

VOLUME 48

WINTER 2014

NUMBER 3

UNIVERSITY OF SAN FRANCISCO LAW REVIEW



UNIVERSITY OF SAN FRANCISCO
School of Law
SAN FRANCISCO, CALIFORNIA

Cite as—U.S.F. L. REV.

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The *University of San Francisco Law Review* (ISSN 0042-0018) is published quarterly for \$45.00 per year by the University of San Francisco School of Law, Kendrick Hall, 2130 Fulton Street, San Francisco, CA 94117-1080. Periodicals postage paid at San Francisco, CA and additional mailing offices. POSTMASTER: Send address changes to University of San Francisco Law Review, Kendrick Hall, 2130 Fulton Street, San Francisco, CA 94117-1080.

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UNIVERSITY OF SAN FRANCISCO LAW REVIEW

Volume 48

Winter 2014

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Not “For God and Country”: Atheist Military Chaplains and the Free Exercise Clause

By ANTONY BARONE KOLENC*

Introduction

THROUGHOUT HISTORY, CHAPLAINS HAVE MINISTERED to the religious needs of military members. They provide “spiritual care and the opportunity for [military] members, their families, and other authorized personnel to exercise their Constitutional right to the free exercise of religion.”¹ The motto of U.S. Army chaplains captures this fundamental spiritual core: *Pro Deo et Patria*²—“For God and Country.”³ But nontheists⁴ are now demanding their own chaplains as a religious accommodation. Although some quip that an atheist chap-

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1. U.S. DEP’T OF THE AIR FORCE, POLICY DIRECTIVE 52-1, CHAPLAIN SERVICE para. 1 (2006) [hereinafter AFPD 52-1].

2. *U.S. Army Chaplaincy Mission*, CHAPNET, <http://chapnet.chaplaincorps.net/index.php/about-2/> (last visited May 27, 2014).

3. Randy Murrey, *Army Chaplains Corps: Serving ‘God and Country’ for 234 Years with 25,000 Chaplains*, U.S. ARMY (July 9, 2009), <http://www.army.mil/article/24086/army-chaplains-corps-serving-god-and-country-for-234-years-with-25000-chaplains/>.

4. This Article uses the terms *atheists*, *nontheists*, and *secularists* to refer to those “who take negative or skeptical positions on the existence of superhuman beings and supernatural powers.” Nelson Tebbe, *Nonbelievers*, 97 VA. L. REV. 1111, 1117 (2011). No disparagement is meant by these terms, which are also used by the group’s own members. Although some argue followers of Eastern religions, such as Buddhism, are also nontheists, this Article, similar to Professor Tebbe, limits the scope of the term to traditional nonbelievers. *See id.* at 1118 (defining *nonbelievers* as atheists, agnostics, and “most secular humanists, freethinkers, and the like—to the degree that they take negative or skeptical positions on [spiritual] issues”).

lain is an “oxymoron,”⁵ the issue is no laughing matter. The quest for nontheist chaplains slices to the core of how religion is defined under the First Amendment. This Article critically examines whether the Free Exercise Clause⁶ should be used to accommodate the demand for atheist military chaplains and proposes an alternative to admitting atheist chaplains into the historically faith-based chaplaincy.

The push for atheist military chaplains is of recent vintage,⁷ emerging in 2011 as the latest salvo in the battle of the New Atheists⁸ against a military structure they view as beholden to Christianity.⁹

5. 159 CONG. REC. H4936, H4942-43 (daily ed. July 23, 2013) [hereinafter *House Debate*] (comments of Rep. Jim Bridenstine (R., OK) and Rep. John Fleming (R., LA)); Ken Klukowski, *Atheists Want Their Own Military Chaplains*, BREITBART (June 5, 2013), <http://www.breitbart.com/Big-Government/2013/06/05/Atheists-Want-Their-Own-Military-Chaplains> (“No one has yet offered an explanation of how an atheist chaplain is anything other than an oxymoron . . .”).

6. U.S. CONST. amend. I. A topic this vast could engender other lengthy articles focusing on related inquiries under the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb–2000bb-4) or the Establishment Clause, U.S. CONST. amend. I. But I believe the discussion should begin with the Free Exercise Clause. Thus, I will limit the scope of this Article to that examination.

7. See Brad Hirschfield, *Why the Military Needs Atheist Chaplains*, FAITH STREET (Nov. 21, 2011), <http://www.faithstreet.com/onfaith/2011/11/21/why-the-military-needs-atheist-chaplains/10176>. The mainstream news media first began to report in earnest on the call for atheist military chaplains near the end of 2011. *Id.* The issue garnered further attention a month later when National Public Radio ran a major story on one advocacy group’s efforts to convince the military to authorize atheist chaplains. See *All Things Considered: Chaplains Wanted for Atheists in Foxholes*, NPR (Dec. 4, 2011) [hereinafter *Chaplains Wanted for Atheists in Foxholes*], available at <http://www.npr.org/2011/12/04/143057431/chaplains-wanted-for-atheists-in-foxholes>.

8. Simon Hooper, *The Rise of the ‘New Atheists,’* CNN (Nov. 9, 2006), <http://edition.cnn.com/2006/WORLD/europe/11/08/atheism.feature/>. Popular authors, such as Richard Dawkins and Christopher Hitchens, were pioneers of the modern movement dubbed “New Atheism.” *Id.* They shared “a belief that religion should not simply be tolerated but should be countered, criticized and exposed by rational argument wherever its influence arises. . . . Their tone is overtly confrontational rather than gently persuasive.” *Id.* A subset of this movement, which includes organizations such as the Military Association of Atheists and Freethinkers (“MAAF”) and the Military Religious Freedom Foundation (“MRFF”), has targeted religion in the military. See MILITARY ASS’N OF ATHEISTS & FREETHINKERS, <http://militaryatheists.org> (last visited Feb. 10, 2014); MILITARY RELIGIOUS FREEDOM FOUND., <http://www.militaryreligiousfreedom.org> (last visited Feb. 10, 2014).

9. See Letter from Lori Lipman Brown, Director, Secular Coalition for America, to President-elect Barack Obama (Nov. 10, 2008) [hereinafter *Secular Letter*], available at http://otrans.3cdn.net/63cc8cf36c5b58e0be_n0m6bcl2r.pdf. In the last decade, nontheists have raised numerous complaints about military life, especially targeting Evangelical Christians. *Id.* The Secular Coalition for America sent a letter to President-elect Barack Obama, asking the military to accommodate nontheistic members and “to prevent a minority of some evangelical Christians from perpetuating employment discrimination based on religion, coercive proselytizing in everyday activity, and an overall culture of religious intolerance against those who do not share the beliefs of this minority.” *Id.*

Their quest represents an important shift in tactics in the evolving nontheist struggle against religion in secular institutions.¹⁰ It is "part of a broader campaign by atheists to win official acceptance in the military," to "raise money and meet on military bases," and to "distribute their literature [and] advertise their events."¹¹ This war is not limited to the military; it is being waged on all fronts. For instance, in July 2012, Stanford University followed Harvard's lead in allowing an atheist chaplain to serve its campus community.¹²

Under current regulations, nontheists do not meet the minimum qualifications for the chaplain corps because they are not endorsed by a "qualified Religious Organization."¹³ The movement to end an exclusively faith-based military chaplaincy came to a head in the summer of 2013 during Congress's consideration of the 2014 National Defense Authorization Act ("NDAA").¹⁴ A proposed amendment would have

10. See Chris Carroll, *Military Atheists Seeking the Rights and Benefits Offered to Religious Groups*, STARS & STRIPES (Aug. 24, 2011), <http://www.stripes.com/military-atheists-seeking-the-rights-and-benefits-offered-to-religious-groups-1.153105>. From 2010 to 2011, over twenty new nontheist groups were formed at military bases. *Id.*

11. James Dao, *Atheists Seek Chaplain Role in the Military*, N.Y. TIMES, Apr. 26, 2011, at A1, available at http://www.nytimes.com/2011/04/27/us/27atheists.html?pagewanted=all&_r=0; see also Carroll, *supra* note 10 (discussing the goals of the secular group Atheists of Meade ("ATOM")).

12. See Nanette Asimov, *Stanford Gets a Chaplain for Atheists*, S.F. GATE (Dec. 22, 2012), <http://www.sfgate.com/news/article/Stanford-gets-a-chaplain-for-atheists-4139991.php#ixzz2L00mDW3B> (noting that, even though the independent Humanist Community at Stanford hires the so-called chaplain, the position is entitled to office space in the university's Office of Religious Life).

13. U.S. DEP'T OF DEF., INSTRUCTION 1304.28, GUIDANCE FOR THE APPOINTMENT OF CHAPLAINS FOR THE MILITARY DEPARTMENTS para. 6.1 (2004) ("To be considered for appointment to serve as a chaplain, an RMP [(Religious Ministry Professional)] shall receive an endorsement from a qualified Religious Organization . . ."); Richard D. Rosen, Katcoff v. Marsh at *Twenty-Two: The Military Chaplaincy and the Separation of Church and State*, 38 U. TOL. L. REV. 1137, 1166 n.201 (2007) ("The Armed Forces Chaplain Board decides whether to accept the religious organization seeking DoD recognition to provide chaplains for the military, and the individual or individuals endorsed by the religious organization must meet the requirements for a commission."); *In re Navy Chaplaincy*, 697 F.3d 1171, 1173 (D.C. Cir. 2012) ("In order to become a Navy chaplain, an individual must have an ecclesiastical endorsement from a faith group endorsing agency certifying that the individual is professionally qualified to represent that faith group within the Chaplain Corps." (internal quotation marks omitted)); U.S. DEP'T OF THE ARMY, REGULATION 165-1, ARMY CHAPLAIN CORPS ACTIVITIES para. 3-1(a) (2009) [hereinafter AR 165-1] ("The Chaplain is a religious professional whose educational qualifications and certification by a religious organization meet the appointment requirements of DODD [(Department of Defense Directive)] 1304.19."); U.S. DEP'T OF THE NAVY, INSTRUCTION 1730.7D, RELIGIOUS MINISTRY WITHIN THE DEPARTMENT OF THE NAVY para. 5(e)(1) (2008) [hereinafter NAVY INSTRUCTION 1730.7D].

14. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013).

required the Secretary of Defense to appoint chaplains “who are certified or ordained by non-theistic organizations and institutions, such as humanist, ethical culturalist, or atheist.”¹⁵ The amendment failed,¹⁶ but it prompted a proposed House counter-amendment in the 2014 Department of Defense Appropriations Act¹⁷ that would have prevented the Department of Defense (“DOD”) from appointing atheist chaplains in the future.¹⁸

Can atheists constitutionally be excluded from the military chaplaincy? This Article addresses this question within the context of the Free Exercise Clause. Part I discusses the constitutionality of the chaplain corps and frames the arguments on both sides of the atheist chaplain issue. Part II tackles the issue’s thorniest and most abstract question: Should atheism be considered a religion entitled to affirmative protection under the Free Exercise Clause?¹⁹ Assuming atheism should be treated as a religion, Part III examines more concrete features of the debate, including commonly raised arguments by secularists against an exclusively faith-based chaplaincy. Finally, Part IV explores whether the admission of atheists would fundamentally redefine the nature of the chaplaincy by secularizing its faith-based core. The Article ultimately rejects the demand for atheist chaplains and, as an alternative, suggests creating a specialized position outside the historically faith-based chaplaincy.

I. Drawing First Amendment Battle Lines

The First Amendment to the U.S. Constitution states: “Congress shall make no law respecting an establishment of religion, or prohibit-

15. *Amendment to H.R. 1960 Offered by Mr. Andrews of New Jersey*, SECULAR COAL. FOR AM. (June 5, 2013), http://secular.org/files/andrew_amendment_1.pdf.

16. Rick Maze, *Mixed Votes from HASC on Military Religious Freedom*, NAVY TIMES (June 5, 2013), <http://www.navytimes.com/article/20130605/NEWS05/306050040/Mixed-votes-from-HASC-military-religious-freedom>; Eric W. Dolan, *Christian Democrat Calls on Congress to Respect Atheists in the Military*, RAW STORY (June 16, 2013), <http://www.rawstory.com/rs/2013/06/16/christian-democrat-calls-on-congress-to-respect-atheists-in-the-military/>.

17. The Department of Defense Appropriations Act of 2014 was eventually passed as part of the Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. 5, 86-152 (2014).

18. See *House Debate*, *supra* note 5, at H4941-43 (prohibiting the use of funding “to appoint chaplains for the military departments in contravention of” current DOD regulations, which do not recognize atheist chaplains). That amendment did not make the final consolidated bill. See Consolidated Appropriations Act, 2014, 128 Stat. 5.

19. When I refer to the affirmative protection of the Free Exercise Clause, I mean one’s right to use the Clause to affirmatively seek government accommodations for one’s religious practices. This is not to deny that the Clause also negatively protects all persons from government coercion to religious practice.

ing the free exercise thereof”²⁰ This deceptively straightforward sentence has engendered endless discussion and controversy about the amendment’s two distinct Religion Clauses. This part of the Article briefly discusses how the chaplaincy can constitutionally survive under the Establishment Clause and frames the two sides of the atheist chaplain debate as presented under the Free Exercise Clause.

