D. GOVERNMENTAL PROPRIETARIES IN RELIGION: CHAPLAINCIES

In recent years, a new meaning has been added to the noun "proprietary." One dictionary defined the earlier meaning as "an owner; one who has exclusive legal right or title to anything...; a proprietary medicine."[1] But when a hapless pilot for a small airline was shot down over Central America and was found to be running weapons to the "Contras," the ensuing controversy—dubbed "Iran-Contragate"—brought out that that the small "private" airline was owned and operated by the Central Intelligence Agency (CIA) for its own clandestine purposes, and that such ostensibly "private" businesses—termed "proprietaries" in the intelligence community—were a standard device for providing an outpost, facility, "front" or cover for covert intelligence operations. The term "proprietary" seems a useful designation for the purposes of this volume—without implying any element of subterfuge or dissimulation—to characterize *a religious entity of which the government is* (or is alleged to be) *the proprietor*. The quintessential instance of such a proprietary is the *chaplaincy* (in its various forms, discussed below).

This arrangement represents the most extensive form of legal "protection" for religion in the American setting and would seem to be exactly the kind of "establishment" of religion that the Establishment Clause forbids. Yet it is often sought to be justified on the ground that such proprietorship is necessary in order to ensure the opportunity for the free exercise of religion guaranteed by the Free Exercise Clause.[2] Some such rationale was alluded to by Justice Brennan in his lengthy concurrence in *Abington v. Schempp*: "[H]ostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners and soldiers cut off by the State from all civilian opportunities for public communion...."[3]

The point was that the state was merely compensating for conditions of its own creation: it had taken individuals from their normal civilian environments, where they would have free access to religious ministrations of their choice, and placed them in artificial, isolated settings, where they did not, and the government was justified, if

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1. *Webster's New Universal Unabridged Dictionary* (New York: Simon & Schuster, 1979), p. 1444.

2. See the rationale of *Wilder v. Sugarman*, 385 F. Supp. 1013 (three-judge court, 1974), discussed at § C5b above.

3. 374 U.S. 203, 299 (1963) (Brennan, J., concurring), discussed at IIIC2b(2). The majority referred to the chaplaincy question in a footnote: "We are not of course presented with and therefore do not pass upon a situation such as military service, where the Government regulates the temporal and geographic environment of individuals to a point that, unless it permits voluntary religious services to be conducted with the use of government facilities, military personnel would be unable to engage in the practice of their faiths." Ibid. at 226 n.10.

not in fact required,[4] to supply that deficiency in order to restore a condition of "neutrality" toward the individual's free exercise of religion. Whether this rationale accurately represents either the problem or the solution will be underlying questions to be kept in mind in what follows and discussed further at the end of this section.

1. The Military Chaplaincy

Probably the primary example of a governmental proprietary in the field of religion is the military chaplaincy, where the federal government of the United States owns and operates chapels at a number of installations of the armed services, staffed by a complete roster of ordained religious functionaries known as chaplains, who are hired, supervised (except with respect to their uniquely religious functions, whatever those may be) paid, promoted or demoted and separated, discharged or retired by the Chaplains Corps, a special branch of their respective armed services under the U.S. Department of Defense. Many doubts have been entertained in various quarters about the constitutionality of this arrangement, as indicated by Justice Brennan's effort to allay these misgivings in his essay on church-state relations quoted above. But no legal challenge to the military chaplaincy was entertained until two enterprising students at the Harvard Law School brought suit in the Eastern District of New York, where it was dismissed.

a. *Katcoff v. Marsh* (1985). The plaintiffs appealed this dismissal to the Second Circuit Court of Appeals, which dealt with the case in a rather definitive opinion by Judge Walter R. Mansfield, joined by Chief Judge Wilfred Feinberg. That opinion also provided a useful description of the actual chaplaincy program of the Army (the Navy, Air Force and Coast Guard were evidently not thought to be at issue in this case, but their chaplaincy programs were essentially similar).

> Congress, in the exercise of its powers under Art. I, § 8, of the Constitution to provide for the conduct of our national defense, has established an Army.... It has specifically authorized that as part of this establishment there be "Chaplains in the Army...."
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> In providing our armed forces with a military chaplaincy Congress has perpetuated a facility that began during Revolutionary days before the adoption of our Constitution, and that has continued ever since.... When the Continental Army was formed those chaplains attached to the militia of the 13 colonies became part of our country's first national army.... On July 29, 1775, the Continental Congress authorized that a Continental Army chaplain be paid, and within a year General George Washington directed that regimental... chaplains be procured.
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> In 1981 the Army had approximately 1,427 active-duty commissioned chaplains, 10 auxiliary chaplains, 1,383 chaplain's assistants, and 48 Directors of Religious Education. These chaplains are appointed as commissioned officers with rank and uniform but without command.

4. Justice Brennan continued, "I do not say that government *must* provide chaplains..., or that courts should intercede if it fails to do so." 374 U.S. at 299, emphasis in original.

Before an applicant may be appointed to the position of chaplain he must receive endorsement from an ecclesiastical endorsing agency recognized by the Armed Forces Chaplains Board, of which there are 47 in the United States, representing 120 denominations. In addition to meeting the theological standards of the endorsing agency the applicant must also meet minimum educational requirements established by the Department of Defense, which are more stringent than those of some religious denominations...and are designed to insure the applicant's ability to communicate with soldiers of all ranks and to administer religious programs. In deciding upon the denominations of chaplains to be appointed the Office of the Chief of Chaplains establishes quotas based on the denominational distribution of the United States as a whole. The entire civilian church population is used in order to assure that in the event of war or total mobilization the denominational breakdown will accurately reflect that of the larger-sized Army.

Upon his appointment the chaplain...is subject to the same discipline and training as that given to other officers and soldiers. He is trained in such subjects as Army organization, command relationships, supply, planning, teaching, map-reading, types of warfare, security, battlefield survival, and military administration. When ordered with troops into any area, including a combat zone under fire, he must obey. He must be prepared to meet problems inherent in Army life, including how to handle trauma, death or serious injury of soldiers on the field of battle, marital and family stresses of military personnel, tending the wounded and dying, and psychological treatment of soldiers' drug or alcohol abuse, as well as the alleviation of tensions between soldiers and their commanders. On the other hand, the chaplain is not required to bear arms or receive training in weapons. Under Articles 33 and 35 of the Geneva Conventions Relative to Treatment of Prisoners of War, "chaplains" are accorded a non-combatant status, which means that they are not to be considered prisoners of war and they may exercise their ministry among prisoners of war. Promotion of a chaplain within the military ranks is based solely on his military performance and not on his effectiveness as a cleric.

The primary function of the military chaplain is to engage in activities designed to meet the religious needs of a pluralistic military community, including military personnel and their dependents....

Aside from the problems arising out of the sheer size and pluralistic nature of the Army, its members experience increased needs for religion as the result of being uprooted from their home environments, transported often thousands of miles to territories entirely strange to them, and confronted there with new stresses that would not otherwise have been encountered if they had remained at home. In 1981 approximately 37% of the Army's active duty soldiers, amounting to 293,000 persons, were stationed overseas in locations such as Turkey, Sinai, Greece or Korea. In most of these areas the Judeo-Christian faiths of most American soldiers are hardly represented at all by local clergy[,]

and the average soldier is separated from the local populace by a linguistic and cultural wall. Within the United States the same problem exists in a somewhat different way in that, although the linguistic or cultural barrier may be absent, local civilian clergy in the rural areas where most military camps are centered are inadequate to satisfy the soldiers' religious needs because they are too few in number for the task and are usually of different religious denominations from those of most of the nearby troops.

The problem of meeting the religious needs of Army personnel is compounded by the mobile, deployable nature of our armed forces, who must be ready on extremely short notice to be transported from bases (whether or not in the United States) to distant parts of the world for combat duty in fulfillment of our nation's international defense commitments. Unless there were chaplains ready to move simultaneously with the troops and to tend to their spiritual needs as they face possible death, the soldiers would be left in the lurch, religiously speaking. In the opinion of top generals of the Army and those presently in the chaplaincy, unless chaplains were made available in such circumstances, the motivation, morale and willingness of soldiers to face combat would suffer immeasurable harm and our national defense would be weakened accordingly.

Many soldiers in the Army also suffer serious stresses from other causes attributable largely to their military service, which can be alleviated by counseling and spiritual assistance from a leader of their respective faiths. Among these are tensions created by separation from their homes, loneliness when on duty in strange surroundings involving people whose language or customs they do not share, fear of facing combat or new assignments, financial hardships, personality conflicts, and drug, alcohol or family problems. The soldier faced with any of these problems at home would usually be able to consult his spiritual adviser. The Army seeks to furnish the same services through military chaplains. In doing so the Army has proceeded on the premise that having uprooted the soldiers from their natural habitats it owes them a duty to satisfy their Free Exercise rights, especially since the failure to do so would diminish morale, thereby weakening our national defense.

To meet the religious needs of our armed forces Army chaplains and their assistants engage in a wide variety of services to military personnel and their families who wish to use them. No chaplain is authorized to proselytize soldiers or their families. The chaplain's principal duties are to conduct religious services (including periodic worship, baptisms, marriages, funerals and the like), to furnish religious education to soldiers and their families, and to counsel soldiers with respect to a wide variety of personal problems. In addition the chaplain, because of his close relationship with the soldiers in his unit, often serves as a liaison between the soldiers and their commanders, advising the latter of racial unrest, drug or alcohol abuse, and other problems affecting the morale and efficiency of the unit, and helps to find solutions. In some areas the Army also makes available religious retreats, in which soldiers

> voluntarily withdraw for a short period from the routine activities of daily living to another location for spiritual reflection and renewal.
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> For this comprehensive religious program involving hundreds of thousands of soldiers and their families, the Army has a large and fairly elaborate administrative organization.... The Chief of Chaplains, a major general of the Army, is in general supervision and management of the Army's chaplaincy.... Over the years the Army has built or acquired more than 500 chapels which are used for the conduct of religious services of many different denominations.... The Army has purchased and made available for voluntary use by various denominations numerous chaplains' kits,...communion sets and vestments, and religious publications (including Holy Scriptures and Prayer Books for Jewish Personnel, The New Testament of our Lord and Savior Jesus Christ, and a Book of Worship)....
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> The great majority of the chaplaincy's services, facilities, and supplies are procured by the Army through funds appropriated by Congress, which amounted to over $85 million for the fiscal year 1981, of which more than $62 million was used to pay the salaries and other compensation of chaplains, chaplain's assistants and auxiliary chaplains. Much smaller amounts were paid for the services of contract [civilian] chaplains ($332,000).... Some $7.7 million of non-appropriated funds, representing voluntary contributions or designated offerings from soldiers and their dependents, were also used in the fiscal year 1981 to provide for the needs of the Army's chaplaincy program.[5]

The court thus sketched a useful description of the Army's chaplaincy program, the religious needs to which it was addressed, and a possibly somewhat idealized conception of its effectiveness in meeting those needs. It was not surprising that a description of the chaplaincy system drawn from the affidavits of "top generals of the Army and those presently in the chaplaincy" might tend to focus on the good intentions and undoubted accomplishments of a vast and complex institution without giving much attention to its weaknesses and shortcomings (including possible constitutional defects) or contemplating in other than a rigidly defensive way any modifications that might remedy them. In other words, this portrayal of the military chaplaincy as a key bulwark of the national defense had about it a bit of the resolute affirmativeness of a regimental history or retirement commendation.

> Appellants' complaint...seeks a declaratory judgment that the foregoing program violates the Establishment Clause.... The complaint alleges that the "constitutional rights of Army personnel and their dependents to freely exercise their religion can better be served by an alternative Chaplaincy program which is privately funded and controlled." In the district court and here appellants have not questioned the need to satisfy the Free Exercise rights of military personnel but have

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

> claimed that government funding of the chaplaincy program is unnecessary. However, appellants have offered no evidence that the many religious denominations and organizations involved would support or finance such a program other than [an] affidavit of the Rev. Carl H. Mischke, President and Spiritual Leader of the Wisconsin Evangelical Lutheran Synod to the effect that the Synod's scriptural principles do not permit its pastors to accept appointment as military chaplains but that at its own expense and responsibility it has successfully conducted a civilian chaplaincy program under which its pastors have provided spiritual support for its members serving in the United States, Vietnam and Europe. For these activities the Army has provided logistical support including travel by military aircraft, transient quarters at full-service rates, exchange privileges, open mess privileges and use of military postal and banking facilities. In Rev. Mischke's opinion his Synod's civilian chaplains are fully effective in ministering to its members in military service and do not unduly burden its finances.
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> In response to the Rev. Mischke's affidavit Gerhardt W. Hyatt, President of Concordia College, St. Paul, and Vice-President of the Lutheran Church Missouri Synod, who served as an Army chaplain in the United States, Europe, Guam, Korea and Vietnam at various times during the period from 1945 to 1975, rising to the position of Deputy Chief of Chaplains, and who is familiar with activities of civilian ministers of the Wisconsin Synod, gives a somewhat different picture.... He swears [in a 1982 affidavit] that there were no Wisconsin Synod civilian chaplains serving soldiers in certain U.S. locations; that their only religious support in locations in Europe where he was stationed was one week-end religious retreat; that during the period when he was on staff of the Office of United States Army Europe..., with which civilian clergy were required to coordinate, no coordination was requested by the Wisconsin Synod except for the one retreat; that in Vietnam, where Rev. Hyatt was Command Chaplain, Military Assistance Command, the Synod had only one clergyman at any time to minister to its members there, which made regular visits to members impossible; and that such civilian clergymen, unlike military chaplains, were not permitted to tend to the wounded on the battlefield but were restricted to secure "rear areas" and hospitals to which wounded were evacuated. Rev. Hyatt further averred that in 1970 officials of the Wisconsin Synod expressed concern over the fact that because of their civilian status they could not adequately tend to the spiritual needs of its members. Hyatt, in his 30 years experience in the Army chaplaincy, knew of no church other than the Wisconsin Synod whose clergy were not permitted to serve as military chaplains or who had undertaken at their expense to serve their members in the military service. In Hyatt's view the religious support furnished by the Wisconsin Synod to its members in the Army was inadequate.

Another chaplain volunteered by affidavit the thought that admitting civilian clergy to military facilities posed security problems, and that "in the event of

hostilities they would be evacuated along with all other civilians." This mobilization of testimony by incumbent and former chaplains to refute the subversive views of Rev. Mischke was an impressive instance of overkill, colored to some degree perhaps by the long-standing rivalry between the conservative Missouri Synod, which cooperated only very warily with other religious bodies, and the ultraconservative Wisconsin Synod, which didn't cooperate with anybody. So to the defense of the existing system in which Rev. Hyatt had invested thirty years of his life was added a certain impatience with the hyperindependent, go-it-alone little Wisconsin Synod, which had made a career of out-stubborning the stubborn Missouri Synod. That did not mean, of course, that Rev. Hyatt was incorrect in his statement of facts, as far as they went. He did not indicate (or the Court did not relay) how many Wisconsin Synod soldiers were involved and whether—contrary to the teaching of their Synod—they availed themselves of religious ministrations at the hands of regular Army chaplains. It was very probably true that no other denomination attempted such a difficult and demanding mode of service to its members in the armed forces. It is not surprising that its efforts were not too effective in ministering to a small number of adherents widely dispersed around the world, especially swimming upstream against the resistance of the existing system, however formally facilitative it may have tried to be. David Riesman coined the phrase "antagonistic cooperation" for such relationships,[6] and most people recognize the phenomenon from their own experience of cross-pressures working for and against a given outcome, so that progress toward it is often minimal and grudging.

Shortly after suit was filed, Judge Jacob Mishler refused to dismiss it, commenting that facts might be produced to show that the chaplaincy was "so overly broad in scope as to constitute a governmentally sponsored program of religious proselytism, and at the same time sadly deficient in providing religious support services to members of certain religious faiths."[7] His successor, Judge Joseph M. McLaughlin, however, granted summary judgment dismissing the action "on the grounds that the court should defer to the decision of Congress in what is essentially a military matter, the feasibility of substituting a civilian chaplaincy in place of a military one."[8]

The Circuit Court continued:

> Turning to the merits, the Establishment Clause of the First Amendment...was designed by our Founding Fathers to insure religious liberty for our country's citizens by precluding a government from imposing, sponsoring or supporting religion or forcing a person to remain away from the practice of religion.
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> "The `establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a

6. *The Lonely Crowd* (New Haven, Conn.: Yale University Press, 1950), pp. 78, 82.
7. *Katcoff v. Marsh*, *supra*, at 230.
8. Ibid., the Circuit Court's characterization.

> person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance."[9]

The Army chaplaincy does not seek to "establish" a religion according to this simple formula. It observes the basic prohibition expressed by the Court in Zorach v. Clauson:

> "The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction."[10]

Since the program meets the requirement of voluntariness by leaving the practice of religion solely to the individual soldier, who is free to worship or not as he chooses without fear of any discipline or stigma, it might be viewed as not proscribed by the Establishment Clause. Indeed, if the Army prevented soldiers from worshipping in their own communities by removing them to areas where religious leaders of their persuasion and facilities were not available it could be accused of violating the Establishment Clause unless it provided them with a chaplaincy since its conduct would amount to inhibiting religion.... "State power is no more to be used so as to handicap religions than it is to favor them."[11]

Congress' authorization of a military chaplaincy before and contemporaneous with the adoption of the Establishment Clause is also "weighty evidence" that it did not intend that Clause to apply to such a chaplaincy.... Moreover, its "unambiguous and unbroken history of more than 200 years,"[12] in continuing that course indicates that, as with the practice of opening legislative sessions with a prayer, "the First Amendment draftsmen...saw no real threat to the Establishment Clause" arising from a military chaplaincy. In interpreting the Bill of Rights such "an unbroken practice...is not something to be lightly cast aside."[13]

The court applied the three-part test of establishment of religion derived from *Lemon v. Kurtzman* (1971): (1) a secular purpose, (2) principal effect that neither advances nor inhibits religion, and (3) no excessive government entanglement with religion.[14]

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9. *Everson v. Board of Education*, 330 U.S. 1 (1947), discussed at IIID2.
10. 343 U.S 306, 314 (1952), discussed at IIIC1b.
11. *Everson*, *supra*.
12. *Marsh v. Chambers*, 463 U.S. 783 (1983), discussed below at § D3a.
13. *Walz v. Tax Commission*, 397 U.S. 664 (1970), discussed at § C6b(3) above.
14. 403 U.S. 602 (1971), discussed at IIID5.

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. Although the ultimate objective of the chaplaincy may be secular in the sense that it seeks to maintain the efficiency of the Army by improving the morale of our military personnel, its immediate purpose is to promote religion by making it available, albeit on a voluntary basis, to our armed forces. The effect of the program, moreover, is to advance the practice of religion. Administration of the program, involving arrangements with many church organizations of different denominations, entangles the government with religious accrediting bodies.

However, neither the Establishment Clause nor statutes creating and maintaining the Army chaplaincy may be interpreted as if they existed in a sterile vacuum. They must be viewed in the light of the historical background of their enactment to the extent that it sheds light on the purpose of the Framers of the Constitution.... They must also be considered in context, since a test which may be reasonable in one context may be wholly inappropriate in another.... Aside from the fact that no single test will meet all contexts, the Establishment Clause must in any event be interpreted to accommodate other equally valid provisions of the Constitution, including the Free Exercise Clause, when they are implicated.

The present case involves two other provisions of our Constitution, which must not only be respected but, to the extent possible, interpreted compatibly with the Establishment Clause. One is the War Powers Clause of Art. I, §8, which provides in pertinent part that Congress shall have the power to "provide for the common defense," "to raise and support Armies," and to "make Rules for the Government and Regulation of the land and naval Forces." Although military conduct is not immune from judicial review when challenged as violative of the Bill of Rights..., the Supreme Court has recognized that:

> "[J]udges are not given the task of running the Army.... The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters...."[15]

In a perilous world our survival as a nation and our enjoyment of the blessings of liberty depend heavily upon our Army and other military institutions, rigid and disciplined as they must be. Those who want the individual liberty embodied in our Bill of Rights must be willing to make sacrifices for it. One of these is the duty of a soldier to obey military orders and forego many of the freedoms that he would otherwise enjoy as a civilian, including the right to travel whenever and wherever he pleases.

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15. Quoting *Orloff v. Willoughby*, 345 U.S. 83 (1953).

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The line where military control requires that enjoyment of civilian rights be regulated or restricted may sometimes be difficult to define. But caution dictates that when a matter provided for by Congress in the exercise of its war power and implemented by the Army appears reasonably relevant and necessary to furtherance of our national defense[,] it should be treated as presumptively valid and any doubt as to its constitutionality should be resolved as a matter of judicial comity in favor of deference to the military's exercise of its discretion.

The second provision of the Constitution which plays a vital role in our interpretation of the Establishment Clause is the Free Exercise Clause of the same Amendment. It is readily apparent that this Clause, like the Establishment 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 denomination is not available to them. Otherwise the effect of compulsory military service could be to violate their rights under both Religion Clauses....

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The standard to be applied, therefore, in deciding whether the Army's military chaplaincy can survive attack as violative of the Establishment Clause must take into account the deference required to be given to Congress' exercise of its War Power and the necessity of recognizing the Free Exercise rights of military personnel. In our view these additional factors, which were not present in Lemon v. Kurtzman or its progeny, relied on by plaintiffs, render its test inappropriate here. On the other hand, we do not agree with the district court that the doctrine of deference to Congress' judgment in military affairs leaves us powerless to review the constitutional permissibility of the military chaplaincy. In our view the test of permissibility in this context is whether, after considering practical alternatives, the chaplaincy program is relevant to and reasonably necessary for the Army's conduct of our national defense.

Applying these principles to the present case, we start with plaintiffs' concession that some chaplaincy is essential. Except for peripheral claims that a few practices of the government's military chaplaincy amount to "religious proselytism," their lawsuit hinges entirely on their contention that a privately funded chaplaincy, patterned on the present military program, would fully and fairly meet the government's needs under the War Powers Clause and the free-exercise needs of military personnel.... For the most part, we disagree.

To begin with, [the government has] described in detail the various functions performed by the Army's chaplains and the inability of local civilian clergy or special organizations of civilian clergy to meet the religious needs of the many different denominations in the armed forces. They note that among the inadequacies of a civilian clergy would be the questionable ability of many denominations, particularly the smaller ones, to fund a civilian chaplaincy and the lack of training in the military subjects needed to enable the civilian chaplain to function effectively in the field.

> In response to the detailed affidavits submitted by [the government]...plaintiffs have not come forward with any evidence or offer through discovery or depositions to establish that the many religious denominations involved, including the principal Catholic, Protestant and Jewish organizations in the United States, would support and be willing to pay their respective shares of the $85 million required to operate a civilian chaplaincy and to provide such additional sums as may be required in case of war or national emergency. Nor have plaintiffs come forward with assurances from the numerous religious organizations involved that they would be willing and able to honor their respective obligations in the years ahead. It is obvious from the evidence offered by the [government] that without enforceable commitments on the part of these denominations the Army would be unable to maintain a functioning civilian chaplaincy. Assuming hypothetically that such a program could be launched, it would constantly be teetering on the brink of disaster. An impractical alternative is no alternative at all....
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> In short, plaintiffs' proposal is so inherently impractical as to border on the frivolous. Absent some substantial evidence that it might be within the realm of the feasible, we do not believe that taxpayers, merely by instituting a lawsuit, are entitled to engage in a costly and time-consuming broad-scale investigation into an entirely speculative suggestion, made without an evidentiary basis for believing that the claim is well-grounded in fact. The sole evidence in support of plaintiffs' claims, the affidavits of the Rev. Carl H. Mischke of the Wisconsin Evangelical Lutheran Church, even if accepted at face value, can hardly serve as an indication that the Catholic Church, the Jewish Religion, and the numerous Protestant denominations would favor, much less financially support, a civilian chaplaincy.
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> Aside from the obvious financial infeasibility of [plaintiffs'] alternative proposal, [they] offer no evidence that civilian chaplains would accept military discipline, which is essential to the efficient operation of our armed forces. This discipline demands willingness to undergo thorough military training except in the use of firearms, to remain with an Army unit for a specified period of time, to obey orders to move overnight with that unit to other locations, which might be thousands of miles away, and to advance as ordered on the battlefield and risk their lives in order to minister to the wounded and dying. Thus, since plaintiffs' suggested alternative of a civilian chaplaincy amounts to nothing more than speculation, unsupported by some showing of practical feasibility, it fails to survive the evidentiary showing advanced by the [government].

The court added that Congress had considered the civilian chaplaincy alternative several times and had as regularly rejected it, concluding that "[t]he purpose and effect of the program is to make religion, religious education, counseling and religious facilities available to military personnel and their families under circumstances where the practice of religion would otherwise be denied as a practical matter to all or a

substantial number." Surprisingly, the court found one respect in which that rational might not apply.

> In a few areas, however, the reasonable necessity for certain activities of the military chaplaincy is not readily apparent. For instance, it appears that in some large urban centers, such as at the Pentagon in Washington, D.C., in New York City and San Francisco, government funds may be used to provide military chaplains, facilities and retreats to "armchair" military personnel who, like other government civil servants, commute daily to their homes and spend their free hours (including weekends) in locations where civilian clergy and facilities are just as available to them as to other[,] non-military citizens. Plaintiffs also assert that government-financed Army chaplains and facilities are provided to retired military personnel and their families. If the ability of such personnel to worship in their own communities is not inhibited by their military service[,] and funds for these chaplains and facilities would not otherwise be expended, the justification for a governmental program of religious support for them is questionable and, notwithstanding our deference to Congress in military matters, requires a showing that they are relevant to and reasonably necessary for the conduct of our national defense by the Army. A remand therefore becomes necessary to determine whether, according to the standard we have outlined, government financing of a military chaplaincy in these limited areas for the purposes indicated is constitutionally permissible.[16]

Judge Thomas Meskill dissented from that portion of the opinion requiring a remand, believing that "the fringe activities of the chaplaincy program that would be examined under the majority's remand are not of constitutional magnitude" and that bothering about them "amounts to little more than judicial nit-picking."[17]

b. A Critique of *Katcoff*. The burden placed by the court upon the plaintiffs was a heavy one: to demonstrate that private organizations not under their control would step forward to guarantee the funding of a civilian chaplaincy at $85 million per year or more. Not surprisingly, the court found that that burden was not met and so decided for the defendants and the *status quo*. In so doing, the court was certainly correct in concluding that "the Catholic Church, the Jewish Religion, and the numerous Protestant denominations" were not prepared to undertake that task, even if they thought it desirable, and there was little evidence (aside from the Wisconsin Synod) that they thought it desirable, or had even thought about it at all.

But one may wonder why it was incumbent upon the plaintiffs to provide a substitute arrangement or to insure its availability. In what other instance does constitutionality turn upon the proffer of a suitable alternative? When the Supreme

16. *Katcoff v. Marsh, supra*.

17. Ibid., Meskill dissent. One of the plaintiffs (Katcoff) told the author that they had decided not to pursue the issue on remand.

Court struck down the Regents' Prayer[18] or the posting of the Ten Commandments in public schools[19] or the public financing of parochial schools,[20] the plaintiffs were under no obligation to suggest, let alone provide, a surrogate means of accomplishing the government's purported purpose. Normally the court limits its consideration to the particulars of the challenged legislative enactment before it. If that enactment is found to be in conflict with the Constitution, it is the responsibility of the legislature, not the court and even less the plaintiffs, to find a constitutional way of achieving its objective.

