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Reconciling the Irreconcilable: Military Chaplains and the First Amendment

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RECONCILING THE IRRECONCILABLE: MILITARY CHAPLAINS AND THE FIRST AMENDMENT

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I. INTRODUCTION

The institution of military chaplains, now more than 230 years old, is an anomaly in religion clause jurisprudence. Patently unconstitutional under almost any view of the Establishment Clause,¹ the system also is likely not mandated by the Free Exercise Clause. It may be possible to justify the chaplaincy as a permissible accommodation of servicemembers' religious needs; however, it is a unique benefit that is not provided to other government workers, absent chaplaincies in penal and medical institutions (though the beneficiaries in those institutions are normally not government employees). Yet according to the one appellate decision that has considered the issue, this accommodation *is* mandated by the Free Exercise Clause.² Under this interpretation, the military chaplaincy system represents one of those rare instances of an affirmative or positive quality to the free exercise interest, placing an obligation on the government to enhance or support a person's religious practice, rather than simply requiring the government to remove burdens on that practice, as is common with negative rights.³

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¹ U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . ."). See *Katcoff v. Marsh*, 755 F.2d 223, 232 (2d Cir. 1985) ("If the current Army chaplaincy were viewed in isolation, there could be little doubt that it would fail to meet the *Lemon v. Kurtzman* conditions.").

² *Katcoff*, 755 F.2d at 234.

³ Carl H. Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?*, 70 NOTRE DAME L. REV. 581, 592 (1995) ("As with all freedoms guar-

The military chaplaincy system is a constitutional train-wreck waiting to happen. It presents—as few government programs do—one of the clearer examples of an irreconcilable conflict between the two religion clauses.⁴ Like most other programs or policies that have presented similar inter-clause conflicts, the military chaplaincy has survived scrutiny by courts minimizing the conflict. But such an approach is an exercise in avoidance. That the Supreme Court has so far evaded ruling on its constitutionality—as it has done with other apparently infirm practices such as the National Motto—may say less about the system’s undeniable constitutionality and more about a realization that the Establishment Clause would be required to bend, again, as it did when the Court upheld legislative chaplains.⁵

That the military chaplaincy system is due for a thorough judicial examination—one that puts it under a careful constitutional microscope—is illustrated by the comprehensive analysis in the article by Professors Lupu and Tuttle.⁶ The various issues presented by the chaplaincy system have long deserved their day before the Court. But the events in recent years—the mild controversy surrounding the appointment of the first Muslim chaplain (and subsequent court-martial of another Islamic chaplain who ministered to Muslim prisoners interred in Guantanamo), allegations of denominational bias in the selection of chaplains by the Navy Chaplain Corps, allegations of proselytizing by chaplains (and other superiors) in the Air Force Academy, resistance among some evangelical chaplains to military requirements to “preach pluralism,” and proposed federal legislation that would allow chaplains to proselytize and engage in other religiously exclusive speech—make the constitutional issues all that more salient.⁷

This Response argues that judges and commentators have too readily minimized the significant constitutional conflicts presented by the military chap-

anted by the Bill of Rights, the Free Exercise and Establishment Clauses protect ‘negative’ rights. That is, the Religion Clauses tell the government what it may not do.”).

⁴ See e.g., *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005) (“While the two Clauses express complementary values, they often exert conflicting pressures.”).

⁵ See *Marsh v. Chambers*, 463 U.S. 783 (1983) (utilizing a historical exception approach in upholding legislative chaplains).

⁶ Ira C. Lupu & Robert W. Tuttle, *Instruments of Accommodation: The Military Chaplaincy and the Constitution*, 110 W. VA. L. REV. 89 (2007).

⁷ See *Veitch v. England*, No. 00-2982, 2005 WL 762099 (D.D.C. Apr. 5, 2005), *aff’d*, 471 F.3d 124 (D.C. Cir. 2006), *cert. denied*, 2007 WL 631274 (U.S. Oct. 1, 2007) (No. 06-1187). See also Emilie Kraft Bindon, *Entangled Choices: Selecting Chaplains for the United States Armed Forces*, 56 ALA. L. REV. 247 (2004); Heather Cook, *Service Before Self? Evangelicals Flying High at the U.S. Air Force Academy*, 36 J.L. & EDUC. 1 (2007); Steven R. Obert, *Public Prayer in the Navy: Does it Run Afoul of the Establishment Clause?*, 53 NAVAL L. REV. 321 (2006); Kenneth J. Schweiker, Note, *Military Chaplains: Federally Funded Fanaticism and the United States Air Force Academy*, 8 RUTGERS J.L. & RELIG. 5 (2006); Alan Cooperman, *A Noisy Takeoff for Air Force Guidelines on Religion*, WASH. POST, Oct. 31, 2005, at A20; Adelle Banks, *Christian Conservatives Ask Bush to Protest ‘Muzzled’ Chaplains*, RELIG. NEWS SERV., Nov. 17, 2005, http://www.beliefnet.com/story/179/story_17928_1.html.

laincy system. The chaplaincy system is patently unconstitutional under the Establishment Clause. It also, contrary to most analyses, is not required by the Free Exercise Clause. Military policy toward religion, aside from the chaplaincy system, is neutral and would otherwise be subject to rational basis review under *Employment Division v. Smith*.⁸ The absence of a chaplaincy system would similarly be viewed as a neutral omission, characteristic of practices in other government workplaces. Finally, the burdens on religious practice presented by military service, including deployment overseas, are not so great as to trigger the protections afforded under the Free Exercise Clause or the Religious Freedom Restoration Act,⁹ assuming the former would otherwise apply.

That said, the military chaplaincy system can be upheld under two theories: the first as a permissive accommodation of religion, as Professors Lupu and Tuttle argue, but only through a liberalization of the current accommodation rules;¹⁰ and second, as a *sui generis* exception to the Establishment Clause.

In contrast, the constitutional rationales supporting the military chaplaincy system do not extend to awarding a corresponding free exercise interest in most activities of military chaplains. The military system has created an internal—and possibly irresolvable—tension within the Chaplain Corps surrounding the application of free exercise and speech rights. On one hand, the chaplaincy system does not exist to accommodate military chaplains' religious practice. Military chaplains are government actors, commissioned officers with rank though apparently “without command,” who are employed to administer an important government program.¹¹ General government employee case law teaches that chaplains enjoy limited expression rights, such that the military can regulate the content and viewpoint of much of their expressive activities.¹² On the other hand, applicable law recognizes that military chaplains have “dual roles,”¹³ and case-law suggests that chaplains may not be speaking for the government when they are engaged in some of their otherwise remunerated activities.¹⁴ Whether this latter premise leads to a *right* of chaplains to espouse views contrary to military policy (e.g., “war is immoral”) or engage in proselytizing of servicemembers is questionable. However, chaplains and military personnel generally may possess limited expressive rights within the context of a worship service where the military has arguably created a limited forum for religious speech.

