# Religion in Military Society

## Reconciling Establishment and Free Exercise

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The First Amendment of the US Constitution's Bill of Rights declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." In military society, a unique collision of "rights" between nonestablishment and religious freedom requires an equally unique accommodation of religious practices—that is, *an agreement that allows people, groups, and so forth, to work together*. Many recent news reports indicate that our commanders and senior leadership lack clear guidance for

parsing the complicated ground that separates "church and state." Because both the (non) Establishment and Free Exercise Clauses of our Constitution have equal weight, the government may not become "entangled" in religion or show it hostility.[1] By examining military society through both lenses—(non) establishment and free exercise—commanders can more clearly understand their responsibilities to service members as they carry out the mission. This article addresses establishment and free exercise in light of constitutional case law, offering four simple tools for making better decisions.

## The Military Community

Military installations are isolated communities of culturally diverse people whose right of freedom of religion has been limited for the sake of the mission. Service members are American citizens protected by the Constitution and are on loan from 50 sovereign states while they continue to advocate for their legal and social preferences through the voting booth. In civilian communities, social and cultural standards found in laws and policies differ from town to town and state to state; they are established from the bottom up. For example, a Christian community will tend toward Christian standards; a Jewish community, Jewish standards; a progressive community, progressive standards; or a family community, family standards. In local politics, the religious and the secular all have equal access to the voting booth. In contrast, on military installations, all religious institutions have been fenced out, and political interaction between religious communities and elected officials does not exist. On fenced military communities, commanders are expected to maintain the constitutional balance of (non) establishment and free exercise. To do so, they have both a judge advocate general (JAG) and a chaplain to advise them.

To make things more difficult, military installations are a public-private hybrid consisting of government mission and family life. For instance, an aircraft hangar may be used for maintenance in the morning and a school-sponsored event in the afternoon. Funding options

are equally confusing. Taxpayer dollars are limited to direct mission requirements that include mandatory funding for chaplain salaries, chapel buildings, and religious worship services while chapel tithes and offerings from the collection plate are also used to fund unit-focused programs such as barbecues in the dormitories and work centers. Commanders must understand that simply scrubbing the religious from military installations or restricting it to the interfaith chapel is not what the writers of our Constitution intended. Consequently, the provision of the right of free exercise through religious accommodation is a direct mission requirement.[2] From the assembly of the Continental Army onward, citizen Soldiers, Sailors, Airmen, and Marines are primarily religious people with religious families, holding religious ethics and living religious lives on government property.

## Establishment and Free Exercise: A Condition of Respect

The US Constitution ensures that religion in the public square does not end on military installations. Some people believe that neutrality toward church and state equates to the absence of the religious on government property and in government operations. By using constitutional case law, we will see that this position is emphatically false. The court of *Lemon v. Kurtzman* observes that "judicial caveats against (government entanglement in religion) must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[3] Additionally, *Lynch v. Donnelly* notes that

> no significant segment of our society, and no institution within it, can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government. "It has never been thought either possible or desirable to enforce a regime of total separation." . . . Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. . . . Anything less would require the "callous indifference" we have said was never intended by the Establishment Clause. . . . Indeed, we have observed, such hostility would bring us into "war

> with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion."[4]

Thomas Jefferson used the term *wall of separation*, writing to religious people in 1802 for the express purpose of allaying the churches' fears that the government would attempt to control their religion. Jefferson stated, "Believing with you that religion is a matter which lies solely between Man & his God . . . I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church & State."[5] Jefferson intended the exact opposite of humanists' use of the phrase today in their attempt to keep religion out of government. In fact,

> in 1962, [Supreme Court] Justice Potter Stewart complained that jurisprudence was not "aided by the uncritical invocation of metaphors like the 'wall of separation,' a phrase nowhere to be found in the Constitution." Addressing the issue in 1985, Chief Justice William H. Rehnquist lamented that "unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years."[6]

Far from banning religion in the public square, the (non) Establishment and Free Exercise Clauses were drafted in a way that allowed people of all faiths—and none—to equally live out their lives on common ground. The founding fathers intended to require American citizens to maintain a condition of mutual respect while they shared the same space. A much better metaphor than "separation of church and state" is "a level playing field for all political issues to be heard equally."[7] Americans cannot choose one of two paths to arrive at common ground. The nonreligious cannot walk the road of (non) establishment and arrive at free exercise. In the same way, the religious cannot walk the road of free exercise and arrive at (non) establishment. Common ground is a level playing field upon which both parties must agree to live as coequals. Respectfully sharing space on a level playing field involves four constitutional principles.