In such an eventuality the legislature might find it necessary to question an assumption shared by plaintiffs, defendants and the court alike: that some outside private source(s) would have to defray the cost of the entire (civilian) chaplaincy system if the Treasury was constitutionally prohibited from doing so. There is no reason whatever why the nation's religious bodies—or the U.S. Treasury, for that matter—should need to subsidize with $85 million or more per year the entire cost of the free exercise of religion of the members of the armed forces of the United States any more than either source needs to fund the free exercise of religion by citizens in the civilian world. The members of the armed forces are neither paupers nor incompetents; they are paid substantial stipends from which those who need or seek the ministrations of religion could support them by their free-will offerings, just as do their civilian counterparts.

To be sure, they do now contribute to various charitable causes sponsored by the military chaplaincy program—$7.7 million in 1981, or $3.69 per capita per annum for the 788,000 soldiers and 1,300,000 dependents reported by the court for that year, hardly a "ruinous" amount, to use Justice Jackson's term in *U.S. v. Ballard*.[21] In fact it is a pittance compared to the level of contribution of their civilian counterparts *in addition* to maintaining their ecclesiastical organizations, including the clergy. In 1981 the per capita contribution for *benevolences* of the denominations reporting amounted to $47.46, or almost thirteen times as much as the "per capita" contribution of the members of the armed forces in that year. In addition, the 41,676,327 church members reported gave a total of $8.014 billion in 1981 for the *upkeep* of their religious organizations, or $192.29 per person.[22]

One reason for the wide disparity was that the church figures referred to members' contributions, while the Army per capita amount was obtained by using as a base the entire Army and dependents (2,088,000 in 1981), since there was no available statistic representing the number of members of the Army and their dependents who actually participated in the chaplaincy program and contributed the $7.7 million in question. But that very anomaly was symptomatic of the defect in the logic of this case, since the elaborate chaplaincy program was patterned, at least theoretically, on

18. *Engel v. Vitale*, 370 U.S. 421 (1962), discussed at IIIC2b(1).

19. *Stone v. Graham*, 449 U.S. 39 (1980), discussed at IIIC3a.

20. *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and progeny, discussed at IIID5 *et seq*.

21. 322 U.S. 78 (1944), discussed at IIB5a.

22. Figures are from the *Yearbook of American and Canadian Churches* (Nashville: Abingdon, 1983), pp. 243-245, for 1983 (which contains figures for 1981). Some denominations, including the 51 million member Roman Catholic Church, do not report their financial statistics.

the supposed religious needs of the entire Army population rather than on the numbers of those who actually utilized it. (Actually the staffing by chaplains of various installations was more closely proportioned to the experienced "traffic" in those facilities, and if all the eligible military personnel—and their dependents—should suddenly be caught up in a simultaneous yearning for spiritual consolation, the result could be a severe overload on the available chaplains. Nevertheless, the supposed ideal was to be able to serve, not only all the present personnel, but those who might be called into the Army in an emergency, at least to judge by the proportioning of denominational affiliation among chaplains to the *civilian* church-going population.)

If obliged to reexamine the present military chaplaincy program in order to bring it within constitutional parameters, Congress might discover that there are many options for ensuring the free exercise of religion among armed forces personnel short of maintaining an extensive ecclesiastical institution as part of the federal government. The court itself pointed to the avenue of reexamination. There are officers and enlisted persons stationed in urban settings, said the court, who commute to work from their homes in the civilian community and who can readily avail themselves of the religious opportunities to be found there without relying on military chaplains or chapels. One might follow that line of logic to observe that there are many military installations around the country which, though not in urban centers, are contiguous to civilian communities with churches to which such persons can repair without undue difficulty. (The author was pastor of a small church on Long Island in the 1950s to which came men and women from a nearby Air Force base, who thus had little need of the base chapel or chaplain.) If the civilian churches in a given locality should prove inadequate to serve the needs of armed forces personnel stationed nearby, then the government might need to *supplement* those ministrations with additional religious leadership or facilities of some type. But this ordinary use of existing churches in the civilian communities, as well as being the most natural and satisfying arrangement, could meet the needs of a large part of the armed forces.

There would remain less accessible installations in the United States and abroad and all the naval vessels at sea. These could be provided with religious ministrations in various ways, including civilian chaplains on long or short contract, spiritual ministries by lay or clergy members of the armed forces serving in other capacities (as Mormons do now), and various rotating or circulating clergy (as Methodist circuit-riders ministered to remote rural communities before resident clergy were settled there).

There are a number of nations that rely upon civilian chaplains rather than career clergy officers, and their experience could be utilized in shaping a different type of arrangement for the free exercise of religion in the armed forces of the United States. But little use appears to have been made of these civilian models in any reevaluation of the American system. A special issue of *The Chaplain*, the organ of the ecumenical General Commission on Chaplains and Armed Forces Personnel, devoted to the question, "Armed Forces Chaplains: *All* Civilians?" was published in spring of 1972. While purporting to examine alternative arrangements, it came to the not very surprising conclusion that the existing system was the only "feasible" possibility.

Section VI professed to consider "Civilian Chaplaincies in the Armed Forces of Other Countries," but, without examining any one of them in particular, concluded, "It would not appear feasible in the United States armed forces to commission or even to engage civilian chaplains of the kind other nations utilize." Why not?

> [M]ost of the countries of Europe, of the British Commonwealth of Nations, and of Latin America [which have such civilian chaplains] have an established church or at least a most-favored church tradition and a relatively narrow denominational spectrum. By contrast, the variegated voluntaristic pluralism of American religion presents an essentially different picture. Again, the extra-territorial commitments of the armed forces of those nations are limited except in time of war. A larger proportion of their armed forces are stationed within their national boundaries. Most of the members of the armed forces serve for relatively short periods and are usually trained and quartered in relative proximity to their homes. The military training in these countries tends to center around the casern, with its relatively small complement of persons, in contrast to the United States pattern of large training centers.... In general, military personnel at present [in the U.S.] come predominantly from the urban and suburban areas of the north and receive the bulk of their training in relatively rural areas of the south. By and large, only small military elements are to be found in the large cities [of the U.S.] where there are sufficiently varied religious services available.[23]

This publication, like the parties and the court in *Katcoff*, assumed that the choice to be made was between a totally military chaplaincy funded by the government and a totally civilian chaplaincy funded (to the same extent) by private denominational sources, a Hobson's choice that completely mischaracterized the problem. If the legitimate rationale for a chaplaincy arrangement was that the government has a responsibility to provide for the free exercise of religion by persons it has removed from their normal civilian environment, then that rationale would justify at least *some* provisions within the present scope of the chaplaincy, if not all of the existing system, which even the circuit court's majority found a bit overextended.

The critical test question is much reduced from the one posed by the court. Rather than having to guarantee private financing of a civilian counterpart of the existing system, a fully constitutional arrangement would only have to provide opportunities for the free exercise of religion by members of the armed forces comparable to those they would have had in their civilian environments, which would have been funded by themselves to the extent desired. Not all denominations are represented in all civilian communities, so the matching of each person with the denomination of his or her preference was an unrealistic ideal in any event. Not all civilian churches have the services of an ordained clergyperson every week or every day, so round-the-clock coverage was also not commensurate. Not all persons in civilian life utilize the services of the churches and synagogues located there, so religious ministries need to

23. *The Chaplain* (Wash. D.C.), Vol. 29, No. 1, 1972, pp. 23-24.

be provided only for those desiring them, which would significantly reduce the constitutional obligation.

Furthermore, in the absence of conscription, the argument can be made that those who choose to serve in the armed forces voluntarily accept with that choice the conditions necessary to a life under orders, with periodic relocations to distant and inhospitable settings, where certain hardships go with the job. Only those persons who have been involuntarily conscripted into service have a clearly cognizable claim to having been extracted from their normal civilian circumstances by state action that needs to be redressed by further state action. In many instances whatever obligation of redress the state may bear can be defrayed by relatively simple logistic means: transporting a civilian pastor to and from isolated outposts at the request of service personnel who wish to have such ministrations.

c. A Critique of the Military Chaplaincy. From time to time criticisms are heard of the existing arrangement of military chaplaincy described in the preceding sections. One of the earliest critics was James Madison.

> James Madison as founding father, as President (1809-17), and as ex-President frequently expressed his opposition to the payment of clergymen with public funds, especially in Congress, but also in the Army and Navy. He preferred voluntary chaplains and voluntary contributions from the beneficiaries. His reasons were both constitutional and also, in a sense, ecclesiological, for he believed in the "immunity of Religion from civil jurisdiction." He would only allow as valid the argument that the government might have to provide services for men drawn far from home, particularly when confined to a vessel on the high seas, but even here he could see advantages in a religiously motivated and morally exemplary officer serving effectively instead of a paid ordained chaplain. Herman Melville, in his autobiographical White Jacket, said much the same when he spoke of the chaplain aboard the United States as attempting to preach on the psychological phenomena of the soul and the ontological necessity of every sailor's saving it, when a religious captain would make "a far better chaplain for his crew than any clergyman."[24]

One wave of criticism crested between the Mexican War and the Civil War, when the chaplaincy was in a far more rudimentary stage of development, without either officers' rank or uniform. Responding to the criticisms, the House Judiciary Committee examined the matter and concluded in March 1849 that federal chaplaincies did not violate the First Amendment and that the government should continue to provide the means for the religious life for those who were serving their country at a distance from their customary religious occasions. The report admitted that the "sound of the gospel in language familiar" might tend to make a "better

24. Williams, George H., "The Chaplaincy in the Armed Forces...in Historical and Ecclesiastical Perspective," in Cox, Harvey G., ed., *Military Chaplains: From Religious Military to a Military Religion* (New York: American Report Press, 1971), p. 30.

soldier or more obedient soldier," but insisted that the real purpose of the chaplaincy was a religious one.

> The spirit of Christianity has even had a tendency to mitigate the rigors of war, if as yet it has not been entirely able to prevent it; to lead to acts of charity and kindness; and to humanize the heart. It was true philanthropy, therefore, to introduce this mitigating influence [through chaplaincies] where, of all other places, its fruits were to be more beneficially realized, namely into the Army and Navy; and to abolish it, in this Christian age of the world, would seem like retrograding rather than advancing civilization.[25]

The churches, too, are occasionally troubled by those who question the existing arrangement. The General Conference of the United Methodist Church in 1968 adopted a statement on "Governmental Chaplaincies" that was essentially an endorsement of the existing arrangement, but only after dealing in one of the legislative committees with a counterproposal from three dissidents, Professor John M. Swomley of St. Paul's School of Theology in Kansas City, Missouri, Dean Philip Wogaman of Wesley Theological Seminary in Washington, D.C., and this author. Their rather mild critique was met in committee by a phalanx of present and former chaplains of Army, Navy and Air Force, mobilized for the occasion, who closed ranks against any subversive ruminations about the chaplaincy, and it was sunk without a trace.

More successful and far more definitive was a report to the Ninth General Synod of the United Church of Christ in 1973 by a Task Force on Ministries to Military Personnel composed of eleven members, two of whom were chaplains on active duty at the time, one in the Office of the Air Force Chief of Chaplains. Excerpts from that report, published under the title *Ministries to Military Personnel*, follow:

> It is the constitutional burden of Government to prevent any establishment of religion and to guarantee its free exercise. It is not the burden of Government to provide free religion for its citizens or employees with the use of public tax monies. It is the burden of the churches to provide religion and religious ministrations to all citizens who voluntarily avail themselves of those offerings. For the Government to provide a military chaplaincy, which is free religion for the employees in one department of Government, is to exceed the scope of its constitutional mandate in several ways—by bestowing excessive religious benefits on one narrow class of the citizenry; by justifying those broad benefits as a warranted relief from the deprivation of free exercise suffered by some but not all of those Government employees; by relieving the churches of their right and responsibility to provide religious ministrations for their members.

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25. 31st Congress, 1st session, House Report, I, No. 583; Report 171, quoted by Williams, *supra* p. 31.

* * *

The crucial issues, then, are the premises used to support the thesis that the military chaplaincy is necessary to guarantee the free exercise of religion for military personnel....

1. Deprivation: This premise maintains that the Government has deprived military personnel of the opportunity to practice their faith at the time and place of their choice. It intends to recognize and allow for the fact that the military is a peculiar community, characterized by mobility, isolation, and constraints on individual liberties because of the singular and overriding mission of the military.... The dominant image comes from the military in action under the rigors of warfare, or a worldwide network of military bases.

These references...can be understood to imply that the Government is not required to provide chaplains and chapels for those military personnel who are not cut off from civilian churches and clergy. Or, to put it the other way around, the Government is safely within the limits of the establishment clause only where chaplains and chapels are provided to the military during actual combat, maneuvers, at locations that are totally inaccessible or, at least, not reasonably close to civilian churches....

Under such an interpretation many military bases in the U.S.A. and some abroad should be served by a civilian local church ministry. What is required of the Government in such cases is free access to religious ministrations for all military personnel, and therefore, the right of civilian clergy, duly ordained by recognized denominations, to be present in the military environment. Free access is certainly incumbent on Government under the free exercise clause itself. Otherwise "soldiers cut off by the state" from accessible civilian churches and clergy are subject to hostile Government deprivation of their free exercise rights.

Furthermore, a primary objective of the military chaplaincy is "religious coverage" of all military personnel and, in many cases, military dependents as well. On the narrow logic of "one lonely soldier" the chaplaincy has grown into a large religio-military institution with the purpose of providing religion for all military personnel. Maximum religious coverage by the chaplaincy, a tendency which increases the isolation of military personnel from civilian church life and encourages them to practice their faith at places chosen by Government, is a disturbing development, which should be resisted by the churches.

This trend is served also by the policy of deploying chaplains on a numerical ratio rather than a deprivation ratio. The result is a concentration of chaplains on large American bases with an even larger dependent community, military populations that often could avail themselves of civilian church services. In fact, these coverage and deployment policies aggravate the deprivation of the lonely soldier at an isolated outpost and further constrict his or her free exercise rights. For lonely outposts do not qualify for resident chaplains and at best receive an itinerant ministry. Nor do Navy ships below cruiser size qualify anymore than submarines under water for three months on end. Operation Deep Freeze in Antarctica is covered only by periodic visits of

civilian clergy from New Zealand. The whole coverage and deployment policy raises the question whether the Government is more interested in martially mediated religion for the majority than in relieving the genuine religious deprivations suffered by a minority.

* * *

2. Compulsion. This premise holds that the Government-initiated deprivation of the religious free exercise rights of military personnel is based on coercive powers legally granted the state....

* * *

The question, then, becomes the validity of the compulsion argument when conscription ends and the Government institutes all-volunteer Armed Forces.... Does the end of conscription vitiate the exercise of Government compulsion and make any religious deprivation involved a voluntary burden of those who choose military service? Is voluntary employment in the military essentially different from employment in other departments of Government?

* * *

For all military personnel are [now] volunteers who freely contract with the Government for employment under conditions stipulated in the contract.... As in the case of the Department of State, the employee may be assigned a period of duty in another place, even a foreign country, requiring his relocation. Such duty may impose the burdens of life in a foreign environment and a dislocation impairing normal access to institutions in which he holds voluntary membership.... The Government is not obliged to provide free religion in the form of a Government chaplaincy for employees of the Departments of State or Defense. But it is required to insure all Government employees free access to religious ministrations provided by the churches for their members.

3. Substitute Clergy. The last element of the legal rationale is that the military chaplaincy is a compensatory, substitutionary, or neutralizing action on the part of Government.... In other words, the legal rationale itself recognizes that chaplains are Government-supplied surrogates for the civilian clergy who should normally be serving the personnel involved.

* * *

We shall only make some observations concerning the substitutionary nature of the chaplaincy, for its surrogate definition has some important implications. For one thing, surrogate status neither requires nor justifies the Government commissioning of the chaplain as a military officer. The substitution to be made is providing accessible clergy in place of inaccessible clergy, not military officers in place of civilian clergy.... In some instances, as in the case of conscientious objector applicants [within the service], the substitution may be an exchange in which a civilian advocate is replaced by a military adversary....

The other implication of surrogate status is that wherever they are available, the Government should utilize civilian clergy and allow free access to them, only providing military chaplains in situations where the inaccessibility of military personnel and operations require it. For if the

> legal rationale allows the civilian norm for free exercise of religion, and premises the Government substitution of clergy on the deprivation of that same civilian free exercise, it is hard to avoid the conclusion that it is incumbent on Government to utilize the normal where possible and the substitute only where necessary. To do otherwise would be tantamount to an admission by the state that the military chaplaincy serves Government interests and goals exceeding mere compensation for deprived rights. This would raise the question of whether the Government is exploiting the military chaplaincy for secular military purposes under the guise of making a constitutionally required restitution.[26]

The United Church of Christ study made some additional observations about anomalies in the Free Exercise rationale of the military chaplaincy. One concerned the wide disparity between the profile of denominational representation in the armed forces and the quotas and criteria for selection of military chaplains.

> The military is not a genuine cross section of the American populace. It is well known that the military comprises a disproportionate number of youth, racial minorities, the poor, and those with limited educational backgrounds.... Such socio-economic and racial factors can also be roughly correlated with religious styles and denominational memberships, suggesting that the main-line churches are over-represented in the chaplaincy in relation to the number of their adherents in the military, and the Black churches along with evangelical and sectarian groups are discriminated against by the present quota system.
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> * * *
>
> The denominational quota system is rendered even more unjust by the educational achievement the military demands of chaplaincy candidates—accredited college and seminary degrees.... [I]n reality it subverts the apparently fair denominational distribution by simply penalizing those churches not requiring all clergy to meet the above educational standards. Under this test...almost all the clergy of some...denominations are excluded from the chaplaincy.... Although 18 percent of all military personnel [in 1981] are Black, only 2.5 percent of all military chaplains are Black (i.e., about 80 out of some 3,000 chaplains).... The National Baptist Convention of America, a church...with 2,670,000 members, has only 3 military chaplains. And the largest Black church, the National Baptist Convention, U.S.A., Inc., has a membership of 5,500,000 and is being represented by 18 chaplains [compared with 109 chaplains from the 1,960,000-member United Church of Christ].

The conclusion drawn from this disparity was that many of the enlisted personnel

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26. Weltge, Ralph, *Ministries to Military Personnel* (Philadelphia: United Church Press, 1973), pp. 18-26, *passim*. Reprinted with permission.

of the armed forces were not being provided with the kind of religious ministry to which they would turn in civilian life. This was not just a matter of denominational difference but of class and race and education and culture. Many who were accustomed to a revivalistic, emotional, fundamentalist, "shoutin' Baptist," "Bible-belt" kind of religion were being provided by the military chaplaincy with a more "refined," ecumenically standardized, middle-to-high church, intellectualized and undemonstrative religious regimen more familiar to "main-line" congregations, of the sort that would not in the least appeal to the majority of the rank-and-file GIs if they were at home, and probably appeals no more strongly to them in the service. For all practical purposes, *they* are not being provided by the military chaplaincy with a usable substitute for the religious ministrations of which they have supposedly been deprived by state action. The rationale for the military chaplaincy is not borne out very well in their experience.

The United Church of Christ report also questioned the ability of the military chaplaincy to help recruits with some of the deepest moral problems encountered in military service.

> Since basic training is by intention traumatic, youth often seek counseling during that period and may meet the chaplain personally for the first time. Recognizing this, the military emphasizes the chaplain's recruit-counseling role (FM [Field Manual]) 16-5, pp. 18-19). And it expects him to use counseling as a therapeutic device supporting the transformation goals of the training. Expecting a sympathetic clergyman, the youth meets a military officer; and seeking an advocate, he or she finds a supporter of the system itself. That too becomes part of the trauma. And it is also the end of the relationship with the chaplain for some youth. The learning is this: there is no liberated zone in a totalist environment, no religious refuge from the onslaught, no sanctuary in the chapel.
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> The gap between the clergy and the enlisted youth is widened by the chaplain's officer status. The caste system in the military is assiduously cultivated and rigorously preserved by the rites of obeisance and the symbols of superiority.... The officer-clergy stand behind a double barrier, and youth can only perceive them as part of the military system, performing a role identified with it.... Rank identifies the chaplain with the military, but not with military youth. It is the youth who are the outsiders.
>
> The usual identification of chaplains with the military institution affects one of the most difficult counseling problems they encounter. This is dealing with youth who come with religious or moral problems arising out of the basic nature and purpose of the military itself—engaging in warfare and killing.... It is obvious that the chaplain's job...is to serve as a mediator of those religious sanctions which legitimate the military enterprise.
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> * * *
>
> The military youth who comes to the conclusion that war, or a particular war, is immoral and refuses to continue in services must be

> interviewed by a chaplain as part of the processing of his or her claim [for discharge as a Conscientious Objector (CO)]. Some have found a chaplain who was open, sympathetic, and helpful. For many others the interview proved to be an obstacle. And in a few documented cases a chaplain has grossly violated the counseling process and... his own clergy office. Chaplains seldom shepherd such a youth through the intricacies of CO processing because few of them know the regulations involved, and most believe it is the job of a legal staff member anyway.....
>
> Generally speaking, we come to the conclusion that chaplains find CO cases difficult to handle and possess a subtle bias against them. A conscientious objector, by the nature of the case he is pleading, confronts the chaplain at the core of his ministry with a statement challenging its legitimacy. The interview, being a test, marks the situation as an adversary proceeding, with clergy set over against a young lay person. And given the chaplain's close identification with the military and its mission, the judgments made about the religious sincerity and moral integrity of these youth are not weighed on scales in perfect balance....
>
> The chaplain is not often considered the person to consult, even on such moral issues as warfare.... The rise of Military Counseling Centers near bases has indicated that military youth need and will use civilian advocates when they experience personal or moral problems with military life. This is a service that youth themselves, many of them veterans, have initiated on behalf of their peers in service.

This phenomenon of (lay) military counseling represented a severe empirical vulnerability in the military chaplaincy arrangement. The author of this treatise had direct personal experience with some of these lay counselors during the Vietnam conflict, who worked for a subsistence wage on the outskirts of military bases, where they were consulted by distressed young recruits confronting various problems, often having to do with revulsion toward killing in a cause in which they could not believe. Finding the military chaplains unapproachable or unhelpful—if not actually hostile—on these questions, they turned for help to persons of their own age and class and culture, off-base and outside the military system. Although often supported by antiwar groups, these military counselors usually exercised high "professional" standards of not trying to influence their counselees against or for the war, but merely trying to help them work through their own dilemmas to find a suitable solution. Many of them knew the pertinent regulations better than anyone on the base, and so were very helpful to counselees seeking CO discharges, but they provided moral support in many other respects as well.

This poses a problem that has been avoided in most discussion of this subject: the total absence of "market research" among the "consumers" of the service in question. What is the evidence that the persons for whose benefit the entire military chaplaincy has been erected (at great cost) really *want* that type of religious ministration? Do they want the pastor, priest or rabbi to whom they look for help (if they do) during their career in the service to be part of the military system? Do they want that

person to have military rank as a commissioned officer,[27] dependent for promotion upon a rating given by the commanding officer of the military unit? Somehow no one seems to have consulted the prospective consumers about their wishes in the matter or to have offered them any alternatives. Nevertheless, many of them have *found* alternatives outside the present military chaplaincy: worshipping off-base in civilian churches, counseling off-base with civilian military counselors, or dispensing with participation in religious activities entirely. But the last thing in the world that will happen is a formal, objective, anonymous plebescite among the enlisted personnel of the armed forces as to whether they want or need the present military chaplaincy as a provision essential to their free exercise of religion—the sole ground on which it would be constitutional. The government has invested many millions of dollars on the assumption that that question would elicit a generally favorable reply, and understandably does not wish to learn otherwise.

So a vast federally financed military-religious enterprise has been erected upon a plausible but unverified supposition that it is the best, or at least an acceptable, way of meeting the Free Exercise needs of the members of the armed forces. And it is defended against criticism by the equally plausible but equally questionable contention that no privately financed alternative is available that could provide the same level and scope of service. If resort were had to empirical research to determine the actual level and scope of service needed or desired by the prospective consumers among the present members of the armed forces, and due allowance were made for their obtaining that service from existing civilian churches or from religiously competent laypersons among their colleagues in the armed forces, the religious needs remaining to be served would be much reduced from the present level and scope, and a substantial portion of the cost of that remainder should be borne by the persons seeking and benefiting from it, as in civilian life.

There might still be an irreducible part of the unserved needs attributable to the lonely outposts and ships at sea (which, as the United Church of Christ study notes, are not served very well now) that the military system might need to provide for through logistic arrangements such as transporting (civilian?) clergy to isolated installations upon request of persons stationed there. But that would be a vastly reduced undertaking from the military-religious enterprise carried on today. This comparison is drawn, not from considerations of saving money, but from concern for what the Constitution would mandate, which might also and incidentally be much more sparing of the taxpayers' expense. Whatever is truly necessary to provide for the free exercise of religion of even one soldier or sailor, at the level and cost that he or she would have obtained in the civilian world (and if truly deprived thereof by state action), should be generously and ungrudgingly supplied, but the amount beyond that level represents not only an unnecessary cost of government but the maintenance of an extensive governmentally-operated ecclesiastical "proprietary" in excess of its constitutional justification. It may also have a deleterious effect on existing civilian religious institutions and on the religious life of members of the armed forces.

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27. The United Church of Christ report commented, "Rank seems to benefit the chaplain more than service personnel." Ibid., p. 90.

The United Church of Christ Task Force Report *Ministries to Military Personnel* generated a heated debate at the Ninth General Synod at St. Louis in 1973, at the end of which the report was "approve[d] in principle" with directions to one of the church agencies to "review, correct, update, and revise" the report prior to final consideration by the Tenth General Synod in 1975. The main element of that process was a review of the report by military chaplains of the United Church of Christ. The upshot of that process was that the Tenth General Synod adopted an action that essentially nullified its previous action and "reaffirm[ed] the military chaplaincy as a principal model of ministry to military personnel." The denomination has subsequently lost interest in the subject, and the critics have gone away, leaving the incumbents comfortably in charge of the *status quo*.

d. Compulsory Chapel at the Armed Services Academies: *Anderson v. Laird* (1972). Another governmental proprietary in religion related to the military chaplaincy was the curious provision at federal level for compulsory chapel. Long after state-sponsored prayers and devotional Bible-reading had been eliminated from public schools, there continued to be one egregious manifestation of state coercion in religious practices: the requirement at each of the U.S. armed forces academics—West Point, Annapolis, and Colorado Springs—that *all* students *must* attend chapel or church every Sunday morning or face disciplinary action. In 1970 suit was brought against Secretary of Defense Melvin R. Laird on behalf of Michael B. Anderson and other West Point cadets and Annapolis midshipmen charging that the compulsory chapel regulation violated the religion clauses of the First Amendment and the "no religious test" clause of Article Six.

Trial was held in the federal district court of the District of Columbia, Judge Howard F. Corcoran presiding. The government brought forth its biggest guns in defense of the practice. Joint Chiefs of Staff Chairman Admiral Thomas H. Moorer appeared in full uniform, with rows of medals on his chest, and not only testified vehemently in favor of compulsory chapel, but remained in the courtroom to lend his impressive presence to the government's entire presentation. Assistant Secretary of Defense for Manpower Roger T. Kelley[28] added his endorsement of compulsory chapel. Judge Corcoran, brother of Thomas ("Tommy the Cork") Corcoran, who had attained only the rank of lieutenant colonel in the armed services, seemed visibly impressed by this show of military might.