⁸ 494 U.S. 872 (1990).

⁹ 42 U.S.C. § 2000bb-1(a)-(c) (2006).

¹⁰ Lupu & Tuttle, *supra* note 6, at 94.

¹¹ 10 U.S.C. § 3581 (2006) (referring to Army chaplains); 10 U.S.C. § 8581 (2006) (referring to Air Force chaplains).

¹² *E.g.*, *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006); *Connick v. Myers*, 461 U.S. 138 (1983).

¹³ ARMY REGULATION 165-1, CHAPLAIN ACTIVITIES IN THE UNITED STATES ARMY §4-3(A) (Mar. 25, 2004) (“Army Chaplains have dual roles as religious leaders and staff officers.”) http://www.usapa.army.mil/pdffiles/r165_1.pdf.

¹⁴ *See Rigdon v. Perry*, 962 F. Supp. 150 (D.D.C. 1997); *accord Montano v. Hedgepeth*, 120 F.3d 844, 851 (8th Cir. 1997).

This Response thus seeks not to dismantle the chaplaincy system but to discover its legitimate constitutional grounding.

Part II of this Response considers the constitutional issues raised by the military chaplaincy system. While I agree with Professors Lupu and Tuttle that the chaplaincy system may be upheld as an accommodation of religion, I part from their analysis in two respects. First, I agree with Lupu and Tuttle that, as a religious accommodation, the chaplaincy system is not mandated by the Free Exercise Clause, particularly following the decision in *Employment Division v. Smith*.¹⁵ However, the religious burden imposed by military service is less substantial than Lupu and Tuttle describe, such that the chaplaincy system can survive as a permissible accommodation only after a weakening of the accommodation standard. Second, the nature of the Establishment Clause violation—considered freestanding—renders this accommodation even more complicated. As a result, the military chaplaincy system may better be considered an exception to the Establishment Clause rather than an accommodation of the mill-run variety.

Part III then considers whether military chaplains themselves enjoy free exercise protection for their religiously based activities. I conclude that chaplains may possess a limited interest under current policies, but that interest is largely dependent on applicable military procedures. As such, it is a fugitive right.

II. THE CONSTITUTIONALITY OF THE CHAPLAINCY SYSTEM

A. *The Establishment Clause*

The military chaplaincy system should represent the “poster-child” of an Establishment Clause violation. Considered in the abstract, the system is breathtaking in its affront to non-establishment principles. Through the chaplaincy system, the government has set up a comprehensive program for religious worship, devotion and instruction. It establishes criteria for and hires clergy to perform religious functions. It promotes, disciplines and dismisses chaplains for their success or failure to adhere to these government-determined standards.¹⁶ In the meantime, the government pays chaplains to “preach the Word” while constructing houses of worship and purchasing religious texts, liturgical supplies, and other religious materials designed to instill religious devotion and piety.¹⁷ These actions violate the traditional understanding that the Establishment Clause was intended to prevent “sponsorship, financial support, and active

¹⁵ 494 U.S. 872 (1990).

¹⁶ See *Veitch v. England*, No. Civ.A. 00-2982, 2005 WL 762099 (D.D.C. Apr. 5, 2005).

¹⁷ See *Katcoff v. Marsh*, 755 F.2d 223, 229 (2d Cir. 1985) (noting that during the 1980’s the Army had acquired or built more than 500 chapels and purchased sacred texts, vestments and other religious accouterments).

involvement of the sovereign in religious activity.”¹⁸ Even under more recent (and more restrictive) interpretations of the clause, the military’s actions fly in the face of the prohibition on government-funded “inculcation of religious beliefs” or “indoctrination.”¹⁹ While Establishment Clause jurisprudence is characterized by few absolutes, it “does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith.”²⁰ Or at least it used to.²¹

Apart from the funding fatality, the chaplaincy system contravenes other establishment concerns. Indisputably, it stands as a government endorsement of religious belief and practice—despite the lack of compulsion behind the system,²² it is difficult to claim that the military has not taken a position on religion.²³ Additionally, despite its quota system for selecting clergy from various faiths, the system in both structure and practice favors some religious traditions—i.e., those with recognized clergy—over nontraditional faiths.²⁴ And, relatedly, by establishing religious categories for potential chaplains and deferring to “recognized” faith communities to certify and recommend potential candidates, the chaplaincy system engages in that type of comprehensive, ongoing, and potentially invasive entanglement the Court has eschewed.²⁵

The recent allegations launched against the chaplaincy systems highlight how the institution is inconsistent with these principles informing the Establishment Clause.²⁶ Governmental involvement in religious matters, even when done for the most benign reasons, usually devolves into misuse in one form or another. The tendency to favor certain faith traditions and expressions is always present, as the current challenges to the Navy Chaplains Corps demonstrate.²⁷ Even in the absence of purposeful or overt favoritism, subtle cultural prejudices will direct the government actions in religiously preferential directions: those faiths that are familiar, non-controversial, and validate martial values (as opposed to historically “peace churches”) will be selected to partner with

¹⁸ *Walz v. Tax Comm’n*, 397 U.S. 664, 668 (1970).

¹⁹ *See Agostini v. Felton*, 521 U.S. 203, 223 (1997).

²⁰ *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 385 (1985), *overruled in part on other grounds by Agostini*, 521 U.S. at 236.

²¹ *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000).

²² *Accord Anderson v. Laird*, 466 F.2d 283 (D.C. Cir. 1972) (holding that compulsory chapel attendance at the military academies violates the Establishment Clause).

²³ *See County of Allegheny v. ACLU*, 492 U.S. 573, 593 (1989) (reaffirming that “government may not favor religious belief over disbelief” or adopt a “preference for the dissemination of religious ideas”) (quoting *Tex. Monthly v. Bullock*, 489 U.S. 1, 27-28 (1989)).

²⁴ *See Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290 (D.C. Cir. 2006).

²⁵ *See Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971).

²⁶ *See supra* note 7.