A. The Constitutionality of the Chaplain Corps

The constitutional arguments for and against atheist chaplains must be grounded in an understanding of why the existing military chaplaincy is constitutional in the first place.²¹ In short, the chaplain corps exists primarily as a government accommodation so military members can freely exercise their religion. Today, the Second Circuit’s 1985 treatment of the chaplaincy’s constitutionality in *Katcoff v. Marsh*²² still stands as the definitive case in this area.

In *Katcoff*, two Harvard law students challenged the constitutionality of the U.S. Army’s chaplain corps.²³ They argued that government funding of the chaplaincy violated the Establishment Clause and that a privately funded program would adequately serve any Free Exercise issues raised by military service.²⁴ The Second Circuit rejected this argument, finding a private program “inherently impractical” and noting the unlikelihood that religious denominations in the nation would “favor, much less financially support, a civilian chaplaincy,” or that civilian chaplains would submit themselves to the kind of military discipline that “is essential to the efficient operations of the armed

20. U.S. CONST. amend. I.

21. This Article assumes the chaplaincy’s constitutionality and thus discusses the constitutionality issue only briefly when appropriate. For further discussion on the issue, see Ira C. Lupu & Robert W. Tuttle, *Instruments of Accommodation: The Military Chaplaincy and the Constitution*, 110 W. VA. L. REV. 89 (2007), for an analysis of the chaplaincy as an accommodation under the Free Exercise Clause; Julie B. Kaplan, *Military Mirrors on the Wall: Nonestablishment and the Military Chaplaincy*, 95 YALE L.J. 1210 (1986), for a discussion on the constitutionality of the current chaplaincy program; and Klaus J. Hermann, *Some Considerations on the Constitutionality of the United States Military Chaplaincy*, 14 AM. U. L. REV. 24 (1964), for a discussion of the chaplaincy’s relationship with, and propriety under, the First Amendment.

22. 755 F.2d 223 (2d Cir. 1985).

23. *Katcoff v. Marsh*, 582 F. Supp. 463, 464 (E.D.N.Y. 1984), *aff’d in part*, 755 F.2d 223. The district court described the challenge as “more the grist of a moot court competition than a case or controversy.” *Id.* But it found the students had standing under the Supreme Court’s taxpayer exception in Establishment Clause cases. *Id.* at 471. The idea for the lawsuit “came to the plaintiffs during one of their law classes.” See IZRAEL DRAZIN & CECIL B. CURREY, FOR GOD AND COUNTRY: THE HISTORY OF A CONSTITUTIONAL CHALLENGE TO THE ARMY CHAPLAINCY 2 (1995).

24. *Katcoff*, 755 F.2d at 235.

forces.”²⁵ In the past, limited experimentation with civilian clergy as chaplains had proved to be problematic for the military.²⁶

While upholding the military chaplaincy, the Second Circuit decided not to apply the potentially fatal *Lemon v. Kurtzman*²⁷ test because it did not take into account the judicial deference required in the military context; nor did it recognize the unique Free Exercise context of the chaplaincy issue.²⁸ Instead, the court applied the tradition-based test of *Marsh v. Chambers*,²⁹ noting “weighty evidence” that Congress had authorized the military chaplaincy “before and contemporaneous with the adoption of the Establishment Clause,” and that it had enjoyed an unbroken history for the entirety of the nation’s existence.³⁰

25. *Id.* at 236. The court explained:

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.

Id. at 236-37.

26. See DRAZIN & CURREY, *supra* note 23, at 43. Drazin and Currey describe how civilian clergy in Vietnam attempted to minister to the troops in the 1960s and argue that the “task of escorting such visitors hampered the work of military chaplains” and led to various other problems. *Id.* But see HERMAN A. NORTON, STRUGGLING FOR RECOGNITION: THE UNITED STATES ARMY CHAPLAINCY 1791–1865, at 44 (1977). Despite this, prior to 1830, civilian clergy on the frontier “functioned as post chaplains at Fort Brady and Fort Mackinac in Michigan territory; Fort Crawford and Fort Winnebago, Wisconsin territory; Fort Leavenworth, Kansas territory; and Fort Snelling, Minnesota territory, the farthest outposts on the Northwest frontier [and] [t]he same practice existed at several posts in the East.” *Id.* This practice, however, was phased out.

27. 403 U.S. 602 (1971) (establishing a three-prong analysis for Establishment Clause cases). Under *Lemon*, to meet the requirements of the Establishment Clause: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.” *Id.* at 612–13 (internal citation omitted) (internal quotation marks omitted). Analyzing *Lemon*’s first prong, the Second Circuit acknowledged that the “ultimate objective” of the chaplaincy was to improve the “morale of our military personnel”; however, the court went on to conclude that the chaplaincy’s “immediate purpose is to promote religion by making it available, albeit on a voluntary basis, to our armed forces.” *Katcoff*, 755 F.2d at 232. Regarding *Lemon*’s second prong, the court recognized that the chaplaincy had the effect of “advanc[ing] the practice of religion.” *Id.* Under the third prong, the court concluded that the chaplaincy’s “arrangements with many church organizations of different denominations[] entangle[d] the government with religious accrediting bodies.” *Id.*

28. *Katcoff*, 755 F.2d at 235.

29. 463 U.S. 783 (1983).

30. *Katcoff*, 755 F.2d at 232 (internal quotation marks omitted) (citing *Marsh*, 463 U.S. at 792).

The Second Circuit agreed with the government that the Free Exercise Clause required an Army chaplaincy to ensure that soldiers would be able to freely exercise their religion when deployed and in remote locations.³¹ This was consistent with Army leadership’s belief that “free exercise was the *raison d’être* of the chaplaincy.”³² However, the Second Circuit was not entirely convinced and partly remanded the case to determine whether the Constitution would justify the funding of chaplains in large urban areas where civilian churches were freely available.³³ The district court never resolved that question—and the Supreme Court never had a chance to review the case—because the plaintiffs dismissed it after remand.³⁴

Today, the Supreme Court would likely uphold the chaplaincy on similar grounds, especially in light of its recent decision involving legislative prayer.³⁵ The Supreme Court has often recognized the need to defer to Congress on military matters³⁶ and has previously upheld federal accommodations based on the Free Exercise Clause. For example, in *Cutter v. Wilkinson*,³⁷ the Court unanimously upheld the Religious Land Use and Institutionalized Persons Act (“RLUIPA”),³⁸ which applied strict scrutiny to any government action that placed a substantial burden on a prisoner’s religion.³⁹ In allowing Congress to

31. *Id.* at 234-35 (“[The Free Exercise Clause] obligates Congress, upon creating an Army, to make religion available to soldiers who have been moved by the Army to areas of the world where religion of their own denominations is not available to them. Otherwise the effect of compulsory military service could be to violate their rights under both Religion Clauses.”).

32. DRAZIN & CURREY, *supra* note 23, at 115.

33. *Katcoff*, 755 F.2d at 237-38.

34. DRAZIN & CURREY, *supra* note 23, at 203-05 (relating how *Katcoff* negotiated a settlement to avoid legal fees and costs on appeal); *see also* Rosen, *supra* note 13, at 1142 (reporting recollections of government litigators in *Katcoff*).

35. *See* *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014) (reaffirming *Marsh* and noting that “the First Congress provided for the appointment of chaplains only days after approving language for the First Amendment”); Lupu & Tuttle, *supra* note 21, at 95-96 (discussing the reasoning of *Katcoff*); Rosen, *supra* note 13, at 1143 (arguing that the Supreme Court would be unlikely to apply *Lemon* to the military chaplaincy due to its historic origins). *But see* Kaplan, *supra* note 21, at 1212 (doubting the chaplaincy’s constitutionality).

36. Judicial deference to Congress and the President in military affairs is commonly practiced by the Supreme Court. *See* *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981) (upholding the Military Selective Service Act); *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (upholding an Air Force regulation prohibiting members from wearing the Jewish yarmulke).

37. 544 U.S. 709 (2005).

38. Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (2000).

39. *See* *Cutter*, 544 U.S. 709.

protect religious practices, the Court appreciated the tension with the Establishment Clause but concluded the RLUIPA was a permissible way for the government to “alleviate exceptional government-created burdens on private religious exercise.”⁴⁰ A similar line of reasoning could apply to the military situation.⁴¹

With the chaplaincy based so firmly in the Free Exercise Clause, it is no surprise the debate over atheist military chaplains takes on a similar character.

B. The Nontheist Position Supporting Atheist Chaplains

Those in favor of admitting atheist military chaplains hold an expansive view about the nature of religion—a vision that includes traditional sects as well as secular life stances and deeply held philosophies. Nontheists argue that “[h]umanism fills the same role for atheists that Christianity does for Christians and Judaism does for Jews It answers questions of ultimate concern; it directs our values.”⁴² In essence, they seek Free Exercise protection, including any accommodations needed to practice their belief while serving in the military.⁴³ They assert the U.S. Armed Forces contain a significant minority of nonbelievers—more than those who self-identify as Jewish, Muslim, Hindu, or Buddhist.⁴⁴ Thus, secularists desire pastoral counseling by those trained in “seminaries who [sic] prepare humanist chaplains for ordination and work in the field, in hospitals, in universities, and again in the militaries that have them.”⁴⁵

40. *Id.* at 720.

41. See Rosen, *supra* note 13, at 1146 (arguing that *Cutter* is more or less analogous to the military chaplaincy situation because, “like prisoners, members of the armed forces are largely dependent upon the government to accommodate their religions”).

42. Dao, *supra* note 11 (quoting Jason Torpy, head of the MAAF) (internal quotation marks omitted).

43. As one Congressman advocated during the Appropriations Act debate: “[T]here is no political goal or secular agenda here. . . . [W]e should include in the chaplaincy people who represent the full diversity of the beliefs of the quality of men and women who serve.” *House Debate*, *supra* note 5, at H4942 (comments of Rep. Jared Polis (D., CO)).

44. See Jason Torpy, *Open Letter to Chaplains from Foxhole Atheists*, MILITARY ASS’N OF ATHEISTS & FREETHINKERS (June 22, 2011), <http://militaryatheists.org/news/2011/10/open-letter-to-chaplains-from-humanists/> (arguing that surveys of servicemembers demonstrate that “Humanists” outnumber non-Christians and members of most Christian denominations, except for Catholics, Baptists, and Methodists). See *id.* DOD statistics indicate almost 10,000 active duty military members (out of 1.4 million) self-identify as atheist or agnostic, while another 285,000 claim “no religious preference”—an amorphous category that may or may not include more atheists. See Dao, *supra* note 11. In comparison, about 70% of the active duty force self-identifies as Christian. *Id.*

45. *House Debate*, *supra* note 5, at H4942 (comments of Rep. Jared Polis (D., CO)).

Nontheists reject the chaplaincy as an exclusively faith-based institution. Believing that “[r]eligious chaplains are ill equipped to handle the problems of nontheistic service members,”⁴⁶ they insist that the military admit atheists as part of the chaplain corps to provide a channel where nontheists can go for confidential counsel on existential questions such as: “Why am I here? What’s the meaning of life? How do I justify the use of force?”⁴⁷ They view mental-health counselors as poor substitutes because their communications enjoy less confidentiality than chaplains and because “[t]here is no stigma attached to seeking counsel from a chaplain.”⁴⁸ They also see no reason why atheists cannot serve equally well as theist chaplains, especially in light of the increasingly secularized role of the modern chaplaincy.⁴⁹

In sum, the secularist position essentially seeks the admission of atheist chaplains as a religious accommodation under the Free Exercise Clause. Secular groups are beginning to test the bounds of the current DOD policy by submitting chaplain applications from humanist candidates and teeing up constitutional challenges if those applications are denied.⁵⁰

46. *Nontheists Urge House Committee to Support Nontheist Military Chaplains*, SECULAR COAL. FOR AM. (June 4, 2013), <http://secular.org/news/nontheists-urge-house-committee-support-nontheist-military-chaplains> [hereinafter *Nontheists Urge House*] (quoting Edwina Rogers, Executive Director of the Secular Coalition for America) (internal quotation marks omitted).

47. *House Debate*, *supra* note 5, at H4942 (comments of Rep. Jared Polis (D., CO)).

48. *Nontheists Urge House*, *supra* note 46; see also Pete Kasperowicz, *House Kills Dem Proposal Allowing Nonreligious Military Chaplains*, THE HILL (June 14, 2013), <http://thehill.com/blogs/floor-action/house/305603-house-kills-dem-proposal-allowing-non-religious-military-chaplains> (noting Rep. Jared Polis’s statement that secular counselors do not “enjoy the same confidentiality that a chaplain visit does”).

49. See Carroll, *supra* note 10 (stating that chaplains engage in a wide range of secular duties).

50. See Jason Torpy, *Foxhole Atheists Denounce Congressional Ignorance of Humanist Values*, MILITARY ASS’N OF ATHEISTS & FREETHINKERS (June 7, 2013), <http://militaryatheists.org/news/2013/06/foxhole-atheists-denounce-congressional-ignorance-of-humanist-values/> (“[The MAAF] is currently working with three humanist chaplain [applicants who] fear they won’t pass this unconstitutional religious test for the public office of the chaplaincy.”); Carroll, *supra* note 10 (relating Torpy’s threat to use “legal means to try to force fundamental change on the chaplain corps”). In May 2014, the Navy apparently met with Jason Torpy himself as a potential candidate for the Navy Chaplaincy. See *Group Preparing to Press Military for Atheist Chaplain, Source Says*, FOX NEWS (May 13, 2014), <http://www.foxnews.com/politics/2014/05/13/group-preparing-to-press-military-for-atheist-chaplain-source-says/>.