The government took the position that compulsory chapel at the academies was a long-standing tradition that had for generations been deemed essential for the training of the nation's top military leaders. As Admiral Moorer so eloquently phrased it:

> The purpose, of course, is to enhance [the officer-to-be's] leadership and command ability by putting him in a position where he can get a feel, an understanding of the impact of religion on the various types of individuals and so he can see this in operation; and, consequently, as he acts as a leader in later years, he will appreciate this impact that religion will have on so many people.... That is the sole purpose. We are in the

28. Previously an executive with the Caterpillar Tractor Company (no relation to the author).

> process of developing leaders and this is a vital part of the overall leadership package....[29]

There was nothing *religious* about this requirment, the government insisted. No one was compelled to *participate* in religious activities at chapel, only to *attend*. No one was obliged to subscribe to any religious beliefs or practices, only to observe how others did so. (The government did not explain how, at the Chapels at West Point or Colorado Springs, where virtually all persons present were cadets attending under orders, there would be any actual worshippers to be observed; all would be merely "observers" observing each other!)[30]

The plaintiffs offered several expert witnesses, including Father Robert F. Drinan, S.J., dean of the Boston College Law School (and later member of Congress); Rabbi Eugene Lipman, Reverend A. Ray Appelquist, director of the General Commission on Chaplains; and the present author. They sought to make clear that coerced participation in worship was a contradiction in terms, that having an audience of nonparticipating "observers" at a religious service was a hindrance to anyone wishing to worship, and that using religious worship as a "tool" for "secular" training of military commanders was a blasphemous offense to religion. Former chaplain Appelquist was particularly effective in testifying that several Academy officers with whom he had served had justified their refusal to attend religious services after graduation as a reaction to "having religion rammed down my throat for...four years at the Point."[31]

Unfortunately, they were heavily outranked by the government's witnesses—at least in the eyes of the trial judge, who gave decision for the government on the grounds that only military officers responsible for training future military officers were equipped to judge what was necessary for their training, and that the witnesses offered by the plaintiffs had no such responsibility, and never had, so their views were of little weight in the matter.

When the case went up to the Circuit Court of Appeals for the District of Columbia Circuit, with it went several briefs *amici curiae* urging reversal, including one from the Baptist Joint Committee on Public Affairs, one from the American Jewish Congress and one from the General Commission on Chaplains and Armed Forces Personnel.[32] The appellants' brief contained a vigorous argument invoking the provision in Article VI of the U.S. Constitution that prohibits a religious test for

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29. *Anderson v. Laird*, 466 F.2d 283, McKinnon dissent, n.19, quoting testimony of Admiral Moorer.

30. Midshipmen at Annapolis marched each Sunday morning in "church parties" to civilian churches in the vicinity and so might have the opportunity to observe actual worshippers at worship.

31. *Anderson v. Laird, supra,* Leventhal opinion, at n. 8, quoting the Rev. Ray Appelquist.

32. The present author, in addition to testifying for plaintiffs, enlisted Rev. Appelquist to testify for them also and arranged for John J. Adams, Esq., to enter a brief *amicus curiae* on behalf of the General Commission on Chaplains, which was cited in the opinions of David L. Bazelon, C.J., and Harold Leventhal, J. (He also drafted the portion of appellant's brief dealing with the Religious Test Clause of Article VI, discussed below.)

federal office. Since the graduates of the academies became officers of the United States, this seemed an opportune time for the courts to construe that clause, which has never been the basis for a judicial decision. Since the cogent argument for the enforcement of that clause in this unique situation was not dealt with by the Court of Appeals, it is reproduced here in its entirety.

> III. THE COMPULSORY CHAPEL REGULATIONS CONSTITUTE A RELIGIOUS TEST UNDER ARTICLE VI
>
> There is a long and unlovely history of efforts to keep the political community ideologically pure. Men's deepest loyalties have traditionally been deemed "religious," and in order to make certain that those loyalties were reliably anchored to the approved orthodoxies, governments have resorted to various types of "religious tests" for membership or leadership in the political community. These tests have sometimes taken the form of oaths, in which the aspirant swore that he did indeed believe the required doctrines (as the scholars and teachers at Oxford and Cambridge until the last century were required to sign the Thirty-Nine Articles of the Church of England in order to hold their positions). The oath did not so much guarantee that he believed what he swore as it provided a basis for prosecution if it later appeared that he didn't believe it.
>
> Oaths alone, however, do not give as great a surety as acts, especially ritual acts related to religious loyalties. For this reason, religious tests have often taken the form of requiring the aspirant to perform certain ceremonies believed to be abhorrent to non-believers. The early Christians were compelled to offer a pinch of incense on the altar to the deified Roman emperor or otherwise to demonstrate by conforming religious acts their loyalty to the established order. (See Leo Pfeffer, Church, State and Freedom, pp. 12, 13). Failure to do so meant death, and many Christians died rather than go through the required gestures.
>
> After Christianity was "established" by the Emperor Constantine, Christians in turn executed, imprisoned or exiled those who failed to meet the religious tests that they imposed. It was a sign of "progress" under Queen Elizabeth of England (in the Act of Supremacy of 1558) that non-juring citizens lost only their offices and other civic benefits rather than their heads.
>
> But a sacramental test was still imposed upon the functionaries of the realm under Charles II, by the Test Act and the Corporations Act. All office-holders, civil and military, were required to take the sacrament and to make a declaration against the Catholic doctrine of transubstantiation.
>
> In later years, members of Parliament met the requirements imposed by the Act to Disable Papists from Sitting in Either

> House of Parliament (passed in 1677), by a practice known as "occasional conformity," in which they went to church and took communion in the Established Church once a year to demonstrate their fealty to the establishment, even though over the years there came to be less and less pretense that "occasional conformity" of behavior evidenced conformity of belief. Still this ritual requirement of members of Parliament endured until the latter part of the last century, defended by Blackstone in his Commentaries (Book IV, pp. 57-58[33]).
>
> The founders of this nation were thoroughly familiar with such religious tests, and resolved that none should exist in the new nation, ending the last substantive Article of the Constitution with this sweeping prohibition:
>
> > "...but no religious Test shall ever be required as a Qualification to any office or public Trust under the United States." (Article VI).

Although many of the Colonies retained religious tests for a while after the ratification of the Constitution, most disappeared within a few decades. One of the last states to rid itself of religious tests was Maryland, where Jews were excluded from public trust or office until 1826, and non-theists until the historic decision of the U.S. Supreme Court in Torcaso, supra, (which was decided on the basis of the First Amendment rather than Article VI because the plaintiff, a notary public, held state office rather than federal).

Today, the only remaining formal religious test for public trust or office under the United States is the requirement that future officers of the armed forces taking their training at the Service Academies must attend chapel (or an approved alternative religious ceremony) each Sunday morning during three or more years of their academic careers.

The government has rather disingenuously contended that the requirement is only that the cadets or midshipmen attend the services

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33. "In order the better to secure the established church against perils from non-conformists of all denominations, infidels, turks, jews, heretics, papists, and sectaries, there are however two bulwarks erected; called the *corporation* and *test* acts: by the former of which no person can be legally elected to any office relating to the government of any city or corporation, unless, within a twelvemonth before, he has received the sacrament of the lord's supper according to the rites of the church of England: and he is also enjoined to take the oaths of allegiance and supremacy at the same time that he takes the oath of office: or, in default of either of these requisites, such election shall be void. The other, called the test act, directs all officers civil and military to take the oaths and make the declarations against transsubstantiation, in the court of king's bench or chancery, the next term, or at the next quarter sessions, or...within six months, after their admission; and also within the same time to receive the sacrament of the lord's supper, according to the usage of the church of England, in some public church immediately after divine service and sermon, and to deliver into court a certificate thereof signed by the minister and church-warden, and also to prove the same by two credible witnesses; upon forfeiture of 500 *l*, and disability to hold the said office. And of much the same nature with these is the statute 7 Jac.I.c.2. which permits no persons to be naturalized or restored in blood, but such as undergo a like test: which test having been removed in 1753, in favor of the Jews, was the next session of parliament restored again with some precipitation [= haste]." William Blackstone, *Commentaries*, Bk. IV (Birmingham: Legal Classics Library special edition, 1983), ch. 4, pp. 57-58.

and not that they participate in worship.[34] Yet, the United States Supreme Court has defined "establishment of religion" repeatedly to mean that "No person can be punished...for church attendance or non-attendance" (Everson [330 U.S. 1 (1947), McCollum [330 U.S. 203 (1948)], Torcaso [367 U.S. 488 (1961)]; emphasis added), and religious bodies do not recognize any such distinction between participation and attendance. (Tr. 336, 346, April 29, 1970).

In addition, the government's witnesses have made no bones about the requirement, pointing out that no one is obliged to attend the Service Academies, that the mandatory chapel requirement is well known in advance to all applicants for appointment, and that if such a requirement is objectionable to them, they can refrain from applying or resign after appointment. What is this but a clearly-announced "Qualification for public trust or office under the United States?"

Whether the government requires "participation" in worship or adherence to religious doctrines is immaterial; the cadets or midshipmen are required to perform certain regular ritual acts that are indistinguishable from what they would perform willingly if they did participate and did believe. They march into church, they sit and stand when the worshippers sit and stand, they march out at the end of the service. (Tr. 385-6, April 29, 1970, App. 128-9). If they "sleep or appear to sleep," if they read or whisper or engage in other "disrespectful (non-worship-like) behavior," they are assessed various stipulated demerits or punishments. (App. 85). They are made to act as though they worshipped, as though they believed, as a requirement for becoming military commanders in the armed forces of the United States. How else can such a requirement be categorized but as a religious test for public trust or office under the United States?

And to confirm the efficaciousness of this religious test in excluding persons with certain unacceptable religious beliefs, the Chairman of the Joint Chiefs of Staff has observed from the witness stand that there are no atheists or agnostics in the upper levels of military command, (Tr. 208, April 28, 1970, App. 101), contrary to the stipulation in Torcaso that "neither a state nor the Federal Government...can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on belief in the existence of God as against those religions founded on different beliefs."[35]

Even if the Government's novel claims are accepted at face value, it cannot "impose requirements" that admit to "public trust or office" only those who will march to chapel every Sunday and conform to the religious rituals practiced there, while excluding those who refuse to do so. To prescribe religious acts in religious premises—or the imitation of

34. The trial court's opinion rests heavily upon this critical distinction, which it termed "crucial" to the case.

35. 367 U.S. 488 (1961), discussed at § B2 above.

> them—is to impose a religious test as a qualification for public trust or office under the United States.[36]

Each of the three judges on the Circuit Court panel wrote a separate opinion. Chief Judge David Bazelon noted that the District Court had held that the purpose and effect of chapel requirement were secular, not religious, and therefore, it did not violate the Establishment Clause; likewise, it did not violate the Free Exercise Clause since "an individual chooses which service to attend and he chooses whether to participate and worship or not. And for sincerely held reasons he can be excused from attendance." But the chief judge was not persuaded.

> These regulations...exceed the constitutionally permitted scope of governmental power.... Attendance at religious exercises is an activity which under the Establishment Clause a government may never compel....
>
> Compulsory church attendance was one of the primary restrictions on religious freedom which the Framers of our Constitution sought to abolish.

He quoted Roger Williams' famed "ship metaphor" ("There goes many a ship to sea...[and] all the liberty of conscience I ever pleaded for, turns upon these two hinges, that none of the Papists, Protestants, Jews, or Turks be forced to come to the ship's prayers or worship, nor compelled from their own particular prayers or worship, if they practice any.") and Jefferson's Statute for Religious Liberty in Virginia ("That no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever....") and concluded, "This brief account reveals that the men who framed the Religion Clauses of the First Amendment were writing to abolish specific governmental practices which destroyed individual religious liberty and thereby `established' religion. Governmental compulsion of church attendance was one of these practices."

He cited prior decisions of the Supreme Court, quoting *Everson*'s famous no-aid formula, which includes the sentences, "Neither [state nor federal government] can force or influence a person to go to or to remain away from church against his will.... No person can be punished...for church attendance or non-attendance."

> Our case would seem to be resolved by Everson, since the attendance regulations undoubtedly force or influence church attendance, and non-attendance is admittedly punished. The inquiry cannot begin and end with Everson, however, for while this reading of the Establishment clause has been reaffirmed several times[37] it has also been difficult to apply. Certain forms of government involvement which recognize, favor

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36. *Anderson v. Laird, supra,* Brief of Appellants in Circuit Court for the District of Columbia Circuit, pp. 43-46.

37. Citing *McCollum v. Bd. of Ed.*, 333 U.S. 210-211 (1948); *McGowan v. Maryland*, 336 U.S. 443 (1961), and *Torcaso v. Watkins*, 367 U.S. 492-493 (1961). It was reaffirmed in *Allegheny County v. ACLU*, 492 U.S. 573 (1989).

and even support religious interests have been sustained under the Establishment Clause in order to avoid conflict with the Free Exercise Clause.... The Chief Justice, writing for the court [in Walz v. Tax Commission], therefore questioned the breadth of the language in Everson and devised the principle of benevolent neutrality between Church and State to accommodate no-establishment and free exercise values.

This principle was mistaken by the District Court as an authority for its holding that all First Amendment rights must bend when they conflict with military interests. The Supreme Court's interpretations of the Establishment Clause refer to no overriding secular interests which could ever justify a government's imposition of those religious activities which the Clause was written to abolish. It should be clear from Walz that the actions absolutely proscribed by the Establishment Clause, among which is the compulsion of church attendance, could be constitutionally justified only out of the necessity of preserving the right to free exercise of religion. To decline to apply the Clause absolutely in this case is to create a loophole in the scope of its protection which the Supreme Court simply does not admit. This is the crux of the difference of opinion between Judges [Harold] Leventhal, [George E.] MacKinnon, and myself....

In this case, rather than conflicting, the two Clauses complement each other and dictate the same result. Abolition of the attendance requirements enhances rather than violates the free exercise rights of cadets and midshipmen. The Establishment Clause should therefore be read as it was in Everson: "Neither a state nor the Federal Government...can force nor influence a person to go to or to remain away from church against his will...."

Compulsory attendance requirements fall squarely within this principle. As the history recounted above shows, official adoption of a single creed is not the sole act of establishment. Compulsory attendance at worship and prayer, profession of belief and payment of tithes are necessary concommitants.

The Government's contention that there is a difference between compelling attendance at church and compelling worship or belief is completely without merit. Neither appellees, nor the dissenting opinion infra, reveal how a government could possibly compel individual worship or belief other than by compelling certain overt actions—for example, profession of belief in God, recitation of prayers; or mere presence during Bible readings. Attendance during chapel services is indistinguishable from these other overt actions, the compulsion of which has been declared unconstitutional in Torcaso v. Watkins, School District of Abington Township v. Schempp, and Engel v. Vitale.[38]...

38. Actually, "compulsion" was not required to be present in *Schempp* or *Engel*, since state-sponsored prayers in public schools were held to be an impermissible establishment of religion even though pupils could be excused.

> We reject also the trial court's allusion to the notion that the attendance requirements ought not be considered compulsory since the military academies are voluntary institutions. It is certainly true that in this case attendance at the academies is not mandatory. However, the Supreme Court's decision in Torcaso v. Watkins turns on its holding that the government may not attach unconstitutional conditions to the award of public employment. An individual's voluntary assumption of an employment or an educational relationship with the government is not a waiver of First Amendment rights.
>
> * * *
>
> Individual freedom may not be sacrificed to military interest to the point that constitutional rights are abolished.

Chief Judge Bazelon had expressed the view that the "new" tests of the Establishment Clause explored in *McGowan* and spelled out in *Walz* were *supplementary* to the *Everson* no-aid"formula rather than *supplanting* it. He also considered that the academies' regulation violated the Free Exercise Clause.

> A single reading of these regulations reveals sufficient coercion to violate the Free Exercise Clause.
>
> First, the failure to attend formal, group worship is punished like any other violation of an academy rule. The most devout believer, who may wish just once or always to worship alone is plainly coerced to attend services.... Thirdly, practitioners of sectarian beliefs may attend only "approved" alternatives to the academy chapels. For certain minorities, and all cadets at West Point,39 there are no alternatives available. Parental and chaplain approval is required for a change in attendance. And finally, visitation of a variety of religious services, thoroughly consistent with the search for or exercise of religious beliefs, is absolutely prohibited.
>
> These manifest restraints on the free exercise of religion can be saved from unconstitutionality only if they were enacted to serve paramount and compelling state interests; and if there are no alternative means to achieve the government's goals. The fact that military interests are involved in this case does not make the test less rigorous.... This case does not involve programs vital to our immediate national security, or even to military operational or disciplinary procedures. Nor does it appear that the ruling will have any detrimental impact on the academies' training programs. The appellees have made no showing that chapel attendance requirements are the best or the only means to impart to officers some familiarity with religion and its effect on our soldiers.... I am constrained to declare these regulations invalid [also] under the Free Exercise clause.[40]

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39. Because of the distance from the U.S. Military Academy at West Point to the nearest village, Highland Falls, New York, travel to civilian churches outside the Academy grounds is not very feasible.

40. *Anderson v. Laird*, 466 F.2d at 296–297, Bazelon opinion.

Judge Harold Leventhal took a slightly different tack.

> I concur in reversal, and in the conclusion that the Establishment Clause of the First Amendment...is violated by the regulations of the various Service Academies requiring Sunday attendance at church or chapel services by cadets (a term used broadly to include midshipmen).
>
> Although I reach the same conclusion as Chief Judge Bazelon on violation of the Establishment Clause, I do not follow the same path. As I understand it, his view is that the compulsory chapel-church attendance requirement is per se a violation of the Establishment Clause, and the justification brought forward by the Service officers and Defense Department officials is not material. Whether the chapel-church attendance regulation would be valid if it were indispensable for officer training and military survival is, for me, a more difficult question than this case requires be answered. It suffices, in my view, that an Academy regulation requiring chapel-church attendance is, at the very least, presumptively invalid as a measure respecting an establishing of religion, and... [i]n view of this conclusion, I find it unnecessary to consider whether these regulations violate the Free Exercise Clause.
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> * * *
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> The Establishment Clause assures that the exercise of religion will be truly free—will be voluntary, and not imposed.
>
> The essential requirement of voluntarism is breached by the compulsory Academy regulations. Violations of these, like other regulations are punished by reprimands, demerits, marching tours, confinement to quarters, and, for repeated violations, expulsion.
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> * * *
>
> [T]he Supreme Court opinions establish at the very least that a government regulation requiring church attendance is prima facie invalid, a badge of religious establishment, and that it would require the strongest kind of demonstration of secularity and necessity in terms of a compelling state interest to establish its validity. Such a showing is not before us in this case....
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> * * *
>
> The Government puts it that the purpose of compulsory chapel-church attendance is wholly secular, as a training program....
>
> The amicus curiae submission in behalf of religious groups terms the assertion a "shocking" claim to debase and manipulate religious worship as a mere instructional tool....
>
> It would be difficult on this record to sustain the conclusion that the purpose of the regulations is wholly secular.
>
> * * *
>
> It is inescapable that compulsory chapel operates to encourage religious tendencies of cadets. Admiral Moorer conceded in his testimony...that chapel attendance tends "to strengthen a man's religious ties" in most cases, and specifically that the requirement of attendance—over and above the course of merely making a chapel available—has "the

effect of encouraging his religious tendencies."

The adverse effect of compulsory chapel on religious sentiment was also the subject of evidence. The General Commission on Chaplains lauds voluntary attendance, by those who come to learn as well as participate, but opposes compelled attendance as a hindrance and inhibition of religious worship by those seeking a meaningful and devout relationship with their God and fellow believers.... The testimony of cadets and chaplains presents in the record the development of resentment, hostility and synicism [sic] toward religion engendered in cadets subject to the chapel requirement.... However, the Government's witnesses, like Admiral Moorer, were not familiar with any such problems of weakening of religious ties.

* * *

Moreover, it is plain that the excuse provision does not in fact mitigate the rigidity of the compulsory requirement [as the District Court maintained]. It is available only to a cadet able to prove "beyond any reasonable question of doubt" that chapel attendance would be "counter-productive," as interfering with his awareness of the effect of religion on others.... It is not sufficient that the cadet does not believe in a Supreme Being, or that he feels that mandatory chapel attendance violates his conscience or inhibits his moral development. No cadet has ever been excused at West Point,[41] and four cadets who sought to be excused in 1969 were called "troublemakers." At the Naval Academy there were three excusals in the past 40 years.[42] The rigidity of the attendance requirement is underscored by the policy concerning transfer from one church or chapel service to another: the cadet must get the permission of both chaplains and the permission of his parents, at least if he is under 21, and must demonstrate a sincere desire to affiliate with the stated denomination.

* * *

The question [now] arises whether the government's use of a practice that bears [such] a religious impress is saved from unconstitutionality because of an overriding state interest in effective training of its military officers. That is the nub of this case, as I see it. For the government to invoke this possibility of justification it must show the clearest kind of imperative, and lack of any alternative, for the "government may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that nonreligious means will not suffice...."[43]

The government simply has not made the required showing that its interference with religious freedoms is compelled by, and goes no further than what is compelled by, the effective training of military officers needed for survival.

a. The concept of government necessity is undercut by the fact that

41. Emphasis added.

42. Emphasis added.

43. The quotation is from *Abington v. Schempp*, 374 U.S. at 265, Brennan, J., concurring.

approximately 95% of the Service officers do not graduate from the Academies, and have never been subject to this compulsory chapel requirement.... In certain respects, Academy graduates can set the standards for the entire officer corps. But if there is truly an imperative need for Academy officers to obtain sensitivity training through personal observation of worship, they could not pass it along to non-Academy officers who have not had such observation.

The long-standing restriction of the chapel attendance obligation to Academy graduates seems to me a powerful demonstration that it is not a necessity in the making of an officer.

b. The church leaders and groups opposing compulsory chapel made it clear to the Defense Department that they shared its objectives of enhancing officer sensitivity to the religious well-springs of servicemen, but believed these did not require the overriding of the voluntarism essential to the vitality of religious life, and could best be achieved by focusing on strong programs encouraging voluntary attendance at chapel and church services and by providing a regular place in the training schedule, including formal instruction, for the overall achievement of the "vital concerns" of the training objectives....

[But] Admiral Moorer testified...that he felt that classroom instruction in comparative religion, religious beliefs and moral values, would be "artificial." [And other] officers concluded, to quote Admiral Moorer's testimony, that it was preferable to permit observation "in a real world, so to speak." While the District Court did not discredit the testimony and views of church leaders and groups, it stood them on a lower rung. "As moralists the Court must accord them due deference, but in matters military the Court feels constrained to look to the military experts.... To accomplish the ends involved the complete training of future military leaders it is the judgment of military experts that secular means would not suffice."

* * *

The District Court failed to take into account that what is involved is necessarily a composite, and not a purely military judgment. Concerning the training of men to understand the religious sentiments of others, educators, psychologists and churchmen would seem to have significant standing. In essence, all that is shown in the record are conclusory opinions of military officers. These simply do not suffice for the extraordinary showing of military necessity that is required for justification to override religious freedom.

c. …[T]here is no substantial justification of the necessity of what may be characterized as the "intensity" requirement of the regulation which prohibits the cadet from attending the services of more than one religious group. This structure is particularly hard to comprehend in view of the claim that the purpose of the regulation is to inculcate awareness of the sentiments of others, the men they will command, rather than to inculcate religious feeling in the cadets themselves. In the absence of necessity, this insistence on attendance at a single church is an "excessive entanglement" with an established religion.... Assistant Secretary of

> defense Roger Kelley was asked why cadets should not go to services of all three religions or more. He replied that this was a good question, and he tended to believe that greater exposure would enhance a cadet's understanding, but this was not administratively feasible. (Note: He focused on the constraints of time. He did not specifically indicate why freedom to attend more than one place of worship could not be permitted in lieu of, or as part of, some compulsory chapel.) There may be elements of administrative convenience in denying leave to attend different places of worship, but administrative convenience does not loom large as an imperative requiring such intensity of church requirements.
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> * * *
>
> The Government asks us to engage in a kind of repair carpentry, to sever out any particular aspects of the regulation deemed constitutionally objectionable. The problem is deeper than that. The court must take the regulations and practice as they are, not as they might have been. As they stand, they are marked by religious character and impact not shown to be unavoidable and imperative. They are a violation of the Establishment Clause.[44]

It is not readily apparent why the Bazelon and Leventhal opinions were both necessary, at least with respect to the Establishment Clause. Each made some good points, but a consolidated opinion would have saved time and pages in the Federal Reporter. However, there was very little similarity between the views of either of them and those of the third member of the panel, Judge George MacKinnon, who saw things very much the way the trial judge had on a lower floor of the federal courthouse.

> It is my basic conclusion that the chapel attendance regulations of the academies are within the military power of the United States Government as recognized by the Constitution, and that the First Amendment does not require a different conclusion. The majority opinions overly stress the application of the First Amendment and seem almost to fail to recognize the Nation's inherent military power; they apparently assume that the First Amendment has overriding supremacy.... I find in the Constitution both a recognition of the military power and the guarantee of freedom of religion, and I believe that these two provisions must be interpreted together.
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> * * *
>
> In the judgment of those military commanders who have been most closely involved with [military] training through the years, some minimal exposure to religion [Note 4: A very minimal exposure is all that is involved in the regulation.]—a force of major importance in the lives of many of the men they will be asked to command—is an absolute necessity in the academies' program of moral and character

44. *Anderson v. Laird*, 466 F.2d at 303–305, Leventhal opinion.

development.

Judge MacKinnon reviewed the powers granted Congress "to raise and support Armies...to provide a Navy [and] to make Rules for the Government and Regulation of the land and naval forces."[45] He reviewed the acts of Congress on the subject of training military officers and providing for religious services, including an act of 1800 requiring commanders of all ships of the Navy having chaplains on board to hold divine services twice a day plus a sermon on Sunday, and to "cause all, or as many of the ship's company as can be spared from duty to attend at every performance of worship of Almighty God."[46]

> This indicates that contemporary opinion in Congress, when the First Amendment was fresh in the public mind, was that such a religious attendance provision was not considered to be violative of the religion clauses.

Turning to the Establishment Clause and the tests most recently enunciated in *Lemon v. Kurtzman*, Judge MacKinnon examined the question whether the purpose of the regulation was secular.

> The record in this case admits of no other conclusion than that the sole purpose and objective of the academies in promulgating the chapel attendance requirement is secular....
>
> Two objections have been raised to this contention. First, that the requirement that the cadets and midshipmen can change their chapel affiliation only with parental consent belies the general educational intent of the regulation and suggests instead an impermissible concern with the content of the religious instruction. I see nothing unconstitutional in this recognition of parental rights by those who are charged with intellectual and moral training particularly since most cadets and midshipmen are minors who are away from home for the first time. Also, the regulations recognize the cadet's individual right of conscience regardless of age.
>
> The second objection is the contention that some alternative means...would not infringe on the First Amendment's protection. Much of the record in the trial below is devoted to discussing this issue. The military leaders who are charged with the responsibility for training our future officers testified that the necessary familiarity with religion for a fully-trained officer is best implanted through observation in the religion that each officer candidate brings with him to the academy and that the necessary results could not be obtained through classroom instruction. Their judgment in a matter committed to their charge is entitled to great weight. After all, throughout our history, such education and training

45. U.S. Constitution, Art. I, Section 8, Clauses 12,13,14.
46. Act of April 23, 1800, ch. 33, 2 Stat. 45.

> has produced military leaders who have successfully met all the demands our Nation has placed upon them. On this issue it is much more reasonable to accept the judgment of experience than the opinions of those without any experience in the field.