²⁷ *Chaplaincy of Full Gospel Churches*, 454 F.3d at 290; *In re England*, 375 F.3d 1169 (D.C. Cir. 2004).

the military. How else does one explain the passage of time before the appointment of the first Islamic chaplain?²⁸ Closely related, it is impossible for the government to use religion so extensively without “employ[ing] [it] as an engine of Civil policy.”²⁹ While the purpose of the chaplaincy policy may be benign—to provide for religious ministrations to servicemembers—the system still exists to further military goals of enhancing morale and ensuring a loyal and compliant fighting force.³⁰ And because of the command and control structure of the military generally, there is always the danger that the military’s use of religion will take on a coercive quality, as demonstrated in the allegations of proselytizing and disparagement of religion at the Air Force Academy.³¹ That the chaplaincy system has existed for so long with so few publicly disclosed problems is a commendation of the character and commitment of the men and women who have served in the various Chaplain Corps. But it is also unlikely that the activities that have led to the recent spate of allegations represent anything new. Rather, the military’s disciplined environment has likely suppressed earlier complaints. It is notable that *Katcoff v. Marsh* was brought not by military personnel, but by a group of law students pursuant to taxpayer standing. Only recently have service personnel felt comfortable in “going public” or filing complaints, aided in part by public interest law groups that did not previously exist.

Thus, the military chaplaincy system should fail even the Court’s recent permissive funding holdings and its decisions permitting limited government acknowledgments of religion.³² As Professors Lupu and Tuttle discuss, the only possible analytical paradigm for upholding the chaplaincy system against an Establishment Clause challenge would be a historical approach similar to that used in *Marsh v. Chambers*.³³ But as they correctly point out, the analogy to *Marsh* is a stretch. The legislative chaplaincy system upheld in *Marsh* existed within a noncompulsory context that is quite different from the military which presupposes a compulsory command and control structure.³⁴ The legislative

²⁸ See Bindon, *supra* note 7, at 249 (noting that the first Muslim chaplains were appointed to the Army in 1993).

²⁹ JAMES MADISON, A MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS ¶ 5 (1785), reprinted in 5 THE FOUNDERS’ CONSTITUTION 85 (Philip B. Kurland & Ralph Lerner eds., The University of Chicago Press 1987).

³⁰ *Katcoff v. Marsh*, 755 F.2d 223, 232, 237 (2d Cir. 1985).

³¹ See *Anderson v. Laird*, 466 F.2d 283 (D.C. Cir. 1972) (striking compulsory chapel attendance at the military academies); AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, RELIGIOUS COERCION AND ENDORSEMENT OF RELIGION AT THE UNITED STATES AIR FORCE ACADEMY, <http://www.au.org/pdf/050428airforcereport.pdf> (last visited Sep. 9, 2007).

³² See *Van Orden v. Perry*, 545 U.S. 692 (2005); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Lynch v. Donnelly*, 465 U.S. 668 (1984).

³³ 463 U.S. 783 (1983).

³⁴ See *Lee v. Weisman*, 505 U.S. 577, 596-97 (1992) (distinguishing the non-coercive environment in *Marsh* from that at a public school graduation).

chaplain's duties were limited to ceremonial religious functions, which stands in stark contrast to the elaborate and comprehensive chaplaincy system that exists within the various military services.³⁵ Also, the financial support for legislative chaplains pales in significance to the hundreds of millions spent on the military chaplaincy. Most significant, however, is that the *Marsh* Court emphasized that the legislative chaplain's religious activities (e.g., prayers) were nonsectarian in character, noting that there was "no indication that the prayer opportunity ha[d] been exploited to proselytize or advance any one, or to disparage any other, faith or belief."³⁶ As discussed in more detail below, although military chaplains are obligated to minister to all servicemembers, regardless of any particular faith, and to advance religious pluralism and respect, they also engage in highly sectarian functions.

Aside from analogizing directly to *Marsh*, applying a historical approach by looking to the "unambiguous and unbroken history"³⁷ of military chaplains constitutes a bad use of historical data and should be rejected as a legitimate form of constitutional analysis.³⁸ To be sure, paid military chaplains existed at the time of the drafting of the First Amendment. According to Marshian logic, this fact and its longstanding pedigree should constitutionalize the practice. But the historical argument presumes that we can draw conclusions as to the founders' collective understanding of the non-establishment mandate (a fallacy itself) out of their awareness of the chaplaincy system.³⁹ This is a faulty—and dangerous—assumption.

The Continental Congress created the military chaplaincy system in 1775, affirming the preexisting practices in the colonial militias and acceding to the request of General George Washington.⁴⁰ By the time of the ratification of the First Amendment, the national military chaplaincy system had existed for more than fifteen years, and there is nothing to indicate that the First Congress did anything more than reauthorize an existing practice.⁴¹ Certainly, there is nothing to indicate that the members of that Congress were thinking in constitutional terms when they agreed on the first budget authorization for the system in 1791. Even if they were, they, like present legislators, were not immune from enacting popular legislation notwithstanding potential conflict with a constitutional mandate. Such legislative actions "prove, at best, that the Framers simply did not share a common understanding of the Establishment Clause, and, at

³⁵ *Marsh*, 463 U.S. at 794-95.

³⁶ *Id.* at 794 n.14 & 794-95.

³⁷ *Id.* at 792.

³⁸ See Steven K. Green, "Bad History": *The Lure of History in Establishment Clause Adjudication*, 81 NOTRE DAME L. REV. 1717 (2006).

³⁹ *Marsh*, 463 U.S. at 791 (arguing that the history of legislative chaplains leads to an interpretation that the drafters of the First Amendment "saw no real threat to the Establishment Clause arising from a practice . . . similar to that now challenged").

⁴⁰ DEREK H. DAVIS, RELIGION AND THE CONTINENTAL CONGRESS 80-81 (2000).

⁴¹ *Id.* at 82.

worse, that they, like other politicians, could raise constitutional ideals one day and turn their backs on them the next.”⁴² Despite the fanciful belief held by several members of the Court that “history” can be encapsulated, accurately appreciated, and then serve as a guide for contemporary constitutional decision making,⁴³ history ends up being an Ouija Board rather than a Rosetta Stone: we read whatever significance we wish back into the events to which we choose to apply significance.⁴⁴ As with legislative chaplains, the historical pedigree of the military chaplaincy has merely created an exception to the Establishment Clause, it has not made it constitutional.