### *Hostility toward Religion Is Not Neutrality*

On military installations, some of what passes as neutrality toward religion is actually hostility—the primary concern of the religious majority on military installations today. We have already examined the Supreme Court statement that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." Additionally the court of *Rubin v. City of Lancaster* cautions that "the danger that such efforts to secure religious 'neutrality' may produce 'a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious.'"[8] A recent survey of Air Force chaplains included the statement "I believe Airmen are free to practice their religion except where military necessity dictates otherwise."[9] The chaplains were asked to agree or disagree on a scale of one to four. A subsequent memorandum from the chief of chaplains notes that 82 percent of chaplains believe that Airmen can practice their religion freely.[10] The corollary holds that, of approximately 500 active duty chaplains, 90 believe that Airmen cannot practice their religion freely. An additional concern is that the survey did not measure the ethos—the atmosphere of free exercise. In other words, is there a pervasive institutional bias against the religious that causes religious people or military leadership to "walk on eggshells"? To walk on eggshells in the matter of religion is not evidence of neutrality but of hostility.

### *God Is Presupposed on Government Property*

*Lynch v. Donnelly* affirms that "there is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789" and that "we are a religious people whose institutions presuppose a Supreme Being."[11] The courts imply that because our government as a whole presupposes a supreme being, each department of our government must also presuppose a supreme being. The Department of Defense (DOD) is not free to banish God from the public square. In principle, the writers of the

Constitution clearly expressed that God is not confined to the chapel but walks the parade ground, the maintenance bay, and the flight line.

For example, with regard to paintings, sculpture, and other displays, *Lynch v. Donnelly* affirms the propriety of nonproselytizing religious art in public places:

> Art galleries supported by public revenues display religious paintings of the 15th and 16th centuries, predominantly inspired by one religious faith. The National Gallery in Washington, maintained with Government support, for example, has long exhibited masterpieces with religious messages, notably the Last Supper, and paintings depicting the Birth of Christ, the Crucifixion, and the Resurrection, among many others with explicit Christian themes and messages. The very chamber in which oral arguments on this case were heard is decorated with a notable and permanent—not seasonal—symbol of religion.[12]

The walls of many DOD headquarters buildings, dining facilities, and other common areas are adorned with art and sculpture of many kinds. Art and sculpture with religious overtones are not, on their face, subject to removal or limitation. Regarding symbols of religion, *Lynch v. Donnelly* affirms the constitutionality of the National Day of Prayer, paid federal holidays of religious origin, the phrase "one nation under God" in our pledge of allegiance, the phrase "in God we trust" on our currency, and Christmas crèches owned and displayed by the government for secular purposes.[13] Religion is welcomed to pervade the public square, and it is the commander's constitutional duty to ensure that religion is welcome on military installations.[14]

### *God May Be Invoked and Welcomed during Government Business*

Whether from a military chaplain or a volunteer from a local house of worship, prayer at government events is constitutional.[15] *Marsh v. Chambers* affirms the propriety of prayers during government assemblies.[16] These prayers are, and have always been, religious in nature and not simply ceremonial.

Regarding religious practitioners with whom he disagreed, founding father Samuel Adams said that "he was no bigot, and could hear a prayer from a gentleman of piety and virtue, who was at the same time a friend to his country."[17] According to *Lynch v. Donnelly*, "It is clear that neither the 17 draftsmen of the Constitution who were Members of the First Congress, nor the Congress of 1789, saw any establishment problem in the employment of congressional Chaplains to offer daily prayers in the Congress, a practice that has continued for nearly two centuries. It would be difficult to identify a more striking example of the accommodation of religious belief intended by the Framers."[18] Religious invocations at government events are an acknowledgement that people of faith have an allegiance to "the Supreme Judge of the world," who is higher than any law of humankind.[19] If we use the level playing field analogy, then providing a respectful presence for a religious prayer is no different than doing so for another nation's national anthem.[20] One does not have to agree with all members of a diverse population to be respectful.