With respect to the primary effect of required participation in church or chapel, Judge MacKinnon concluded that there might be some marginal effects that would advance or inhibit religion in some cases, but he considered both possibilities *de minimis*.

> The chapel regulation has had a long existence and it is fully disclosed to applicants prior to their admission. It is not something that is foisted on them after they arrive at the academies. Thus, those entering the academies knowingly consent to this regulation and all the other regimentation and curricular requirements involved in their training and education at the academies.
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> * * *
>
> The importance of the attendance regulations to the academies' training program is of the highest order, to my mind. It is in the great importance that I place on this portion of the curriculum...that I part company with my colleagues. I consider such training to be more important and necessary than they do. As I view the chapel attendance requirement, it is a partial guarantee that our military leaders will be aware of the moral principles that influence and guide our Nation.... To assure that our military leaders will meet these standards requires that academy graduates be conversant with religion. The academies have a compelling obligation to the Nation to see that their graduates are fully trained and that ignorance of the spiritual and moral values of our Nation and our servicemen does not occur. We do not wish to train military leaders—who will have the power in our name to order the destruction of cities and nations—without some assurance that they have at least been exposed to the principles of basic morality that we stand for as a nation. The stakes are too high—we should continue doing everything humanly possible to avoid future My Lais.[47]

Judge MacKinnon disposed of the third prong of the *Lemon* test of Establishment by saying that the chapel attendance regulation created no greater degree of entanglement between government and religion than that already existing under the (voluntary) chaplaincy program. He concluded that "trying to give a person an understanding of the moral force and motivation of religion without attending church is like trying [to] teach swimming without water."

In this case were illuminated some of the conflicts and ironies of the law of church and state. The government and the military establishment found themselves trying to

47 *Anderson v. Laird*, 466 F.2d at 313 (MacKinnon, J., dissenting). The reference is to the destruction of a Vietnamese village by U.S. troops without clear justification in reasons of war.

defend what they viewed as a hallowed element in the traditional system for training the elite officer corps of the armed forces, like a brandy distiller who reproduces all the accidental peculiarities of his old still when building a new one so as not to risk impairing the product by any change in the process. The rule requiring all cadets to attend divine services together in a body every week was obviously initiated because it was thought important to morale and morals that all hands show due respect to the Deity and do so *together*. In more effete times it had become necessary to fragment this solidarity into two or three or more "church parties," but the simultaneity and togetherness were maintained as fully as possible.

Then when the American Civil Liberties Union carried the case of a handful of "troublemakers" to court, the government found itself—because of the peculiarities of recent First Amendment case law—obliged to argue the awkward and unnatural contention that there really wasn't anything *religious* about the requirement; it was just to enable the future officers to *observe* how religious people went about their prayers and hymn singing! But in spite of this transparent fiction, the touching trust of these high-placed laymen—Admiral Moorer, Assistant Secretary Kelley, Judges Corcoran and MacKinnon—in the motivational importance of religion kept shining through. If those cadets could just hear enough prayers and Scripture readings and sermons, surely *some* of it would soak in and instill in them the spiritual strength and moral dedication that we can't be sure they'll get any other way!

Whereas, on the other side were the professional religionists—rabbis and priests and ministers, religious organizations, and the General Commission of Chaplains!—aware as all preachers eventually come to be—that people's listening to sermons doesn't necessarily affect adult motivation, and may indeed be counterproductive. And because they felt that religion was being drafted for unhallowed duty as a tool of "secular" government purposes, they were (again) appearing to strike at the very roots of public piety—as had seemed to be the fashion since *Engel* and *Schempp*.[48]

Their arguments were devastating to the government's carefully constructed fictions: If compulsory "observing" of worship was so essential to training officers, why wasn't it used for *all* officers and not just the 5 percent elite corps in the service academies? If the idea was to acquaint future officers with the *varieties* of religious experience among the men they were likely to command, why was a method used that meticulously excluded any experience of variety whatever? How would it prepare a future officer to understand the spiritual needs or moral dynamics of a Southern Baptist or a Pentecostal or a Roman Catholic (which were the most numerous persuasions among enlisted personnel) to go every week perforce to a high-church Protestant liturgy (Episcopal-Lutheran-Presbyterian hybrid) in a cathedral-like chapel such as most enlisted persons never saw?

If this case had never arisen, the *status quo* might have continued intact—more or less—for decades, with most cadets and midshipmen mindlessly conforming to the regulations—in this as in many other, more insistent and arduous respects. Most cadets would go on gaining perhaps some mild and superficial benefit from the

48. *Engel v. Vitale*, 370 U.S. 421 (1962), and *Abington v. Schempp*, 374 U.S. 203 (1963), discussed at IIIC2b(1) and (2), respectively.

weekly chapel drill, or at least not being harmed by it. Only a handful would be offended by it—those to whom religious words and acts and symbols *meant* something—pro or con—obviously "troublemakers"—would be the tiny dissident minority for whom *freedom* of *religion* is important and worth protecting—despite the uncomprehending distress of those who take comfort in familiar old traditions that lend stability and order to an all-too-unsettling world.

The U.S. Supreme Court declined to hear the case.[49] Compulsory chapel was abolished at all service academies. Chapel attendance on a voluntary basis continues to flourish, and the republic still stands.

2. Prison, Hospital, Police and Airport Chaplaincies

Military service was not the only situation in which a chaplaincy system was in effect as a governmental proprietary in religion. Chaplaincies also existed in prisons and jails, in medical and psychiatric hospitals and in various other settings. When such settings were nongovernmental, there was no state action and thus no church-state issue: the religion clauses of the First Amendment (or their state constitutional counterparts) were not implicated.[50] But when the institution in question is governmentally operated, the balancing of "Establishment" against "Free Exercise" becomes potentially—though not often actually—a litigable issue.

The Free Exercise rationale for the military chaplaincy, discussed above, was weakened by several extenuations:

1. At such times as conscription is not in effect, many—if not all—members of the armed forces are present by their own free choice;

2. Many—if not all—members of the armed forces have some degree of access to a civilian community in which ministrations to their religious needs can be obtained;

3. Many—if not all—members of the armed forces receive salaries adequate to pay for the religious services they need, as they would in the civilian community.

These extenuations do not necessarily apply to some of the other governmentally operated settings in which chaplaincies are provided. In *prisons*, for instance, inmates are present, not by choice, but by force of the working of the criminal justice system (municipal, state or federal). They do not have ready access to the civilian community. And they do not receive stipends sufficient to pay for religious services as they might in the civilian community. Therefore, the constitutional rationale that justifies a governmentally funded and regulated chaplaincy in prison as a protection of the free exercise of religion is much more persuasive than that of the military chaplaincy. Nevertheless, it has not gone unchallenged. Two tangential challenges have been discussed elsewhere: *Bridges v. Davis* (1971)[51] and *O'Malley v. Brierley* (1973).[52] Neither of those involved chaplaincies as such but were claims by outside

49. 409 U.S. 1076 (1972).

50. Of course there are some interesting boundary questions as to when governmental support or regulation of otherwise private institutions creates an element of state action sufficient to implicate the religion clauses, but these are a subclass of the conundrum of "state action" and will not be treated at this point.

51. 443 F.2d 970 (1971), discussed at IVB2.

52. 477 F.2d 785 (1973).

clergy of a Free Exercise right to minister to prisoners in a military stockade (*Bridges*) or state penitentiary (*O'Malley*). In both cases the court held that clergy do not have such a Free Exercise right. Claims to the services of a chaplain of their own faith have been asserted by Black Muslims and other minority religious groups in prison, but were disposed of as incidents of broader Free Exercise claims, usually with the holding that it would be impossible for government to provide chaplains (under the existing system) to match every faith represented in the prison population.[53]

Whether, even in the prison setting, clergy employed and supervised on a continuing basis by government represent the only way of meeting this Free Exercise need is at least a debatable question. Some prisons, to be sure, are located far from civilian communities with residential clergy adequate to serve the prison population in addition to their own communicants. Typically, prisons are located in rural, sparsely populated regions where what population and churches there may be are of theological and cultural character generally very different from that of most inmates, who tend to be products of densely populated urban areas and of black, Hispanic and other minority communities whose religious traditions are very different from that of the rural areas where the prisons are located—not that the career chaplains provided by the state are necessarily any better match to the religious affinities of most inmates.

Many clergy in the civilian community (and the congregations that employ them) are likely to be unreceptive to the spiritual needs of prison inmates, or incapable of meeting them, or both. Prison officials also are reluctant for security reasons to encourage a flow of traffic of variously credentialed clergy visitors from the civilian community coming and going at irregular times and not attuned to the institutional concerns of the correctional system.[54] This is not to say that either civilian churches' incapacities or correctional officials' reluctances are always justifiable, but they do militate against a possibly unreliable and problematic arrangement for civilian coverage (on a voluntary or nonstipendiary basis) of the prison inmates' religious needs.

a. *Rudd v. Ray* (1976). Chaplaincies usually appear on the church-state agenda when challenged as violations of the Establishment Clause—as was seen in the case of the military chaplaincy in *Katcoff v. Marsh*, *supra*. Such a challenge of the prison chaplaincy occurred in Iowa in 1976, which can stand as a representative of the genre. Taxpayers brought suit against the governor of Iowa, charging that legislation providing for salaried chaplains and religious facilities at the state penitentiary violated the Establishment Clause of the federal First Amendment and its state counterpart. The trial court held that the arrangement did not violate the federal Constitution, but did violate the Iowa Constitution, which is somewhat more explicit. The Supreme Court of Iowa heard the appeal *en banc* and rendered decision in an opinion written by Justice K. David Harris and concurred in by Chief Justice C. Edwin Moore and Associate Justices M.L. Mason, Clay LeGrand, Warren J. Rees, W.W. Reynoldson and Mark McCormick.

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53. See IVE3 in general.

54. See the concerns expressed by correctional officials in *Bridges* and *O'Malley*, *supra*.

> The facts can be simply stated.... Under authority given by statute, the Iowa State Penitentiary: (1) employs two full-time chaplains (one Protestant, one Catholic) at annual salaries totaling $25,000, (2) employs a part-time chaplain at a salary of $216 monthly, (3) expends other funds in relation to chapel activities at the penitentiary. Separate chapel areas are reserved in a previously vacant industrial building for Catholic and Protestant congregate worship. Another group, calling themselves the Church of the New Song,[55] utilizes the prison auditorium and also has office and meeting space elsewhere in the penitentiary.
>
> The chaplains at the penitentiary are ordained clergymen who have received advanced training concerning institutional settings and counselling. They provide sectarian services. The Protestant services are general in nature. The Protestant chaplains provide service for inmates of all religious persuasion, including "minority religions." Attendance by the prisoners at all services is purely voluntary. The chaplains provide substantial counselling service. Counselling is done on both a group and individual basis, at set times or on a crisis basis.
>
> * * *
>
> Plaintiffs argue the challenged legislation violates all three parts of the Nyquist[56] test [of establishment] and thus runs afoul of the establishment clause. The argument has force but ignores the companion free exercise clause with which the establishment clause must be balanced. The free exercise clause prohibits the making of a law which in any way interferes with the free exercise of religion. The prohibition extends to unorthodox as well as orthodox religious beliefs and practices. It extends to religious organizations and individuals....
>
> The crucial and controlling fact in this case is that it deals with the exercise of religion by prison inmates. Prison inmates are restrained and consequently deprived of their liberty. By reason of their status they are displaced from their homes and communities. They are thereby denied the opportunity to exercise their individual rights to worship in the same manner as could an ordinary citizen.
>
> It is clear prisoners retain some rights to religious freedom.... A prisoner's retained rights of religious freedom include some reasonable opportunity to exercise their religion....
>
> The question becomes whether the enhancement of the free exercise clause by state-provided chaplains and religious facilities nevertheless violates the establishment clause. The few cases which have addressed the question seem to agree with our conclusion it does not.[57]

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55. For further information about this religious group—a creation of prison inmates—see IVE3b(2) and (3).

56. The reference was to *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), which contains a later version of the *Lemon* test, from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), discussed at IIID5.

57. Citing *Remmers v. Brewer*, 361 F. Supp. 537 (1973); *Theriault v. Carlson*, 339 F. Supp. 375 (1972); *Horn v. California*, 321 F. Supp. 961 (1968); and quoting Justice Brennan's concurring dicta in *Abington v. Schempp* with which this section began.

* * *

Plaintiffs alternatively claim the provision for chaplains and religious facilities violates Art. I, § of the Iowa Constitution. That provision states:

"The General Assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister, or ministry."[58]

The court reviewed the process of disestablishment in the early United States and noted in the 1776 Constitution of New Jersey language identical to that in the Iowa Constitution.

To the extent our provision differs from the First Amendment to the United States Constitution we think our framers were merely addressing the evils incident to the state church. The framers addressed and provided a defense against the evils incident to a state church, forced taxation to support the same, and the payment of ministers from taxation. It is not surprising they should borrow from the language of the New Jersey constitution of 1776...in accomplishing their objectives.

In construing constitutional intent it is proper to look at contemporaneous legislative pronouncements....

Iowa's first constitution was adopted in 1846. Its second, the current constitution, was adopted in 1857. Art. I, § 3 of both constitutions were identical. In 1855, during the period between the enactment of our two identical religious liberty provisions, the General Assembly enacted a law which in relevant part provided:

"It shall be the duty of the Inspectors and Warden of the Penitentiary to appoint a chaplin [sic] to the same, whose duty it shall be to give them religious instructions, such as may be found compatible with their condition and circumstances; the chaplain shall receive the sum of one hundred dollars per annum for his services, to be paid by the Warden, out of the appropriation therefore...."

It is obvious the 1855 legislature did not feel Art I, § 3, of the 1846 Constitution proscribed having chaplains at the state penitentiary. It also seems likely the delegates to the 1857 Iowa Constitutional convention did not feel Art. I, § 3, of our present constitution would proscribe a statutory scheme then recently enacted....

Our determination is controlled by the same forces and concerns which caused the federal courts to strike a balance between the establishment and free exercise clauses of the First Amendment of the United States Constitution. We do not believe the prohibition contained in the last clause of Art. I, § 3 in any way disturbs the balance.... [That clause] was inscribed in our constitution to prevent the establishment of a state church. The language was borrowed, as we have seen, from

58. *Rudd v. Ray*, 248 N.W.2d 125 (1976).

> eastern states which had earlier struggled with the same problem. The provision of ministers and places of worship within the prisons of this state is lawful, not in order to spread or encourage religion there, but rather in order to accord prisoners their guaranteed right to exercise it.
>
> The trial court enjoined not only the payment of chaplains' salaries but also the maintenance of places of worship within the penitentiary. This was in accordance with the prayer in plaintiffs' petition. On oral submission of this appeal plaintiffs contend more strongly against the payment of chaplains' salaries and suggest in argument the free exercise clause might be satisfied by tolerating the presence in the prison of clergymen sent there on a voluntary basis.
>
> Any such argument manifestly presupposes the legislature acted unconstitutionally in how it balanced the free exercise and establishment clauses. Under our scheme of government it is for the legislature and not for contending parties to strike such a balance so long as it does so within the constitutional framework. We believe the legislature has stayed within such framework. We hold the trial court erred in enjoining the payment of public funds for the purposes specified.

(In commenting on the Free Exercise justification of military chaplaincies, the Iowa court observed, "In view of the greater restraint placed on prisoners we see more reason for allowance for prison chaplains than for military chaplains.")

The Iowa Supreme Court was not unanimous in its decision. Two justices believed that the majority was bending the wording of the state constitution and the rules of appellate review to their own whims. Their view resembled the literalist-"modernist" controversy in religion over the leeway allowable in (re)interpretation of Scripture, and resonated with the literalism of Justice Hugo Black in construing the federal Constitution. Justice Harvey Uhlenhopp's dissent was joined (in part) by Justice Maurice E. Rawlings.

> The question is not whether religion in prison is desirable. Undoubtedly religion has brought solace and comfort to many prison inmates and has helped to turn inmates around and head them toward useful and constructive lives. Rather, the question is whether religion shall be brought to prison inmates by the taxpayers or by churches and religious groups. More specifically, the question is whether the legislature can constitutionally appropriate tax funds to bring religion to prison inmates.
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> * * *
>
> We are dealing here with one of our state institutions, the penitentiary. The record before us shows that in this institution the state provides one floor of a state building for exclusive permanent use as a Protestant chapel and another floor for exclusive permanent use as a Catholic chapel. Each of these chapels contains the usual altar, furniture, symbols, art, and artifacts of a church. The state constructed and maintains, heats, and lights the building of which the chapels are parts.
>
> The state employs one part-time and two full-time chaplains for the

penitentiary, who are under the regular merit system for state employees. The chaplains receive their salaries and benefits from tax funds and carry on the usual religious activities of clergymen—they conduct regular worship services, administer the sacraments and provide religious counseling....

* * *

The present case has a unique characteristic. It is not the usual case in which a party claims some state action indirectly fosters religion. Here we have outright direct use of tax money for places of worship and chaplains. I find this direct financial support very difficult to reconcile with language of the United States Supreme Court in Everson v. Board of Education... "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion...."

* * *

Like the trial court, I am unable to square [these words] with two practices here. One practice is that of permitting exclusive and permanent use for religious purposes of space in a building which the state built and maintains, heats, and lights, from tax funds. I think this violates the portion of the third part [of the state stricture], "nor shall any person be compelled to...pay...taxes...for building or repairing places of worship...." The other practice is that of paying salaries and benefits to the three chaplains from tax funds. I think this violates the portion of the third part, "nor shall any person be compelled to...pay...taxes...for...the maintenance of any minister, or ministry."

The court majority justifies use of tax funds for these practices by a process of construction of the third part of § 3: historically, the evil aimed at was taxation for the support of a state church; this is not support of a state church; ergo this is not within the prohibition.

The difficulty with this process of construction is the language of the third part of § 3. Sometimes constitutional clauses are abstract and general such as "due process of law," and historical antecedents are needed to fill in meaning.... But the language in the third part of § 3 is of the opposite kind, concrete and specific: no one may be taxed for building or repairing places of worship or for maintaining any minister or ministry....

Here...we have clear, definite, unambiguous language.... Hence the principle applies that construction is unnecessary and we are to be guided by the ordinary meaning of the words.

* * *

I would hold that legislative appropriation of tax funds to provide and maintain prison chapels and chaplains violates the third part of § 3 of the Iowa Bill of Rights.

Finally, would the result I reach mean that the Iowa Constitution cuts off prison inmates from all religion except such as they can provide for themselves? Not at all. As to space, this court pointed to a

> constitutionally permissible way in Davis v. Boget.[59] Incidental religious use of a public building is permissible. Spaces such as mess halls, meeting rooms, auditoriums, gymnasiums, and other facilities in our state institutions may be used for religious purposes, provided the use is entirely subordinate to the regular use so that the taxpayers are not put to additional expense. Apparently, this is the present practice of the Church of the New Song in the penitentiary. As to personnel, I believe that our churches and religious groups, which have founded and operated edifices, colleges, hospitals, orphanages, and foreign missions, are able through such agencies as their boards of home missions to support clergy for the inmates of prisons. These are the kinds of sources from which financial support for religion in prisons should come, rather than taxation.[60]

Thus did the majority, by vote of 7 to 2, ratify the practice of the Iowa legislature of providing chaplains at the state penitentiary—a practice continuous since 1855—even though it required an exercise of reconstruction of the meaning of the constitutional prohibition in its original *Sitz im Leben* worthy of the apostles of Biblical higher criticism. It was probably true that the Iowa Constitutional Convention of 1857 simply reproduced the language of the Iowa Constitution of 1846 without contemplating its possible implications for the recently (1855) instituted provision for prison chaplains, and the Iowa Constitutional Convention of 1846 simply reproduced the language of the New Jersey Constitution of 1776 without contemplating its possible implications for the not-yet-imagined chaplaincy of a not-yet-built penitentiary of a state that was just aspiring to come into existence and was drafting a constitution with an eye to gaining approval from Congress to enter the Union from its territorial status. The drafters of the New Jersey Constitution of 1776 were writing in the glow of the newly declared condition of independence, and they addressed the problems of their time and place, which were much as the majority opinion described.

Certainly they were unlikely to have given much thought to the possible implications of their words—concrete and specific as those words indeed were—for the provision of chaplains at state expense in a state prison, which did not exist in New Jersey until twenty-two years later, for reformatory or rehabilitative purposes, which were a development of the next century.[61] Religious instruction, exhortation or consolation was virtually unknown in the prisons and jails of the eighteenth century (except for voluntary visits by evangelical "enthusiasts" like the Wesleys in England to "save" those facing execution), and certainly there was no conception that the *state* should provide such ministrations (except at executions, if then), even under the Established Church in England. So it was as difficult to attach to the words of the Iowa/New Jersey proviso a specific intent with respect to full-time chaplains in then-

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59. 50 Iowa 11.

60. *Rudd v. Ray*, supra, Uhlenhopp dissent (emphasis in original).

61. Sutherland, Edwin H., *Principles of Criminology* (Chicago: J.B. Lippincott, 1939), pp. 412-413.

nonexistent state penitentiaries as it is to divine the views of the authors of the Federal First Amendment on the role of religion in then-nonexistent public schools or as part of the public-service obligation of not-yet-even-dreamed-of radio or television.

One of the essential functions of courts is to adapt the principles of law to changing circumstances, lest the law designed to render justice in its original circumstances should be found to render injustice in new and different circumstances. But how far should adaptation be carried by the courts? The Supreme Court of Iowa in effect rewrote the concrete and specific wording of Article I, Section 3, of the state constitution to read that no person "shall be compelled to...pay...taxes...for building or repairing places of worship, or the maintenance of any minister, or ministry" *unless at the state prison when necessary to provide opportunities for free exercise of religion of persons confined there by action of the state.*

Some might contend that the task of adapting the law to changing conditions is the responsibility of the legislature, not the courts. But the reply could be made that, in this instance at least, the legislature had clearly indicated its will that a chaplain should be provided at state expense in the state prison, and had so indicated contemporaneously with the (re)adoption by the Constitutional Convention in 1857 of the language of Article I, Section 3.

While Justice Uhlenhopp's vision of religious ministrations being provided in makeshift prison settings by volunteers from the outside civilian community has a romantic attractiveness about it, it would probably prove unworkable for reasons set forth at the beginning of this section. The Free Exercise rationale seems more persuasive for the state's undertaking this responsibility in the prison setting than it does in the military setting or in some of the others to be considered below.

Hospitals pose a somewhat different problem, or rather, an array of problems, as there are several categories of hospital settings with respect to the Free Exercise issue. (This church-state issue arises, of course, only in governmentally operated hospitals; what private hospitals may do about religious ministrations is not a matter of "state action.") The average "general" hospital, providing a wide range of short-term therapies for the population at large, whether under municipal or quasimunicipal auspices, has little reason *not* to rely upon existing religious ministries in the environing community from which its patients come for brief periods of medical care. Those patients who have ties to existing religious organizations in the community can usually rely on those organizations and their clergy for whatever spiritual needs they may have. For the meeting of spiritual needs unmet by those organizations, or experienced by patients not already having ties to them, the hospital is not necessarily responsible—beyond notifying such organizations of such needs.

Although spiritual needs may be more intense at times of hospitalization, and although the effective meeting of those needs may strengthen the patient's ability to recover, the matching of spiritual needs to effective spiritual help is not such a generally recognized specific remedy as would be likely to justify a constitutionally cognizable obligation upon the hospital under the Free Exercise rubric. Such a hospital might undertake to facilitate such spiritual help through a staff coordinator to notify volunteer clergy of patients requesting a visit by a spiritual counselor, or

might even institute a part- or full-time chaplain to make rounds of otherwise spiritually neglected patients, but would probably not be constitutionally *obliged* to do so, nor would an Establishment Clause challenge likely lie against such a practice. It is probably one of those discretionary areas between establishment and free exercise in which government *may* accommodate religious practice but is not obliged to do so.[62]

Beyond the municipal general hospital is the facility for long-term care of chronic medical illness. Such institutions are usually private, though supported largely by Medicare and Medicaid payments (which, under the "Church" amendment,[63] may not render them elements of "state action"). Patients in such facilities may not be residents of the immediate community and, over the term of a lengthy hospitalization, may have lost contact with the communities from which they came. A chaplaincy program would seem to be more justifiable in such circumstances, though probably not obligatory. A special case in this category would be the Veterans Administration's hospitals, which have a well-developed full-time professional chaplaincy service, as will be seen in a case reviewed immediately below.

A third category of hospital would be the state institution for more-or-less long-term care of emotionally disturbed and/or mentally retarded persons. Many of these persons have been committed to such institutions by state action (either civil or criminal), while others may not be competent to gain release or to fend for themselves on the outside. Whatever their legal status, they are in general an adaptability-impaired population with limited access to or ties in the outside community. Perhaps here the rationale for a state-supported and -regulated chaplaincy to protect their Free Exercise interest would be at its strongest in the hospital category.

b. *Carter v. Broadlawns Medical Center* (1987). One Establishment Clause challenge to a hospital chaplaincy occurred in Iowa and will represent the genre. It was brought in federal court by taxpayers contending that use of tax funds to employ a full-time chaplain at a county hospital, Broadlawns Medical Center (BMC), violated the Establishment Clause of the U.S. Constitution. Decision was rendered by Chief Judge Donald E. O'Brien of the Southern District of Iowa, Central Department. The opinion devoted a number of pages to "Findings of Fact":

> In December 1983, Trustee Milton Brown [of BMC] received a letter from the Des Moines Area Religious Council urging the Board to create a pastoral care department and to employ a full-time chaplain. BMC had never previously employed a chaplain, and instead had relied on volunteer chaplains, a system that had proved to be inadequate. The Trustees [of the hospital] discussed this proposal at numerous meetings in early 1984. Plaintiff Larry Carter appeared at these meetings along with other Polk County citizens. Plaintiff Carter represented himself, spoke as a member of the BMC Primary Care Advisory Board, and acted on behalf of American Atheists in opposing the chaplain proposal.... The Court is persuaded by the testimony and the exhibits...that the volunteer

62. See Justice Brennan's comment in *Abington v. Schempp*, quoted at note 3 *supra*.

63. See IID n.19.

chaplain effort has, particularly in recent years, received a "very poor" response.

On June 12, 1984, the Board of Trustees approved the funding of a "chaplain" position at BMC. However, instead of hiring a "chaplain" in the generally accepted meaning of that term, the Board hired Maggie Alzeno Rogers, a female[!], who is not an ordained minister. [She] graduated from the University of Dubuque Theological Seminary in 1984. She is "endorsed" by the United Church of Christ.

* * *

Chaplain Rogers set out the philosophy of [her program] as follows:

> The philosophy is we do not force [our] faith understanding on anyone. We do not proselytize, that is a violation of a person who is already in a fairly helpless condition, crisis situation, everything else is already up in the air. So you're very careful not to violate that person's human rights.
>
> You listen very carefully to their story, to their faith language, to the symbols that are important to them, and you help them find the resources of faith and the resources of their life whether that be family or their church or their faith or their own history, how have I gotten through hard situations before, and help them to find their own strengthening and own courage....