B. *The Free Exercise Justification*

Because the military chaplaincy faces such constitutional hurdles, attention quickly shifts to the Free Exercise Clause to justify the institution.⁴⁵ Analysis usually takes two interrelated tracks: first, to minimize the degree of non-establishment offense in an effort to avoid a direct inter-clause conflict; and second, to exaggerate the free exercise interests at stake so as to make the latter interest more compelling and thus worthy of prevailing.

The first track is reflected in *Katcoff v. Marsh*, the sole appellate decision on the constitutionality of the military chaplaincy system.⁴⁶ Despite opining that there was “little doubt” that the Army chaplaincy system “would fail to meet the *Lemon v. Kurtzman* conditions,” the Second Circuit went on to argue that the putative Establishment Clause violation could not be viewed as if it “existed in a sterile vacuum.”⁴⁷ Rather than seeking to “‘establish’ a religion according to . . . [a] simple formula,” the chaplaincy system promotes principles of neutrality evoked in *Zorach v. Clauson*.⁴⁸ Because the system promotes voluntariness “by leaving the practice of religion solely to the individual soldier, who is free to worship or not as he chooses without fear of any discipline or stigma, it might be viewed as not proscribed by the Establishment Clause,” the Court wrote.⁴⁹ Why the absence of compulsion—in the face of the unmitigated funding, endorsement, and entanglement issues—rendered the system less of an establishment violation, the court did not say. This approach of minimizing the establishment failings, however, is consistent with the attitude of courts that

⁴² *Lee v. Weisman*, 505 U.S. 577, 626 (1992) (Souter, J., concurring).

⁴³ *See Van Orden v. Perry*, 545 U.S. 677, 694 (2005) (Thomas, J., concurring); *McCreary County v. ACLU*, 545 U.S. 844, 895-98 (2005) (Scalia, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting).

⁴⁴ Green, *supra* note 38, at 1728-1734.

⁴⁵ U.S. CONST. amend. I (“Congress shall make no law . . . prohibiting the free exercise [of religion] . . .”).

⁴⁶ *Katcoff v. Marsh*, 755 F.2d 223, 232 (2d Cir. 1985).

⁴⁷ *Id.*

⁴⁸ *Id.* at 231 (referring to *Zorach v. Clauson*, 343 U.S. 306 (1952)).

⁴⁹ *Katcoff*, 755 F.2d at 231-32.

have reviewed government-funded chaplaincies in public hospitals, veterans homes and prisons, as well, with one court remarking that the “religious establishments that result [from such systems] are minor” thus rendering them of less constitutional concern.⁵⁰

The second, more common, approach is to justify the military chaplaincy system on the basis it is demanded by the Free Exercise Clause. The argument is that the structure of military service, by closely regulating the activities and personal freedoms of its employees, “deprive[s] such persons of the opportunity to practice their faith at places of their choice.” Thus “in order to avoid infringing [on] the free exercise guarantees,” the government may “provide substitutes” to meet those religious needs.⁵¹ Commonly, this accommodation of servicemembers’ religious needs via the chaplaincy system is viewed as not merely being permissive, but as a mandate in order to prevent a free exercise violation by the government. As the *Katcoff* court remarked:

It is readily apparent that th[e] [Free Exercise] Clause . . . obligates Congress, upon creating an Army, to make religion available to soldiers who have been moved by the Army to areas of the world where religion of their own denominations is not available to them. Otherwise the effect of compulsory military service could be to violate their rights under both Religion Clauses of the First Amendment.⁵²

Although the *Katcoff* court did not say in so many words, it effectively held that the organization and structure of the military itself *burdens* a servicemember’s “right under the Free Exercise Clause to practice his freely chosen religion.”⁵³ This assumption that the chaplaincy system functions as an accommodation to prevent an otherwise free exercise violation has been readily embraced by courts and most commentators.⁵⁴

Contrary to this prevailing view, the military chaplaincy system cannot be justified as an accommodation to prevent free exercise infringements on the rights of service personnel. First, as Professors Lupu and Tuttle point out, *Katcoff* was decided before the revolution in free exercise jurisprudence brought

⁵⁰ See *Johnson-Bey v. Lane*, 863 F.2d 1308, 1312 (7th Cir. 1988) (“The religious establishments that result are minor and seem consistent with, and indeed required by, the overall purpose of the First Amendment’s religion clauses, which is to promote religious liberty.”).

⁵¹ *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 297-98 (1963) (Brennan, J., concurring).

⁵² *Katcoff*, 755 F.2d at 234 (emphasis added).

⁵³ *Id.*

⁵⁴ See *Schempp*, 374 U.S. at 296-98 (Brennan, J., concurring); *Anderson v. Laird*, 466 F.2d 283, 290 & n.36 (D.C. Cir. 1972); Steven H. Aden, *The Navy’s Perfect Storm: Has a Military Chaplaincy Forfeited its Constitutional Legitimacy by Establishing Denominational Preferences?* 31 W. ST. U. L. REV. 185, 186 (2004).

about in *Employment Division v. Smith*. According to *Smith*, neutral laws of general applicability do not, without more, impose burdens of constitutional significance on one's ability to practice religion.⁵⁵ A requirement that a servicemember perform his or her job duties in ways that may provide limited opportunities to engage in religious activity (or other personal activity) would be viewed as neutral and not targeted at religion. One could argue, as Lupu and Tuttle suggest, that because the military pays and provides for a host of nonreligious activities for the benefit of its personnel—health care, psychological counseling, recreation, etc.—that the failure to provide for religious ministrations is not religiously neutral.⁵⁶ This argument is strengthened by the comprehensive and integrated nature of military service that distinguishes it from all other forms of government employment, one that not only imposes restrictions on personal freedoms but also undertakes responsibility for providing a host of important services to personnel.

While this argument may be appealing from a policy standpoint, it fails from a constitutional one: despite recent case law suggesting that any nonreligious viewpoint or activity has a religious comparable, thus setting up a zero-sum gain,⁵⁷ the provision of only nonreligious government services or benefits does not translate into a religiously non-neutral system.⁵⁸ The Court has considered and rejected such arguments in other contexts, indicating a hesitation to impose a constitutional obligation on the government to support religion merely because it advances secular comparables through its policies.⁵⁹

Finally, the absence of a chaplaincy system would also be viewed as a neutral omission under *Smith*, one that is no different from what exists in other government workplaces. The *Katcoff* declaration that the military's failure to provide a chaplaincy "would deprive the soldier of his right under the Establishment Clause not to have his religion inhibited," cannot be taken at its word; it states that the military's constitutional wrong is committed not by an affirmative act (e.g., policies that restrict religious practice), not merely by a neutral act (e.g., the inhibiting nature of military life), but by the failure to affirmatively enhance religion (e.g., provide a chaplaincy system).⁶⁰ Even under the protective *Sherbert* compelling interest test, now abandoned, courts would not presume that neutral acts automatically burdened religious practice.⁶¹ And as the Court has iterated on several occasions, "the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what

⁵⁵ *Employment Div. v. Smith*, 494 U.S. 872, 878-79 (1990).