### *The Threat of Litigation Cannot Be Grounds for Marginalizing the Religious*

*Lynch v. Donnelly* affirms that "a litigant cannot, by the very act of commencing a lawsuit, however, create the appearance of divisiveness and then exploit it as evidence of entanglement."[21] Ethical leaders must be concerned about good order and discipline.[22] However, the principle of good order and discipline cannot be used as a carte blanche to bulldoze all traces of the constitutional rights of a vulnerable class of citizens. Balance is critical! On the one hand, we must not violate the Establishment Clause by offending the nonreligious with the appearance of a government-endorsed religion. On the other hand, we must not violate the Free Exercise Clause by demonstrating hostility to religion through the systematic purging of everything with a religious overtone. Angry agitators, religious or atheist, must not be the determining factor for leadership decisions. The courts have provided much guidance for walking this tightrope and have supplied the

groundwork for ethical decision making in a military context. In partnership, the JAG and Chaplain Corps must revisit the US Constitution and case law to move forward *collaboratively*, crafting policies and using explicit language that describes a level playing field on which respectful people may agree to disagree. In all cases, DOD policies must clearly define and prohibit hostility toward religion.

## Four Tools for Parsing Establishment and Free Exercise

In the past few years, installation commanders in a number of reported incidents have apparently been advised to focus exclusively on the Establishment Clause in an attempt to secure religious neutrality. Unfortunately, in some cases their intended defensive action for (non) establishment was rightfully perceived as offensive to free exercise. In the same way we use 3-D movie glasses, commanders must intentionally look through both lenses of (non) establishment and free exercise to see the constitutional picture clearly. The following four simple tools for discerning the line between the Establishment and Free Exercise Clauses use court decisions as a guide. These court decisions are few, readily available, and easily read.

### *Historic Practice*

*Marsh v. Chambers* tells us that the constitutionality of government-paid chaplaincy and legislative-type prayer is not found in any "test" but in historic practice.[23] Responding to a suit in which a complainant objected to a government-paid chaplain for the Nebraska Legislature, the Supreme Court held that

> the Nebraska Legislature's chaplaincy practice does not violate the Establishment Clause. . . . The practice of opening sessions of Congress with prayer has continued without interruption for almost 200 years, ever since the First Congress drafted the First Amendment, and a similar practice has been followed for more than a century in Nebraska and many other states. . . . Standing alone, historical patterns, cannot justify contemporary violations of constitutional guarantees, but there is far more here

> than simply historical patterns. In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent.[24]

The court of *Marsh v. Chambers* appeals to the contemporary practices of those who actually penned the law. The writers of the Constitution did not forbid what they themselves permitted.[25] When confronted with questions about the scope and practice of chaplains and public prayer, one should employ the first tool to determine if historic practice exists.

### *Context*

*Lynch v. Donnelly* upheld the constitutionality of a private association to erect a Christmas display on public property on the basis of context:

> The Court has recognized that "total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable." . . . The narrow question is whether there is a secular purpose for Pawtucket's display of the creche. . . . Here, whatever benefit there is to one faith or religion or to all religions, is indirect, remote, and incidental; display of the creche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as "Christ's Mass," or the exhibition of literally hundreds of religious paintings in governmentally supported museums.[26]

Another case, *County of Allegheny v. American Civil Liberties Union*, concerns the constitutionality of a crèche placed on the "Grand Staircase" of a county courthouse. The crèche was part of a larger holiday display dispersed throughout the grounds. The court found that the *location* of the crèche was unconstitutional, based on the context:

> The creche sits on the Grand Staircase, the "main" and "most beautiful part" of the building that is the seat of county government. . . . No viewer could reasonably think that it occupies this location without the support and approval of the government. Thus, by permitting the "display of the creche in this particular physical setting," . . . the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the creche's religious message.[27]

This case tells us that discerning the line between "a secular purpose" and promoting a religion involves not the religious presence or practice but the context in which it is found. A frontline supervisor, for example, may be religious and live his or her religious life at work. A supervisor, however, must not live this religious life in such a way that it would give *reasonable* people the appearance of favoring the religious over the nonreligious or others of differing faiths. It is a difficult line, but simply "playing it safe" and sanitizing the area violates the supervisor's constitutional rights. When confronted with an object or practice with religious overtones, one should use the second tool to observe the context.