C. The Traditional Chaplaincy Position Opposing Atheist Chaplains

Traditionalists support a traditional, believing chaplaincy and decry the seemingly self-contradictory request from nontheists who reject belief in the existence of deities to be part of an organization that was historically built precisely on that belief. At the core of this objection is a resistance to equating faith-based religion with secular philosophies. For instance, during the House of Representatives debate over the proposed amendment to the NDAA in June 2013, Representative Tim Huelskamp (R., KS), asked: “How is it that one can hold a religious service for an organization . . . that does not consider itself to be a religion? It’s completely contrary to the directions, instructions, and the very definition of the chaplain corps.”⁵¹

Traditionalists also question the secularist premise that religious chaplains are unable to relate to atheist servicemembers. They argue that, “[b]ecause chaplains by their nature and calling see others through a lens of care and compassion, no chaplain would ever turn any [servicemember] away. There is no litmus test regarding faith or religious affiliation.”⁵² They also point out the unique historical role of the chaplain corps as a Free Exercise accommodation for military members. If nontheist members wish to get counseling from a secular perspective, they need only turn to the vast services found in every part of the military outside the chaplaincy, which is the lone haven for religious ministry in the armed forces. “The Chaplain Corps is faith-based, but it should be remembered that there are lots of non-faith-based helping agencies in the military . . . available to atheists.”⁵³ The real fear is that the admission of atheists would redefine the chaplaincy from a faith-based organization to one serving primarily secular functions.⁵⁴ In essence, the traditionalist position does not believe the

51. Press Release, Tim Huelskamp, Congressman, “Atheist Chaplain” Idea Panned by Huelskamp and Rejected by House (June 14, 2013), *available at* <http://huelskamp.house.gov/media-center/press-releases/atheist-chaplain-idea-panned-by-huelskamp-rejected-by-house> (containing a video of Rep. Tim Huelskamp on floor of House). Rep. John Fleming expressed similar concerns about atheist chaplains being unable to provide the faith-based moral support a dying soldier might need. *See* Katherine Weber, *Lawmakers Vote to Oppose Atheist Chaplains in Military*, CHRISTIAN POST (June 6, 2013), <http://www.christianpost.com/news/lawmakers-vote-to-oppose-atheist-chaplains-in-military-97478/>.

52. Carroll, *supra* note 10 (quoting Major General Richardson, former Air Force Chief of Chaplains) (internal quotation marks omitted).

53. *Id.* (quoting Major General Richardson) (internal quotation marks omitted).

54. Weber, *supra* note 51. For instance, Rep. John Fleming worried that accepting atheists “would make a mockery of the chaplaincy.” *Id.*

Free Exercise Clause requires atheist chaplains as a religious accommodation for nontheist servicemembers.

With the battle lines drawn, and atheist chaplain candidates already applying and being rejected,⁵⁵ this Article explores the relative merits of these arguments under the Free Exercise Clause.

II. Atheist Chaplains and the Meaning of the Term *Religion*

The demand for atheist military chaplains has triggered confusion about the meaning of commonly accepted words, such as *religion*. Stanford University's announcement about its atheist chaplain in 2012 prompted a similar debate, with some praising the decision as "broaden[ing] the conversation about 'belief' and 'unbelief,'"⁵⁶ and others despairing that "[w]hen words and terms mean whatever people want, we lose common frames of reference."⁵⁷ This part of the Article explores that thorny issue by examining the nature of religion and arguing that, while atheism is not eligible for accommodation under the Free Exercise Clause, the rights of atheists should be, and *are*, protected by other provisions of the Constitution.

A. Is There an Official Meaning of the Term *Religion*?

The First Amendment does not define the term *religion*. Some scholars question whether it is possible or even desirable to provide such a definition.⁵⁸ To be certain, this Article will not resolve the matter but will merely plot some waypoints on the definition map and

55. See John Burnett, *Should Military Chaplains Have to Believe in God?*, NPR (July 31, 2012), <http://www.npr.org/2013/07/31/207320123/should-military-chaplains-have-to-believe-in-god>; Kimberly Winston, *Humanists Want a Military Chaplain to Call Their Own*, RELIGION NEWS SERV. (July 22, 2013), <http://www.religionnews.com/2013/07/22/humanists-want-a-military-chaplain-to-call-their-own/> (interviewing Humanist chaplain candidate Jason Heap). In May 2014, the Navy formally rejected the application of humanist chaplain candidate Jason Heap. Adelle M. Banks, *Navy Rejects Request for First Humanist Chaplain*, RELIGION NEWS SERV. (June 3, 2014), <http://www.religionnews.com/2014/06/03/navy-rejects-request-first-humanist-chaplain/>.

56. Alan Jones, *John Figdor Appointed [sic] as Atheist Chaplain at Stanford*, HUFFINGTON POST (Dec. 28, 2012), http://www.huffingtonpost.com/alan-jones/an-atheist-chaplaincy-a-good-way-to-begin-the-new-year_b_2366663.html. Alan Jones, Dean Emeritus for Grace Cathedral, found the news of an atheist chaplain at Stanford "very encouraging, if a bit confusing." *Id.*

57. Wesley J. Smith, *Stanford Gets an Atheist 'Chaplain'*, NAT'L REV. ONLINE (Dec. 22, 2012), <http://www.nationalreview.com/corner/336371/stanford-gets-atheist-chaplain-wesley-j-smith> (calling Stanford's move the "latest example of the ongoing postmodern assault on the meaning of language").

58. See Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753, 763 (1984) ("[T]he very phrase 'definition of religion' is potentially misleading.").

offer some thoughts on dealing with the term in the context of the atheist chaplain debate.

1. Considering the Original Meaning of the Term *Religion*

In defining the word *religion*, the logical starting place should be the text of the First Amendment, which uses the term only once: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”⁵⁹ What did the Framers mean when they used and understood the term in this context? The significance of this question will vary, depending on one’s perspective as an originalist or non-originalist. But three points should provide sufficient perspective regarding the original language, whatever value one finds there.

Most notably, the first Congress debated the issue and decided *not* to expand the First Amendment’s protection to all rights of conscience. “Compelling” evidence suggests the Framers rejected a version of the Religion Clauses that would have covered secular conscience rights and chose instead to favor only “the narrower category of religion.”⁶⁰ The record is not sufficient to rule out alternative theories about why Congress acted in this way; however, the most plausible explanation is that the Framers intended solely to cover religious rights.⁶¹ What does that mean in the end? Simply that the Religion Clauses were not initially designed as a means to protect purely secular ideas, such as that of conscience.

Just as significant, the Framers chose to use the term *religion* only once to join both the Establishment and Free Exercise Clauses. This indicates the intent to use the same meaning of the term in both clauses and argues against a “dual definition.”⁶² Justice Rutledge ex-

59. U.S. CONST. amend. I.

60. Eduardo Peñalver, *The Concept of Religion*, 107 YALE L.J. 791, 802–04 (1997); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410, 1481 (1990).

61. Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 338 (1996) (“[I]t is hard to draw much meaning from [Congress’s] failure to include a conscience clause [in the First Amendment, but] when the Founders thought of religion, they thought of theism.”); see also Peñalver, *supra* note 60, at 803 (concluding the original intent of the Framers was to define *religion* in the everyday usage of the word, and that it is quite plausible they purposely chose to limit the coverage of the First Amendment to definition of the term).

62. See Greenawalt, *supra* note 58, at 758 (recognizing the need for a unitary definition, but championing a looser unitary approach with significant flexibility); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1085 (1978) (embracing a dual definition, but noting that a unitary definition “would avoid the irony that inheres in any

plained in his *Everson v. Board of Education*⁶³ dissent why a dual meaning was not plausible.⁶⁴ The logical result of this unity may not please all scholars, but even some who dislike it admit "we cannot repudiate [the Framers'] decision without rejecting an essential feature of constitutionalism, rendering all constitutional rights vulnerable to repudiation if they go out of favor."⁶⁵

Third, although the Framers lived during the Enlightenment, and held various religious (and nonreligious) perspectives, when they used the word *religion* they had theism in mind.⁶⁶ As one scholar put it: "There is little, if any, evidence that the Framers, ratifiers, or ordinary members of the public understood the meaning of religion to encompass nontheistic views."⁶⁷ This does not necessarily mean, however, that the Framers would have limited coverage of the First Amendment only to Western religious traditions had they been forced to address the issue.⁶⁸ But they surely would not have placed atheism and other forms of nonbelief under the umbrella of religion. This may be one of the reasons some scholars have spent so much time trying to escape the original meaning of religion in search of alternative definitions under the Religion Clauses.⁶⁹ In any event, the

dual approach which embraces a progressive, modern understanding of religion in one context and harkens back to a more traditional definition in another").

63. 330 U.S. 1 (1947).

64. See *id.* at 32 (Rutledge, J., dissenting). Rutledge explained:

[The word] "[r]eligion" appears only once in the [First] Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid "an establishment" and another, much broader, for securing "the free exercise thereof." "Thereof" brings down "religion" with its entire and exact content, no more and no less, from the first into the second guaranty, so that Congress and now the states are as broadly restricted concerning the one as they are regarding the other.

Id.

65. Laycock, *supra* note 61 at 314 ("For whatever reason, the Constitution does give special protection to liberty in the domain of religion.").

66. See *id.* at 338 (conceding that the Framers viewed the common meaning of the word *religion* as theistic when they used the word in the First Amendment); Peñalver, *supra* note 60, at 803 (noting the Framers may have defined the term *religion* as encompassing only theistic beliefs).

67. Micah Schwartzman, *What if Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1405 (2012).

68. See Peñalver, *supra* note 60, at 804 ("The Framers probably never considered the issue of defining religion for the First Amendment at all, because they thought the everyday meaning of the term was clear. Indeed, there is no way to distinguish original intent to apply the First Amendment to religion in the everyday sense of that word (at any given point in time) from original intent to apply the First Amendment to a particular, theistic definition of religion. The two were, for the Framers, one and the same thing.").

69. See Laycock, *supra* note 61, at 339 (arguing the originalist view will "exclude nontheists from the goal of government neutrality," leading us to either "expand the tex-

originalist argument bolsters the position of traditional supporters of the military chaplaincy, who would exclude atheism from the definition of religion.

2. The Supreme Court and the Meaning of the Term *Religion*

The Supreme Court's treatment of the meaning of the term *religion* has been at best inconsistent. Typically, the Court discusses the Religion Clauses without attempting to place any definition at all on the term.⁷⁰ And when the Court finally did give a definition in 1890, not surprisingly it used starkly theistic terms. In *Davis v. Beason*⁷¹—a case involving the Mormon Church and the crimes of bigamy and polygamy—a unanimous Supreme Court defined the term this way: “reference to one’s views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.”⁷² The Supreme Court continued to approve of similar theistic views of religion until the 1960s.⁷³

The Court took a new direction in *Torcaso v. Watkins*⁷⁴ by unanimously striking down a Maryland religious oath test that required candidates for public office to declare belief in God.⁷⁵ Justice Black wrote for the Court that government cannot force anyone “‘to profess a belief or disbelief in any religion.’ Neither can [it] constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can [it] aid those religions based on a belief in

tual meaning of ‘religion’ to include the new answers to religious questions, or . . . [to] shrink the textual meaning of ‘exercise’ to avoid preferring theistic beliefs with respect to conscientious objection”); Schwartzman, *supra* note 67, at 1403 (arguing that if religion is “not special” or not “distinctive[],” then, under an originalist view, the Religion Clauses are “morally defective” since they treat religion as special and distinct).

70. See Peñalver, *supra* note 60, at 794 (noting the Court generally uses the word *religion* nonreflectively, as though the term were self-defining).

71. 133 U.S. 333 (1890).

72. *Id.* at 342. The Court distinguished “religion” from the “form of worship of a particular sect” and noted that the First Amendment is “intended to allow every one . . . to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper . . .” *Id.* The Court stated that accepting the Mormon advocacy of bigamy and polygamy as “a tenet of religion” would “shock the moral judgment of the community.” *Id.* at 341–42. Of course, this view should come as no surprise in light of the word’s original meaning and the historic homogeneity of the nation as Christian.

73. See *United States v. Macintosh*, 283 U.S. 605, 625 (1931) (“We are a Christian people, according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God.”).

74. 367 U.S. 488 (1961).

75. *Id.*

the existence of God as against those religions founded on different beliefs."⁷⁶ In a footnote, the Court drew from nonlegal sources and noted that "[a]mong religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism,⁷⁷ Taoism, Ethical Culture, Secular Humanism and others."⁷⁸

In a pair of cases four years later, the Supreme Court in dicta interpreted a statutory definition of "religious training and belief" found in the Universal Military Training and Service Act,⁷⁹ and divined what Congress intended to cover as a proper basis for conscientious objection. In *United States v. Seeger*,⁸⁰ the Court concluded the crux of Congress's definition was "whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."⁸¹ The Court was careful to note this statutory interpretation did not address the issue of atheism.⁸² In *Welsh v. United States*,⁸³ the Court expanded on its statutory interpretation in

76. *Id.* at 495.