⁵⁶ Lupu & Tuttle, *supra* note 6, at 119.

⁵⁷ *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 831 (1995).

⁵⁸ *See Locke v. Davey*, 540 U.S. 712 (2004).

⁵⁹ *See Norwood v. Harrison*, 413 U.S. 455, 462 (1973); *Schempp*, 374 U.S. at 225-26.

⁶⁰ *Katcoff*, 755 F.2d at 234.

⁶¹ *Sherbert v. Verner*, 374 U.S. 398, 403 (1963); *Employment Div. v. Smith*, 494 U.S. 872, 884 (1990).

the individual can extract from the government.”⁶² The *Katcoff* declaration goes one step beyond *Sherbert* and in so doing, ventures into unchartered constitutional territory.

Assuming that a strict scrutiny standard would be applied to the military pursuant to the Religious Freedom Restoration Act,⁶³ it is questionable whether the military’s job constraints or the failure to supply a chaplain for religious expression suffices as a substantial burden. On one level, the burden imposed on servicemembers’ religious practice by military service is minimal. Unlike the burden imposed on Ms. Sherbert, which required her to choose between employment and a central tenet of her religious faith—observing the Sabbath by not working (more was involved than merely the ability to attend Saturday worship)—servicemembers are not coerced to violate tenets of their faith.⁶⁴ The burdens on religious practice imposed by military life are not so comprehensive or encompassing. In most situations, servicemembers have opportunities to engage in aspects of their religious faith. The abundance of churches that surround military bases speaks for something.⁶⁵ Also, there is no evidence that the military is hostile to religion or to having servicemembers who are religiously devout. On the contrary, servicemembers are generally more religious than the population as a whole and many within the command structure openly encourage religious engagement.⁶⁶ Even when in basic training or deployed overseas in ships or confined to base, most servicemembers have personal free time within which to engage in religious expression. A counterargument is that the personal free time for religious study, contemplation or prayer may not fulfill the full religious dictates of some faith traditions, such as the requirements for Catholics to receive mass and confession, which can only be provided by an ordained priest. While such obligations may be true for some faiths, likely no faith tradition denies the validity of private or group religious study, contemplation or prayer.

The issue therefore becomes whether a partial burden on religious practice (by military life interfering with the opportunity for some, but not all expressions of religious faith) constitutes a cognizable burden on religion that demands a full accommodation of religious practice (i.e., providing chaplains and chapels), rather than the partial accommodation afforded by time for personal and informal religious activity, which already exists.

Also, the burden imposed via military service is very different from the mill-run of affirmative burdens placed on religious practice by government reg-

⁶² Bowen v. Roy, 476 U.S. 693, 700 (1986) (quoting *Sherbert*, 374 U.S. at 412 (Douglas, J., concurring)).

⁶³ 42 U.S.C. § 2000bb, *et seq.*

⁶⁴ See *Sherbert*, 374 U.S. at 404.

⁶⁵ See, e.g., Cook, *supra* note 7, at 6-7 (documenting the opportunities for evangelical religious activity at the Air Force Academy and in the surrounding community).

⁶⁶ See Obert, *supra* note 7, at 334-35, 339-40 (describing religious practices common in the Navy).

ulations that, for example, prohibit a Christian bookstore or religious landlord from discriminating against gays and lesbians in their employment and housing practices.⁶⁷ Here, the burden is passive: it is the possible imposition on personal freedoms while enlisted in the military that constitutes the burden. But the government regularly “prevents” its employees from engaging in religious activity (and other forms of personal activity) by virtue of requiring them to perform their job duties. Is the requirement that the government receive full secular value of its employees’ time a burden on their religious practice? To be sure, most other government employees do not have their personal freedoms constrained 24/7 as may occur with some servicemembers, such that they can avail themselves of religious ministrations outside of the work day. But most deployments are temporary and, again, all servicemembers have personal free time within which to engage in religious expression.⁶⁸ As with NASA astronauts who face periods of constraint on the ability to practice their religion while performing their duties, the constraints on military personnel will usually be limited and temporary. (Or is NASA obligated to provide chaplains for the space station?) Also, people join the military (like NASA) with the expectation that their personal freedoms may be constrained by the job requirements. With this understanding in mind, servicemembers would be hard pressed to argue a constitutional deprivation simply through the demands of their service obligation.

Any analogy to an unconstitutional condition fails for two reasons. First, service in the military is not an entitlement for which the government seeks a *quid pro quo* as a condition for exercising the benefit (as in Ms. Sherbert’s situation), and the burdening requirement (constrained personal freedoms) is not unrelated to the “benefit” (i.e., the job duties). Second, an unconstitutional conditions argument for religious practice would apply to other expressive rights as well, such as the ability to talk back to one’s commanding officer. Yes, the military is requiring potential servicemembers to surrender some of their expressive (and constitutional) freedoms as a condition of enlistment. No, this is not an unconstitutional condition.

As a result, the argument that the military is obligated to accommodate servicemembers’ religions because of a government imposed burden on that practice is weak. The demands of the Free Exercise Clause (or RFRA) cannot justify the military chaplaincy system. And with the free exercise basis for the chaplaincy system weakened, the establishment argument for its invalidity grows.

⁶⁷ See *Smith v. Fair Employment and Housing Comm’n*, 913 P.2d 909 (Cal. 1996).

⁶⁸ This distinguishes it from the prison situation addressed in *Cutter v. Wilkinson*, where the Court held that RLUIPA alleviates “exceptional government-created burdens on private religious exercise.” 544 U.S. 709, 720 (2005).

C. *Reconciling the Military Chaplaincy*

That said, the military chaplaincy system may be justified on two grounds: first, as a permissive accommodation of servicemembers' religious practice; and second, as a limited exception to the Establishment Clause.