* * *

The services that Chaplain Rogers provides are available to all BMC patients, regardless of their income or reason for hospitalization. Her services are not billed directly to the patients. Chaplain Rogers and the few volunteer chaplains she supervises have had accress [sic] to patients' medical records and admission data. This has been done without securing advance approval of patients.... She explains that "when I am asked to consult with a patient or his family, I look at the records to get background on them so I can be of better service. If I learn something [about a patient], it is confidential...." Chaplain Rogers attempts to make rounds in the medical section of the hospital every day....

Chaplain Rogers makes calls on patients prior to surgery.... These pre-operative calls occur both before and after sedation, even though the patient has made no request to see her. When Chaplain Rogers visits a patient, she normally asks if there is anything she can do for the patient. Approximately 40% of the time, the patient's response is to ask her to say a prayer. If Chaplain Rogers already knows from a previous visit that prayer is meaningful to a person, she will ask them if she can say a prayer for them.

She summed up some of her activities as follows:

> I supply grief counseling, I help them to express their fears, cry, whatever. If I had to guess I would say 20 to 30% of my time is spent in religious activity, the rest of the time I'm listening to people. I focus on the patient's needs.... I have religious discussions only if they lead. If a patient made it clear that he wanted no part of a chaplain, I would honor that. I'm not trying to change their faith.... I am part of the medical team, the healing team. Chaplain followup is important.

In the intensive care and surgery waiting rooms, she often drops in, introduces herself, and gets to know the family to see if there is anything she can do for them. These people cannot, under the circumstances—for example, a death-bed watch—leave the hospital to go and seek solace elsewhere. A similar situation arises in intensive care, where family can only go into the patient's room for a fifteen-minute period once every two hours....

Chaplain Rogers also takes her turn with the volunteer chaplains in conducting Sunday services in the Nauraine conference room at BMC. This room contains a wooden cross and various hymnals marked with a BMC stamp. The Sunday services are Christian services which include a brief worship service, singing, prayer, reading of Scripture, the chaplain's reflection on the Scripture, and a benediction. The time of the Sunday service is announced over the intercom at the hospital, and only those people wishing to attend do so, usually averaging fifteen to twenty people who are not able to leave BMC to attend outside Sunday services. A parking space is provided near the hospital building for use by volunteer ministers. This space is also available to provide ready access for clergymen, not affiliated with BMC, but who are called in urgent situations....

Defendants called as witnesses a strong cross-section of Des Moines area health care professionals.... Dr. Barry Ingebritson...is the Medical Director for BMC's Primary Care Unit. He opined that as a medical doctor, he is concerned with all health issues, and requires all possible tools to confront them. He believes that a "wholistic" method should be applied to health care. He testified that four health issues must be addressed: (1) social, (2) emotional, (3) spiritual, and (4) bodily. Dr. Ingebritson uses the term "spiritual" rather than "religious" in the sense of belonging to any particular denomination. He testified that a chaplain is needed to treat the "spiritual" aspect, and that a person's health entails much more than mere medicine.

Dr. Timothy Olson is BMC's Director of Psychiatry.... Dr. Olson testified that a full-time chaplain could provide secular and spiritual benefits to (psychiatric) patients. He testified that BMC's psychiatric patients are "special," but "they can be very hard to handle; we need an experienced chaplain. Coordination with the doctors is important. We had some trouble with our volunteer chaplains.... The spiritual need is great, so I don't believe psychiatric social workers could do the job."

The consensus of these witnesses was that the chaplaincy was a fine program and that it was badly needed at BMC, not solely for religious services, but more importantly, to assist the doctors in their "wholistic" approach to medical care, and to provide grief therapy for family members.... [T]he Iowa Veterans Home at Marshalltown and the state hospitals at Cherokee, Oakdale, Independence, Clarinda, Mt. Pleasant and Woodward all have tax paid chaplains....

* * *

Plaintiff John Doe, now identified as...a professor of literature at Drake University in Des Moines, Iowa...is an atheist.... The presence of a tax-

> paid chaplain at BMC deters [him] from using BMC for medical care and caused him to go to another Des Moines hospital for treatment instead of BMC. [He] does not believe that religion should be mixed with medicine and does not want a chaplain to view his medical records. He believes he is entitled to have BMC, a tax-supported hospital, free of religious activity.... [Another plaintiff] fears that he will be subjected to religious services at BMC when he is both conscious and unconscious. The Court finds that his fears are unfounded, based on the [nonintrusive] methods employed by...the chaplains.
>
> The Court also heard evidence concerning the finances of BMC.... The Court finds that there are not sufficient funds donated privately year in and year out to fund the chaplaincy position. Absent private donations that have not been forthcoming, the only methods for funding the chaplaincy program are receipts from patient billings, the cafeteria and tax appropriations, which constitute about one-third of the total. All moneys received are commingled. This Court does not believe it would be appropriate, or solve any constitutional problems if only money from the cafeteria or patients' billings were used to fund the chaplain position.[64]

(1) What a Hospital Chaplain *Could* Do. In this recital the court recorded its encounter with clinical pastoral training as it has come to be practiced in a number of institutional settings. One of the wellsprings of that movement was the work at Massachusetts General Hospital of two pioneers, the noted physician Richard C. Cabot, M.D., and a minister, Russell L. Dicks, B.D., who jointly wrote a remarkable volume, *The Art of Ministering to the Sick*,[65] containing impressive insights from their years of collaboration in ministering to both body and soul in that institution. From this and similar sources has developed an extensive theory and praxis of collaboration between medicine and pastoral care. Utilizing insights from psychology as well as theology, it recognizes in many kinds of life-threatening ailments a variety of causes that may be "spiritual" as well as physical, such as guilt, hate, bitterness, unresolved grief, rage, fear etc., in many of which a skilled counselor can be of great help to the healing process.

Few physicians, unfortunately, are trained to do this kind of work, and the heavy pressures of the kind of work they are trained to do leave them little time for this often time-consuming interaction. Not all clergy, unfortunately, are trained to do this kind of work either, but the number is growing, and most clergy now have some acquaintance with the field, though not all of them are adept at it. Some have specialized in this work and have gone into it full time, as had the chaplain described in this case. In some situations this has led to a fruitful collaboration between medicine and pastoral care and has made the chaplain a valuable and trusted member of the staff "team" working together to advance the "wholistic" healing process. In other situations, of course, it has not worked out as well because of inadequacies or

64. *Carter v. Broadlawns Medical Center*, 667 F. Supp. 1269 (S.D.Ia. 1987).

65. New York, Macmillan, 1936 (reprinted 11 times by 1947).

resistances on the part of one or more of the "team" members, overburdened caseloads, pressures to reduce ward census, shortage of trained pastoral counselors or of line-items to employ them, or all of the above.

One hospital administrator (who was essentially sympathetic to the ideal of pastoral care) commented to the author that she seldom saw the chaplains at her institution; when she did, they were not of much help; and when she called on them to work with a given case, she usually regretted it. She added that the social workers on the staff had case-loads of fifty or sixty patients, but there were ten times that many patients per chaplain, so it was hard to imagine their being able to give much sustained attention to many individual cases.

Nevertheless, there is an important service that can and should be rendered by someone in the modern hospital, and physicians, nurses, attendants and even social workers are not usually assigned it as part of their job description. That is the task of helping patients to adjust to the highly regimented, often impersonal and usually new and strange routines and procedures of the hospital. The patient is often not only ill, weak and adjustment-impaired but disoriented, lost and *scared*. Everything around him is unfamiliar, bustling, peremptory, mechanical, preoccupied, not "user-friendly." In addition, the patient is overwhelmed with anxieties about what has gone wrong with his health, what can be done about it, what will happen to his family, will he get worse, will he suffer, will he die? All of these intimidating surroundings and harrowing anxieties about the unknown impose a significant *physical* burden upon the process of healing and recovery, and that burden is in part due to *spiritual* causes, or at least susceptible to *spiritual* relief. The burden is heaviest at times of medical crisis, such as immediately prior to an operation.

At such times the healing process can be immensely helped by someone who can, literally and figuratively, "hold the patient's hand" and provide a link to ongoing caring and concern, strength, courage, trust and faith. Such a person can provide a buffer between the patient and seemingly alien surroundings, explaining what is going on, what the routine is, what will happen next. In difficulties, such a person can sometimes serve as a sort of ombudsman between the patient and the hospital's "machinery," straightening out misunderstandings, correcting unrecognized neglects, securing needed resources of comfort and encouragement. It might seem strange that such a role is needed in an institution supposedly devoted to patient care, where everyone should be committed to meeting these common human needs, but anyone who has been in such a setting can attest that it often just isn't so, through nobody's fault in particular and everybody's fault in general, since what is everyone's responsibility is often no one's. It doesn't require an ordained person labelled a "chaplain" to do this otherwise often neglected work, but it is consonant with the training, aptitude and assignments of such a staff person, and fits closely with the more specialized tasks for which that person is uniquely trained.

These further contributions to the total healing task include helping patients and their families to deal spiritually with the possibilities and prospects of paralysis, amputation, other permanent handicap and death. Sometimes physicians speak of a patient's lack of the "will to live" as a critical factor in successful therapy and recovery. That is essentially a *spiritual* factor, not a physical one, and points to a

wide array of nonmedical elements in the struggle for health against discouragement, malaise, fear and other spiritual problems mentioned earlier. Beyond these are the questions with which patient and family may need to wrestle under adverse conditions: to what degree should life-support systems be employed to keep alive a person who has suffered brain death or who may be permanently comatose? These are in large part "spiritual" questions, affected by one's understanding of the meaning of life and the significance of death. Of course, many patients and their families may already have resolved these questions or may want to do so with the help of their own spiritual advisers. But others may not have such advisers, or they may not be available when needed, or they may have avoided thinking about such matters until the hour of crisis, so there will be occasions when a hospital chaplain can be helpful, as suggested in this case.

It should be apparent that these aspects of a chaplain's work are vastly more significant, demanding and delicate than holding religious services for ambulatory patients once or twice a week. Such services, though they may be of help to some, are the least of a trained and skillful chaplain's work. That work, when well performed, can lead to an appreciation by medical staff and hospital administration of the chaplains' role such as was expressed in testimony in this case. But does that appreciation justify support of that role by tax funds in a public hospital?

How did the district court resolve that question in the instant case? The court applied the three-part test of *Lemon* and *Nyquist*[66] to the Establishment Clause challenge.

> The first element in this analysis in relation to the Establishment Clause only requires that the practice must reflect a clearly secular purpose. This does not mean that the challenged activities' purpose be exclusively secular.... Thus, the issue is whether BMC's chaplain has a clearly secular purpose.
>
> The Court recognizes that Chaplain Rogers fulfills some secular duties at the hospital, including grief counseling and other secular patient counseling. The Court believes that it is a close question whether her purpose is clearly secular. The principles of [pastoral care] appear to indicate that a person's "spiritual needs" do not necessarily mean "religious needs." Also, Chaplain Rogers and the few volunteer chaplains strictly adhere to the...concept of nonproselytization. However, after careful consideration of all the evidence and testimony in relation to the Establishment Clause, the Court concludes that the chaplain's position is not clearly secular. One of its main purposes is to meet the religious needs of patients.... Thus, while the BMC chaplain is available on a voluntary basis and does not proselytize or "push" religion on patients, the immediate purpose is to provide religion to patients who clearly want it.
>
> The Court turns next to the second element of the...test, which states

66. Cf. *Lemon v. Kurtzman*, 403 U.S. 601, 612-13 (1971), discussed at IIID5 above, and *Committee for Public Education v. Nyquist*, 413 U.S. 756, 772-773 (1973), discussed at IIID7(a).

that the activity "must have a primary effect that neither advances nor inhibits religion...." The issue in the case at bar is whether the chaplaincy provides merely an "incidental advancement" of religion. The Court concludes that it does not.... Paying a chaplain to provide religious care (while not the chaplain's only duty), is an advancement of religion. The fact that Chaplain Rogers abides by [pastoral care] concepts makes the advancement more tolerable, but does not eradicate it.

The third element of the...test is that the activity must avoid excessive government entanglement with religion. Chaplain Rogers, while she may at times coordinate her hospital rounds with BMC administrators, does not take direction from them as to how she is to counsel patients.... The Court finds that the evidence demonstrates no excessive entanglement.

However, given the fact that BMC's hiring of a chaplain fails two of the three...elements, it is clear that the Establishment Clause will only permit the hiring of a paid hospital chaplain if it fits with an exception to its general prohibitions. The Court now considers the issue of whether the hiring is permissible under the Free Exercise Clause...

* * *

Although plaintiffs have maintained that this action does not involve the Free Exercise Clause, the Court finds that, factually, the prohibition of a chaplain would directly impact upon the opportunity which BMC patients have to freely exercise their chosen religious beliefs.

* * *

Polk County does not generally "confine" patients at BMC in the same manner as prisoners in penal institutions or as the army assigns its members to particular posts. [Footnote: "However, the testimony did demonstrate that at least one-third of the patients in (the psychiatric) unit are involuntarily committed."] Plaintiffs contend that hospital patients are not in the same situation as prisoners and that Rudd [v. Ray[67]] therefore does not apply. Plaintiffs assert that in contrast to prisoners, Broadlawns' patients are not confined by the government and they may leave at any time. While this argument has some attraction, it is not grounded in reality.

Few people confined to a hospital may leave at any time. Most patients' mobility is severely restricted due to their health, a condition patients have little control over. Also, BMC psychiatric patients are confined for the most part, and those who are "free" to leave may do so only if they obtain a pass. Furthermore, BMC treats many indigents who have no other hospitalization alternatives. An indigent's freedom to leave the hospital is limited by both his health and his ability to secure medical care elsewhere. Plaintiffs contend that the county could pay for medical services at a private religiously sponsored hospital for those indigent patients who desire religious services. However, this would result in an indirect contribution to religion and would be fraught with many of the same problems that the plaintiffs now perceive in the hiring of a tax-paid chaplain at BMC. Therefore, the Court finds that the fact that the county

67. 248 N.W.2d 125 (1976), discussed immediately above.

government does not place or confine all the patients at BMC has little relevance, and does not ultimately distinguish the facts of this case from the holdings in Katcoff, Baz and Rudd.[68]

This Court is not only persuaded that the Iowa Supreme Court correctly decided Rudd, but that the citation in Rudd to Justice Brennan's concurring opinion in School District of Abington Township v. Schempp...expresses the ultimate legal conclusion pertaining to the free exercise interest of patients at BMC:

> There are certain practices, conceivably violative of the establishment clause, the striking down of which might seriously interfere with certain religious liberties also protected by the First Amendment. Provision for churches and chaplains at military establishments for those in the armed services may afford one such example. The like provision by state and federal governments for chaplains in penal institutions may afford another example. It is argued that such provisions may be assumed to contravene the establishment clause, yet be sustained on constitutional grounds as necessary to secure to the members of the armed forces and prisoners those rights of worship guaranteed under the free exercise clause.[69]

Therefore, the Court finds that the hiring of a tax-paid chaplain at BMC, like the hiring of a military chaplain or a prison chaplain, is constitutional under the Free Exercise Clause. For similar reasons, the Court concludes that it is also constitutional for BMC to permit religious services and artifacts in the Nauraine conference room and to provide a reserved parking space close to the hospital for visiting ministers as a necessary incident to the provision for a chaplain. Further, the Court finds that there is no constitutional infirmity with either the paid chaplain or volunteer chaplains making patient rounds so long as the principles of [pastoral care] are followed....

While the Court finds that the BMC chaplain is constitutional under the Free Exercise Clause, the chaplain's activities should not be unrestricted.... The Court concludes that a government-paid chaplain at BMC who uses coercive methods to forcefully expose patients to religious doctrine would contravene the Establishment Clause...and would contravene the Free Exercise Clause. Since the employment of a paid hospital chaplain abiding by the [pastoral care] principles explained at trial is consistent with ensuring a patient's free exercise interests, the Court concludes that it is not unconstitutional for BMC to employ a chaplain who performs as Maggie Alzeno Rogers does at BMC.

This decision, however, is limited to providing religious and grief counseling service to inpatients only. She may provide grief counseling services to families that are at the hospital and for all practical purposes not free to leave because a loved one is in a life-death situation. Chaplain Rogers testified that some of her religious counsel was extended to

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68. Citations are to *Katcoff v. Marsh*, 755 F.2d 223 (1985), discussed at § D1a above, *Baz v. Walters*, 782 F.2d 701 (1986), discussed immediately below; and *Rudd v. Ray*, *supra*.

69. 374 U.S. 203, 196-99 (1963), discussed at IIIC2b(2).

> employees, families of patients, and outpatients. Free Exercise interests of these three classifications—employees, families (exclusive of those mentioned above) and outpatients—are not implicated since they are free to leave the institution and procure religious counsel elsewhere. Thus, relief for the defendants is granted subject to a restriction against the chaplain's providing religious counsel to employees, patients' families (except as set out above) and outpatients.
>
> The Court also concludes that the policy of chaplains having open access to patient medical records is constitutionally infirm under the Fourteenth Amendment. Patients at BMC have a right of privacy founded on the Fourteenth Amendment's concept of personal liberty. One facet of the right of privacy "is the right of an individual not to have his private affairs made public by the government...."[70] In allowing chaplains free access to medical records, BMC is not properly respecting a patient's confidentiality and privacy. The Court concludes that patient medical records can only be accessed by a chaplain upon prior express approval of the individual patient or his guardian. This will not be so broad as to bar doctors, medical and psychiatric professionals and nurses to provide to the chaplain basic information, not privileged, which would enable the chaplain to understand what the patient's basic problem was, e.g., a suicide attempt....
>
> This order should not be read as setting a general precedent for the hiring of paid chaplains in state or county institutions. Each situation must be determined on its particular facts.... [Footnote: This decision should not be read as a finding that publicly owned hospitals are required by the Constitution to provide chaplains to patients....][71]

The district court thus tried carefully to sort through the chaplaincy arrangement so as to separate out the "religious" from the "secular" and even the "religious" from the "spiritual." The latter was a curious effort, drawing upon one medical witness's testimony that he used the term "spiritual" rather than "religious" "in the sense of belonging to any particular denomination." The court later commented, "The principles of [pastoral care] appear to indicate that a person's `spiritual needs' do not necessarily mean 'religious needs.'" The word "spiritual" means "pertaining to the spirit or soul" and is often used in contrast to "material," "temporal" or "corporeal." "Religious" often is used in a similar way, contrasted with "secular," "worldly" or "mundane," but it pertains more directly to "religion"—an organized continuing and coherent body of belief and practice designed to meet "spiritual" needs.

For purposes of this analysis, a useful distinction can be made between the individual's craving, searching or aspiring for a sense of meaning, purpose, belonging beyond material or interpersonal relationships, which is the feeling of *spiritual need*, and the several systems of thought and practice designed to meet those needs, which are *religious*. Religious thought, activities and organizations spring from and respond to spiritual needs and draw from spiritual resources and insights. Patients experience

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70. Citing *Whalen v. Roe*, 429 U.S. 589 (1977).

71. *Carter v. Broadlawns Medical Center, supra*.

spiritual needs, particularly during hospitalization, that may have a vital connection with their ability to recover. They may not think of those needs as "religious" or turn to any particular religion for help, but the teaching and praxis by which those needs are met is *religious*, even when not identified with a particular religion, since the function of religion is to explain the ultimate meaning of life and to help people to relate to the ultimately real.[72]

Insofar as the meeting of spiritual needs and the remedying of spiritual deficits is an important part of the healing process, the means by which that is done is an important adjunct to the healing institution, and that means may be a practitioner trained and skilled in the *religious* praxis of meeting spiritual needs, viz., a "chaplain." (There may be other means that can be used, but none was envisioned in this case that would have the availability, deployability and reliability of a paid, full-time chaplain.) If it is proper for the state (or county) to provide a healing institution, why is it not proper to provide the necessary adjuncts to that institution to carry on the healing process? That question was a concern of the Eighth Circuit Court of Appeals, whose opinion in this case follows.

c. *Carter v. Broadlawns Medical Center* (1988). The district court's judgment was cross-appealed by both sides; the hospital appealed the restrictions on the chaplain's practice, and the plaintiffs appealed the court's decision to allow the hospital to employ a chaplain. The Eighth Circuit Court of Appeals announced on September 13, 1988, an opinion unanimously issued by a panel composed of Circuit Judges Gerald W. Heaney and John R. Gibson and Senior District Judge Roy W. Harper (sitting by designation) and written by Judge Gibson. The opinion reviewed the facts found by the district court, but reached a slightly different conclusion.

> The first question posed by the Lemon test is "whether the challenged law or practice has a secular purpose." Lynch [v. Donnelly].[73] Lynch made it clear that the presence of religious purposes would not doom a law or practice, as long as there was also a secular purpose. "The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded that there was no question that the statute or activity was motivated wholly by religious considerations. Even where the benefits to religion were substantial...we saw a secular purpose and no conflict with the Establishment Clause."
>
> Though the district court correctly observed that the challenged action need not be exclusively secular to pass the purpose test, in actuality it considered the presence of a religious purpose fatal, despite factual findings establishing a valid secular purpose. The court recognized Rogers fulfilled some strictly secular duties, "including grief counseling and other patient counseling...." The court also recognized that in the context of Broadlawns, even Rogers' religious duties had a secular purpose. "BMC's intent in hiring Maggie Rogers was to enhance the hospital's 'wholistic' treatment approach." In other words, the purpose of the chaplaincy was

72. See discussion at § F5 below.

73. 465 U.S. 668 (1984), discussed at § E2f below.

the same as that of the hospital generally—to help patients get well or at least to provide the best care possible for those who would not get well. But from these factual findings, the court drew the legal conclusion that the chaplaincy failed the purpose test: "However,...the Court concludes that the chaplains' position is not clearly secular. One of its main purposes is to meet the religious needs of patients." (emphasis added)

The district court in this case slipped into the same legal error made by the district court in Lynch v. Donnelly, by focusing on the religious purpose in isolation from the larger context, which reveals a valid secular purpose....

* * *

Accepting the district court's findings of historical fact, we conclude that the finding that Broadlawns hired Rogers to enhance its wholistic treatment approach to patient care establishes a valid secular purpose under the Lemon test.

The second question posed by the Lemon test is whether the challenged practice has the principal or primary effect of advancing or inhibiting religion. Once again, the district court's findings of historical fact on this issue belie its ultimate conclusion that the effect of the Broadlawns' chaplaincy was to advance religion. The district court's findings stress that the existence and nature of the religious content in Rogers' services to a patient depended entirely on the patient's pre-existing preference.

* * *

The district court also found that Rogers "does not view her primary focus as religious." The evidence supported these findings of neutrality. Rogers' testimony established that patients of all persuasions may take advantage of her counselling on their own terms....

The taxpayers argue that the chaplaincy violates the effect test by inculcating particular beliefs, by subsidizing religious activities, and by effecting a "symbolic link" between church and state. The district court's findings that Rogers has avoided proselytization show that there is no direct advancement of religion by Broadlawns inculcating any religious belief or practice....

* * *

The taxpayers also argue that Broadlawns has violated the "effect" element of Lemon by creating a symbolic tie between church and state. Again, the findings of neutrality of the chaplaincy as practiced by Chaplain Rogers distinguish this case from those cited by the taxpayers....

* * *

In sum, we cannot conclude that the facts as found by the district court show an impermissible advancement of a particular religion, or of religion over non-religion.

The final question of the Lemon test is whether the challenged practice gives rise to undue entanglement between church and state. The district court held it did not. We agree with that holding, in light of the evidence that Chaplain Rogers' presence has in fact reduced the need for oversight of the volunteer chaplains by other hospital personnel, because it is part of Rogers' job to supervise the volunteer chaplains to make sure that they

abide by the non-proselytization principles.... It is obvious that employing a chaplain causes some entanglement, but the testimony in this case showed time and again that the nature of the hospital's services make it necessary for hospital employees to deal with patients' religious problems in making decisions about how to care for the patients. Decisions such as whether to resuscitate a patient or allow him to die have a religious tenor for most patients that the hospital cannot avoid, either by ignoring it or by depending on a volunteer program that the district court found inadequate. Cf. Wilder v. Bernstein.[74] The evidence indicates that hiring a person trained to facilitate the patients' resolution of religious dilemmas should lessen, not increase, the hospital's entanglement in them.

Though we disagree with the district court's conclusion that the Broadlawns chaplaincy violated the Establishment Clause, we agree with the district court's alternative theory that the chaplaincy is a permissible accommodation of at least some patients' free exercise rights. There was evidence that a large percentage of Broadlawns' patients were subject to restrictions on their movement attributable to the state by virtue of the fact that the patients were prisoners or had been involuntarily committed or by virtue of hospital rules in the psychiatric ward. Such restrictions constitute a state-imposed burden on the patients' religious practices that the state may appropriately adjust for.

Most of the restrictions the district court imposed on Rogers' practices resulted from the court's conclusion that the chaplaincy was only permissible insofar as it alleviated the obstacles to religious practice posed by the patients' immobility. Since our holding does not rest on the fact of immobility, but on the secular goal of helping patients to get well, it is appropriate to lift the restrictions prohibiting Rogers from counseling outpatients and patients' families. Allowing the chaplain to counsel outpatients has the same therapeutic value as letting her counsel inpatients. While one could argue that counseling patients' families does not directly serve the therapeutic purpose of the chaplaincy described by the witnesses, the argument would be unrealistically restrictive. To the extent the chaplain counsels families, it is largely to help them cope with the problems resulting from the patients' illnesses and to serve as a liaison between the families and the medical staff. Therefore, allowing her to counsel the families serves the same purpose as counseling the patients.

However, Chaplain Rogers' testimony describing her counseling of the hospital employees indicates that this counseling focuses on problems other than the patients' illnesses.... She made the general observation that providing the staff counseling helped them serve the patients better. This wide-ranging principle, however, is far too loosely related to the secular healing purpose found by the district court to permit Chaplain Rogers to engage in religious counseling of the employees.

However, the record established that Chaplain Rogers also provides a significant amount of purely secular counseling to the employees. She testified that her exchanges with staff members primarily involved

74. 848 F.2d 1338 (2d Cir. 1988), discussed at § C5e above.

> assisting the employees with personal problems, such as letting off steam about supervisors, dealing with gossip and teenage children, and venting grief over loss of a family member. Chaplain Rogers viewed her service as giving support and encouragement, and she stated that it was relatively rare for these interactions to assume a religious nature. If the hospital chooses to use Rogers to provide strictly secular counseling to its employees, it is evident that there is no constitutional barrier to this decision.
>
> Accordingly, the district court's order should be modified insofar as it restricts the chaplain from engaging in employee counseling that is non-religious in nature, and we remand to the district court to fashion an appropriate order.[75]

The appellate court, having significantly widened the scope of constitutionally permissible action of the hospital chaplaincy under the Establishment Clause, apparently wanted to make clear that it was not utterly open-ended. So it insisted that the chaplain should not do any *religious* counseling with hospital *employees*. That seems a legitimate limitation dictated by the court's rationale that the (secular) purpose of the chaplaincy was to *help patients get well*. But the appellate court overlooked one important aspect of the chaplains' activity with employees that would clearly come within that rubric. In the district court's opinion, footnote 10 refers to that aspect: "This counseling now relates in part, at least to the duties of these employees in life-or-death situations with all the stress and grief involved therein. Thus, as much as it may be desirable, it cannot be allowed in this setting."