77. Although the Court referenced Buddhism and other Eastern religions, it is not clear those religions should be labeled nontheistic in the same sense as atheism. In a later case, Justice Douglas elaborated at length on some of the nontraditional religions in the world, focusing especially on Hinduism and Buddhism. *United States v. Seeger*, 380 U.S. 163, 188-93 (1965) (Douglas, J., concurring). He explained how even Buddhists can be said to believe in *God*, depending on how the term is defined. *Id.*

78. *Torcaso*, 367 U.S. at 495 n.11. The Court also favorably cited the theistic *Davis v. Beason*, 133 U.S. 333 (1890), case (among others), which had "thoroughly explored . . . the First Amendment, the reasons for it, and the scope of the religious freedom it protects." *Id.* at 492.

79. Pub. L. No. 80-759, § 6(j), 62 Stat. 612, 613 (1948) (codified at 50 U.S.C. app. § 456(j) (1958)) (defining "religious training and belief" as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code").

80. 380 U.S. 163.

81. *Id.* at 165-66 (noting Congress's definition "merely clarif[ed] the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views").

82. *Id.* at 173-74 ("The question is not, therefore, one between theistic and atheistic beliefs. We do not deal with or intimate any decision on that situation in these cases."). But in its discussion of "a few of the views that comprise the broad spectrum of religious beliefs found among us," the Court quoted from various religious sources, including an authority on the Ethical Culture Movement, Dr. David Saville. *Id.* Dr. Saville explained that "the God that we love is not the figure on the great white throne, but the perfect pattern, envisioned by faith, of humanity as it should be, purged of the evil elements which retard its progress toward the knowledge, love and practice of the right." *Id.* at 183 (quoting DAVID SAVILLE MUZZEY, *ETHICS AS A RELIGION* (1951) (internal quotation marks omitted)).

83. 398 U.S. 333 (1970).

Seeger and found that certain beliefs “function as a religion” in life if “an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time.”⁸⁴ Although these were statutory interpretations, some legal scholars glimpse a constitutional underpinning in the Court’s reasoning.⁸⁵

In any event, the Supreme Court backed away from this expansive view of religion just two years later. In *Wisconsin v. Yoder*,⁸⁶ the Court recognized that religion possesses a quality that distinguishes it from secular beliefs and philosophies:

A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. . . . Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau’s choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.⁸⁷

This apparent departure from the Court’s recent views of religion was not lost on a dissenting Justice Douglas, who saw the Court’s “re-treat[]” on religion as contrary to the holding in *Seeger*.⁸⁸ It is possible the majority narrowed their “conception of religion” because the Justices began to realize “the problematic implications” of the *Seeger* and *Welsh* language.⁸⁹

84. *Id.* at 339-40 (“‘[I]ntensely personal’ convictions which some might find ‘incomprehensible’ or ‘incorrect’ come within the meaning of ‘religious belief’ in the Act.”). Justice Harlan subscribed to the majority’s definition of religion under the First Amendment but believed Congress had subscribed to a more traditional definition, as articulated in a Ninth Circuit case that had conceived of religion “in theistic terms.” *Id.* at 345 (Harlan, J., concurring) (citing *Berman v. United States*, 156 F.2d 377, 380-381 (9th Cir. 1946)).

85. Schwartzman, *supra* note 67, at 1417-18 (calling the Supreme Court’s interpretation of religion in *Seeger* and *Welsh* “a stretch (and perhaps then some)” but recognizing that perhaps “the Court was concerned about constitutional infirmities arising from the exclusion of those with ethical and moral views not grounded in traditional religious beliefs”); see also Greenawalt, *supra* note 58, at 760-61 (“[T]he Supreme Court’s broad statutory construction of religion, as well as its decision in *Torcaso*, has led other courts and scholars to assume that the constitutional definition of religion is now much more extensive than it once appeared to be.”).

86. 406 U.S. 205 (1972).

87. *Id.* at 215-16.

88. *Id.* at 247 (Douglas, J., dissenting).

89. Peñalver, *supra* note 60, at 798.

Since *Yoder*, the Court has made references that some interpret as an affirmation of the notion that purely secular philosophies could be defined as religion. In *Wallace v. Jaffree*,⁹⁰ the majority explained that the Court “[a]t one time” had thought the right to choose a creed “would not require equal respect for the conscience of the infidel . . . [or] the atheist”; however, the Court had now “unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.”⁹¹ The Court has also said the “touchstone” of the Establishment Clause is “that the ‘First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion.’”⁹²

These quotes prove the Religion Clauses shield atheists from theism, but they also illustrate that the Court draws a distinction between the religious and the nonreligious, as when the Court noted in 1989 that “[a] secular state establishes neither atheism nor religion as its official creed.”⁹³ Indeed, the Court’s most recent ruling in the area unanimously recognized that the First Amendment “gives special solicitude to the rights of religious organizations.”⁹⁴ To be certain, the Religion Clauses protect nontheists from government coercion to believe in a deity, but that is not necessarily because atheism is a religion deserving of special protection in its own right under the Free Exercise Clause. To the contrary, this may simply mean that *theism* is a

90. 472 U.S. 38 (1985).

91. *Id.* at 53.

92. *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005) (citing *Epperson v. Arkansas*, 393 U.S. 97 (1968)).

93. *County of Allegheny v. ACLU*, 492 U.S. 573, 610 (1989).

94. *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012). The Court recognized a First Amendment ministerial exception for religious organizations that take employment actions against minister-employees. *Id.* The Court rejected the argument that the Religion Clauses “have nothing to say about a religious organization’s freedom to select its own ministers,” but that religions organizations could still take refuge in the implicit First Amendment right to freedom of association. *Id.* (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)) (internal quotation marks omitted). In rejecting this argument as untenable, a unanimous court stated:

[F]reedom of association is a right enjoyed by religious and secular groups alike. It follows under the EEOC’s and Perich’s view that the First Amendment analysis should be the same, whether the association in question is the Lutheran Church, a labor union, or a social club. That result is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations. We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization’s freedom to select its own ministers.

Id.

religion that cannot be forced upon anyone under the Establishment Clause.

B. Scholarly Debate and the Broadening of the Meaning of the Term *Religion*

To recap, there is not yet an authoritative, official meaning of the term *religion*. The Framers viewed religion in theistic terms under a single definition. For its part, the Supreme Court has sent mixed signals, struggling to maintain a distinction between belief and nonbelief while at the same time respecting the nation's growing religious diversity.⁹⁵ This lack of clear authority has led to vigorous debate among scholars about how the word *religion* ought to be interpreted.

The scholarly literature reflects some dissatisfaction with the original view of religion accepted by the courts for the first 150 years of the nation's history.⁹⁶ Although the push to expand the idea of religion originated in nonlegal academic circles,⁹⁷ legal scholars have now developed their own theories with distinctive contours.⁹⁸ The most far-reaching of these views would abandon the original definition of religion and broaden the term to embrace atheism, agnosticism, and humanism.⁹⁹ Others seek a middle road that could embrace nontradi-

95. See Peñalver, *supra* note 60, at 811 (criticizing the "dictionary-style definition" of religion, which often implies a purely theistic view of the meaning of the term *religion*, even when used by the U.S. Supreme Court).

96. See *id.* at 803-04 ("[A]n exclusive reliance on original intent would mandate the adoption of the Framers' theistic definition of religion, . . . [which] would be inconsistent with the evolutionary nature of language and would raise serious establishment concerns."). Professors Kent Greenawalt and Eduardo Peñalver have written excellent articles in this area that provide helpful critiques of these approaches to defining religion, while rejecting a strict originalist philosophy. See *id.*; Greenawalt, *supra* note 58.

97. See Tebbe, *supra* note 4, at 1132-35. Professor Tebbe reviewed several nonlegal academic theories on how to define religion, including a functionalist and substantive approach. *Id.* A functional approach takes a societal focus, viewing religion as having "the power to delineate and unify communities and even whole societies." *Id.* at 1132. A substantive approach, which has won greater academic support, defines religion more concretely as "a system of communal beliefs and practices relative to superhuman beings." *Id.* at 1134 (quoting MERRIAM-WEBSTER'S ENCYCLOPEDIA OF WORLD RELIGIONS 915 (Wendy Doniger ed., 1999) (internal quotation marks omitted)). Both approaches broaden the concept of religion beyond the theism accepted by most Americans at the time the Framers drafted the Constitution.

98. In one of the earliest discussions on how to define the term *religion* in the Religion Clauses, Dean Choper provides an elaborate critique of various theories such as "ultimate concerns" and "extratemporal consequences." See Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 599 (1982) (internal quotation marks omitted).

99. See Schwartzman, *supra* note 67, at 1416. Schwartzman wants to loosen the "interpretive constraints imposed by originalist (and textualist) theories of constitutional interpretation" for a non-originalist reconciliation of "the Religion Clauses with the view that

tional religions while maintaining a distinction between belief and unbelief. The result of this debate has been the creation of single-factor and multi-factor approaches to this thorny question.

Modern single-factor¹⁰⁰ approaches seek to broaden the legal idea of religion beyond the Western bias of the Framers by isolating a single factor that separates the religious from the secular. For instance, the ultimate concern approach, inspired by the Supreme Court's discussion in *Seeger* and *Welsh*, suggests that "when a person sincerely holds beliefs dealing with issues of 'ultimate concern' that for her occupy a 'place parallel to that filled by . . . God in traditionally religious persons,' those beliefs represent her religion."¹⁰¹ The Seventh Circuit used this method to treat atheism as a religion in a prisoner Free Exercise case.¹⁰² The ultimate concern theory has been widely criticized as "fundamentally flawed,"¹⁰³ however, because "[n]ot only can religion be present without ultimate concern; matters that are not religious may involve ultimate concerns."¹⁰⁴

religion is not normatively distinctive." *Id.* at 1414-15; *see also Toward a Constitutional Definition of Religion*, *supra* note 62 (arguing for an expansive definition of religion when interpreting the Free Exercise Clause and a narrow definition when interpreting the Establishment Clause).

100. Greenawalt, *supra* note 58, at 802-11 (identifying three such single factors—looking for a "Supreme Being," "ultimate concern," and a "higher reality"—and attacking each as inadequate to address the complexities of the question under the Religion Clauses). Professor Eduardo Peñalver has broken these definitions into two categories. *See* Peñalver, *supra* note 60, at 794. The "functional approach" broadly defines religion as embracing the "ultimate concern" of an individual, while the "content-based" approach looks for "some essence within all religious belief systems according to which such systems can be distinguished from nonreligious belief systems" such as a belief in "extra-temporal consequences to human action." *Id.* (internal quotation marks omitted); *see also* Choper, *supra* note 98, at 593-97 (discussing various approaches, including the ultimate concern approach).

101. *Kaufman v. McCaughtry*, 419 F.3d 678, 681 (7th Cir. 2005) (quoting *Fleischfresser v. Dirs. of Sch. Dist. 200*, 15 F.3d 680, 688 n.5 (7th Cir.1994)) (citations omitted) (internal quotation marks omitted).

102. *Id.* at 682. The court waded through the ambiguous Supreme Court references on the topic and concluded "the Supreme Court has recognized atheism as equivalent to a 'religion' for purposes of the First Amendment on numerous occasions." *Id.* at 682. In dealing with the language in *Yoder*, the court merely noted that the Supreme Court had distinguished religion from "a 'way of life,' even if that way of life is inspired by philosophical beliefs or other secular concerns." *Id.* 681 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)). Looking at its own precedent, the court noted that it had previously accepted that "atheism may be considered, in this specialized sense, a religion." *Id.* at 682 (citing *Reed v. Great Lakes Cos.*, 330 F.3d 931, 934 (7th Cir. 2003)).

103. Greenawalt, *supra* note 58, at 806.

104. *Id.* at 810; *see also* Choper, *supra* note 98, at 595 (discussing the difficulties with the ultimate concern approach); Peñalver, *supra* note 60 (rejecting the ultimate concern approach).

Perhaps the “most plausible single-factor approach” asks whether a would-be religion believes in some higher reality.¹⁰⁵ “Under this approach, the essential feature of religion is faith in something beyond the mundane observable world—faith that some higher or deeper reality exists than that which can be established by ordinary existence or scientific observation.”¹⁰⁶ This approach is broad enough to embrace non-Western religions “that claim the apparent world is unreal and true meaning is ‘immanent’ rather than transcendent,” yet narrow enough to reject as “nonreligious the activities of groups, such as Ethical Culture, that engage in practices closely resembling the worship services of the traditional religions but that do not assert a realm of meaning inaccessible to ordinary observation.”¹⁰⁷

The trend among modern scholars has been to reject a single-factor approach in favor of a multi-factor “methodology for deciding if a belief system is or is not a religion, rather than a definition in the dictionary sense.”¹⁰⁸ The most accepted of these methodologies has become known as the analogical approach.¹⁰⁹ This methodology identifies “instances to which the concept [of religion] indisputably applies” and then compares “in more doubtful instances how close the analogy is between these and the indisputable instances.”¹¹⁰ Some scholars appreciate the “virtues” of this methodology: “It is flexible and nuanced, and it resonates with [a] broader eclectic theory of religious freedom.”¹¹¹ Others have made their own refinements to the methodology but always with the intent to broaden the scope of relig-

105. Greenawalt, *supra* note 58, at 805.

106. *Id.* Greenawalt, while ultimately rejecting this approach, felt it was a strong single-factor approach because it included “not only belief in a ‘transcendent’ reality, but also the belief that all truth is to be found within oneself once layers of illusion are peeled away.” *Id.*

107. *Id.*

108. Peñalver, *supra* note 60, at 794 (citing George C. Freeman, III, *The Misguided Search for the Constitutional Definition of “Religion,”* 71 GEO. L.J. 1519, 1534-48 (1983)); Greenawalt, *supra* note 58, at 763 (“[A]ny dictionary approach oversimplifies the concept of religion . . .”).