### *The Lemon Test*

> *In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: "sponsorship, financial support, and active involvement of the sovereign in religious activity."*
>
> *—Lemon v. Kurtzman*

This three-point litmus test, also known as the "*Lemon* test," determines the dividing line between free exercise and establishment.[28] A more recent case, *Lynch v. Donnelly* (1984), offers additional clarification for application: "In the line-drawing process, we have often found it useful to inquire whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion."[29] The descriptions and examples below are brief. Commanders and senior leadership would benefit greatly by reading the court decision for themselves.

The first point of the *Lemon* test evaluates for the legitimacy of a secular purpose. The question at hand is, Does the mere presence of a religious symbol or practice on government property imply government *sponsorship* for a specific religion or religion over nonreligion?

The *Lynch v. Donnelly* court addresses the often misused metaphor of a "wall" of separation between church and state, observing that the "metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state" and that "total separation is not possible in an absolute sense."[30] Religious symbols and celebrations may be found on government property for secular reasons and are not, in themselves, evidence of government sponsorship.

The second point of the *Lemon* test evaluates whether or not a symbol or practice's primary effect advances or inhibits religion. This is assessed through context. Regarding the City of Pawtucket's practice of including a crèche in its larger holiday display, the court found that, as mentioned above, "whatever benefit there is to one faith or religion or to all religions, is indirect, remote, and incidental; display of the crèche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as 'Christ's Mass,' or the exhibition of literally hundreds of religious paintings in governmentally supported museums." Again the issue is context. Whether we are looking at a holiday scene or viewing a picture on a wall, the government's question should be, In the eyes of a reasonable person, does this act or display give the appearance of government advancement or inhibition of a particular religion or religion over nonreligion?

The third point of the *Lemon* test evaluates unnecessary government entanglement. In other words, if we go down this road, will the government have to spend significant resources in policing and monitoring to ensure that secular-religious lines are not crossed or that no significant amount of manpower and funding is expended? The court found that

> entanglement is a question of kind and degree. . . . There is no evidence of contact with church authorities concerning the content or design of the exhibit prior to or since Pawtucket's purchase of the creche. No expenditures for maintenance of the creche have been necessary; and since the city owns the creche, now valued at $200, the tangible material it contrib-

> utes is *de minimis*. In many respects, the display requires far less ongoing, day-to-day interaction between church and state than religious paintings in public galleries.[31]

Allowing the religious time and space in the public square is not government entanglement with religion. Even the government purchase and maintenance of religious items for secular purposes do not constitute entanglement with religion.

Let us examine three recent examples of DOD intervention in religious issues and apply the *Lemon* test to each one. Again, the three questions are as follows: (1) Does the mere existence of a religious symbol or practice on government property imply government sponsorship for a specific religion or religion over nonreligion? (2) Does the context of a religious symbol or practice on government property advance or inhibit a specific religion or religion over nonreligion? (3) Will the religious symbol or practice be an entanglement to the government due to significant amounts of monitoring, funding, or manpower?

The first example comes from a June 2013 news story reporting that "an Air Force video saluting first sergeants—produced by an Air Force Chaplain—was removed by order of the Pentagon because it mentions the word 'God,' even though it was never intended as required viewing."[32] The video was produced in conjunction with a number of first sergeants and intended as a humorous parody of a Super Bowl commercial. In directing the removal of the video, "the Chief of the Air Force News Service Division stated incorrectly, . . . 'Proliferation of religion is not allowed in the Air Force or military. How would an Agnostic, Atheist or Muslim serving in the military take this video?'"[33] Applying the *Lemon* test, we ask, Does the video have a secular purpose? Yes. Is the video's primary effect to advance or inhibit religion? No. Does the video foster excessive government entanglement? No. If all the facts are as stated, then the Pentagon's actions appear to violate the Constitution's First Amendment by favoring nonreligion over religion and evidence of hostility toward religion. Additionally, the Penta-

gon's position was eventually reversed. No evidence of malice exists—only the lack of clear, objective written guidance from our most senior policy makers.