Hospital employees have their feelings, their doubts and anxieties, also, and these can have a direct and significant effect on their ability to help the healing process or "to provide the best care possible" for those who are beyond healing. Counseling them on personal problems would indeed seem remote from this objective, but counseling them on how to deal with patients' religious problems in crisis situations and how to cope with their own feelings toward suffering and death of patients in their care is not at all remote. Nurses and attendants called to a patient's bedside to deal with a serious hemorrhage or other life-threatening crisis in the middle of the night cannot always refer a patient's anguished queries about "Why does God let this happen?" to a chaplain. And even if the nurse or attendant can turn aside the patient's cry with soothing or palliative generalities, the situation can still leave the employees shaken, not only in their own emotional equilibrium, but in feeling frustration or impotence at being unable to help the patient with his or her acute *religious* distress, which can cause sympathetic religious distress in the employee.

The chaplain can have a legitimate role—under the appellate court's rationale—in helping employees know how to respond to these situations without either rebuffing the patient's outcry or overanswering it, in the sense of offering theological reassurances that the patient may not share. The chaplain may also be able, under the appellate court's rationale, to counsel with employees on their own spiritual struggles

75. *Carter v. Broadlawns Medical Center*, 857 F.2d 448 (1988).

to understand and accept the suffering and death they encounter every day when the healing process fails, especially when the patient decides against resuscitation or use of life-support machinery, contrary to the employee's (religious?) convictions. Employees who become rigid and unfeeling in order to protect their own sensibilities from others' pain are not giving the best help they could to the healing "team," and the chaplain may enable them to do better.

The court continued:

> The restriction requiring the chaplain to have express permission to review medical records is consistent with and even mandated by the non-coercion reasoning we have used today. Central to our decision in this case is the idea that the nature and extent of Rogers' services to a patient are entirely dependent on the patient's wishes. Permitting a chaplain to review the patient's records without the patient's (or his guardian's) permission would undermine the findings of neutrality we have so heavily relied on.[76]

The appellate court in this instance moved beyond the somewhat cramped and stilted decision of the lower court to allow for a broader recognition of the important part that a pastoral counselor can play in the "wholistic" healing process. Aside from the restrictions on religious counseling of employees and examining medical records without permission, however, it was not as clear what the chaplain may *not* do. The Circuit Court quoted with approval the chaplain's statement that she did not view her "primary focus as religious" and characterized this as commendable "neutrality." But offering "religious" ministry is not unneutral under the Circuit Court's rationale, so long as not imposed on unwilling patients. The chaplain was engaged in *religious* ministry, though not in *evangelism* or *ecclesiastical* outreach, and should feel no compunction about offering *religious* service to those who wish it, while offering human help and support to others.

Both courts relied heavily upon the particular type of chaplaincy carried on by the incumbent, which the district court thought to be unusual: "She is not the stereotype of one's usual image of a 'chaplain.'" Did the courts' conclusions apply to the "stereotype" or "usual image" chaplain, whatever that might be? The principles and praxis of pastoral care seem to have been approved by both courts as the model of a chaplaincy that would not violate the constitution, but neither court said in so many words that only such chaplaincies could be approved, and the job description for the Broadlawns chaplaincy did not stipulate conformity to that model. The record and the opinions included excerpts from Chaplain Rogers' *description* of various aspects of the pastoral care system as she understood and practiced it. But there was no systematic exposition of its principles or praxis. The two courts clearly attached great importance to the nonproselytizing character of the pastoral care method and to its "neutrality," presumably as among religions and between religion and nonreligion. But there are doubtless different understandings and practices within the pastoral

76. *Carter v. Broadlawns*, Eighth Circuit decision, *supra*.

care movement, and there are other, similar schools of pastoral care that might or might not fit the model perceived by the courts from Ms. Rogers' description.

If and when Ms. Rogers moved on to another position, how would Broadlawns go about employing her successor so as to be sure that its chaplaincy program continued to fit the model the courts deemed to be constitutional? What if its applicants were "stereotyped" "usual image" chaplains? Every course in pastoral care at seminary relates the horror stories of the evangelistic amateur chaplain who got cardiac patients out of bed to kneel in prayer, and that clearly would never do. But between that extreme and Ms. Rogers' nondirective approach there are many shades and gradations, some of which will appear in the next case. Suppose a chaplain were trained in pastoral care but nevertheless believed there is no salvation except in Christ. Though he may not announce that conviction to dying patients, yet it may still color his understanding of their plight, and he may want to try to direct their thoughts to that assurance if they are receptive to it. If he thinks the patient has a Christian history or might benefit from Christian hope, he may want to awaken the patient's awareness of the Christian promises as a source of strength and courage in the face of death, and that may not be a bad thing in some instances. At what point does a chaplain with a slightly different style begin to move outside the parameters permissible under the Circuit Court's rationale? There are many different ways for a chaplain to be part of the healing process—to help people get well or give them the best possible care if they can't get well—without proselytizing or pressuring them. *Broadlawns* sketched the central rationale, but the edges remained a bit fuzzy, as may well be necessary under case-by-case adjudication. Courts are not responsible for setting forth the entire manual for pastoral care in state institutions but only for evaluating the facts adduced before them in the light of constitutional norms.

d. *Baz v. Walters* (1986). Another hospital chaplaincy case posed a different set of questions. The plaintiff in this instance was not a church-state separationist challenging the chaplaincy under the Establishment Clause (as in *Katcoff*, *Rudd*, and *Broadlawns*, *supra*) or a clergyperson seeking to get into the institution to minister to inmates under the Free Exercise Clause (as in *Bridges* and *O'Malley*, *supra*), but a former chaplain protesting his separation from the staff of a Veterans Administration (VA) hospital with a predominantly psychiatric patient population.

The following opinion was delivered by a panel of the Seventh Circuit Court of Appeals composed of Judges Richard Cudahy, Jesse Eschbach and John Coffey, written by Judge Cudahy. This case, in contrast to the preceding, gave a portrayal of how *not* to carry on a chaplaincy role.

> Franklin Baz received a Bachelor's degree in Bible and Theology from Southeastern Bible College of Lakeland, Florida in 1967. He was ordained a minister of the Assemblies of God Church in 1970. For the next six years, he held part-time positions as associate pastor and hospital chaplain while continuing his schooling; in 1976, he was graduated from the Lutheran Theological Seminary in Columbia, South Carolina with a Master's degree in Divinity.
>
> In 1977 Reverend Baz applied to the V.A. for a full-time chaplain

> position. Although he lacked the required three-year post-graduate parish ministry experience, he was appointed a chaplain on September 6, 1977. He was assigned on a probationary basis to the V.A. Medical Center in Danville, Illinois, a full-service medical facility with between 1000 and 1200 patients, including approximately 800 psychiatric patients....
>
> The district court noted that Reverend Baz "from the beginning...had difficulty in the discharge of his duties," recounting incidents in which Reverend Baz accepted honoraria for conducting funerals and borrowed money from a patient to purchase gasoline, both violations of V.A. regulations; failed to follow regulations in requisitioning a film, "The Cross and the Switch-blade," to show to patients; was not punctual in his duties at the hospital; and failed to maintain adequate records of patient contact. The district court concluded, however, that
>
> > [These] matters...while they appeared to have entered into the plaintiff's termination, are not the primary or even the significant reason he was discharged. The crux of the plaintiff's problems lay in his relationship with the patients and with the medical staff and in plaintiff's view of his ministry and his calling to preach the Gospel.[77]

It is refreshing to find a court and a hospital administration willing to grapple with a religious problem when it is the actual gravamen of the dispute rather than passing it off on such (secular) shortcomings as "violation of regulations." Reverend Baz's troubles began six months after his appointment to Danville with the arrival of a new chief of chaplains, Reverend Taylor D. Neely, a Protestant (as was his predecessor).

> The plaintiff had been placed in charge of the Sunday evening "sung service." It was intended, Reverend Neely says, as a recreational period for the patients with music as a main attraction. The plaintiff had changed the format of the event to a Christian evangelical service. He preached and encouraged musical participation in a manner that Reverend Neely interpreted as proselytizing. On one occasion, Reverend Neely recalled a sermon the plaintiff gave containing (sic) an illustration of threatening harm to a child's eye with a pair of scissors. The Reverend Neely found this totally inappropriate for a patient group which was largely psychiatric in nature and tended to concretize illustrations. Reverend Neely also found the methods employed by the plaintiff to be contrary to the Veterans Administration regulations against proselytizing. Consequently, the Sunday evening services were transferred to the recreational department and the plaintiff was excluded from them.
>
> Reverend Neely recounted other problems the plaintiff had in dealing with patients at the Medical Center. There were incidents in which the plaintiff interfered with the decisions of the medical staff. An example

77. *Baz v. Walters*, 782 F.2d 701 (CA7 1986), quoting *Baz v. Walters*, 599 F. Supp. 614, 617 (C.D.Ill. 1984).

was given of a patient of advanced age who was dying and the plaintiff decided that the physicians were not caring properly for the patient. So the plaintiff telephoned the patient's daughter and asked her to intervene and have her father's course of treatment changed. On other occasions the plaintiff entered the operating amphitheater to pray while the physicians were engaged in surgical procedures. That occurred on four occasions, according to the plaintiff's statement, and as near as I am able to tell from the testimony, he did not have the approval of the physicians to enter the operating room on three of these occasions. Another incident was recounted by Reverend Neely involving a patient who had received the sacrament of communion and was experiencing feelings of guilt because he had done so. The plaintiff, Reverend Neely says, contradicted the assurances of forgiveness and comfort which Neely was emphasizing to the patient and instead reinforced the plaintiff's feelings of guilt and dependency.

In short, the plaintiff's view of his function as a Veterans Administration chaplain in a Veterans Administration hospital with psychiatric patients was decidedly different from the demands of his superiors. The plaintiff saw himself as an active, evangelistic, charismatic preacher while the chaplain service and the medical staff saw his purpose as a quiescent, passive listener and cautious counselor. This divergence in approach is illustrated by the plaintiff's listing "twenty-nine decisions for Christ" in his quarterly report of activities of the Veterans Administration. It was one of the matters pointed out to the plaintiff by Reverend Neely as unacceptable conduct on the part of the Veterans Administration chaplain.

Reverend Neely pointed out that he attempted to "counsel" with Reverend Baz about his difficulties and that Reverend Baz took this as a series of reprimands. Reverend Baz contacted Reverend James Rogers, the national director of Chaplain Services, and Reverend Theodore Gannon, the leader of the Assemblies of God Church, to enlist their aid. Both men visited Danville; after his visit, Reverend Rogers suggested that Reverend Baz be transferred to a general medical facility (one without a large psychiatric population like Danville). Reverend Neely tried to do this, but before the transfer came through, Reverend Rogers retired as director of Chaplain Services and was succeeded by Reverend Corbin Cherry. Reverend Cherry decided that Reverend Baz should be discharged. He testified as to his reasons: (1) Reverend Baz should never have been appointed to the chaplaincy because he lacked the requisite post-graduate pastoral experience; (2) the planned transfer was to a facility in which Reverend Baz would be the only full-time chaplain, which Reverend Cherry thought unwise; and (3) chaplains would have to be shuffled between six or seven hospitals to effect this transfer.

Reverend Baz's employment was terminated on September 1, 1978. His written notification listed five reasons for the action: (1) failure to demonstrate appropriate professional skills for a psychiatric facility; (2) difficulties in assuming responsibilities for punctuality in meeting appointments and completing assignments; (3) failure to understand a

> multi-disciplinary approach to patient health care; (4) failure to understand the need to work within established procedures to accomplish objectives; and (5) difficulty in relating to other chaplains, which complicated the effective coordination of their spiritual ministry.
>
> Reverend Baz filed a formal charge with the Equal Employment Opportunity Commission (EEOC) in December, 1978. The EEOC investigated the charge and in February 1980 issued a finding of no discrimination, expressly adopting the reasons for termination set forth by the V.A. On September 4, 1980, Reverend Baz filed this suit in the United States District Court for the Central District of Illinois. After a bench trial, judgment was entered on behalf of the defendants on November 19, 1984, and this appeal ensued.

The court dealt with Baz's contention that his claim under Title VII of the Civil Rights Act should have been upheld since the VA had failed to "accommodate" his religious ministry. He had been hired, he said, so that he might practice his religion in the service of a secular employer, but was fired when his employer did not approve of his way of doing so. The appellate court did not agree.

> [T]his characterization of the facts, while poignant, is not wholly accurate. A V.A. chaplain is hired to conduct a ministry in a V.A. facility and is provided with detailed instructions as to his duties and as to the prohibitions that apply to his actions. He is not simply a preacher but a secular employee hired to perform duties for which he has, by dint of his religious calling and pastoral experience, a special aptitude. Thus, there is no reason to analyze this case differently from the typical Title VII case....
>
> Title VII forbids an employer from firing an employee solely on the basis of his religion...unless the employer can demonstrate that "he is unable to reasonably accommodate to an employee's...religious observation or practice without undue hardship on the conduct of the employer's business."[78]...
>
> The district court was correct in finding that the plaintiff had made out a prima facie case of religious discrimination. We do not doubt that Reverend Baz's actions were "religious" within the meaning of the statute. Further, the district court found that the primary reason for Reverend Baz's discharge lay in his "view of his ministry and his call to preach the Gospel." The burden thus shifted to the defendants to produce evidence tending to rebut the inference of discrimination raised by the plaintiff's prima facie case. The defendants produced evidence showing (1) that their primary motivation in terminating Reverend Baz was to further the primary purpose of the hospital, which is the overall well-being of the patients; (2) that Reverend Baz was unable to conform to the "multi-disciplinary" approach to patient care taken by the V.A. in a medical facility specializing in the care of psychiatric patients; (3) that

78. 42 U.S.C. § 2000e(j).

> they had attempted to offer Reverend Baz guidance in how to so conform; and (4) that accommodation in the form of a transfer of Reverend Baz to a non-psychiatric facility had been considered but rejected as an undue burden on the Chaplain Service and the V.A. The district court found that the defendants had met their burden of producing rebuttal evidence and that Reverend Baz had failed to carry his ultimate burden of persuasion with a showing that the proffered rebuttal was pretext....
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> * * *
>
> The defendants here have met [their] burden. They have produced evidence to show that Reverend Baz's philosophy of the care of psychiatric patients is antithetical to that of the V.A. To accommodate Reverend Baz's religious practices, they would have to either adopt his philosophy of patient care, expend resources on continually checking up on what Reverend Baz was doing or stand by while he practices his (in their view, damaging) ministry in their facility. None of these is an accommodation required by Title VII....

Having resolved the issue of "religious discrimination," the court turned to the constitutional issues of Free Exercise and Establishment.

> Appellant is correct that public employment may not be conditioned upon the denial of constitutional rights, yet it is also true that the appellant has no absolute constitutional right to conduct religious services and offer religious counsel in a government institution....[T]he hospital administration thought, and the district court agreed, that Reverend Baz's religious activities at Danville were detrimental to the best interests of the patients and to the general maintenance of order at the hospital.... Here, the specific environment was a medical facility specializing in the care of psychiatric patients. Support for the conclusion that the V.A. was justified in limiting Reverend Baz's religious expression in this environment can be found in an analogous case involving the First Amendment right to free speech. In Smith v. United States,[79] a staff psychologist was discharged because he insisted upon wearing a peace pin, in violation of V.A. regulations, while treating emotionally disturbed veterans at a V.A. hospital. The Fifth Circuit ruled that even though the wearing of the pin constituted symbolic speech, the psychologist's actions resulted in a material and substantial interference with his therapeutic duties. Such a finding has been made in Reverend Baz's case as well, and it is enough to justify limiting his First Amendment right to religious expression in this context....
>
> Reverend Baz also contends that the V.A. through its rules and regulations governing the conduct of V.A. chaplains has impermissibly established an "institutional theology" at V.A. facilities. He does not assert that the V.A. chaplaincy itself violates the establishment clause (indeed, in his Title VII claim he seeks reinstatement as a V.A. chaplain)

79. 502 F.2d 512 (CA5 1974).

> but rather that the V.A. violated the establishment clause of the First Amendment when it took steps to "limit and restrict the manner in which the plaintiff could pray with patients, preach, and also limited the content of his sermons." He asserts that he was discharged because he would not conform his ministry to the dictates of the V.A.-sanctioned "institutional theology."
>
> It is true that the medical staff at Danville views the role of a chaplain as that of a "quiescent, passive listener and cautious counselor" while Reverend Baz saw himself in the role as an "active, evangelistic, charismatic preacher." But there is no evidence that the V.A. has "institutionalized" a theology at Danville or any other facility. What the V.A. has instituted is an ecumenical approach to its chaplaincy with special attention to the sensitive needs of its patient population.
>
> The V.A. provides a chaplain service so that veterans confined to its medical facilities might have the opportunity to participate in worship services, obtain pastoral counselling and engage in other religious activities if they so desire. If there were not a chaplaincy program, veterans might have to choose between accepting the medical treatment to which their military service has entitled them and going elsewhere in order to freely exercise their chosen religion. This itself might create a free exercise problem.... But, at the same time, the V.A. must ensure that the existence of the chaplaincy does not create establishment clause problems. Unleashing a government-paid chaplain who sees his primary role as proselytizing upon a captive audience of patients could do exactly that. The V.A. has established rules and regulations to ensure that those patients who do not wish to entertain a chaplain's ministry need not be exposed to it. Far from defining its own institutional theology, the medical and religious staffs at Danville are merely attempting to walk a fine constitutional line while safeguarding the health and well-being of the patients.
>
> Since we agree with the district court that Reverend Baz has shown neither that he was the victim of religious discrimination nor that his rights under the First Amendment were violated, the judgment of the district [court] is affirmed.[80]

This rather lengthy excursus into Title VII, Free Exercise and Establishment provided an instructive window through which to glimpse some of the operational problems of a chaplaincy program but seems a bit overelaborate for disposing of the case. Baz was not an employee who insisted on preaching and proselytizing on the side while performing his occupational task (such as typing, filing, sweeping or machining) in an otherwise satisfactory manner—a more typical Title VII "accommodation" case. Instead, he was an employee who was hired to provide religious ministrations appropriate to the needs of the institution and its clientele—not to exercise *his* religion freely as he saw fit irrespective of the needs of the institution and its clientele.

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80. *Baz v. Walters*, *supra*.

Baz may have been correct that his approach might have been more beneficial than the institution's approach to (some of) its patients, but in that case his responsibility was not to change the institution's approach without its consent, but to go out and start his own institution. In other words, he had simply violated the terms and conditions of his employment. He was not performing the job he was hired to do but some other job of his own imagining, and no employer is obliged to put up with that, religion or no.

Institutions and courts are sometimes (though rarely) so mesmerized by religious claims that they give them more extensive—and inapposite—attention than they deserve. This author yields to no one in devotion to religious liberty, but that does not necessarily include every cause that a misguided claimant may assert. It does not include the pretentions of an ordained individual to use the Veterans Administration's chaplaincy provisions to indulge his own disruptive style of religious expression, however meritorious that might be if exercised on his own time and with a self-recruited audience. In these terms the court may not have needed to reach the Title VII and constitutional claims at all except for the fact that the task for which Baz was hired happened to be *religious* ministrations—a complicating factor indeed, and one of the perplexing problems of all chaplaincies—but one that had already been thoroughly canvassed in *Rudd* and *Broadlawns, supra.*

But if it be conceded that the rationale for a governmental chaplaincy is valid—and it has greater claim to validity in this setting than in some others—then the religious *content* of the job description is less subject to individual idiosyncracy. Just as an engineer or physician or psychologist who had certain necessary professional qualifications could be hired to do a necessary task within certain broad parameters and could be fired if he failed to do that task or to operate within the parameters set by the institution, so an ordained clergyperson could and should be held responsible to the terms and conditions of employment even though the subject matter of the task happened to be religious. The institution (particularly a governmental institution) may not be the best judge of what would be the *ideal* praxis in religion (as it might not be in engineering, medicine or psychology), but it *is* the determinative judge of what is to be done in those fields in its own premises, and that seems to be what was really at issue here.

e. *Voswinkel v. Charlotte* (1980). Another type of chaplain found in some localities is attached to the police or fire department. New York City, for instance, has a number of such functionaries. Sometimes these positions are paid, sometimes volunteer, but usually part time. Some pastors who are “police buffs” or “fire buffs” like to work with those departments and look upon their role as a type of “honorary” policeman or fireman. They sometimes get to ride in a squad car or a fire truck or even to put a siren and flashing red or blue light on their own vehicle so they can respond to police or fire calls. They may also perform some pastoral functions with respect to members of the force or with fire or crime victims or even with apprehended suspects.

A case challenging the constitutionality of a full-time police chaplaincy in the city of Charlotte was decided by the federal district court for the Western District of North Carolina in an opinion by Judge James B. McMillan.

> The position in question is the result of an agreement between the City of Charlotte and Providence Baptist Church approved by the Charlotte City Council.... The agreement provides that the Church will furnish the City with the services of a minister to serve as a "full-time" police chaplain. After opposing the agreement unsuccessfully before the City Council, plaintiffs brought suit challenging the arrangement as violative of the First Amendment prohibition against any law "respecting an establishment of religion...." Plaintiffs insist the agreement gives a preferred position to the Providence Baptist Church, and to Baptists and Protestants in general, over other religious groups and results in "excessive entanglement" of the City with religion.[81]

The opinion set forth the full text of the agreement between the church and the city, with certain parts underscored by the court. Eight functions of the chaplain were listed (of which only the first was underscored). The underscoring represented elements the court felt created problems under the Establishment Clause. (Not all of the agreement is reproduced here.)

> Beginning January, 1980, The Church will provide to the City's Police Department the services of a minister who will act as a full-time police chaplain. The minister will be clinically trained in counseling and crisis intervention, and selection will be only on approval by the City's Chief of Police. The minister, acting as a police chaplain, will be a staff assistant to the Chief of Police and will perform the following duties:
>
> 1. Serve as advisor to the Chief in any matter pertaining to the moral, spiritual and mental welfare of police personnel.
> 2. Counsel individual police officers and/or their family members in times of personal crisis, sickness, job-related stress, injury or death.
> 3. Assist officers and family members as necessary in obtaining appropriate outside professional services such as marriage counselors, psychologists, psychiatrist, and financial planning counselors.
> 4. Assist police officers and/or medical or rescue personnel in emergencies, disasters or other crisis situations;
> 5. Visit sick or injured police officers at home or in the hospital;
> 6. Provide non-religious instruction at the Police Academy or at recruit orientation on areas of stress, crisis-handling and services of the chaplain;
> 7. Notification of the family of a police officer or employee of the death or of serious injury to the officer or employee;
> 8. Appearances at civic clubs, churches or other groups as a public relations representative of the Police Department.
>
> The Police Chaplain shall not engage in religious instruction nor conduct any service of religious worship while wearing the uniform of his office or while acting in his capacity as Police Chaplain. The Chaplain

81. *Voswinkel v. City of Charlotte*, 495 F. Supp. 588 (1980).

> may provide religious guidance to any police officer or other person he is counseling when he is specifically requested to do so by the officer or other person being counseled....
>
> The Police Chief shall seek the assistance of the Charlotte Clergy Association in designating a Chaplain's advisory committee to include the former police chaplain, members of the clergy reflective of a cross-section of the membership of the Police Department, and also representation from members of the Police Department as determined by the Police Chief. Such committee will advise the Chief and the Chaplain on the role and activities of the chaplain and on the spiritual and moral welfare needs of police personnel.
>
> The Police Chaplain shall be paid by the Church the sum of $20,000 annually as consideration for his services—including $10,000 from the Church and $10,000 from the City, paid pursuant to this contract. The City will furnish the chaplain equipment, an office and uniform, and make necessary arrangements for transportation.

It will be noted that the chaplain's duties were all directed toward the *employees* of the Police Department rather than toward its *clientele*, whether crime victims or suspects. In this respect the police chaplain, at least as described in this case, is less like the prison or hospital chaplain described above and more like the military chaplain or an "industrial chaplain"—a clergyperson employed by some companies to cultivate the morale of their employees (but not treated in this work because no "state action" is involved and thus no church-state issue is presented).

> A considerable portion of...testimony dealt with the reasons for requiring that a minister fill what the City insists is a secular office. [Police Chief] Goodman said this decision was dictated by several factors. Foremost were considerations of economy and availability:
>
> > Q Now, assuming that you found someone who was qualified in the areas of you said clinical psychologist and counselor, what would then be the advantage of having a chaplain instead of someone from a secular walk who had the same counseling abilities?
> >
> > A Economic considerations, for one thing, to hire a psychologist, they come pretty high. They work on an hourly fee, an hourly basis, and they are not always available at three o'clock in the morning or whatever time you might need them, whereas a fulltime chaplain doesn't cost as much, and he does make himself available 24 hours a day, 7 days a week, as much as possible.

The court applied the three-prong *Lemon* test of establishment, finding that the first prong—a secular purpose—was too clouded for purposes of summary judgment. The second, however—a primary effect that neither advanced nor hindered religion—was more useful.

The agreement here necessarily has several obvious, direct, and constitutionally impermissible effects:

1. It provides for a publicly funded position that must, under the terms of the agreement, be filled by a "minister." To the extent that one's status as a minister depends on some degree of adherence to the creed of, and is subject to control by, the denomination one serves, the agreement necessarily imposes a religious test for eligibility to a publicly funded office.... Religious tests for public employment are unconstitutional per se....

There is no evidence that the parties ever contemplated that Providence Baptist Church would furnish anyone other than a Baptist minister, though the agreement does not expressly limit eligibility to that extent. According to common understanding, the promise of a "minister" at least requires some variety of Protestant clergyman. It could perhaps be extended to cover priests of the Roman Catholic or Greek Orthodox faiths.... It could not be reasonably read to permit a Jewish rabbi or a Muslim imam. It necessarily precludes employment of a qualified counselor who is an atheist or agnostic, or a member of religious sect which, like some divisions of Quakerism, lacks a formal clergy. It also bars those persons, who, while devout, have not qualified as ordained ministers of their particular sect.

This religious test would be unconstitutional in any public job. It is especially objectionable when applied to this particular job. Despite the City's assurances that it acted with a secular purpose and that the position is largely secular in content, it cannot be gainsaid that the job has unavoidable religious connotations. The jobholder is called a "chaplain." He must be a "minister." He is to advise in "spiritual" and "moral" affairs. He is to seek advice on the "spiritual and moral welfare needs of police personnel" from a Chaplain's Advisory Committee whose only outside members are local clergymen. It is true, as defendants argue, that provision for "spiritual" and "moral" needs is not necessarily inconsistent with a purely counseling function. Concern for such matters is not the exclusive province of the religious; it may be that even atheists have spiritual interests. Still, when all is said, moral and spiritual matters are the most vital objects of religious concern. Indeed, there is little if anything that is religious that could not be characterized as one or the other. Given these unavoidable religious associations, the use of a religious test brings this particular state activity even closer to the heart of what the Establishment Clause was intended to prevent.

