345 U.S. 83, 92 (1953)).

<sup>136</sup> Compare *supra* notes 47–54 and accompanying text (describing the subordination of military service members' rights to the overall good of the unit) with *supra* notes 128–130 and accompanying text (demonstrating the elevated nature of civilians' free exercise rights).

<sup>137</sup> See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 276 (1981).

<sup>138</sup> See *Parker v. Levy*, 417 U.S. 733, 758 (1974) ("[T]he members of the military are not excluded from the protection granted by the First Amendment . . ."); see also *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981) (reserving a role as ultimate arbiter of service members' rights in certain instances).

For example, with respect to the specific instance of religious activity in the military, a workable standard for what an “appropriate degree” of individual rights considerations might entail lies in the D.C. Circuit’s decision in *Anderson v. Laird*.<sup>139</sup> In that case, the court held that regulations at West Point, the Naval Academy, and the Air Force Academy requiring attendance at Sunday worship services were unconstitutional.<sup>140</sup> Specifically, the court stated that while individual freedoms must necessarily be subverted to military interests, those freedoms “may not be sacrificed to . . . the point that constitutional rights are abolished.”<sup>141</sup> The court found that since “there is no difference between requiring attendance and requiring worship,” service academy members’ individual rights had been abolished.<sup>142</sup>

The essence of the D.C. Circuit’s argument in *Anderson*, and ultimately in the interpretation of the otherwise ambiguous “appropriate degree” language, lies in a principle of **voluntariness**. As the court rightly observed, compelling attendance at an inherently proselytic event such as a worship service is akin to compelling religious worship itself.<sup>143</sup> That is vastly different, however, than reciting a prayer at a public military function to commemorate the solemnity of an occasion or to bolster morale. Worship services involve participation from congregational attendees and service leaders alike. Prayer requires no such effort and allows for infinitely easier nonparticipation.

\* \* \*

The Legitimate Ends test mandates an accommodation of individual service members’ First Amendment rights to an “appropriate degree.”<sup>144</sup> In the case of public prayer in a military context, such practice should not be held to violate the “appropriate degree” standard if it is voluntary in nature because it is a non-proselytic activity that may be readily abstained from as an individual desires.

## 2. “Balancing of Interests”

Finally, the unique feature of the Legitimate Ends test, the subordination of individual rights, is further illustrated by the D.C. Circuit’s statement that analysis of a military regulation “does not require a ‘balancing’ of the individual and military interests on each

---

<sup>139</sup> 466 F.2d 283 (D.C. Cir. 1972).

<sup>140</sup> *Id.* at 284–85.

<sup>141</sup> *Id.* at 295.

<sup>142</sup> *Id.* at 295–96.

<sup>143</sup> *Id.*

<sup>144</sup> *Goldman v. Weinberger*, 475 U.S. 503, 506 (1986), *superseded by statute*, 10 U.S.C. § 774 (2006).

side.”<sup>145</sup> This statement is critical to understanding the crux of the proffered test because, under this reasoning, *it does not matter how incidental or tenuous a specific instance is in relation to a military regulation*. For example, in *Goldman* the D.C. Circuit tacitly accepted the offended Air Force chaplain’s argument that his yarmulke was unobtrusive and insignificant; therefore, no harm would result to the uniformity of the service by allowing him to wear the symbol of his religious faith.<sup>146</sup> The court went on to note, however, that the Air Force cannot make exceptions to its regulations without “undermining the goals of teamwork, motivation, discipline, and the like.”<sup>147</sup> Therefore, because of the importance of the overarching goals of the military itself, the strict enforcement of a military regulation in the face of a violation of individual rights was allowed even in a case where the actual tangible harm done to the military interest was slight.<sup>148</sup>

\* \* \*

While the Legitimate Ends test was proffered in a free exercise case,<sup>149</sup> it should be extended to all instances where the validity of a military regulation is analyzed. When the test is applied to military public prayer, it is easy to see how that practice does not violate the Establishment Clause. As has been previously discussed, there is already a legitimate end to public prayer in the military: the commemoration of a solemn occasion and the maintenance and bolstering of unit morale and cohesiveness.<sup>150</sup> Thus, any means by which this end is accomplished are valid (1) even if they violate individual First Amendment rights (provided they accommodate individual rights to an “appropriate degree” discussed above) and (2) regardless of how attenuated the military interest is to the regulation sought to be enforced. This standard rightfully gives military commanders the leeway they need to employ such a practical tool as public prayer in the leadership of their units.

#### CONCLUSION

Military public prayer does not violate the Establishment Clause. As demonstrated in Part I, its historical precedent and proven practical application more than satisfy the necessary criteria under *Marsh v. Chambers* to absolve it from further scrutiny. Alternatively, military

---

<sup>145</sup> *Goldman v. Sec’y of Def.*, 734 F.2d 1531, 1536 (D.C. Cir. 1984).

<sup>146</sup> *Id.* at 1539–40.

<sup>147</sup> *Id.* at 1540.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 1536.

<sup>150</sup> *See supra* note 46 and accompanying text.

public prayer deserves a separate analysis apart from the convoluted *Lemon*, Coercion, or Endorsement tests described above in Part II.<sup>151</sup> The appropriate analysis should ensure that military interests are met without completely eschewing individual rights. The Legitimate Ends test provides the appropriate analysis. It requires giving an appropriate level of judicial deference to military regulations while ensuring that individual service members' rights are accommodated to an "appropriate degree." Ultimately, regardless of whether the *Marsh* exception or the Legitimate Ends test is applied, courts must remember one key principle before condemning traditional, time-honored military public prayer practices such as the noon meal prayer at the Naval Academy: "*judicial deference to . . . congressional exercise of authority is at its apogee* when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged."<sup>152</sup>

*Benjamin D. Eastburn*

---

<sup>151</sup> Additionally, the Supreme Court has recognized that the Legitimate Ends test is necessary for not just military public prayer contexts, but for *all* military regulations. See *Goldman v. Weinberger*, 475 U.S. 503, 506 (1986), *superseded by statute*, 10 U.S.C. § 774 (2006), (asserting that the Legitimate Ends test should be applied to all questions of military regulations).

<sup>152</sup> *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981) (emphasis added).