109. Although the analogical approach was first defined by Judge Adams of the Third Circuit in 1979, courts have used some type of analogical approach going back as far as the late 1950s. Greenawalt, *supra* note 58, at 771 (“A careful examination of past borderline cases indicates that the courts have been employing an analogical strategy for some time, rarely starting with a settled definition of religion but comparing the debated belief, activity, or organization with what is undeniably religious.”).

110. *Id.* at 763 (“[The analogical approach] can yield applications of the concept to instances that share no common feature, a result that the dictionary approach precludes.”). Peñalver suggests that judges should use analogical baselines from religions identified as pantheistic, theistic, and nontheistic. *See* Peñalver, *supra* note 60, at 817-18.

111. Tebbe, *supra* note 4, at 1137.

ion it embraces.¹¹² Indeed, those who have adopted the analogical method are also more likely to consider atheism a religion.¹¹³

It is beyond the scope of this Article to evaluate all the merits of these theories; however, even the newest thoughts about religion should keep faith with the original understanding of the Religion Clauses. Scholars have demonstrated it is possible to construct definitions of religion that broaden the concept in principled ways, thereby giving academics and judges many tools from which to choose when examining the nature of religion under the Free Exercise Clause. These constructs widen the definition even to the point of including atheism.¹¹⁴ Yet none of these approaches seems to perfectly capture the elusive concept of religion.

A narrower approach—even an imperfect one, such as Higher Reality—is a better path to defining religion under the First Amendment than the broader, multi-factor approaches. Considering the Framers’ original view of religion—backed by the Supreme Court for the first 170 years of the nation’s history—it seems that any newly adopted approach must be narrow enough to maintain that crucial distinction between religion and nonreligion. Otherwise, we ignore

112. As one modification, Peñalver offers “negative guidelines” to help deal with any Western bias toward religion:

First, religious status may not be denied to a belief system because of its failure to contain a concept of God (or gods). Second, religious status may not be denied to a belief system because of its particular structural characteristics or lack of institutional features (for example, clergy or organized worship). Third, religious status may not be denied to a belief system because of its failure to focus on or distinguish the sacred, spiritual, supernatural, or other-worldly.

Peñalver, *supra* note 60, at 818. Using this approach, Peñalver concludes that Marxism would not satisfy the criteria as a religion. *Id.* at 820-21.

113. See Greenawalt, *supra* note 58, at 793-94 (“If the establishment clause is understood as barring government from sponsoring claims of truth in the domain of religion, then antireligious ideas may be understood as a subset of religious ideas.”); Tebbe, *supra* note 4, at 1149 (arguing that, under some circumstances, atheism should be considered a religion); Schwartzman, *supra* note 67, at 1421-22 (advocating for an expansion of the term *religion* to include all types of secular views).

114. Laycock has argued that atheism must be a religion because it offers answers to religious questions such as: “What is the nature of God and what does He/She want for us?” Laycock, *supra* note 61, at 326-27.

[Religion] is any set of answers to religious questions, including the negative and skeptical answers of atheists, agnostics, and secularists. . . . “No God exists and this imaginary construct wants nothing for us” is a belief about religion. It is not merely a descriptive statement about religion, such as an anthropologist might make, or a scholar of comparative religion. Rather, it is an affirmation of belief, capable of generating commitment and even lifelong activism on behalf of the cause.

Id.

the Framers' original choice to reject a general conscience protection.¹¹⁵ Our adopted approach must be broad enough, however, to embrace diverse religions from all traditions—not just the West.¹¹⁶ An approach such as Higher Reality would not be inconsistent with the Framers' views. Although most of the Framers embraced religion in its Western forms—including non-Christian faiths such as Deism—they clearly recognized the existence of starkly different religious traditions in the world. For instance, the American colonists were familiar with the Hindu religion because the British had been trading with and colonizing India for almost 200 years at the time of the First Amendment's passage.¹¹⁷

C. Applying a Narrower Definition: Atheism as Nonreligion

The atheist chaplain debate cuts to the heart of the definitional problems noted earlier. The confusion inherent in this inquiry was on full display during the House debate on the proposed amendment to the NDAA to require atheist chaplains, with some arguing that atheists “don't believe anything.”¹¹⁸ Nontheists have worked hard to dispel this mistaken notion. Secular groups have built foundations for ethics and morality that are devoid of any reference to the divine, the immortal soul, or deity-based incentives.¹¹⁹ They have also developed “comprehensive, secular, reason-based alternatives to the religion-

115. See Schwartzman, *supra* note 67, at 1405-06 (“[T]here is substantial evidence that the Founders did not intend either of the Religion Clauses to protect atheist beliefs.”). *But see* Peñalver, *supra* note 60, at 804 (arguing that, because the Framers likely did not seriously question the meaning of *religion*, the term is ambiguous).

116. Peñalver believes that “an exclusive reliance on original intent would mandate the adoption of the Framers' theistic definition of religion,” Peñalver, *supra* note 60, at 803, a possibility he believes “would be inconsistent with the evolutionary nature of language and would raise serious establishment concerns.” *Id.* at 804.

117. See THE REGISTER OF LETTERS &C. OF THE GOVERNOUR AND COMPANY OF MERCHANTS OF LONDON TRADING INTO THE EAST INDIES: 1600–1619 (Sir George Birdwood ed., 1893) (discussing Hinduism).

118. Weber, *supra* note 51. During that debate, Mike Conaway (R., TX) argued, “You can't use the word chaplain with atheists because they don't believe anything.” *Id.* (internal quotation marks omitted). This drew a stinging reply from Rep. Adam Smith (D., WA), who called the comment “just ignorant,” and pointed out that atheists and humanists have strongly held beliefs and values, similar to those found in religions such as Christianity. *Atheist Chaplains Would Call Fallen Soldiers 'Worm Food,' GOP Congressman Says (VIDEO)*, HUFFINGTON POST (June 5, 2013), http://www.huffingtonpost.com/2013/06/05/atheist-chaplains-worm-food_n_3393122.html.

119. See Laycock, *supra* note 61, at 336 (“[The nontheist] belief in transcendent moral obligations . . . is analogous to the transcendent moral obligations that are part of the cluster of theistic beliefs that we recognize as religious.”).

based life.”¹²⁰ But does it make sense to include such groups under the definition of religion? This Part of the Article discusses that question and addresses two common objections to excluding atheism from religion.

1. The Benefits of a Narrower Definition

Applying a narrower definition—such as the Higher Reality approach—to nontheist views would likely exclude those philosophies from the ambit of religion.¹²¹ But there are sound reasons to adopt this approach, even if it classifies nontheism as nonreligion.

First, a narrower definition is more consistent with the original intent and understanding of the Free Exercise Clause. The Framers’ concept of religion surely ruled out theories of nonbelief and never envisioned the Free Exercise Clause as an affirmative protection for atheists.¹²² Second, there are thoughtful modern approaches that provide theoretical constructs that can reasonably delineate between the religious and the nonreligious. The Higher Reality approach in particular seems expansive enough to accommodate modern sensibilities while keeping faith with the Framers’ views.¹²³ Third, in the ongoing culture wars over the past forty years, secularists have often resisted being labeled as members of a religion.¹²⁴ This more recent change in

120. Mary Jean Dolan, *Cautious Contextualism: A Response to Nelson Tebbe’s Nonbelievers*, 98 VA. L. REV. IN BRIEF 32, 34-35 (2012) (noting that “‘New Atheists’ have taken center stage with their flamboyant mission to disprove and denigrate religion” but recognizing that the atheism of those seeking an alternative philosophy to religion is “hard to distinguish from the ‘religion’ of the unaffiliated, yet (often quite vaguely) spiritual”).

121. The higher reality theory sees the “essential feature of religion” as “faith that some higher or deeper reality exists than that which can be established by ordinary existence or scientific observation.” Greenawalt, *supra* note 58, at 805. This contradicts the distinctive nontheist rejection of both the supernatural and higher levels of existence outside the observable universe. Thus, the higher reality approach would likely label atheism as nonreligion.

122. See *supra* Part II.A.1.

123. See *supra* notes 105-107, 115-117, and accompanying text.

124. See Laycock, *supra* note 61, at 329 (detailing the history of the modern culture wars and noting that “the religious right began to argue that secular humanism is a religion and that it is established in the schools, and the organized humanist movement began to respond that it is not a religion after all”). This is significant only because a group’s own rejection of the *religion* label could impact whether a court will view it as such. See *Ctr. for Inquiry, Inc. v. Clerk, Marion Circuit Court*, 2012 WL 5997721, at *7 (S.D. Ind. Nov. 30, 2012). (“[Plaintiff, Center for Inquiry (“CFI”), a secular humanist organization,] stipulated that CFI is not a religion. . . . The group’s recurrent insistence that it is not a religion forecloses the analysis they have entreated the Court to make. We must therefore treat CFI precisely as we would any other non-religious entity.”).

position seeking inclusion as a religion could be viewed as a tactical decision for litigation purposes.

In any event, if religion can no longer be distinguished from nonreligion, then the Religion Clauses would seem to protect nothing special. Using a narrower definition of religion strikes the proper balance by taking into account the religious diversity of the modern world while also resisting the temptation to totally redefine constitutional terms.

2. Addressing the Establishment Clause Objection

Some legal scholars raise an objection to a narrower definition of religion due to Establishment Clause concerns. They fear the exclusion of atheism from the ambit of religion will logically lead to another type of undesirable establishment. Under their worst-case scenario, the government would be permitted to establish atheism as the state's favored religion or philosophy,¹²⁵ and the only protection for religious persons would be other aspects of the First Amendment.¹²⁶ To avoid this possibility, they argue the word *religion* must outgrow its traditional boundaries and include atheism. But there are other ways to address this objection.

The valid concern these scholars raise is essentially based on a formalistic reading of the Establishment Clause—an approach the Supreme Court is not eager to adopt. Although not required by the text's technical wording, recall that the touchstone of the Establishment Clause is “the principle that the First Amendment mandates government neutrality between religion and religion, and between

125. Professor Laycock puts the problem in stark terms: “Government could teach atheism in the schools, promote atheism in the mass media, subsidize the American Atheists and a network of local chapters, and ridicule God as the opiate of the masses.” Laycock, *supra* note 61, at 330. Professor Laycock also claimed that

[i]f atheism is not a religion for constitutional purposes, such an establishment would be perfectly constitutional. . . . If atheism is just a secular idea, government would be free to promote atheism to the same extent that it has ever promoted any other secular idea—say the war effort in World War II, or civil rights during the Second Reconstruction.

Id.; see also Schwartzman, *supra* note 67, at 1422 (positing a similar hypothetical and noting the Establishment Clause must prevent the state from promoting “major schools of modern ethical thought, such as Kantianism and utilitarianism,” because otherwise the state would have “established a secular doctrine” in violation of the First Amendment).

126. See Laycock, *supra* note 61, at 330 (“The Free Speech Clause would protect citizens from being forced to affirm atheistic beliefs, and the Free Exercise Clause would protect believers from persecution or discrimination.”); Greenawalt, *supra* note 58, at 793 (“[P]ublic sponsorship of atheism should be treated as raising only free exercise claims in those who profess religion.”).

religion and nonreligion.”¹²⁷ Adopting atheism as an official philosophy would not be an example of this neutrality. Instead of redefining the word *religion*, the same result can be reached by focusing on the words *respecting* and *establishment*.

If the government were to adopt atheism as its philosophy, Supreme Court precedent would find it had taken action respecting an establishment of religion. Adoption of nonbelief is an establishment *against* religion, and a step toward atheism would be an action *respecting* this forbidden establishment. As the Court itself has said, “[a] secular state, it must be remembered, is not the same as an atheistic or antireligious state. A secular state establishes neither atheism nor religion as its official creed.”¹²⁸ But even if this worst-case scenario could survive an Establishment Clause analysis, government action adopting atheism might not be allowed under the Free Exercise Clause. An official policy that rejects religion and advocates nonbelief might create an environment that would make it substantially difficult for Americans to freely exercise their religious rights. In short, worries about an establishment of atheism are unnecessary. There are ways to deal with that problem other than to redefine the word *religion*.

Indeed, interpreting religion to include atheism may lead to the *opposite* concern in future Establishment Clause cases. Recall how vigilantly the courts have policed this area of the law, especially in the debate about teaching scientific creation principles in the public schools, even if all mention of God is removed.¹²⁹ Courts have struck down seemingly harmless disclaimers about the theory of evolution because they have feared it might promote Biblical beliefs.¹³⁰ Thus, if

127. *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005) (internal citation omitted) (internal quotation marks omitted).

128. *County of Allegheny v. ACLU*, 492 U.S. 573, 610 (1989).