2. This is the only chaplain position the City has funded and the only such agreement it has entered.... The Church is therefore in the unique position of providing the nominee to a position with unavoidable religious associations. While all the evidence indicates that the Church receives no financial benefit from the funds expended by the City, the Church will garner whatever prestige may result from its position as the supplier of the City's only "full-time police chaplain." It is also necessarily the case that Baptists have the "inside track" in providing religious guidance to those police officers who are disposed to request it.

This superior opportunity afforded Baptists to disseminate their views to member of the police department cannot be considered an insubstantial benefit to a religious sect.

And whatever the impact, the contract necessarily creates an appearance of religious favoritism. This appearance, by itself, offends the Establishment Clause....

The particular benefit that the agreement provides the Church is not one that the City may properly bestow on a particular church for any reason. This is not a case where the government has, through a law of general application, conferred benefits on religious and nonreligious groups alike. It is not a case where the government has dealt with a particular church in some manner devoid of religious significance—as where the state leases a building from a religious body for some secular purpose. Rather the City of Charlotte has contracted with one particular church to provide a service that is inextricably linked with religious concerns.

3. Another necessary consequence of the contract is that the City is financing the provision of expressly religious benefits to some, but not all, of the police department's employees. The agreement states that the chaplain is not to engage in unsolicited religious instruction. The agreement does, however, allow the chaplain to give "religious guidance" to those employees who request it. Obviously, the police officers who will be most inclined to ask the chaplain for religious guidance are those who would consider a Baptist clergyman a useful source of such guidance. Those who are so disposed may thus obtain religious counseling from a quasi-public functionary with an office at police headquarters. Those who are not must go elsewhere. This favoring of the religious needs of some of the department's employees offends the Establishment Clause....

It has long been recognized that the Establishment Clause requires neutrality between competing religions and between religion and nonreligion.... The present arrangement is simply inconsistent with this fundamental rule of neutrality.

The court is aware of cases which hold or suggest that military, prison or legislative chaplaincies are constitutionally acceptable. Those cases are distinguishable from the one here. Given the extraordinary restraint to which both soldiers and prisoners are subjected, the provision of chaplains can be considered as a reasonable governmental measure to fulfill the coequal constitutional obligation not to interfere with the free exercise of religion.... There is no suggestion here that police officers are like soldiers or prisoners in this respect or that they are substantially less able than other public or private employees to pursue their spiritual needs....

The third prong of the [Lemon] test asks whether the challenged government program results in "excessive entanglement" of government with religion....

The police chaplaincy creates or threatens "excessive entanglement" in at least three respects. The first arises from the ambiguity of the position in question. It is not clear to whom the chaplain must answer, in the last

analysis, in the performance of his duties. Is he employed by the City, by the Church, or jointly by both? On the one hand, his occupational title is "police chaplain." The City furnishes him an office, a uniform, a car and half of his salary. He is a "staff assistant to the Chief of Police." His selection is contingent upon approval by the Chief of Police. On the other hand, his employer "for purposes only of salary, payment and benefits is the Providence Baptist Church." He receives his paycheck from the Church and the Church is the ultimate source of the other half of his salary. The Church nominates him for the Chief's consideration. The Church does not provide the minister; rather it provides "the services of a minister who will act as a full-time police chaplain." (Emphasis added.) Any view one might take of this relationship would, on reflection, offend the principle of separation of Church and State. The chaplain is either a church employee who must answer in his employment to the police chief; or he is a police employee in some way responsible to both in the performance of what purports to be a public function.

The second source of entanglement arises from the City's presumably sincere attempt to secularize the police chaplaincy sufficiently to satisfy the First Amendment. On the one hand, the chaplain is free to give "religious guidance" when requested and is obligated under the contract to advise the Police Chief "in any matter pertaining to the moral, spiritual and mental welfare of police personnel." On the other hand, he is not to "engage in religious instruction nor conduct any services of religious worship." Without the latter prohibition, the contract could reasonably be seen as a direct establishment of the Baptist creed within the Charlotte Police Department. With the prohibition, however, the contract creates precisely the potential for entanglement in religious matters that the Supreme Court has repeatedly indicated is forbidden by the Establishment Clause. Either the contractual prohibition is intended seriously or it is not. If not, then the contract, again, could be seen as tantamount to an establishment of religion in the Charlotte Police Department. If it is seriously intended, who will see that it is enforced? If it is to be left to the good intentions of the church and the minister, then the arrangement lacks the safeguards needed to insure that public funds are not in fact being used to further religion. Mere words of good intent in the document do not provide that assurance. On the other hand, if the Police Chief is to see to it that the prohibition on religious activity is honored, then he must make the Solomonic distinctions between the religious instruction that the contract forbids and the moral and spiritual advice that the chaplain was hired to provide. If questions arise about the content of the confidential counseling sessions, the Police Chief must determine what constitutes a specific "request" for religious guidance. If he finds no specific request, he must decide if the resulting advice was religiously moral rather than secularly moral in content. To describe the enterprise is to recognize its impossibility. To attempt it is to engage in precisely the sort of official judgments about religious matters that the Establishment Clause, in part, was intended to avoid.

* * *

> "A broader base of entanglement, of yet a different character," arises from the divisive political potential of the police chaplaincy.... Having entered into this novel relationship with a particular church, the City could hardly ignore proposals from any other local church for a similar arrangement. In that event, what criteria for decision would the City use? Will it contract for a multiplicity of full-time chaplains? Or will it decide that one church or the other is better qualified to provide the City with "the services of a minister who will act as a full-time police chaplain"? If so, on what basis will it make that decision? It is not necessary for plaintiff to show that there are other churches presently interested in furnishing a chaplain. It is enough, for Establishment Clause purposes, that such competition among churches for special relationship with government is invited by the contract in question....
>
> Here it is a combination of elements that renders the whole arrangement unconstitutional under the First Amendment.... There is no way in this case to sever the constitutional from the unconstitutional elements of the agreement. It therefore must fail in toto.[82]

The arrangement described in this case was unusual in that a church was a contracting party and put up *half* of a substantial stipend, thus subsidizing the provision of what was ostensibly a *public* service. A "contribution" of $10,000 a year to the city for the employment of a Baptist minister nominated by the church does tend to cast a shade of doubt upon its utterly disinterested altruism. In other cities where there may be police chaplains, if they are paid at all by the city it is usually for part-time service, and they apply as independent contractors without a church as intermediary or co-contractor, which would avoid some of the church-state problems of the Charlotte situation, but by no means all. The hiring by any city of ordained clergy to serve as police "chaplains" is essentially a nonneutral arrangement that could seek to be justified on some such free-exercise rationale as military or prison chaplains. But as Judge McMillan observed, it is hard to think of police officers as being in the same situation as soldiers or prisoners who are unable to "pursue their spiritual needs" in the civilian community. Why do they need a governmentally supported chaplain any more than any other "public or private employees"? If the chaplain were employed to counsel or console victims of crime or suspects being held for interrogation, there might be a Free Exercise justification, though only a tenuous one, but that is rarely envisioned as a police chaplain's task. And a clergyperson employed to counsel employees of the police department "at the office," as it were, might raise some questions in the minds of the pastors, priests and rabbis in the community who may think themselves the appropriate providers of spiritual counsel to the police officers in their congregations. That is a characteristic vice of a governmental proprietary in religion in the normal community.

f. *Brashich v. Port Authority* (1979). Another case involved an *airport*. It seems that the Port Authority of New York and New Jersey provided land at Kennedy Airport (JFK) in New York City for the erection of three religious chapels—

82. Ibid.

Catholic, Protestant and Jewish—and this so aggrieved one Deyan Ranko Brashich that he brought suit for violation of the Establishment Clause, perhaps because there was no Serbian Eastern Orthodox chapel (he originally claimed a Free Exercise violation as well, but subsequently withdrew it and all references to his own Serbian adherence). The case came on to be heard by Judge Lawrence W. Pierce of the Southern District of New York, who rendered judgment on December 20, 1979. The opinion was instructive about the formulation of this unique chaplaincy arrangement as well as about its ostensible legal rationale.

> The three chapels in controversy are located on a plaza in the middle of the Central Terminal Area on the north side of a lagoon; it is separated from the terminals and passenger services by a principal roadway. By reason of this separation, the chapels do not interfere with the operation and functioning of the Airport.
>
> Prior to 1952, under the auspices of an organization known as the Catholic Guild of New York International Airport, religious services were conducted on Sundays in the terminal building at the Airport. In 1952, a group of Airport employees sought to lease land accessible to this terminal building for the purpose of erecting a chapel to provide Catholic religious services to Airport employees and the travelling public. On November 6, 1952, the Port Authority authorized the issuance of a permit to the Roman Catholic Church of Christ the King (hereinafter "Catholic") for the construction of a chapel. At the same time, the Port Authority announced that it would enter into similar arrangements with any other religious groups that might be interested in constructing a chapel at the Airport.... As in all its leases, the permit did not reserve title in the permittee to any improvements made on the land. This was in accord with the Port Authority's lease with the City of New York which provides that title to any and all buildings, structures, and additions to the JFK Airport land is to vest in the City of New York immediately upon annexation to the land....
>
> On June 6, 1957, and March 5, 1959, respectively, the Port Authority granted the applications of defendants International Synagogue and Jewish Center, Inc. (hereinafter "Jewish") and the Council of Churches of the City of New York, Inc. (hereinafter "Protestant") to lease land at JFK.... These new leases were to each cover approximately one acre per annum.... The lessees were required to pay their own construction and utility service costs, although the Port Authority paid the costs of providing paving and utilities to the new site, and reimbursed the groups for costs incurred for the central heating plant connections....
>
> Plaintiff brings this suit to challenge the constitutionality of the Port Authority's actions with respect to the chapel leases, and the presence of the religious chapels at the Airport.
>
> I. Plaintiff's Standing to Sue...
>
> Plaintiff asserts standing to sue as an eight year New York State resident and a citizen of the United States who "has on numerous occasions visited and departed from John F. Kennedy Airport." He

> claims to be adversely affected by the Port Authority's actions in leasing the land to the religious defendants and permitting them to build religious edifices on the land....
>
> Plaintiff here has alleged no injury peculiar to himself. He has not alleged nor shown any direct economic or non-economic injury.... The plaintiff herein has fallen short of alleging "the type of concrete and direct injury requisite to invocation of federal judicial power…."[83] Thus, the plaintiff here is found to lack standing to sue.

That would seem to have settled the matter, but the court dealt with the merits anyway.

> II. Plaintiff's Claim that the Port Authority has Established Religion
>
> Even if plaintiff had demonstrated standing to sue, he has not shown that the Port Authority has "established religion...."
>
> In the instant case, the Port Authority has not established religion, but has only made accommodations for religious practices. As earlier stated, JFK Airport is a massive facility covering over 4,500 acres, with an enormous number of people using the facility. The Port Authority has made many provisions to accommodate the Airport's large population of travellers, visitors and employees.... Providing land for the erection of religious chapels is merely a further accommodation by the Port Authority to serve the convenience of those who use the Airport. Contrary to plaintiff's contention, the Port Authority does not sponsor, subsidize or interfere with the religious groups which operate the chapels at the Airport. Nor does it advise them on the conduct of their institutions.... On the facts presented herein, the Port Authority has made accommodations for religion, it has not established religion.[84]

Two interesting sidelights can be noted in this case. (1) The chapels were erected by the three religious groups at their own expense, but they became the property of the City of New York (like all other structures at JFK)! Additionally, the religious groups paid $1,300 rent per year for land that otherwise "probably would have remained vacant, in light of...the lack of easy access to the area" (note 15). This would seem to be a subsidy by religious groups of the municipality and the Port Authority. Furthermore, (2) no mention was made of any Free Exercise justification for the siting of the chapels in the middle of JFK, nor of the extent of user-traffic that was being "accommodated." As a matter of fact, the chapels were not accessible from the passenger terminals where all the travellers and employees were, as indicated in the quotation from footnote 15 above, which continued, "The Port Authority presented evidence at trial that it considers it too dangerous to have an exit off its high speed roadway into the area where the chapels are presently located." This information suggests that the chapels were not very accommodating in their actual

83. Citing *American Jewish Congress v. Vance*, 575 F.2d 939 (D.C. Cir. 1978).

84. *Brashich v. Port Authority*, 484 F.Supp. 697 (1979).

location and leads to the further inquiry: what religious needs or usages were being accommodated at the three marooned chapels sitting high and dry in the center of the hectic and convoluted traffic patterns swirling between them and the distant passenger terminals? (The principle of governmental "accommodation" of religion requires that government remove a burden upon religion imposed by government; what was the governmentally imposed burden being relieved in this instance?)

Independent investigation produced the information that weekly services were held at all three chapels and that they were the setting for several weddings per week, though it was not known what proportion of participants in either type of usage was attributable to airport employees or travellers. A more clearly air-travel-linked usage was that by delegations of ecclesiastical dignitaries of one or another of the sponsoring bodies, who often used the chapels for ceremonial occasions prior to departure for, or on return from, missions abroad. Beginning in 1989 the chapels were demolished to make way for a huge central hub facility in which the three faith groups would be allocated comparable chapel space—plus a fourth chapel for other faiths—that would be much more readily accessible to the stream of air travellers passing through the new central hub on their way to the outlying passenger terminals.[85]

The Port Authority was operating "under color of state law" in providing space for the chapels. Although they were built by private subscription, and no *tax* funds were used on them in any event, they still could be viewed as a governmental *sponsorship* of permanent religious structures—an arrangement that would normally implicate "Establishment" considerations in the absence of countervailing free-exercise concerns. At trial the Free Exercise justifications for the chapels were not extensively explored, let alone vindicated. Given the court's conclusion that the plaintiff did not have standing to complain, it was not incumbent upon the court to reach the merits of the complaint. Having undertaken to consider the merits anyway, the court disposed of the establishment challenge in a somewhat conclusory manner, asserting that the Port Authority does not "sponsor..." religion by providing space for the chapels. The chapels seem to have been analogized by the court to other "services" provided by Port Authority tenants— barber shops, banks, gift shops, medical and dental services, etc. Perhaps the element of sponsorship might have thus been sufficiently attenuated along "(limited) public forum" lines after the fashion of *Widmar v. Vincent* (religious extracurricular student clubs on a state university campus may not be assumed to be sponsored by the university because of the variety of [secular] student clubs existing there[86]—decided in 1981, two years after *Brashich*).

The question of imputed "sponsorship," however, would seem to be in part an empirical (fact) determination. Did the passing populace *realize* that the Port Authority, a governmental entity, was *not* sponsoring the three chapels and the religious ministrations ostensibly dispensed there? Did they have any reason to

85. Interview with Rev. N. J. L'Heureux, Director of the Queens Federation of Churches, Nov. 10, 1988.

86. *Widmar v. Vincent*, 450 U.S. 909 (1981), discussed at IIIE3b.

suppose that the chapels were not part of the Port Authority's function and purpose in operating the Airport? Were they not more likely to analogize them to the control tower, the maintenance and security facilities as essential adjuncts of air transport or to the barber shops, gift shops, banks and other optional conveniences located (at that time) with the several passenger terminals? The three chapels sitting in a prominently visible (though rather inaccessible) location conveyed a significant symbolic message of Port Authority solicitude for the ministries of religion—whether anyone ever actually utilized them or not.[87] That "significant symbolic message" of solicitude for religion would seem to be tantamount to sponsorship and certainly not quite what is meant by governmental "neutrality" toward religion, at least in the absence of a countervailing Free Exercise obligation.

There apparently was a certain concerted demand by some—though by no means all[88]—Catholic employees for religious services on airport premises at the time of the erection of the Catholic chapel. Whether it extended beyond a level of minor convenience to the free-exercise necessity created by state action removing people from access to their normal religious environments is open to question; there were many Catholic churches within a few miles of the airport at the time, and many employees passed one or more of them (or could have done so) on their way to and from work. But even this moderate level of demand by (some) Catholics for a more convenient religious facility at which to discharge their daily or weekly religious obligations was not matched by most Protestant and Jewish employees, who do not have the same sort of Mass-attendance obligations that (some) Catholics do. For them, religion is more a matter of being and believing than of participating in a sacramental rite on a daily (or even weekly) basis. So the Jewish and Protestant campaigns to build comparable chapels at Idlewild (as this author recalls from his participation in the workings of the Protestant Council of New York City in those years) were largely a matter of "keeping up with the Catholics" for status reasons, not primarily to minister to the religious needs of their constituents at the airport. Thus for those faith groups the Free Exercise rationale was highly attenuated, if not nonexistent. They were more interested in the *symbolic* significance of the chapels, which strengthens the Establishment rather than the Free Exercise side of the balance.

Neither side of the balance is very heavily weighted in this case, and a simple disclaimer notice posted at the chapels by the Port Authority—"In leasing these premises to private religious groups to serve the needs of the travelling public the Port Authority does not (necessarily?) endorse or sponsor their religious activities"—might well dispel whatever intimations of establishment might arise in the eyes of some beholders. It may be one of those *de minimis* situations—like the references to God on coins and in the pledge of allegiance to the flag—that are best handled by not handling them, as in denying that plaintiffs have standing to sue.

Incidentally, this case seems to have involved three *chapels* but no *chaplains*.

87. See discussion of symbolic messages of sponsorship in *Lynch v. Donnelly*, 465 U.S. 668 (1984), and related cases discussed below, E2d ff.

88. Author's wife, who worked for Italian Airlines at Idlewild (as it was then called) at the time, reported that many of her Catholic fellow employees resisted the effort to secure chapel facilities at the airport because "then we'd have to go to Mass all the time"!

There have been chaplains serving the chapels (on a part-time basis) who were provided by the respective religious groups. But since they were paid—if at all—by the groups themselves, they did not become an issue in this litigation.

Several different types of chaplaincies have been reviewed in the preceding pages, but there is another type that is significantly different in character and constitutional justification: a government proprietary in religion operated by and for the legislative branch.

4. The Legislative Chaplaincy

The rationale more or less applicable to the chaplaincies discussed above is scarcely applicable at all to the equally venerable and ubiquitous provision of chaplains to the legislature. It could hardly be maintained with a straight face that legislators are removed from their normal civilian environment by force of law, or that they do not have access to the civilian community, or that they cannot afford to avail themselves of the religious ministrations available there. So some other rationale would seem to be needed if such chaplaincies were not to succumb to the strictures of the establishment clause, since they are clearly state "proprietaries" in religion.

a. *Marsh v. Chambers* (1983). The U.S. Supreme Court wrestled with this problem in 1983 in the landmark case of *Marsh v. Chambers*. It was a "landmark" because the Court had never ruled on the issue before (and probably will not again), and because the Court crafted a unique rationale for it that marked a striking departure from its prior Establishment Clause cases.

This case began its course through the courts when Ernest Chambers, a member of the Nebraska Legislature, challenged that body's practice of employing a paid chaplain to offer prayers in its sessions. He brought suit in federal district court against State Treasurer Frank Marsh, the Executive Board of the Legislative Council, and Chaplain Robert Palmer, a Presbyterian minister who had served as chaplain since 1965 at a salary of $319.75 per month for every month the legislature was in session. The district court rejected a motion to dismiss on grounds of legislative immunity. It held that the Establishment Clause was not violated by the prayers but was violated by paying the chaplain from public funds to deliver them.

The Eighth Circuit Court of Appeals applied the three-part test of establishment fashioned by the Supreme Court in *Lemon v. Kurtzman* (1971)[89] and found the chaplaincy arrangement as a whole unconstitutional:

> [T]he purpose and primary effect of selecting the same minister for 16 years and publishing his prayers was to promote a particular religious expression; use of state money for compensation and publication led to entanglement.[90]

The Supreme Court granted *certiorari* and ruled in an opinion written by Chief Justice Burger, author of the *Lemon* test of establishment.

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89. 403 U.S. 602, discussed at IIID5.

90. *Marsh v. Chambers*, 675 F.2d 228 (CA8, 1982), cited in 463 U.S. 783 (1983).

> The opening sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom.

After noting that the district court, the appellate court and the Supreme Court itself all opened their sessions with the ritual invocation, "God save the United States and this Honorable Court," the court observed, "Although prayers were not offered during the Constitutional Convention, the First Congress, as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer."[91] Then came the linkage that the Court considered dispositive.

> On Sept. 25, 1789, three days after Congress authorized the appointment of paid chaplains, final agreement was reached on the language of the Bill of Rights. Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress. It has also been followed consistently in most of the states, including Nebraska, where the institution of opening legislative sessions with prayer was adopted even before the State attained statehood.
>
> 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.
>
> * * *
>
> It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a Chaplain for each House and also voted to approve the draft of the First Amendment for submission to the States, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable. In applying the First Amendment to the states through the Fourteenth Amendment, it would be incongruous to interpret that clause as imposing more stringent First Amendment limits on the States than the draftsmen imposed on the Federal government.
>
> This unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged.
>
> * * *
>
> In the light of the unambiguous and unbroken history of more than

91. Ibid. (See discussion of lack of formal prayers at the Constitutional Convention, at § c below.)

> 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgement of beliefs widely held among the people of this country.

The court dealt almost parenthetically with three features of the Nebraska arrangement: that one particular clergyman had been the sole chaplain for sixteen years, that he was paid from tax funds, and that the prayers were exclusively from the Judeo-Christian tradition. It found that none of these factors invalidated the practice.

> The Court of Appeals was concerned that Palmer's long tenure has the effect of giving preference to his religious views. We, no more than Members of the Congresses of this century, can perceive any suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church. To the contrary, the evidence indicates that Palmer was reappointed because his performance and personal qualities were acceptable to the body appointing him. Palmer was not the only clergyman heard by the Legislature; guest chaplains have officiated at the request of various legislators and as substitutes during Palmer's absences. Absent proof that the chaplain's reappointment stemmed from an impermissible motive, we conclude that his long tenure does not in itself conflict with the Establishment Clause.
>
> Nor is the compensation of the chaplain from public funds a reason to invalidate the Nebraska Legislature's chaplaincy; remuneration is grounded in historic practice initiated, as we noted earlier, by the same Congress that adopted the Establishment Clause.... The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.[92]

The chief justice was joined in this opinion by Justices White, Blackmun, Powell, Rehnquist and O'Connor.

b. Justice Brennan's Dissent. A long and thoughtful dissent was written by Justice Brennan, joined by Justice Marshall.

> The Court today has written a narrow and, on the whole, careful opinion. In effect, the Court holds that officially sponsored legislative prayer, primarily on account of its "unique history," is generally exempted from the First Amendment's prohibition against "the establishment of religion." The Court's opinion is consistent with dictum

92. *Marsh v. Chambers, supra*. Note 14 observed that "Although some of his earlier prayers were often explicitly Christian, Palmer removed all references to Christ after a 1980 complaint from a Jewish legislator."

in at least one of our prior decisions,[93] and its limited rationale should pose little threat to the overall fate of the Establishment Clause. Moreover, disagreement with the Court requires that I confront the fact that some twenty years ago, in a concurring opinion in one of the cases striking down official prayer and ceremonial Bible reading in the public schools, I came very close to endorsing essentially the result reached by the Court today.[94] Nevertheless, after much reflection, I have come to the conclusion that I was wrong then and that the Court is wrong today. I now believe that the practice of official invocational prayer, as it exists in Nebraska and most other State Legislatures, is unconstitutional. It is contrary to the doctrine as well [as] the underlying purposes of the Establishment Clause, and it is not saved either by its history or by any of the other considerations suggested in the Court's opinion....

I

The Court makes no pretense of subjecting Nebraska's practice of legislative prayer to any of the formal "tests" that have traditionally structured our inquiry under the Establishment Clause. That it fails to do so is, in a sense, a good thing, for it simply confirms that the Court is carving out an exception to the Establishment Clause rather than reshaping Establishment Clause doctrine to accommodate legislative prayer. For my purposes, however, I must begin by demonstrating what should be obvious: that, if the Court were to judge legislative prayer through the unsentimental eye of our settled doctrine, it would have to strike it down as a clear violation of the Establishment Clause.

* * *

That the "purpose" of legislative prayer is preeminently religious rather than secular seems to me to be self-evident. "To invoke Divine guidance on a public body entrusted with making the laws" is nothing but a religious act.... [T]o claim a secular purpose for the prayer is an insult to the perfectly honorable individuals who instituted and continue the practice.

The "primary effect" of legislative prayer is also clearly religious.... More importantly, invocations in Nebraska's legislative halls explicitly link religious belief and observance to the power and prestige of the State. "[T]he mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred."[95]

Finally, there can be no doubt that the practice of legislative prayer leads to excessive "entanglement" between the State and religion. Lemon pointed out that "entanglement" can take two forms: First, a state statute or program might involve the state impermissibly in monitoring and

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93. "We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952), the Court's first "accommodationist" decision, discussed at IIIC1b.

94. "The saying of invocational prayers in legislative chambers, state or federal, and the appointment of legislative chaplains, might well represent no involvement of the kind prohibited by the Establishment Clause." *Abington v. Schempp*, 374 U.S. 203, 213 (1963), discussed at IIIC2b(3).

95. Quotation from *Larkin v. Grendel's Den*, 459 U.S. 116 (1982), discussed at § A4 above.

overseeing religious affairs. In the case of legislative prayer, the process of choosing a "suitable" chaplain, whether on a permanent or rotating basis, and insuring that the chaplain limits himself or herself to "suitable" prayers, involves precisely the sort of supervision that agencies of government should if at all possible avoid.

Second, excessive "entanglement" might arise out of "the divisive political potential" of a state statute or program.... In this case, this second aspect of entanglement is also clear. The controversy between Senator Chambers and his colleagues, which had reached the stage of difficulty and rancor long before this lawsuit was brought, has split the Nebraska Legislature precisely on issues of religion and religious conformity....

In sum, I have no doubt that, if any group of law students were asked to apply the principles of Lemon to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional.

II

The path of formal doctrine, however, can only imperfectly capture the nature and importance of the issues at stake in this case. A more adequate analysis must therefore take into account the underlying function of the Establishment Clause, and the forces that have shaped its doctrine.

A

Most of the provisions of the Bill of Rights, even if they are not generally enforceable in the absence of state action, nevertheless arise out of moral intuitions applicable to individuals as well as governments. The Establishment Clause, however, is quite different. It is, to its core, nothing less and nothing more than a statement about the proper role of government in the society that we have shaped for ourselves in this land.

The Establishment Clause embodies a judgment, born of a long and turbulent history, that, in our society, religion "must be a private matter for the individual, the family, and the institutions of private choice...." Lemon v. Kurtzman.

* * *

The principles of "separation" and "neutrality" implicit in the Establishment Clause serve many purposes. Four of these are particularly relevant here.

The first, which is most closely related to the more general conceptions of liberty found in the remainder of the First Amendment, is to guarantee the individual right to conscience. The right to conscience, in the religious sphere, is not only implicated when the government engages in direct or indirect coercion. It is also implicated when the government requires individuals to support the practices of a faith with which they do not agree.

* * *

The second purpose of separation and neutrality is to keep the state from interfering in the essential autonomy of religious life, either by taking upon itself the decision of religious issues, or by unduly involving itself in the supervision of religious institutions or officials.