The second example is from a news report that the Air Force's Rapid Capabilities Office (RCO) removed the Latin name *Dei* (God) from its logo after objections by the Military Association of Atheists and Freethinkers: the "RCO patch logo previously included the motto 'Opus Dei Cum Pecunia Alienum Efficemus' (Doing God's Work with Other People's Money), an inside joke among RCO members. Caucus members say it was changed to 'Miraculi Cum Pecunia Alienum Efficemus' (Doing Miracles with Other People's Money)."[34] Applying the *Lemon* test, we ask, Does the logo have a secular purpose? Yes. Is the logo's primary effect to advance or inhibit religion? No. Does the logo foster excessive government entanglement? No. If all the facts are as stated, then the Pentagon's actions appear to violate the Constitution's First Amendment by favoring nonreligion over religion and evidence of hostility toward religion. Additionally, atheist groups have petitioned our courts for years to remove the phrase "in God we trust" from our monetary notes and coins.[35] The courts have repeatedly and emphatically rejected their argument: "In dismissing the suit, U.S. District Judge Harold Baer, Jr., wrote that 'the Supreme Court has repeatedly assumed the motto's secular purpose and effect' and that federal appeals courts 'have found no constitutional violation in the motto's inclusion on currency.' He added that while the plaintiffs might feel offended, they suffered no 'substantial burden.'"[36]

The third example involves the removal of religious artwork from a dining facility. A painting entitled *Blessed Are the Peacemakers*, a 9-11 memorial gift to the installation, had long been displayed on a dining facility's wall. An atheist organization petitioned for and was granted the removal. A news report also relates that the wing commander said that "he will be ordering another inspection to rid his base of anything else like what had been hanging in the dining hall."[37] Applying the *Lemon* test, we ask, Does the artwork have a secular purpose? Yes. Is

the artwork's primary effect to advance or inhibit religion? No. Does the artwork foster excessive government entanglement? No. If all the facts are as stated, then the commander's actions appear to violate the Constitution's First Amendment by favoring nonreligion over religion and evidence of hostility toward religion. Another report indicated that the commander maintained that "the painting violated military regulations governing the free exercise of religion" and that "the . . . [regulation] states that we will remain officially neutral regarding religious beliefs—neither officially endorsing nor disapproving any faith belief or absence of belief."[38] The commander cited the regulation correctly, but his interpretation was faulty. He had no "test" available to determine the ground between neutrality and hostility.

The three-part *Lemon* test is a simple tool for items with religious content. Each point of this test involves some subjectivity. Thus, it is critical that *both* the JAG, arguably representing (non) establishment, and the chaplain, representing free exercise, have equal input into a commander's decision process. We must use the 3-D glasses! When faced with an object or practice with religious overtones, ethical leaders should utilize a respectful, methodical, and equitable process to find the balanced position. The third tool in the box is the *Lemon* test.

### *Bottom-Up Consensus*

Commanders at all levels are unelected stewards who have limited legal authority to constrain constitutional rights to accomplish their missions. Primary drivers for poor command decisions include haste, misinformation, or personal bias. Regarding removal of the artwork from the dining facility, for instance, a report noted that the non-DOD complainant "gave the Air Force an hour to take action" and that the subsequent removal took place in 56 minutes.[39] This was a top-down decision. When dealing with social issues, religious or otherwise, the community must be consulted from the bottom up and must take time to contact the JAG, chaplain, senior leadership, and the installation's private organizations. The Air Force's integrated delivery system

should have an opportunity to broker a peaceful settlement among organizations. Any *appearance* of the imposition of a commander's personal preference for cultural and religious standards that exceed those necessary for the mission may be construed as social engineering and must be seen as a catastrophic moral violation of professional ethics. Commanders must never use their positions to impose any religious or cultural standard, whether Christian, Jewish, Muslim, Wiccan, atheist, conservative, or progressive. In social issues within a closed community, "good order and discipline" is not a top-down affair.[40] Ethical commanders allow members of their community to speak to one another, advocate for their positions, and, most of all, be respected. Then and only then do ethical commanders make command decisions. The fourth tool is bottom-up consensus.

## Legal "Tests" or Historic Practice?

In 2007 the *Air Force Law Review* published an article entitled "Religion in the Military: Navigating the Channel between the Religion Clauses."[41] For seven years, it has remained a significant "think piece" for making Air Force policy; indeed, the article is listed as a reference in the current Air Force JAG publication *The Military Commander and the Law*.[42] The legal assessments and conclusions of the authors—Maj David E. Fitzkee, USA, retired, and Capt Linell A. Letendre, USAF—regarding the Chaplain Corps's scope and practice and the provision of public prayer are horribly wrong.