129. Traditional creationism espouses the biblical view that God created the world in seven days. See *Genesis* 1–2. Some modern creationists exclude explicit references to God while advocating against the idea of a purely random evolutionary theory. See Antony B. Kolenc, “Mr. Scalia’s Neighborhood”: A Home for Minority Religions?, 81 ST. JOHN’S L. REV. 819, 879 (2007). In *Edwards v. Aguillard*, 482 U.S. 578 (1987), the Court struck down a Louisiana policy allowing for the teaching of creation science despite a nonreligious definition—a move that led a dissenting Justice Scalia to accuse the majority of suppressing the views of scientists simply because of their personal religious beliefs, *id.* at 634 (Scalia, J., dissenting).

130. See *Tangipahoa Parish Bd. of Educ. v. Freiler*, 185 F.3d 337, 438 (5th Cir. 1999), *cert. denied*, 530 U.S. 1251 (2000) (Scalia, J., dissenting) (lamenting the decision to bar a school “from even suggesting to students that other theories besides evolution—including, but not limited to, the Biblical theory of creation—are worthy of their consideration”); *Selman v. Cobb Cnty. Sch. Dist.*, 390 F. Supp. 2d 1286, 1308 (N.D. Ga. 2005) (finding a sticker placed in a biology textbook that stated: “Evolution is a theory, not a fact, concerning the origin of living things” violated the Establishment Clause), *reversed by* 449 F.3d 1320

secular philosophies such as Marxism or humanism were included under the umbrella of religion, some courts might be overly protective and prevent teaching those topics in public school as viable ways to interpret history.

In sum, Establishment Clause worries do not provide a compelling basis to redefine religion. A narrower definition can be used without fear of the secular establishment of atheism.

3. Addressing the Special Protection Objection

Some scholars have also objected to a narrower definition of religion on fairness grounds by arguing the Constitution should not provide special rights to believers over nonbelievers.¹³¹ In particular, the equal liberty approach claims that “religion should be subject to neither extraordinary protections nor extraordinary burdens in law.”¹³² This objection can be answered in at least four ways to help understand why religion should receive special protection over nonreligion.

First, the decision to protect a special subset of Americans was a considered value judgment the Framers felt was necessary to avoid government oppression, after intentionally rejecting a broader secular conscience protection.¹³³ This judgment was not made in a vacuum: religious persecution had an unfortunate historical pedigree familiar to the Framers.¹³⁴

(11th Cir. 2006). *Selman* was later settled in favor of the plaintiffs. See Mike Rich, *Textbooks Disclaimed or Evolution Denied: A Constitutional Analysis of Textbook Disclaimer Policies and Academic Freedom Acts*, 63 ALA. L. REV. 641, 644 n.21 (2012).

131. See, e.g., Schwartzman, *supra* note 67.

132. Tebbe, *supra* note 4, at 1142 (“[C]onstitutional guarantees of religious freedom are best read as requiring government evenhandedness toward all deep and valuable commitments.”). Under this view, it seems unfair to favor one subset of believing Americans while not affording the same protection to another subset with beliefs that seem analogous on the philosophical questions of human life. Laycock has argued that

religious beliefs may evolve from theism to deism to modernism to resymbolized Christianity to humanism to agnosticism to atheism. This evolution is itself an exercise of religion; it is a series of religious choices or of shifting religious commitments. The state should not draw a line across this evolutionary path. . . .

Laycock, *supra* note 61, at 336.

133. See *supra* Part II.A.1; Peñalver, *supra* note 60, at 802 (citing “the original intent of the Framers and the text of the Constitution itself” as a reason to limit “the protection extended by the Religion Clauses to religion as the term is used in everyday language”).

134. See Laycock, *supra* note 61, at 317 (noting that “governmental attempts to suppress disapproved religious views had caused vast human suffering in Europe and in England and similar suffering on a smaller scale in the colonies that became the United States” and that one goal of the Religion Clauses was to “minimize this conflict”); Peñalver, *supra* note 60, at 802 (citing “the history of religiously motivated violence and the vulnerability of

Second, the Constitution should offer special protection when government legislates in the area of religion because it lacks a legitimate interest in regulating religious practices and “beliefs about theology, liturgy, and church governance,” especially when juxtaposed with the weighty interest historically demonstrated by individuals who have found religion “important enough to die for, to suffer for, to rebel for, to emigrate for.”¹³⁵ Again, in light of past and present discrimination against religion, it makes sense to continue to give religion special protection from government regulation.¹³⁶

Third, the Religion Clauses are not the most logical place to find protections for nontheists, who are “more appropriately covered by other provisions of the Constitution.”¹³⁷ There is no need to redefine religion to protect speech, association, due process, and equal protection rights of nonbelievers.

Fourth, rejecting a narrow definition of religion can lead to inconsistent results and a dual definition of religion under the First Amendment.¹³⁸ Some scholars who have embraced a broad definition of religion have then argued for an inconsistent application of the Religion Clauses to avoid the unintended consequences of that definition.¹³⁹

In sum, sufficient grounds exist to provide the affirmative protection of the Free Exercise Clause only to believers and not nonbelievers. But even if atheism were treated as a religion—as the next part of this Article will assume—the demand for atheist chaplains would require more evaluation.

religious groups to marginalization and persecution” as another reason to treat religion differently).

135. Laycock, *supra* note 61, at 317.

136. There is a counter to this point. Professor Tebbe has argued that nontheists are also a minority group that suffers from discrimination. *See* Tebbe, *supra* note 4, at 1124. He claims they are “despised” by Americans, who view “[s]ome degree of ‘spirituality’” as “a natural part of human life.” *Id.* But there is little evidence today to fear state persecution of nonbelievers on religious grounds. To the contrary, based on decades of Supreme Court precedent and the continued government retreat from religion, it appears momentum is in the nontheist’s favor.

137. Peñalver, *supra* note 60, at 802.

138. *See supra* notes 62-65 and accompanying text.

139. *See* Tebbe, *supra* note 4, at 1149 (“Although it is possible to imagine strong exemption claims, courts may approach some of them with a degree of skepticism not appropriate for recognized religions. . . . [R]ules protecting the autonomy of religious institutions should not extend to organizations of atheists, agnostics, or humanists.”).

III. Accommodating Atheism: The End of a Faith-Based Military Chaplaincy?

Despite arguing to the contrary earlier, this part of the Article will assume *arguendo* that atheism would qualify as a religion. That assumption does not resolve the ultimate issue of whether atheist military chaplains should be accommodated under the Free Exercise clause. Nontheists demand a specific remedy to accommodate their religion: the accession of atheist chaplains and the end of an exclusively faith-based chaplaincy. A more searching inquiry must be made into this demand. Due to their small number of adherents present in the military, not every variety of faith-based religion in the world has representation in the chaplaincy.¹⁴⁰ Moreover, nonbelief itself presents unique issues that may preclude an accommodation that fundamentally changes a chaplain corps built on the needs of those who believe in a higher reality.

A. Are Nontheists Deprived of Confidential Communications?

Nontheists contend they are deprived of equal counseling due to the inadequacy of confidentiality rules governing communications with therapists and counselors *outside* the chaplaincy.¹⁴¹ They argue this creates an unfair situation for secularists, who have no atheist chaplains to turn to for confidential advice about existential questions. This policy argument misses the mark of the Free Exercise Clause because it is not grounded in atheist religious practice and because confidentiality outside the chaplaincy is sufficient.

Theists and nontheists have equal counseling avenues outside the chaplain corps where they can speak candidly with trained family advocacy counselors and mental health professionals in a nonreligious environment about their private struggles and problems, whether related to marriage, parenting, substance abuse, war, or personal mental health. In addition, the military provides its members free confidential civilian care with off-base counselors through the DOD's Military

140. Chaplains from unrepresented faiths are authorized "when the military services 'recognize the need based on their lay constituencies.' Thus, the armed forces will appoint chaplains from religions or sects not previously represented when the number of adherents to the particular faith reaches a certain critical mass within the services." Rosen, *supra* note 13, at 1165 (citing INSPECTOR GEN., U.S. DEP'T OF DEFENSE, EVALUATION REPORT ON THE DoD CHAPLAIN PROGRAM 12-13 (2004); AR 165-1, *supra* note 13, at para. 6-2a).

141. See Kasperowicz, *supra* note 48 (noting Rep. Jared Polis's statement that secular counselors do not "enjoy the same confidentiality that a chaplain visit does").

OneSource initiative.¹⁴² These communication channels are all covered by a solid therapist-patient privilege of confidentiality that was created for purely nonreligious reasons.¹⁴³

Nontheists complain that this therapist privilege is not all encompassing. They are correct; the privilege is less comprehensive than that found within the chaplain corps. For instance, it does not apply in cases when the patient is a danger to himself or others or when disclosure is necessary to ensure the safety and security of military property or classified information.¹⁴⁴ But the problem with this nontheist complaint, from a Free Exercise standpoint, is that it does not provide a religion-based rationale for rejecting these various exceptions. The areas where confidentiality is not guaranteed have nothing to do with religious or existential issues, and nontheists have no religion-based justification to argue for more confidentiality in these areas. Also, the exceptions apply equally to believing and nonbelieving servicemembers who seek these counseling services.

But what of the confidentiality available *inside* the chaplaincy? Servicemembers of all faiths or no faith also have equal rights to speak confidentially with a chaplain about any matter.¹⁴⁵ Indeed, the military privilege extends this confidentiality to *all* communications to a chaplain made "as a matter of conscience."¹⁴⁶ Of course, secularists question whether theist chaplains are capable of providing advice to

142. DEP'T OF DEF. TASK FORCE ON MENTAL HEALTH, AN ACHIEVABLE VISION: REPORT OF THE DEFENSE TASK FORCE ON MENTAL HEALTH 13 (2007) [hereinafter AN ACHIEVABLE VISION] ("OneSource is a DOD-funded initiative offering 24-hour, 7-day-a-week, confidential non-medical information and referral system that can be accessed globally through the telephone, Internet, and e-mail. In addition, it offers confidential family and personal counseling in local communities Face-to-face counseling is provided at no cost for up to six sessions per person per problem per year.").

143. See MIL. R. EVID. 513(a) (2012) ("A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist . . . if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition."); *Jaffee v. Redmond*, 518 U.S. 1 (1996) (discussing the basis in federal common law for the privilege).

144. MIL. R. EVID. 513(d).

145. See AR 165-1, *supra* note 13, at para. 16-2(a) ("The privilege of confidential communication with a Chaplain is a right of every individual . . .").

146. MIL. R. EVID. 503(a) (allowing members the privilege "to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman . . . if such communication is made either as a formal act of religion or as a matter of conscience"); see also AR 165-1, *supra* note 13, at para. 16-2(a) ("Confidential communication is any communication given to a Chaplain in trust by an individual, to include enemy prisoners of war (EPWs), if such communication is made either as a formal act of religion or as a matter of conscience.").

nontheists—a question to be taken up later.¹⁴⁷ For now, the key First Amendment difficulty is that the nontheist complaint about confidentiality lacks a Free Exercise component. Communications to military chaplains and civilian clergy are protected under military law as a *religious* accommodation, just as in many civilian jurisdictions.¹⁴⁸ But this accommodation stems from a millennia-old religious requirement in the Catholic Church requiring a priest to preserve the inviolate seal of secrecy when a penitent confessed sins during the Sacrament of Confession.¹⁴⁹ Forcing a priest to reveal the sins of a penitent could have serious repercussions on the soul of the priest and the ability of the Church to dispense forgiveness.¹⁵⁰ No similar religious argument accompanies a secularist's concerns about confidentiality. With no fear of divine retribution or forgiveness, the atheist may have practical reasons for confidentiality, but no religion-based justifications.

In short, secularists are not burdened in the exercise of any religious belief due to the therapist-patient privilege. This policy-based complaint does not trigger a Free Exercise claim.

B. Is Competent Counseling Available to Nontheists Outside the Chaplaincy?

Confidentiality aside, proponents for atheist chaplains also raise two objections regarding the adequacy of secular counseling. They worry about a perceived stigma associated with the mental health profession,¹⁵¹ and they complain that secular counselors are not

147. See *infra* Part.III.C.

148. See U.S. DEP'T OF THE AIR FORCE, INSTRUCTION 52-101, PLANNING AND ORGANIZING para. 4.1 (2005) [hereinafter AFI 52-101] ("The privilege of total confidentiality in communications with a chaplain is an essential component of the chaplain's ministry."). This is on par with many state privileges. See, e.g., FLA. STAT. ANN. § 90.505(1)(b) (West 2014) ("A communication between a member of the clergy and a person is 'confidential' if made privately for the purpose of seeking spiritual counsel and advice from the member of the clergy in the usual course of his or her practice or discipline . . .").

149. See Chad G. Marzen, *Protecting Statements in Catholic Tribunal Proceedings Under the Priest-Penitent Privilege: Cimijotti v. Paulsen Considered*, 88 U. DET. MERCY L. REV. 291 (2010) (discussing the history of the priest-penitent privilege and considering various state privileges that require the communication be penitential in nature).

150. Today, the same strict religious requirements of secrecy still govern Roman Catholic priests. See CATECHISM OF THE CATHOLIC CHURCH, No. 2490 (2d ed. 1994) ("[I]t is a crime for a confessor in any way to betray a penitent by word or in any other manner or for any reason." (internal quotation marks omitted)).