Does the above discussion disputing the seriousness of a burden on religious practice mean that the argument for a permissive accommodation is lacking? Notably, the Court has held that the government may permissibly accommodate religious practice even when the burden does not rise to the level of a free exercise violation.⁶⁹ Lupu and Tuttle identify four principles or preconditions for a permissible accommodation, similar to those espoused recently by the Court in *Cutter v. Wilkinson*.⁷⁰ All of the conditions appear present in the military chaplaincy system, with the possible exception being whether the military has imposed a burden in the same way to which we are conditioned to thinking about government-imposed burdens. The system facilitates private and voluntary religious practice, it does not burden third persons through its accommodation (usually), and it is (arguably) provided on a religion-neutral basis. The on-going litigation in the *Chaplaincy of Full Gospel Churches* challenges the truth to this last factor, but as designed, the military chaplaincy is required to be religiously neutral.

However, it should be acknowledged that the argument for a religious accommodation—particularly this degree of accommodation—is not as strong as was presented in *Corporation of the Presiding Bishop v. Amos* and *Cutter*. Here again, the burden on religious practice is passive, based on military life, not resulting from an affirmative regulation of conduct that may infringe on a religious tenet or practice, such as a prohibition on religious discrimination.⁷¹ While a parallel exists in the prison context where the burden is also passive, resulting from prison life, the burden considered in *Cutter* was far more comprehensive;⁷² servicemembers have numerous opportunities to engage in religious practice that are denied to prison inmates. Additionally, the laws involved in *Amos* and *Cutter* did not impose the same level of personnel or financial obligations on the government in order to accommodate the religious practice. That the military would arguably be required to accommodate the religious needs of servicemembers in some manner begs the question as accommodation analysis looks not only at the justification for the government's accommodation but also

⁶⁹ *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987); *Walz v. Tax Comm'n*, 397 U.S. 664, 673 (1970).

⁷⁰ Lupu & Tuttle, *supra* note 6, at 112-16.

⁷¹ See Title VII, 42 U.S.C. § 2000e, *et seq.*

⁷² See *Cutter*, 544 U.S. at 720 (referring to the “exceptional government-created burdens on private religious exercise” in prisons).

at its chosen remedy.⁷³ And finally, the courts in both *Amos* and *Cutter* fell into the pattern of finding the accommodations were not only justified as relieving burdens on religion, but also as not presenting serious Establishment Clause questions.⁷⁴ The myriad ways the military chaplaincy system violates the Establishment Clause makes this balancing much more difficult. Thus, the argument for a permissive accommodation justification for the chaplaincy system may not be as strong as Professors Lupu and Tuttle suggest. For the Court seriously to consider the justification for a religious accommodation for military service would require it to apply a more permissive rule than it applied in either *Texas Monthly v. Bullock* or *Cutter*.

An alternative way of analyzing military chaplains is as a *sui generis* exception to the Establishment Clause. This approach—not one I particularly endorse—borrows in part from the decisions I criticized above: *Marsh v. Chambers* and *Katcoff v. Marsh*. Rather than minimizing the degree of an Establishment Clause violation presented by the government action, this approach acknowledges that the accommodation fails that clause, period. In contrast, it recognizes that because a handful of longstanding government practices are unlikely to change or be smitten (e.g., chaplaincies, the National Motto), they are best (or worst?) seen as exceptions to the Establishment Clause. Then, as exceptions, they should be cabined by fashioning a limiting rule to prevent their viral spread. An exceptions approach does not *justify* the actions by looking to their historical pedigree as occurred in *Marsh* and *Van Orden v. Perry* or their “history and ubiquity” as identified in *Lynch v. Donnelly*;⁷⁵ it simply recognizes the lack of political and judicial will to take the non-establishment mandate at its word.

The accompanying limiting rule for military chaplaincies then borrows from *Marsh* and *Katcoff* to ensure that as an exception to the Establishment Clause, the system does not roam too far afield from underlying religion clause values. *Amos* and *Katcoff* set out the most important limiting factor: that the purpose of the government action resulting in an exception must be to further religious liberty generally.⁷⁶ While the burden on religious practice of military service may not be great, the undeniable purpose of the chaplaincy system is to alleviate those religious burdens that may exist.⁷⁷ *Marsh* then sets out other conditions that make the military chaplaincy a possible candidate for an Establishment Clause exception. First, in order to be consistent with religion clause

⁷³ See *Bd. of Educ. of Kiryas Joel Sch. Dist. v. Grumet*, 512 U.S. 687, 706 (1994) (“accommodation is not a principle without limits”). See also *Tex. Monthly v. Bullock*, 489 U.S. 1 (1989); *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985).

⁷⁴ See *Cutter*, 544 U.S. at 723-24 (distinguishing the seriousness of the establishment concern presented in *Kiryas Joel*); *Amos*, 483 U.S. at 337 (disputing that the Section 702 exception advances religion).

⁷⁵ 465 U.S. at 693 (O’Connor, J., concurring).

⁷⁶ *Amos*, 483 U.S. at 335-36.

⁷⁷ *Katcoff v. Marsh*, 755 F.2d 223, 237 (2d Cir. 1985).

values generally, the chaplaincy system must remain nonsectarian in operation. *Marsh* emphasized the nonsectarian nature of the legislative chaplaincy, though it inconsistently declared no interest in the content of the chaplain's prayers.⁷⁸ However, subsequent cases, several arising in the context of hospital and prison chaplaincies, have interpreted this *Marsh* nonsectarian factor as a First Amendment prerequisite.⁷⁹ Additionally, *Marsh* and lower court holdings have emphasized that acceptable chaplaincy programs and their employees do not engage in religious indoctrination or proselytization.⁸⁰ This would not mean that chaplains would be barred from engaging in religious instruction or in the rites of specific faith communities. As discussed below, the various branches have likely created limited forums for religious expression in worship, instructional and counseling settings such that they may be barred from imposing restrictions on religious content.⁸¹ But to engage in discrete religious functions as part of ministering to the spiritual needs of a particular religious community is not the same as engaging in proselytization or religious indoctrination; nor does it turn the overall system into a sectarian enterprise.