> The third purpose of separation and neutrality is to prevent the trivialization and degradation of religion by too close an attachment to the organs of government. The Establishment Clause "stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy to permit its `unhallowed perversion' by a civil magistrate."[96]
>
> Finally, the principles of separation and neutrality help assure that essentially religious issues, precisely because of their importance and sensitivity, not become the occasion for battle in the political arena.... With regard to most issues, the Government may be influenced by partisan argument and may act as a partisan itself. In each case, there will be winners and losers in the political battle, and the losers' most common recourse is the right to dissent and the right to fight the battle again another day. With regard to matters that are essentially religious, however, the Establishment Clause seeks that there should be no political battles, and that no American should at any point feel alienated from his government because that government has declared or acted upon some "official" or "authorized" point of view on a matter of religion.
>
> B
>
> The imperatives of separation and neutrality are not limited to the relationship of government to religious institutions or denominations, but extend as well to the relationship of government to religious beliefs and practices.... [I]n the pair of cases that hang over this one like a reproachful set of parents, we held that official prayer and prescribed Bible reading in the public schools represent a serious encroachment on the Establishment Clause....
>
> Nor should it be thought that this view of the Establishment Clause is a recent concoction of an overreaching judiciary. Even before the First Amendment was written, the Framers of the Constitution broke with the practice of the Articles of Confederation and many state constitutions, and did not invoke the name of God in the document. This "omission of a reference to the Deity was not inadvertent; nor did it remain

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96. *Engel v. Vitale*, quoting *Memorial and Remonstrance against Religious Assessments* by James Madison. The author of this treatise cannot forbear to quote here the first part of footnote 16 of Justice Brennan's opinion, keyed to this point in the argument:

> 16. Consider, in addition to the formal authorities cited in text, the following words by a leading Methodist clergyman: "[Some propose] to reassert religious values by posting the Ten Commandments on every school-house wall, by erecting cardboard nativity shrines on every corner, by writing God's name on our money, and by using His Holy Name in political oratory. Is this not the ultimate in profanity?... What is the result of all this display of holy things in public places? Does it make the market-place more holy? Does it improve people? Does it change their character or motives? On the contrary, the sacred symbols are thereby cheapened and degraded. The effect is often that of a television commercial on a captive audience—boredom and resentment." Dean M. Kelley, Beyond Separation of Church and State, 5 *J. Church & State* 181, 190-191 (1963).

unnoticed...."[97] And James Madison, writing subsequent to his own Presidency on essentially the very issue we face today, stated:

> "Is the appointment of Chaplains to the two House of Congress consistent with the Constitution and with the pure principles of religious freedom?
>
> In strictness, the answer on both points must be in the negative. The Constitution of the U.S. forbids everything like an establishment of a national religion. The law appointing Chaplains establishes a religious worship for the national representatives, to be performed by Ministers of religion, elected by a majority of them; and these are to be paid out of the national taxes. Does not this involve the principle of a national establishment, applicable to a provision for a religious worship for the Constituent as well as of the representative Body, approved by the majority, and conducted by Ministers of religion paid by the entire nation." Fleet, Madison's "Detached Memoranda," 3 Wm. & Mary Quarterly 534, 558 (1946).

C

Legislative prayer clearly violates the principles of neutrality and separation that are embedded within the Establishment Clause.... It intrudes on the right to conscience by forcing some legislators either to participate in a "prayer opportunity" with which they are in basic disagreement, or to make their disagreement a matter of public comment by declining to participate. It forces all residents of the State to support a religious exercise that may be contrary to their own beliefs. It requires the State to commit itself on fundamental theological issues. It has the potential for degrading religion by allowing a religious call to worship to be intermeshed with a secular call to order. And it injects religion into the political sphere by creating the potential that each and every selection of a chaplain, or consideration of a particular prayer, or even reconsideration of the practice itself, will provoke a political battle along religious lines and ultimately alienate some religiously identified group of citizens.

* * *

We have...recognized that Government cannot, without adopting a decidedly anti-religious point of view, be forbidden to recognize the religious beliefs and practices of the American people as an aspect of our history and culture. Certainly, bona fide classes in comparative religion can be offered in the public schools. And certainly, the text of Abraham Lincoln's Second Inaugural Address which is inscribed on a wall of the Lincoln Memorial need not be purged of its profound theological content. The practice of offering invocations at legislative sessions cannot, however, simply be dismissed as "a tolerable acknowledgement of beliefs widely held among the people of this country." "Prayer is

97. Quoting Leo Pfeffer, "The Deity in American Constitutional History," 23 *Journal of Church and State*, 215 (1981).

religion in act." "Praying means to take hold of a word, the end, so to speak, of a line that leads to God."[98] Reverend Palmer and other members of the clergy who offer invocations at legislative sessions are not museum pieces, put on display once a day for the edification of the legislature. Rather, they are engaged by the legislature to lead it—as a body—in an act of religious worship. If upholding the practice requires denial of this fact, I suspect that many supporters of legislative prayer would feel that they have been handed a pyrrhic victory.

* * *

This is not...a case in which the State is accommodating individual religious interests. We are not faced here with the right of the legislature to allow its members to offer prayers during the course of general legislative debate. We are certainly not faced with the right of legislators to form voluntary groups for prayer or worship. We are not even faced with the right of the state to employ members of the clergy to minister to the private religious needs of individual legislators. Rather, we are faced here with the regularized practice of conducting official prayers, on behalf of the entire legislature, as part of the order of business constituting the formal opening of every single session of the legislative term. If this is Free Exercise, the Establishment Clause has no meaning whatsoever.

III

[T]he Court says almost nothing contrary to the above analysis. Instead, it holds that "the practice of opening legislative sessions with prayer has become part of the fabric of our society" and chooses not to interfere. I sympathize with the Court's reluctance to strike down a practice so prevalent and so ingrained as legislative prayer. I am, however, unconvinced by the Court's arguments, and cannot shake my conviction that legislative prayer violates both the letter and the spirit of the Establishment Clause.

A

The Court's main argument for carving out an exception sustaining legislative prayer is historical.... This is a case, however, in which—absent the Court's invocation of history—there would be no question that the practice at issue was unconstitutional. And despite the surface appeal of the Court's argument, there are at least three reasons why specific historical practice should not in this case override that clear constitutional imperative.

First,... the Court assumes that the Framers of the Establishment Clause would not have themselves authorized a practice that they thought violated the guarantees contained in the clause. This assumption, however, is questionable. Legislators, influenced by the passions and exigencies of the moment, the pressures of constituents and colleagues, and the press of business, do not always pass sober

98. The first quotation is from the majority opinion. The second is from Sabatier, A., *Outlines of a Philosophy of Religion* (New York: Harper, 1957). The third is from Heschel, A., *Man's Quest for God* (New York: MacMillan Publishing Co., 1974).

> constitutional judgment on every piece of legislation they enact, and this must be assumed to be as true of the members of the First Congress as any other. Indeed, the fact that James Madison, who voted for the bill authorizing the payment of the first congressional chaplains later expressed the view that the practice was unconstitutional is instructive on precisely this point. Madison's later views may not have represented so much a change of mind as a change of role, from a member of Congress engaged in the hurley-burley of legislative activity to a detached observer engaged in unpressured reflection. Since the latter role is precisely the one with which this court is charged, I am not at all sure that Madison's later writings should be any less influential in our deliberations than his earlier vote.
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> Second, the Court's analysis treats the First Amendment simply as an Act of Congress, as to whose meaning the intent of Congress is the single touchstone. Both the Constitution and its amendments, however, became supreme law only by virtue of their ratification by the States, and the understanding of the States should be as relevant to our analysis as the understanding of Congress. This observation is especially compelling in considering the meaning of the Bill of Rights. The first 10 Amendments were not enacted because the members of the First Congress came up with a bright idea one morning; rather, their enactment was forced upon Congress by a number of the States as a condition for their ratification of the original Constitution. To treat any practice authorized by the First Congress as presumptively consistent with the Bill of Rights is therefore somewhat akin to treating any action of a party to a contract as presumptively consistent with the terms of the contract. The latter proposition, if it were accepted, would of course resolve many of the heretofore perplexing issues in contract law.[99]

This penetrating insight struck at the heart of the majority's basic assumption, that if the First Congress did it, it must be all right. In the margin Justice Brennan noted "certain other skeletons in the congressional closet," viz., that the same First Congress that had approved the Eighth Amendment for ratification by the states ("...nor cruel and unusual punishment be inflicted...") adopted in 1790 An Act for the Punishment of certain Crimes against the United States providing for public flogging "not exceeding thirty-nine stripes," and on July 23, 1866, Congress reaffirmed racial segregation of the public schools in the District of Columbia "exactly one week after Congress proposed the Fourteenth Amendment to the States."[100] Though it is not clear that flogging was "cruel and unusual punishment" in 1790 or that public school segregation was contrary to the intent of the Fourteenth Amendment until *Brown v. Board of Education* in 1954, the point is well taken that Congress does not always discern the constitutional implications of its acts, even those adopted in temporal proximity to constitutional amendments.

A further point is not so well taken: to the degree that the ratifying States entered

99. *Marsh v. Chambers*, *supra*, Brennan dissent.

100. Ibid., n. 30.

into a sort of contract with Congress as coproprietors of the Bill of Rights, it is difficult to substantiate that they would have entertained a different view of the propriety of paying legislative chaplains than did the First Congress, since all or most of them did the same, if and as they could afford it.

But just as the public consensus eventually came to consider flogging to be "cruel and unusual punishment" and racial segregation in public schools to be unconstitutional (with a little help from the Court), so the views of the people and the courts have changed and will change on other constitutional questions, which leads to Justice Brennan's third reason.

> Finally, and most importantly, the argument tendered by the Court is misguided because the Constitution is not a static document whose meaning on every detail is fixed for all time by the life experience of the Framers. We have recognized in a wide variety of constitutional contexts that the practices that were in place at the time any particular guarantee was enacted into the Constitution do not necessarily fix forever the meaning of that guarantee.... Our primary task must be to translate "the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century...."[101]
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> * * *
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> Similarly, the members of the First Congress should be treated, not as sacred figures whose every action must be emulated, but as the authors of a document meant to last for the ages. Indeed, a proper respect for the Framers themselves forbids us to give so static and lifeless a meaning to their work. To my mind, the Court's focus here on a narrow piece of history is, in a fundamental sense, a betrayal of the lessons of history.
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> B
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> Of course, the Court does not rely entirely on the practice of the First Congress in order to validate legislative prayer. There is another theme which, although implicit, also pervades the Court's opinion. It is exemplified by the Court's comparison of legislative prayer with the formulaic recitation of "God save the United States and this Honorable Court." It is also exemplified by the Court's apparent conclusion that legislative prayer is, at worst, a "mere shadow" on the Establishment Clause rather than a "real threat" to it. Simply put, the Court seems to regard legislative prayer as at most a de minimis violation, somehow unworthy of our attention. I frankly do not know what should be the proper disposition of features of our public life such as "God save the United States and this Honorable Court," "In God We Trust," "One Nation Under God," and the like. I might well adhere to the view expressed in Schempp that such mottos are consistent with the Establishment Clause, not because their import is de minimis but because they have lost any true religious significance. Legislative invocations, however, are very different.

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101 . Quoting *West Virginia v. Barnette*, 319 U.S. 624, 639 (1943), discussed at IVA6b.

> First of all, as Justice Stevens' dissent so effectively highlights, legislative prayer, unlike mottos with fixed wordings, can easily turn narrowly and obviously sectarian. I agree with the Court that the federal judiciary should not sit as a board of censors on individual prayers, but to my mind the better way of avoiding that task is by striking down all official legislative invocations.
>
> More fundamentally, however, any practice of legislative prayer, even if it might look "non-sectarian" to nine Justices of the Supreme Court, will inevitably and continuously involve the state in one or another religious debate. Prayer is serious business—serious theological business—and it is not a mere "acknowledgement of beliefs widely held among the people of this country" for the State to immerse itself in that business. Some religious individuals or groups find it theologically problematic to engage in joint religious exercises predominantly influenced by faiths not their own. Some might object even to the attempt to fashion a "non-sectarian" prayer. Some would find it impossible to participate in any "prayer opportunity" marked by Trinitarian references. Some would find a prayer not invoking the name of Christ to represent a flawed view of the relationship between human beings and God. Some might find any petitionary prayer to be improper. Some might find any prayer that lacked a petitionary element to be deficient. Some might be troubled by what they consider shallow public prayer, or non-spontaneous prayer, or prayer without adequate spiritual preparation or concentration. Some might, of course, have theological objections to any prayer sponsored by an organ of government. Some might object on theological grounds to the level of political neutrality generally expected of government-sponsored invocational prayer. And some might object on theological grounds to the Court's requirement that prayer, even though religious, not be proselytizing.... [I]n this case, we are faced with potential religious objections to an activity at the very center of religious life, and it is simply beyond the competence of government, and inconsistent with our conceptions of liberty, for the state to take upon itself the role of ecclesiastical arbiter.

Every example given in this paragraph was documented in the margin by reference to religious writers expressing the point of view described—a remarkable job of religious research! For example, the statement that "some might be troubled by...shallow public prayer" was supported by a quotation from the Gospel According to Matthew: "But thou, when thou prayest, enter into thy closet, and when thou hast shut thy door, pray to thy Father which is in secret; and thy Father which seeth in secret shall reward thee openly."[102] Others are less authoritatively attested by reference to more specialized works of more recent provenance, but they do suggest the range of religious views on the nature and occasion of efficacious prayer, at least from a number of normative theological standpoints.

Whether any of these views would actuate any of the legislators in the ordinary

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102. *Marsh v. Chambers, supra,* n. 47, quoting Matt. 6:6, KJV.

legislative assembly is another matter. There is no indication in the courts' opinions what the basis of Mr. Chambers' objections were. They may not have been *religious* objections at all. And he was the only legislator out of the tens of thousands who have served in the several states and Congress in recent times to make his protest a matter of public record in the courts. So the potential grounds of *religious* objection might be a somewhat esoteric basis for invoking the possibility that the courts would be thrust into the unwanted role of having to decide among theological disputants as to the proper kind of legislative prayer.

Justice Brennan's dissent is quoted at some length because, as usual, he tried to make sense out of the delicate and complicated jurisprudence of the religion clauses, even when he could not persuade a majority of the Court to his point of view. His words are almost always illuminating and cast a helpful light on the broader context of the law of church and state beyond the points at issue in the instant case. In this instance he stated the central concern of the religious community—including *all* the varieties contrasted in the last paragraph quoted above— that "prayer is serious business—serious theological business," and that governments and courts should not be the arbiters of that business. But that is not necessarily the central concern of the legislature(s) or of the public in general, which may favor legislative prayers for a number of reasons, many of them less seriously theological than the views cited by Justice Brennan.

c. Benjamin Franklin's Motion. Probably the main consideration leading to the employment of a chaplain to offer prayer(s) at the beginning of each legislative session was that attributed to Benjamin Franklin in a footnote in the majority opinion seeking to justify why there was no chaplain and no prayer at the Constitutional Convention of 1787. The footnote explained:

> 6. History suggests that this may simply have been an oversight. At one point, Benjamin Franklin suggested "that henceforth prayers imploring the assistance of Heaven, and its blessings on our deliberations, be held in this Assembly every morning before we proceed to business." His proposal was rejected not because the Convention was opposed to prayer, but because it was thought that a mid-stream adoption of the policy would highlight prior omissions and because "[t]he Convention had no funds."[103]

The majority opinion seemed to imply that Dr. Franklin was simply trying to remedy an unfortunate oversight by calling attention to a needful propriety of legislative assemblies, viz., that they were *supposed* to begin with an invocation, like the chairman in a cartoon who remarks, halfway through a meeting, "Oops! We forgot the opening prayer!"

The explanation of pious propriety, though it may be the main consideration for most such engagements, does not do justice either to Dr. Franklin or the occasion of his suggestion. The Constitutional Convention seemed on the brink of failure because

103 . *Marsh v. Chambers*, *supra*, majority opinion, n.6.

of intensifying disagreement between the large states and the small ones over their respective representation in the federal legislative body. The larger ones—Virginia, Pennsylvania, New York and Massachusetts—wanted representation in proportion to population; the smaller ones wanted each state, as an independent sovereign body, to have an equal vote with every other. Dr. Franklin, who was elderly and obese, wrote out his speeches, which were read by others. On this occasion his speech leading up to the proposal quoted by the court bespoke more than an appeal to pious propriety. James Madison inserted it in his "Debates in the Federal Convention of 1787" at the end of the record for Thursday, June 28, 1787: "The Speech of Doct^{r}. F."

> Mr. President
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> The small progress we have made after 4 or five weeks close attendance & continual reasoning with each other—our different sentiments on almost every question, several of the last producing as many noes as ays, is methinks a melancholy proof of the imperfection of the Human Understanding. We indeed seem to feel our own want of political wisdom, since we have been running about in search of it. We have gone back to ancient history for models of Government, and examined the different forms of those Republics which having been formed with the seeds of their own dissolution no longer exist. And we have viewed Modern States all round Europe, but find none of their Constitutions suitable to our circumstances.
>
> In this situation of this Assembly, groping as it were in the dark to find political truth, and scarce able to distinguish it when presented to us, how has it happened, Sir, that we have not hitherto once thought of humbly applying to the Father of lights to illuminate our understandings? In the beginning of the contest with G. Britain, when we were sensible of danger we had daily prayer in this room [Independence Hall] for the divine protection.—Our prayers, Sir, were heard, & they were graciously answered. All of us who were engaged in the struggle must have observed frequent instances of a superintending providence in our favor. To that kind providence we owe this happy opportunity of consulting in peace on the means of establishing our future national felicity. And have we now forgotten that powerful friend? or do we imagine that we no longer need his assistance? I have lived, Sir, a long time, and the longer I live, the more convincing proofs I see of this truth—that God governs in the affairs of men. And if a sparrow cannot fall to the ground without his notice, is it probable that an empire can rise without his aid? We have been assured, Sir, in the sacred writings, that "except the Lord build the Houses they labour in vain that build it." I firmly believe this; and I also believe that without his concurring aid we shall succeed in this political building no better, than the Builders of Babel: We shall be divided by our little partial local interests; our projects will be confounded, and we ourselves shall become a reproach and bye word down to future ages. And what is worse, mankind may hereafter from this unfortunate instance, despair of establishing Governments by

> Human wisdom and leave it to chance, war and conquest.
>
> I therefore beg leave to move—that henceforth prayers imploring the assistance of Heaven, and its blessings on our deliberations, be held in this Assembly every morning before we proceed to business, and that one or more of the Clergy of this City be requested to officiate in that Service—
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> Mr. Sherman seconded the motion.
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> Mr. Hamilton & several others expressed their apprehensions that however proper such a resolution might have been at the beginning of the convention, it might at this late day, 1. bring on it some disagreeable animadversions. & 2. lead the public to believe that the embarrassments and dissensions within the Convention, had suggested this measure. It was answered by Docr. F., Mr. Sherman & others, that the past omission of a duty could not justify a further omission—that the rejection of such a proposition would expose the Convention to more unpleasant animadversions than the adoption of it: and that the alarm out of doors that might be excited for the state of things within, would at least be as likely to do good as ill.
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> Mr. Williamson, observed that the true cause of the omission could not be mistaken. The Convention had no funds.
>
> Mr. Randolph proposed in order to give a favorable aspect to ye measure, that a sermon be preached at the request of the convention on 4th of July, the anniversary of Independence; & thenceforward prayers be used in ye Convention every morning. Dr. Frankn. 2ded this motion. After several unsuccessful attempts for silently postponing the matter by adjourning, the adjournment was at length carried, without any vote on the motion.[104]

In this historic episode at the Convention that wrote the Constitution can be seen at least seven reasons for instituting opening prayers.

1. Duty, obligation, propriety;
2. Nostalgia ("in the beginning...we had daily prayer in this room.");
3. Humility ("humbly applying to the Father of lights...");
4. Subordination of factional interests to the common good ("divided by our little partial local interests");
5. Acknowledging dependence upon God ("have we now forgotten that powerful friend? or do we imagine that we no longer need his assistance?");
6. Seeking guidance and illumination ("to illuminate our understandings");
7. Obtaining divine help ("is it probable an empire can rise without his aid?" "without his concurring aid...our projects will be confounded...").

Some of these reasons are more "religious" than others. The last scarcely reaches the level of insight or reverence of Abraham Lincoln's "It is my earnest desire to know the will of Providence in this matter. *And if I can learn what it is, I will do*

104. Madison, James, *Debates in the Federal Convention of 1787* (Amherst, N.Y.: Prometheus Books, 1987), vol. I, pp. 181-182.

it!"[105] The Founders tended to focus more on activating God's presumed special solicitude for the United States than on bringing the new nation into conformity with God's will, which might conceivably be different from their own. Many latter-day legislative invocations seem to echo the assumption that "Somebody up there likes us" rather than "Are we doing what Somebody up there likes?"

Those who believe that "prayer is serious business"—or at least *ought* to be—may prefer the "higher" religious motivations to folk piety, but they ought not to be supercilious toward the legislators who just think "prayer is a good thing" whenever and wherever encountered, and participate with sincere, even if perhaps sometimes perfunctory, reverence. They are to be preferred to those who think that prayer is a good thing for *others* and will perhaps induce them to virtues the proponents of such prayer may think they themselves have already attained. The extreme form of this didactic use of prayer may be seen in those legislators who favor opening prayers delivered by a paid chaplain that they regularly do not themselves attend, and there must be very many of these, since most legislative halls are relatively empty during the opening prayers.

One wonders why, if circumstances in the legislature inspired a need for divine help such as Dr. Franklin expressed, it was necessary to call in a professional clergyperson to address the Deity on behalf of the company, and further to pay him or her to do so on a regular basis. Surely there ought to be one or more members of the legislative body directly acquainted with the experienced need who could perform the desired office in a lay capacity more expeditiously and pertinently than an outside professional. No religion prevalent in the United States teaches that the prayer of a lay believer in such circumstances is not efficacious. One should like to think that even Dr. Franklin could have offered up a Deist prayer at least as eloquent as his address, even if someone else had to read it, without summoning "one or more of the Clergy of this City" to "officiate."

One should like to think that such a lay prayer inspired by the occasion would not implicate the Establishment Clause, but would pass as Free Exercise. It is not the offering of a single prayer in special circumstances that offends the Establishment Clause so much as repeated practice that becomes institutionalized, as by hiring a clergyperson to come in every day for that sole purpose. Justice Brennan recognized some such dimension of establishment when he wrote, "The lesson I draw from all this...is that any *regular* practice of official invocational prayer [in the legislature] must be deemed unconstitutional."[106] One commentator on church-state law, George R. LaNoue, Jr., suggested that "establishment" of religion must involve "*systematic* state action," i.e., *one* prayer does not an establishment make, or even two or three, if not regularized, institutionalized.[107]

The other element of establishment suggested by Justice Brennan's comment is

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105. Wolf, William J., *The Almost Chosen People* (Garden City, N.Y.: Doubleday, 1959) p. 22 (emphasis in original).

106. *Marsh v. Chambers, supra*, Brennan dissent, n. 21, emphasis added.

107. When the manuscript was reviewed posthumously for publication, reviewers were unable to locate this citation.

"*official* invocational prayer"—LaNoue's "systematic *state action*"—which is not implicated when one or a few legislators offer prayer(s) in time of stress or fateful decision-making. It is when motions are adopted, budget lines authorized, minutes recorded and prayers published that prayer becomes *official* and "state action" occurs, and that is exactly what Dr. Franklin was getting into, and what his colleagues seemed to be trying to avoid voting on and finally succeeded in adjourning without doing so—for whatever reasons.

If no lay member of the legislature was inclined to lead the rest in oral, collective prayer, there was still the option that is available in every circumstance of need; those legislators so inclined could themselves each invoke the help of God in silent, inward prayer, which the Sermon on the Mount (quoted by Justice Brennan at note 47 of his dissent) commends to Christians as the ideal mode of prayer, and which poses no establishment problems whatever. But that apparently is not the kind of prayer desired by most legislatures (and their constituents?), which suggests that legislative prayers are designed to serve other, and symbolic, interests beyond simply making connections with the Most High. It is those symbolic interests that most smack of "establishment," since they bespeak state "sponsorship," endorsement and ostentation of religion for ulterior purposes of political advantage or aggrandizement.

(Perhaps the private prayers of members of the Constitutional Convention were heard—or Dr. Franklin's intervention, though unsuccessful in its immediate intent, did lift the delegates' attention to a loftier perspective—since the dilemma confronting them was shortly thereafter resolved by the famous Bicameral Compromise, in which the newly created federal legislature was to consist of two houses, one in which representation would be in proportion to population, and one in which each state would have equal representation. It is ironic that the case challenging the legislative chaplaincy should arise nearly two centuries later in the only state in the Union that had not followed the bicameral model, Nebraska being the only state with a unicameral legislature.)

In any event, it is difficult to conceive of any purpose or effect of regular, "official" *prayer* in a legislative body that would be other than *religious*, whether "high" religion or "low," whether sincere or for appearance's sake, and it was no less religious when instituted in the First Congress. The lower courts, in this case, using the Supreme Court's own *Lemon* test, found such use of prayer unconstitutional, and the Supreme Court's abandonment of that test for one of supposed historicity is not persuasive. It is clearly a governmental "proprietary" of religion unjustified by any countervailing necessity to provide for free exercise. The Supreme Court might have done better, if it was determined not to disturb the hallowed practice, simply to rest its decision explicitly on deference to the legislative branch to manage its internal affairs as it saw fit. Relying on the doctrine of separation of powers would have avoided confusing the already none-too-lucid law of the religion clauses with a further area of exception to perplex the lower courts. As Judge Arlin Adams of the Third Circuit Court of Appeals observed about *Marsh* and several other church-state decisions from the same term of the Supreme Court, "[T]he absence of a coherent

framework for analysis would appear to do a disservice both to government and to religion."[108]

d. Justice Stevens' Dissent. As was his wont, Justice John Paul Stevens had a unique insight to express on this subject.

> In a democratically elected legislature, the religious beliefs of the chaplain tend to reflect the faith of the majority of the lawmakers' constituents. Prayers may be said by a Catholic priest in the Massachusetts Legislature and by a Presbyterian minister in the Nebraska Legislature, but I would not expect to find a Jehovah's Witness or a disciple of Mary Baker Eddy or the Reverend Moon serving as the official chaplain in any state legislature. Regardless of the motivation of the majority that exercises the power to appoint the chaplain, it seems plain to me that the designation of a member of one religious faith to serve as the sole official chaplain of a state legislature for a period of 16 years constitutes the preference of one faith over another in violation of the Establishment Clause of the First Amendment.
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> The Court declines to "embark on a sensitive evaluation or to parse the content of a particular prayer." Perhaps it does so because it would be unable to explain away the clearly sectarian content of some of the prayers given by Nebraska's chaplain [a highly Christological invocation was quoted in the margin at this point]. Or perhaps the Court is unwilling to acknowledge that the tenure of the chaplain must inevitably be conditioned on the acceptability of that content to the silent majority.[109]

In a footnote Justice Stevens pursued a concern he had expressed in other contexts:

> 1. The Court holds that a chaplain's 16-year tenure is constitutional as long as there is no proof that his reappointment "stemmed from an impermissible motive." Thus, once again, the Court makes the subjective motivation of legislators the decisive criterion for judging the constitutionality of a state legislative practice.... Although that sort of standard maximizes the power of federal judges to review state action, it is not conducive to the evenhanded administration of the law.

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108. Adams, Arlin, "Is the Supreme Court Making a Significant Shift in Church-State Jurisprudence?" in D. M. Kelley, *Government Intervention in Religious Affairs, 2* (New York: Pilgrim Press, 1986), p. 75.

109. *Marsh v. Chambers*, *supra*, Stevens dissent.