Referring to *Marsh v. Chambers* (1983), Fitzkee and Letendre correctly remark that "the court has upheld an opening prayer for a legislative session relying on the historical exception but has denied a moment of silence in public schools using the *Lemon* analysis."[43] The authors clearly delineate between historically sanctioned prayers at a historically rooted, adult-dominant event from prayers at a child-dominant public school event. Then, inexplicably, they choose to argue the validity of historical prayer in military settings (*Marsh* language) from the same category as prayer at school graduations and

football games (*Lemon* language).[44] In short, they switch from historical precedent to "tests." Fitzkee and Letendre complete their conversion with the following statement: "When facing the challenging question of prayer at an official military function, one must navigate through the array of legal opinions deliberately and with full understanding of the particular context in which the prayer will be given."[45] Absolutely not! In a legislative or military setting, prayer is found constitutional through historic practice; context is irrelevant. Worse, they end their analysis by declaring,

> Unlike a school environment, where students can vote on whether or not to have a message and decide what the content of the message should be, the military does not put to a vote whether to have an "opening message" at a change-of-command or a dining-in. Instead, a commander typically decides that there will be an invocation and routinely asks a chaplain to perform this duty. This overt government involvement, both in the decision making and delivery of an invocation, results in clear government speech, thereby compelling Establishment Clause analysis.[46]

Do Fitzkee and Letendre really believe that the framers of our Constitution held that military commanders who request chaplain invocations at change-of-command ceremonies are guilty of violating the Establishment Clause? The Supreme Court does not agree.[47] To examine the constitutionality of the Chaplain Corps's scope and practice, one must consult the best court ruling—*Marsh v. Chambers* (historic practice).

## A Word about Ceremonial Deism

At the time of this writing, in *Town of Greece v. Galloway*, the Supreme Court is deliberating the consequences of a relatively new artificial construct called "ceremonial deism."[48] At issue is "whether the court of appeals erred in holding that a legislative prayer practice violates the Establishment Clause."[49] In other words, is a prayer at a government event really a prayer? To understand the debate, one must grasp the origins of ceremonial deism. The original term comes from an unpublished 1962 lecture at Brown University given by Yale Law

School dean Eugene Rostow in which he proposed that "certain types of religious speech, which he called 'ceremonial deism,' were 'so conventional and uncontroversial as to be constitutional.'"[50] Reflecting on this reference in 1984, Justice William Brennan offered his dissenting opinion in *Lynch v. Donnelly*:

> While I remain uncertain about these questions, I would suggest that such practices as the designation of "In God We Trust" as our national motto, or the references to God contained in the Pledge of Allegiance to the flag can best be understood, in Dean Rostow's apt phrase, as a form of "ceremonial deism," protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content.[51]

In his ponderings of uncertainty, Justice Brennan implies that he personally finds that these religious references have no "significant religious content." The original intent of the authors is lost on him.

In 1989 Justice Brennan's thoughts became a legal player through the majority opinion of *County of Allegheny v. American Civil Liberties Union*:

> The concurrence, in contrast, harmonized the result in *Marsh* with the endorsement principle in a rigorous way, explaining that legislative prayer (like the invocation that commences each session of this Court) is a form of acknowledgment of religion that "serve[s], in the only wa[y] reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." . . . The function and history of this form of ceremonial deism suggest that "those practices are not understood as conveying government approval of particular religious beliefs."[52]

With regard to legislative prayer, the justices chose not to refute *Marsh*'s historic-practice argument and so added a new proposition on top of it. The *County of Allegheny* court stated that it has "harmonized" *Marsh* with "this form of ceremonial deism" so that legislative prayer should be viewed as a method of "solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society" (see above). But by artifi-

cially separating the act of prayer from its religious content, the Supreme Court has created additional confusion. The decision of *Town of Greece v. Galloway* may be intended as clarification. Will the Supreme Court uphold the original intent of the framers of the Constitution, meaning that public prayer is an example of free exercise, or will it overturn *Marsh* and pursue ceremonial deism in the name of (non) establishment? It is doubtful that the Supreme Court would overturn *Marsh*. However, it is almost certain that it will also continue to "harmonize" the founders' religious intent with antireligious ceremonial deism.