As a result, it may be better simply to view the military chaplaincy system as a limited exception to the Establishment Clause. Though causing damage to that value, the injury is ameliorated by several factors: it is a longstanding practice unlikely to change; it is for the purpose of enhancing religious liberty generally; and its offense is lessened by its non-preferential, non-indoctrinating nature. As one court has characterized this approach, "[t]he religious establishments that result are minor and seem consistent with . . . the overall purpose of the First Amendment's religion clauses, which is to promote religious liberty."⁸² While I do not particularly endorse this approach—nor see how it can be cabined to military chaplaincies once it is embraced—it is at least a more honest way of reconciling the non-establishment mandate. But perhaps the risk in an exception approach is too great, and it simply is better for courts and commentators to continue to overstate the free exercise interests at stake.

⁷⁸ *Marsh v. Chambers*, 463 U.S. 783, 793 n.14, 794-95 (1985).

⁷⁹ See *County of Allegheny v. ACLU*, 492 U.S. 573, 603 (1989) (discussing the nonsectarian nature of the activities in *Marsh*); *Remmers v. Brewer*, 361 F. Supp. 537, 543 (S.D. Iowa 1973), *aff'd*, 494 F.2d 1277 (8th Cir. 1974) ("Certainly the Constitution does not bar the State from providing chaplains in prisons for the spiritual edification of the inmates, so long as no particular religion is fostered thereby."); *Williams v. Lara*, 52 S.W.3d 171, 186, 192 (Tex. 2001) (finding that a chaplaincy program is unconstitutional if it "conveys the impermissible message of official preference for one specific religious view.").

⁸⁰ *Marsh*, 463 U.S. at 794-95 (highlighting that "the prayer opportunity has [not] been exploited to proselytize or advance any one, or to disparage any other, faith or belief"); *Montano v. Hedgepeth*, 120 F.3d 844, 850 n.10 (8th Cir. 1997) ("Having made religious leaders available to inmates, however, a state cannot 'advanc[e] religion through indoctrination.'"); *Carter v. Broadlawns Med. Ctr.*, 857 F.2d 448, 455-56 (8th Cir. 1988); *Baz v. Walters*, 782 F.2d 701, 709 (7th Cir. 1986); *Remmers*, 361 F. Supp. at 543.

⁸¹ See *Rigdon v. Perry*, 962 F. Supp. 150, 159-60 (D.D.C. 1997).

⁸² See *Johnson-Bey v. Lane*, 863 F.2d 1308, 1312 (7th Cir. 1988).

III. THE RIGHTS OF CHAPLAINS

The more interesting constitutional issues involve whether military chaplains possess any personal free exercise and free speech interests to engage in religious activity that conflicts with the wishes of the military. These issues have risen to the forefront of public debate with controversies over alleged proselytizing activities of chaplains at the Air Force Academy and proposed Navy regulations to prohibit Navy chaplains from engaging in sectarian prayer.⁸³ Also, at least one case has considered a chaplain's free exercise challenge to a military policy to "preach pluralism."⁸⁴ The fundamental question is whether the free exercise basis for the chaplaincy system generally affords any protections for chaplains themselves, or do chaplains enjoy some independent expressive rights in the performance of their duties?

At first glance, the answer to the above questions would appear to be a quick "no." As discussed above, the free exercise basis for the chaplaincy system is not particularly compelling. Even if the chaplaincy system is justified as a permissible accommodation of the religious needs of *servicemembers*, that same rationale cannot be seen to impart a free exercise interest in the chaplains themselves, let alone one that might elevate the chaplains' religious interests over those of their flock.⁸⁵ The use of chaplains is justified, solely, on the need to accommodate the religious beliefs and practices of the servicemembers, not to accommodate the possibly conflicting religious interests of the chaplains. There is no comparable burden on the religious activity of chaplains that the government should be required to lift, unless one argues that chaplains experience the same burdens on religion that are imposed on servicemembers generally, but such logic becomes circular and self-fulfilling: by providing a religiously pluralistic chaplaincy system, the military has burdened the religious needs of chaplains who exist to provide a pluralistic religious accommodation. In point of fact, by virtue of their job functions which are *religious*, chaplains would not experience the same burdens on religion as are experienced by servicemembers, unless it was as a result of the requirement that they be religiously pluralistic, which is discussed below.

More to the point, chaplains are employed for the very purpose of ministering to service personnel and as such, are engaging in government functions when they are performing their religious duties. They are government agents when they are engaged in religious expression in ways that other servicemembers are not. Arguably, their religious speech and activity is government speech, not that of their own. As a result, they lack a strong free exercise or free speech claim to expression that is directly job-related.⁸⁶ Accordingly, a requirement

⁸³ See *supra* note 7.

⁸⁴ *Veitch v. England*, 471 F.3d 124, 127 (D.C. Cir. 2006).

⁸⁵ See *Baz*, 782 F.2d at 708 (noting that a V.A. hospital chaplain "has no absolute constitutional right to conduct religious services and offer religious counsel in a government institution").

⁸⁶ See *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006); *Baz*, 782 F.2d at 708.

that military chaplains be religiously pluralistic in their activities (no denigration of other religious faiths) and not proselytize would implicate no free exercise right because: (1) their religion is arguably not burdened by them performing the very accommodation that provides for their existence; and (2) they are engaged in direct job duties, for which they have a minimal independent expressive interest.

As Professors Lupu and Tuttle point out, however, the matter is not so simple. The structure of the chaplaincy system suggests that chaplains represent a unique, hybrid form of government employee. While immediately answerable to their military superiors, they are accountable to their host denominations for some matters of faith, in particular their certifications as clergy. They must remain in good standing in their religious community, which would necessarily include adhering to the doctrines and tenets of their denomination. For example, a Southern Baptist chaplain might risk decertification if she advocated the notion of salvation occurring through infant baptism.⁸⁷ Whether it was necessary for the military to construct such a system of dual authorities is an interesting question beyond the scope of this response; the point is that the current system recognizes that all of the expression and activities that accompany the job duties of the chaplains may not be “government speech.” Thus, at second glance, the speech that accompanies a worship service or counseling session may not necessarily be attributable to the government or justify the same type of government constraints as have been legitimated in the Court’s government-employee jurisprudence.

With respect to the military requirement that chaplains advance an environment of religious pluralism⁸⁸—or “preach pluralism”—Lupu and Tuttle offer a typology of “maximal” and “minimal” pluralism. A requirement that chaplains affirmatively advocate religious pluralism—or a maximal pluralism requirement—would be no different than requiring chaplains to preach a specific religious message, Lupu and Tuttle assert, and would impose burdens on the free exercise rights of the chaplains while implicating the Establishment Clause by assuming the ability to judge superior religious doctrines. In contrast, a regime of minimal pluralism would not force a chaplain to adopt any theological truth claim but merely require that the chaplain facilitate the religious needs of all servicemembers on an equal basis.⁸⁹

This typology is helpful, but it needs refining. It still does not explain why the free exercise interest of an otherwise government employee is triggered by a requirement that they embrace a specific truth claim rather than a vague one, particularly when both claims are inherent in the message that the military is keen on promoting: religious pluralism and respect are good; religious dissension is harmful to the ranks. Lupu and Tuttle claim the former takes place

⁸⁷ Lupu & Tuttle, *supra* note 6, at 128.