151. *Nontheists Urge House*, *supra* note 46 ("Religious chaplains are ill equipped to handle the problems of nontheistic service members and unfortunately, seeking psychiatric help can stigmatize a service member for the rest of their career." (quoting nontheists) (internal quotation marks omitted)).

equipped to discuss existential questions.¹⁵² These objections also fall short of stating a Free Exercise claim.

Some military members do perceive a stigma against those who seek the advice of counseling professionals—both chaplains and mental health providers.¹⁵³ This stems from a military culture that values “strength, mental toughness, elitism and self-sufficiency,” while shunning a culture of professional counseling, which is “deficiency-oriented and values emotional vulnerability.”¹⁵⁴ Counseling from chaplains also clashes with this military culture; however, servicemembers perceive less stigma with the chaplaincy¹⁵⁵ and feel more comfortable seeking those services, partly due to the chaplaincy’s stronger privilege of confidentiality.¹⁵⁶

Though unfortunate, the stigma issue does not raise a Free Exercise claim. Both believing and nonbelieving military members are susceptible to the same fear of a stigma, and it impacts the services of both chaplains and secular counselors. Moreover, this is mostly a problem of perception; there are no actual governmental barriers or burdens to receiving secular counseling services. In fact, the DOD has

152. See *House Debate*, *supra* note 5, at H4942 (comments of Rep. Robert E. Andrews (D., NJ)).

153. See U.S. DEP’T OF DEFENSE TASK FORCE ON THE PREVENTION OF SUICIDE BY MEMBERS OF THE ARMED FORCES, *THE CHALLENGE AND THE PROMISE: STRENGTHENING THE FORCE, PREVENTING SUICIDE AND SAVING LIVES* 59 (2010) [hereinafter *PREVENTING SUICIDE AND SAVING LIVES*], available at <https://ia801008.us.archive.org/0/items/551723-suicide-prevention-task-force-final-report/551723-suicide-prevention-task-force-final-report.pdf> (“Site visits revealed widespread reports in some military branches and specialties of discriminatory treatment of Service Members who had made appointments to see mental health professionals or chaplains for assistance with personal, psychological, emotional, or spiritual concerns and reported being singled out and publicly humiliated, often in front of their entire units.”).

154. Craig J. Bryan, *It’s Okay to Change: Mental Health Stigma, Mental Health Care and Suicide Prevention Among Military Personnel and Veterans*, HUFFINGTON POST (Sept. 2, 2013), http://www.huffingtonpost.com/dr-craig-j-bryan/its-okay-to-change-mental_b_3839146.html.

155. A 2012 study conducted by the DOD and Veterans Administration determined that “qualitative findings indicate that chaplains may be more likely to be sought out for care than mental health care providers for reasons such as reduced stigma, greater confidentiality, more flexible availability, and comfort with clergy as natural supports within a community.” Jason A. Nieuwsma et al., *Chaplaincy and Mental Health in the Department of Veterans Affairs and Department of Defense*, 19 J. HEALTH CARE CHAPLAINCY, no. 1, 2013, at 11. A similar result was noted by a 2010 DOD study into suicide. See *PREVENTING SUICIDE AND SAVING LIVES*, *supra* note 153, at 62.

156. Nieuwsma et al., *supra* note 155, at 11 (listing confidentiality as a common reason for preferring a chaplain to a mental health professional); *PREVENTING SUICIDE AND SAVING LIVES*, *supra* note 153, at 63 (“Rather than entering a behavioral healthcare clinic, many expressed their preference for the chaplaincy because of the added confidentiality and/or the more acceptable primary care setting.”).

identified this stigma issue and is actively and systematically engaged in changing these perceptions and encouraging members to seek counseling from the many channels available to them, both secular and religious.¹⁵⁷

Nontheists also question whether therapists and counselors are “equipped to answer those kinds of existential questions” asked by atheist servicemembers.¹⁵⁸ This concern assumes therapists cannot address existential questions from a secular perspective and undervalues the services available from counselors who routinely help clients grapple with difficult personal, family, and mental issues without involving God. Once the supernatural is removed from the equation, even existential questions must necessarily find their answer in biological, chemical, and psychological processes. These are cornerstones of the modern counseling industry.

Perhaps the real concern here is that, even if therapists do have the training to handle these issues, nontheists should not be forced to seek answers from the mental health profession:

It is wrong to say to a soldier who comes from such a [humanist] tradition, that he or she, if they have an issue on which they're troubled, must go to a mental health professional in order to receive counseling, rather than someone who comes from their philosophical faith or tradition.¹⁵⁹

This concern is valid. The desire to discuss existential questions in a confidential setting is quite different than seeking professional services for dysfunctional families or mental illness. But must atheist chaplains be admitted to address this concern? This leads to the next critique by nontheists: the adequacy of theist chaplains to handle nontheist counseling.

C. Can Theist Chaplains Adequately Minister to Nontheists?

In reality, when secularists complain about a lack of confidentiality or training *outside* the chaplaincy, they are mostly complaining about the lack of atheists *inside* the chaplaincy. The real issue is

157. See Exec. Order No. 13625, sec. 4(C)(ii)(2), 77 Fed. Reg. 54783 (Sept. 5, 2012) (setting out as a function of the task force the duty to evaluate “agency efforts to improve awareness and reduce stigma for those needing to seek care”); AN ACHIEVABLE VISION, *supra* note 142, at 15 (setting, as a major priority, the reduction of the stigma associated with mental health professionals and chaplains).

158. During the 2014 House debate, Rep. Jared Polis argued: “A psychiatrist or a medical professional is not equipped to answer those kinds of existential questions that a member of the military might seek out to discuss with a chaplain. Why am I here? What’s the meaning of life? How do I justify the use of force?” *House Debate*, *supra* note 5, at H4942.

159. *Id.* (comments of Rep. Robert E. Andrews (D., NJ)).

whether theist chaplains can adequately serve the "religious" needs of nontheists. If theist chaplains are up to the task, then the admission of atheist chaplains under the Free Exercise Clause is not required. But nontheists maintain that "[r]eligious chaplains are ill equipped to handle the problems of nontheistic service members."¹⁶⁰ This claim overlooks both the ability and commitment of theist chaplains to perform their duty.

Secularists argue that theist chaplains are untrained in nonreligious philosophies by claiming they rarely receive religious-diversity instruction in their seminaries, including "training in philosophies such as humanism, atheism and agnosticism (or Buddhism, pantheistic religions or Wiccan, for that matter)."¹⁶¹ But this claim is inaccurate. Most Christian seminaries offer extensive coursework on world religions and secular philosophies.¹⁶² Once in the military, these chaplains will also receive additional diversity training.¹⁶³

More significantly, secularists have argued that some chaplains cannot extricate themselves from their faith-based views to assist atheist servicemembers. Imagine a nontheist who consults a chaplain due to a lack of meaning in life. Consider this potential response from atheist author Richard Dawkins: "There is something infantile in the presumption that somebody else . . . has a responsibility to give your life meaning and point. . . . The truly adult view, by contrast, is that our life is as meaningful, as full and as wonderful as we choose to

160. *Nontheists Urge House*, *supra* note 46 (internal quotation marks omitted) (quoting Edwina Rogers, Executive Director of the Secular Coalition for America).

161. *Secular Letter*, *supra* note 9.

162. Guidelines on the formation of Roman Catholic priests in the United States require extensive coursework in all types of secular and religious philosophy, including "the study of logic, epistemology, philosophy of nature, metaphysics, natural theology, anthropology, and ethics." U.S. CONFERENCE OF CATHOLIC BISHOPS, PROGRAM OF PRIESTLY FORMATION 59 (5th ed. 2006), *available at* <http://www.usccb.org/upload/program-priestly-formation-fifth-edition.pdf>. This includes the "study of philosophical anthropology" and the "philosophical study of the human person, his fulfillment in intersubjectivity, his destiny, his inalienable rights, and his nuptial character as one of the primary elements which is expressive of human nature and constitutive of society." *Id.* at 60 (internal quotation marks omitted); *see also* 2012–2013 *Academic Catalog*, FULLER THEOLOGICAL SEMINARY, *available at* [http://www.fuller.edu/Microsites/Academic_Catalogs/2012_-_2013/Course_Descriptions_\(School_of_Theology\)/](http://www.fuller.edu/Microsites/Academic_Catalogs/2012_-_2013/Course_Descriptions_(School_of_Theology)/) (last visited May 31, 2014) (discussing courses that address world religion, secular humanism, and other secular philosophies).

163. The Army's basic chaplain officer course includes several phases of training. Phase Two emphasizes "pastoral ministry in the military environment, communication skills, pluralism, ethics, Basic Human Interaction, [and] world religions," while Phase Three focuses on "integration of military and pastoral skills including collegiality and pluralism." *Chaplain Basic Officer Leadership Course (CHBOLC)*, U.S. ARMY CHAPLAIN CTR. & SCH. (Jan. 15, 2009), *available at* http://dmna.ny.gov/arng/ocs/chbolc_dates.pdf.

make it.”¹⁶⁴ Could a theist chaplain offer such advice? Nontheists point to instances where theist chaplains have allegedly overstepped their bounds and proselytized unwilling atheists instead of accepting them.¹⁶⁵ This criticism strikes at the heart of the chaplaincy: the ability to relate to members of varying faiths in a pluralistic environment based on tolerance and respect.

The idea that chaplains serve members of all faith traditions has been woven into the very fabric of the chaplain corps.¹⁶⁶ The Navy chaplaincy currently lists its core competencies as follows: “Chaplains care for all Service members, including those who claim no religious faith, facilitate the religious requirements of personnel of all faiths, provide faith-specific ministries, and advise the command.”¹⁶⁷ An Air Force chaplain described a chaplain’s duty this way:

A chaplain’s ultimate responsibility is to provide for the free exercise of religion, including those who express a specific religion and those who express no religion at all.

From my perspective, I am a chaplain to all, a pastor to some.

I am not allowed to pick and choose whom I will serve based on a service member’s religious affiliation.¹⁶⁸

With only a few Buddhist, Muslim, and Hindu chaplains on active duty, members of those faith groups—and many other minority religious groups without specific representation—daily receive advice from chaplains of widely differing beliefs.¹⁶⁹ It is a fact of military life.

Indeed, chaplains are asked to walk a fine line between supporting religion under the Free Exercise Clause and counseling members

164. RICHARD DAWKINS, *THE GOD DELUSION* 360 (2006).

165. This was another area in which secularists engaged President-Elect Obama in 2008, complaining that some “chaplains have reportedly tolerated disparaging remarks about belief systems . . . and allowed commanding officers to deny privileges to nontheists that are routinely available to religious members.” *Secular Letter*, *supra* note 9.

166. See WAR DEP’T, ARMY REGULATION 60-5, CHAPLAINS para. 4(b) (1941) [hereinafter AR 60-5] (“Chaplains will serve as friends, counselors, and guides, without discrimination, to all members of the command to which they are assigned, regardless of creed or sect.”).

167. NAVY INSTRUCTION 1730.7D, *supra* note 13, at para. 5(e) (3); see also AR 165-1, *supra* note 13, at para. 1-5(b) (“Army Chaplains represent faith groups within the pluralistic religious culture in America and demonstrate the values of religious freedom of conscience and spiritual choice.”).

168. Keith Beckwith, *Military Chaplains Responsibility Is Free Exercise of Religion*, NORTHFIELD NEWS (May 25, 2013), available at http://www.southernminn.com/northfield_news/opinion/guest_columns/article_f733dbf5-0ab4-5c17-9994-713806f0c46b.html (editorial by Air National Guard chaplain).

169. During the 2013 House debate, one Congressman noted: “Military chaplains have a duty to faithfully serve all servicemembers and to facilitate the free exercise of religion under the First Amendment.” *House Debate*, *supra* note 5, at H4942 (comments of Rep. Jim Bridenstine (R., OK)).

in a setting free from unwanted proselytization. There undoubtedly are instances where chaplains have not fulfilled the lofty goals of their calling, but those are relatively few compared to the hundreds of thousands of counseling sessions conducted by chaplains each year. From the beginning of their service, chaplains agree "as a condition of appointment" that they are "willing to function in the diverse and pluralistic environment of the military, with tolerance for diverse religious traditions and respect for the rights of individuals to determine their own religious convictions."¹⁷⁰ Daily military life testifies to the overall faithfulness of chaplains to this duty, as evidenced by the scant complaints against them and their continued popularity as a source of counseling among the troops.

From a Free Exercise perspective, another obstacle undermines the secularist demand for atheist chaplains as a required accommodation: the proposed solution would not actually solve the alleged problems for almost all atheist servicemembers. If a small, representative number of atheist chaplains was admitted in the chaplain corps—just as a few Hindu and Buddhist chaplains have been admitted—from a statistical standpoint that would not change the dynamic of which nontheists complain. With hundreds of military installations throughout the world, almost all nontheist servicemembers would still need to rely on theist chaplains and secular counselors to handle their personal issues. Few military installations would house an atheist chaplain available for this kind of counseling. The reality for servicemembers of all (or no) faiths is that they must rely on the professionalism of chaplains and other counselors who often do not share the same faith tradition. The proposed accommodation would not alter this fact.