In the foreseeable future, regardless of *Town of Greece v. Galloway*, the American people should expect that the painting *The Baptism of Pocahontas* will remain on the Capitol Rotunda wall and that the National Gallery of Art will continue to display *Rabbi* and fund the maintenance of the *The Sacrament of the Last Supper*.[53] The Senate chaplain will continue his or her duties, ensuring that "all sessions of the Senate have been opened with prayer, strongly affirming the Senate's faith in God as Sovereign Lord of our Nation."[54] Each of these long-standing government practices provides examples of how our commanders should manage religion on their installations.

## Conclusion

In the twenty-first century, US military society has entered a new era of cultural change, and we have been given few tools to make the transition. Indeed, we have not even framed the questions. Military leaders have sworn to support and defend the Constitution of the United States, and service members depend upon those in authority to act honorably. Leaders must be concerned about good order and discipline but must never use this as an easy excuse to sanitize religion. We can neither endorse religion nor show it hostility. We should use the four tools for discerning the line between establishment and free exercise. The only way to determine constitutionality in matters of religion is to look through both the 3-D lenses of (non) establishment and free

exercise. In practice, the JAG office represents the commander and has given the appearance of advocating for the institution over the rights of the individual. The scale has tipped in favor of (non) establishment. The scale must now be balanced to include the weight of free exercise. It is most critical that the Chaplain Corps "get smart" on constitutional law. Our JAGs and Chaplain Corps should transparently work together to restore First Amendment balance throughout the DOD. Constitutional free exercise must always remain a positive principle to be celebrated and not simply the dark side of (non) establishment. ✪

## Notes

1. Lemon v. Kurtzman, Supreme Court, 403 US 602 (1971); and Rubin v. City of Lancaster, United States Court of Appeals, Ninth Circuit, no. 11–56318, 8 November 2012.
2. Joint Publication 1-05, *Religious Affairs in Joint Operations*, 20 November 2013, viii, http://www.dtic.mil/doctrine/new_pubs/jp1_05.pdf.
3. *Lemon*.
4. Lynch v. Donnelly, Supreme Court, 465 US 668 (1984) / Committee for Public Education and Religious Liberty v. Nyquist, 413 US 756, 760 (1973). See, for example, Zorach v. Clauson, 343 US 306, 314, 315 (1952); Illinois ex rel. McCollum v. Board of Education, 333 US 203, 211 (1948); *Lynch/Zorach*, 314; *Lynch/McCollum*, 211–12; and *Lynch*.
5. "Jefferson's Letter to the Danbury Baptists: The Final Letter, As Sent," 1 January 1802, Library of Congress, http://loc.gov/loc/lcib/9806/danpre.html.
6. James Hutson, "'A Wall of Separation': FBI Helps Restore Jefferson's Obliterated Draft," Library of Congress, accessed 14 March 2014, http://www.loc.gov/loc/lcib/9806/danbury.html.
7. "Rev. John C. Rankin to Discuss 'Honest Politics,'" Community College of Rhode Island, 24 February 2011, http://www.ccri.edu/marketing/news_events/2011/february/rankin.html.
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Chaplain Sugg (MDiv, Seminary of the East; BS, Charter Oak State College; MS, Tarleton State University) is the staff chaplain for the USAF Expeditionary Center, Joint Base McGuire-Dix-Lakehurst, New Jersey. As course director and academic instructor, he developed and delivered cutting-edge education and training for Chaplain Corps personnel deploying to high-risk environments. As staff chaplain, he provides pastoral care and counseling to a staff of 400 and a student population of 24,000 while advising Expeditionary Center leaders on matters of religious accommodation, ethics, and morale. Chaplain Sugg assists the joint base's Chaplain Corps to ensure free exercise of religion and to provide pastoral care, counseling, worship, rites, and sacraments to joint base personnel and their families. He is a credentialed pastoral counselor with over 4,000 hours of client counseling, 870 hours of clinical supervision, and 8 units of Clinical Pastoral Counseling. Chaplain Sugg has been the senior pastor for 12 congregations, including military communities in South Korea, Kuwait, and Saudi Arabia.