⁸⁸ See *Veitch*, 2005 WL 762099, at *4 (D.D.C. Apr. 5, 2005).

⁸⁹ Lupu & Tuttle, *supra* note 6, at 139-41.

primarily in religious worship situations, but this on its own does not explain the basis for a free exercise shield against the military policy of pluralism.

The answer may come from borrowing from free expression jurisprudence, and more specifically, public forum doctrine. In establishing the military, the government has not created forums for the free exchange of ideas, even though it employs millions of personnel in a variety of jobs who engage in various forms of expression, some of which expectantly do not communicate a governmental message.⁹⁰ More is needed to create a public forum which, in turn, helps determine the extent of private expressive interests. As the Court reminded us in *Cornelius v. NAACP Legal Defense and Education Fund*, “[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.”⁹¹ Mere selective use of a government site for expressive activity “unsupported by evidence of a purposeful designation [of a forum] for public use, does not create a public forum.”⁹² Also crucial is the compatibility between the nature of the speech and the property in question.⁹³

In authorizing the military chaplaincy system, the government has created two related, but severable operations. Primarily, it has created a government agency—the Chaplains’ Corps—to serve the religious needs of servicemembers by providing religious ministering and support for military personnel and their families. Chaplains perform a host of religious and secular duties, the majority of which advance both general and specific goals of the military. As the *Katcoff* court described, in addition to performing religious functions such as conducting worship services, marriages and baptisms, chaplains engage in counseling (spiritual and otherwise), serve as intermediaries during health and family crises, and act as liaisons between enlisted personnel and their commanders.⁹⁴ In these capacities, chaplains communicate important military messages regarding compassion, respect, patriotism, obedience, and religious pluralism. Here, the chaplains are performing job-related duties in what is essentially a closed expressive forum. The military can impose content and viewpoint restrictions on the statements of its employee-chaplains, so as to ensure that its preferred messages are not garbled or distorted.⁹⁵

However, in establishing the chaplaincy system, the government has created a limited opportunity for private religious expression, primarily through worship services. The military’s purpose behind this limited expressive forum is evinced through the construction of chapels and in the regulations governing

⁹⁰ *Accord* *Greer v. Spock*, 424 U.S. 828 (1976).

⁹¹ *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985).

⁹² *Id.* at 805.

⁹³ *United States v. Kokinda*, 497 U.S. 720 (1990).

⁹⁴ *Katcoff v. Marsh*, 755 F.2d 223, 228 (2d Cir. 1985).

⁹⁵ *See* *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960 (2006). *Accord* *Rosenberger*, 515 U.S. at 833.

selection and certification of chaplains which recognize their dual roles. The military purposefully allows personnel of like-faith to meet for religious worship and use scripture, hymnals and liturgy not developed by the state. When meeting in these worshipful settings, the military not only allows but expects chaplains to preach and expound according to the dictates of the faith represented, not to that of the government.⁹⁶ Accordingly, in these limited settings it can be argued that the military has purposefully created limited forums for religious expression, such that it cannot impose content or viewpoint requirements, absent a narrowly tailored compelling interest.⁹⁷ It can also be argued that in these settings chaplains cease to be government agents so far as their expression is concerned.⁹⁸ Even though they are still performing a job-related duty, they are now doing so in a limited speech forum created for the purpose of enabling private religious worship. It would be inconsistent with the nature of the expressive forum (and undermine the servicemembers' private speech interests as listeners) to hold that the person leading the protected expression was communicating a government message rather than a private message. In this context, therefore, the chaplains are no different from other servicemembers and here they enjoy comparable free exercise and speech interests.

Thus, it is because chaplains are participating in limited expressive forums—worship services, confidential counseling, etc.—created by the military that their free exercise and free speech interests attach so as to immunize them from military regulations regarding pluralism and even proselytizing. Outside of these purposefully created expressive forums, however, chaplains remain government agents with minimal free exercise or free speech rights. Thus the trigger for a chaplain's free exercise interest does not turn on the specificity or vagueness of the truth claim he is required to advocate; nor does it turn on the degree of inconsistency between that claim and the chaplains own religious beliefs. Rather, the chaplain's free exercise interest depends on the forum. The availability of that forum and the accompanying expressive right, however, depends entirely on the military's willingness to provide for worship and counseling moments. So a chaplain's free exercise interest may be curtailed by the military simply through the elimination of the forum.

So understood, I disagree with Professors Lupu and Tuttle about whether the military could require a chaplain outside a worship or counseling setting to advocate a principle of pluralism, even if it conflicts with his or her own theological truth claim. Similarly, the military could appropriately impose a requirement that public ceremonial prayers be nonsectarian without infringing upon a chaplain's putative free exercise rights. When performing official ceremonial functions the chaplain is acting in his official duties as a government

⁹⁶ See *Rigdon v. Perry*, 962 F. Supp. 150, 159-160 (D.D.C. 1997) (discussing various military regulations).

⁹⁷ See *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37 (1983).

⁹⁸ *Rigdon*, 962 F. Supp. at 160. *Accord* *Montano v. Hedgepeth*, 120 F.3d 844, 851 (8th Cir. 1997).

agent and may be required to tote the official line. Only when the chaplain acts in the military-created free religious expression forums does he retain the freedom to preach “war is wrong” or “pluralism is bad.”

IV. CONCLUSION

The military chaplaincy system can be reconciled with both the Free Exercise and Establishment Clauses without doing significant damage to either clause’s jurisprudence. The first step is for courts to address the various issues squarely, not taking the easy approach of overstating the free exercise interests or understating the establishment concerns. Courts should also not revert to artificial justifications such as represented in the *Marsh* historical approach. Professors Lupu and Tuttle avoid such pitfalls, offering a thorough and compelling analysis of the military chaplaincy, one that adds significantly to the literature. I offer modest refinements to that analysis and, like them, wait expectantly, although not optimistically, for the day the High Court finally tackles this issue.