D. Can Atheists Fulfill the Duties of a Military Chaplain?

Secularists have demanded the admission of atheist military chaplains to better serve the needs of nonbelieving servicemembers. Assume *arguendo* that, first, atheism is a religion and, second, that the Free Exercise Clause requires the military to provide nontheist members with "someone who comes from their philosophical faith or tradi-

170. NAVY INSTRUCTION 1730.7D, *supra* note 13, at para. 5(e)(2); *see also* AR 165-1, *supra* note 13, at para. 3-2(b)(2) ("Chaplains will minister to the personnel of their unit and/or facilitate the free-exercise rights of all personnel, regardless of religious affiliation of either the Chaplain or the unit member.").

tion”¹⁷¹ to whom they can speak about existential questions. These two assumptions do not yet resolve the atheist chaplain question. Traditionalists have argued that, since 1775, “chaplains have been affiliated with faith and spirituality. By definition, chaplains minister to the spiritual needs of our men and women in the armed services—a vital function that an individual without any inclination towards spirituality would not be able to perform.”¹⁷² If atheists are unable to fully perform the duties of a chaplain, then a different accommodation could be in order, such as creating a position separate and outside of the historically faith-based chaplaincy.

Representative John Fleming (R., LA) argued during the 2014 DOD Appropriations Act debate that “[a] chaplain is a person who ministers to spiritual needs, but who is assigned to a secular organization.”¹⁷³ Current military regulations support this characterization, dividing the duties of modern chaplains into three broad categories. “The Chaplain Service (1) conducts religious observances, (2) provides pastoral care, and (3) offers advice to leaders on spiritual, ethical, moral, morale, and religious accommodation issues.”¹⁷⁴ This Subpart questions whether atheists can accomplish these core duties without fundamentally changing them.

1. Conducting Religious Observances

As perhaps their most trademark duty, chaplains have always held weekly religious services for military members according to their varied faith-based traditions. This duty has been discussed at length in even the earliest unofficial chaplain manuals.¹⁷⁵ Indeed, it has been required by federal statute since 1864.¹⁷⁶ In the U.S. military today,

171. *House Debate*, *supra* note 5, at H4942 (comments of Rep. Robert E. Andrews (D., NJ)).

172. *Id.* at H4942 (comments of Rep. John Fleming (R., LA)).

173. *House Debate*, *supra* note 5, at H4943 (comments of Rep. John Fleming (R., LA)).

174. AFPD 52-1, *supra* note 1, at para. 1.2 (defining “core processes”). The Navy and Army divide these areas up slightly differently, yet capture the same general idea. *See* NAVY INSTRUCTION 1730.7D, *supra* note 13, at para. 5(e)(3); AR 165-1, *supra* note 13, at para. 3-1(b).

175. Robert Nay, *The Operational, Social, and Religious Influences Upon the Army Chaplain Field Manual, 1926-1952* (June 13, 2008) (Master’s Thesis, U.S. Army Command and General Staff College). Prior to the twentieth century, there were no official chaplain manuals. *Id.* There were, however, several officially sanctioned works by private Army chaplains that set forth the duties of military chaplains. *Id.* While these manuals do not carry the full weight of official government pronouncements, they accurately portray the realities of chaplain life during the nineteenth century. *See id.*

176. Act of April 9, 1864, ch. 53, sec. 4, 13 Stat. 46 (“[A]ll chaplains in the military service of the United States shall hold appropriate religious services at the burial of soldiers

this notion still evokes images of Catholic priests saying Mass, Protestant ministers preaching sermons, Jewish rabbis reading from the Torah in the synagogue, and Muslim imams bowing in submissive prayer to Allah. Even Buddhism—often cited by atheists as an example of a nontheistic religion¹⁷⁷—has military chaplains who offer faith-based services to servicemembers.¹⁷⁸

The legal duty to hold weekly religious services again raises the question of how to define the term *religion*—whether it should include atheism in its embrace.¹⁷⁹ But that very modern question would have been foreign to those who levied the legal requirements for the chaplaincy. Indeed, when originally passed in 1864 and recodified in 1956, the statutory requirement for chaplains to hold weekly religious services was directed exclusively at faith-based services, not a purely secular gathering.¹⁸⁰ That is still true in the law today, with the Air Force calling chaplains “visible reminders of the Holy,”¹⁸¹ and the Army requiring that “[a]ll Chaplains provide for the nurture and practice of religious beliefs, traditions, and customs in a pluralistic environment to strengthen the spiritual lives of Soldiers and their Families.”¹⁸²

Secularists maintain that atheist chaplains would fulfill this legal duty by holding their own weekly services for nontheists—something that occurs in the few nations with humanist chaplains. Consider a

who may die in the command to which they are assigned to duty, and it shall be their duty to hold public religious services at least once each Sabbath when practicable.”).

177. This may not be an accurate characterization. See *United States v. Seeger*, 380 U.S. 163, 188-93 (1965) (Douglas, J., concurring) (discussing how Buddhists could be seen to believe in *God*, depending on how the term is defined).

178. In 2013, an Army Buddhist chaplain opened a “faith-based resiliency center” at Bagram Airfield in Afghanistan where he “has been leading meditation classes and providing spiritual support for Army Buddhists” in a “building dedicated to Eastern health and spiritual practices,” equipped with “a Buddhist altar and statues inside.” Samantha Bryson, *Spiritual Warfare: Buddhist Chaplain Helps Heal Soldiers’ Minds*, STARS & STRIPES (May 18, 2013), <http://www.stripes.com/news/us/spiritual-warfare-buddhist-chaplain-helps-heal-soldiers-minds-1.221388> (internal quotation marks omitted) (describing Captain Thomas Dyer, a Baptist minister turned Buddhist chaplain).

179. See *supra* Part II.A.1 for a discussion on whether atheism should be treated as a religion.

180. Not only did chaplains primarily perform religious services, they were strictly limited in the performance of secular duties. See U.S. DEP’T OF THE ARMY, REGULATION 165-15, RELIGIOUS ACTIVITIES: FUNCTIONS OF CHAPLAINS, COMMANDERS’ RESPONSIBILITIES, AND REPORTS para. 2(a) (1955) (“The status of a chaplain in the Army is that of a religious and spiritual leader. . . . He may be detailed to perform secular duties only in cases of extreme military emergency.”).

181. AFI 52-101, *supra* note 148, at para. 2.1.

182. AR 165-1, *supra* note 13, at para. 3-2(a). This is consistent with traditional requirements that chaplains “strive to promote morality, religion, and good order” in their units. AR 60-5, *supra* note 166, at para. 4(b).

description by a Dutch atheist chaplain—actually, a “humanist counselor,” a term specially designed to avoid the word *chaplain*¹⁸³—who deployed from the Netherlands to Afghanistan.¹⁸⁴ She explained that in her ministry she gives soldiers talks on different topics, such as forgiveness, and speaks with them about “learning to let go, about the families that the soldiers have left at home and how to deal with being part of a war.”¹⁸⁵ Other issues atheist chaplains might discuss with members as part of their ministry include existential questions such as: “Why am I here? What’s the meaning of life? How do I justify the use of force?”¹⁸⁶

One can hardly dispute that nontheist servicemembers will grapple with these types of existential questions—universal, ultimate human questions to which religion has provided answers throughout history. Nor should one doubt that the atheist’s answers to these questions will be uniquely different from that of the Christian, Muslim, or Jew. Recall atheist author Richard Dawkins’s quip that “[t]here is something infantile in the presumption that somebody else . . . has a responsibility to give your life meaning and point.”¹⁸⁷ As one nontheist argued, a humanist community “mostly does what religions do—provide fellowship and a chance for ethical and moral development. ‘If there’s a reason to support religion in the military, it’s the ethics and values that come out of it, not the supernatural claims’”¹⁸⁸ Imagine nontheist servicemembers coming together in fellowship with one another, raising their voices in song about the brotherhood and sisterhood of humankind, followed by the type of sermon described by the Dutch counselor about forgiveness and war or a talk on the meaning of life.

At least in appearance, that kind of secular gathering would not be far different from the weekly services held in some traditional Western religions. But it would still lack any faith-based component

183. See Jason Torpy, *Humanist Chaplains in the Dutch Military*, MILITARY ASS’N OF ATHEISTS & FREETHINKERS (Mar. 29, 2013), <http://militaryatheists.org/news/2013/03/humanist-chaplains-in-the-dutch-military/> (noting that humanists were not designated with the name *chaplain*).

184. Matthew Fisher, *Padre Offers Guidance Without God*, EDMONTON J. (May 1, 2009), <http://www2.canada.com/edmontonjournal/news/story.html?id=33973229-2683-46ec-ae1a-c215207206ab&p=1> (interviewing a female humanist chaplain stationed in Afghanistan in 2009).

185. *Id.*

186. *House Debate*, *supra* note 5, at H4942 (comments of Rep. Jared Polis (D., CO)).

187. Dawkins, *supra* note 164, at 360.

188. Carroll, *supra* note 10 (quoting Army Captain Ryan Jean, organizer of ATOM).

directed to the Holy¹⁸⁹ or the spiritual.¹⁹⁰ And that is the critical objection raised by traditionalists. Once atheist chaplains are admitted, the definition of a religious service will need modification to focus it away from the Holy and on to some broader concept that would encompass both the spiritual and the nonspiritual. This would necessarily result in a fundamental redefinition of the chaplain's most sacred duty, as is discussed further in Part IV.

The issue becomes even more complicated when removed from the weekly service to the other types of services chaplains must be ready to perform, such as funerals and memorials.¹⁹¹ Could an atheist chaplain perform these for a theist military member? Current Army regulations allow for chaplains to opt out of performing services that "would be in variance with the tenets or practices of their faith."¹⁹² For the vast majority of religious military members who die, a religious service would be expected and desired. Atheist chaplains would likely need to opt out of those services to remain true to their own beliefs.¹⁹³

In sum, traditionalists would argue that an atheist chaplain cannot perform the religious observances envisioned by current federal law and military regulation. Moreover, even if one were to assume that a weekly secular service would satisfy the requirement for a religious observance, it is likely that atheist chaplains would opt out of services for the majority of members, who still overwhelmingly subscribe to a faith-based religious tradition.

189. See *supra* text accompanying note 181.

190. See *supra* text accompanying note 182.

191. This is another area where chaplains have long performed important duties. See AR 60-5, *supra* note 166, at para. 4(b)-(c) (requiring chaplains to conduct "appropriate religious services," "activities as usually attach to formal or informal Sunday or weekday religious observances," "burial services," the "marriage rite," and "Christian baptism"); 10 U.S.C. § 3547(a) (2012) (requiring chaplains to perform "religious burial services for members of the Army who die while in [their] command.").

192. AR 165-1, *supra* note 13, at para. 3-2(b)(6); see also NAVY INSTRUCTION 1730.7D, *supra* note 13, at para. 6(e) ("When invited to deliver religious elements at command functions, if the chaplain chooses not to participate, he or she may do so without adverse consequences.").

193. It would seem to be asking too much for an atheist chaplain to fake it with regard to a service where one talks about the joys of an afterlife awaiting the deceased servicemember. In contrast, a theist chaplain performing a memorial service for a nontheist could honor the memory of the member without making outward references to God, if that were the best way to comply with that member's wishes.

2. Providing Pastoral Care

The second broad category of chaplain duties is to provide pastoral care to servicemembers and their families.¹⁹⁴ This wide-ranging mission occurs both on and off the battlefield, at home and abroad. It requires chaplains to put themselves in harm's way as they comfort wounded soldiers in combat zones and to put themselves in uncomfortable situations at military hospitals as they console grieving family members or those diagnosed with illness. Some wonder whether atheists are equipped to provide the counseling expected from chaplains during those difficult times when people often seek spiritual answers or turn to God for help.¹⁹⁵

Seven U.S. military chaplains have been awarded the Medal of Honor¹⁹⁶ and several others have been killed or wounded and received medals such as the Four Chaplains' Award¹⁹⁷ and the Purple Heart.¹⁹⁸ Consider the service of two chaplains posthumously awarded the Medal of Honor. Father Vincent Capodanno—a Navy chaplain killed in Vietnam attempting to rescue a wounded medical corps-

194. AFPD 52-1, *supra* note 1, at para. 1.2.

195. For instance, during the 2013 House Debate, Representative John Fleming openly doubted the ability of atheist chaplains “to minister to the spiritual needs” of believers. *House Debate*, *supra* note 5, at H4943.

196. See DRAZIN & CURREY, *supra* note 23, at 42; *Kapaun to Be 7th Chaplain to Earn Medal of Honor*, WICHITA EAGLE (Apr. 10, 2013), <http://www.kansas.com/2013/04/10/2755994/kapaun-to-be-7th-chaplain-to-earn.html>. The other awardees were two chaplains from the Civil War, one from World War II, and three from Vietnam. *Id.*

197. This 1961 “Special Medal for Heroism” was awarded posthumously to four chaplains for their acts aboard the USAT *Dorchester*, sunk by a German U-boat in 1943. *The Saga of the Four Chaplains*, FOUR CHAPLAINS MEM’L FOUND., <http://www.fourchaplains.org/story.html> (last visited Apr. 14, 2014). The chaplains encouraged the men and gave up their places on a lifeboat. *Id.*

Rabbi Goode did not call out for a Jew; Father Washington did not call out for a Catholic; nor did the Reverends Fox and Poling call out for a Protestant. They simply gave their life jackets to the next man in line.

As the ship went down, survivors in nearby rafts could see the four chaplains—arms linked and braced against the slanting deck. Their voices could also be heard offering prayers.

Id.

198. For instance, as recently as February 2014, Chaplain Captain Michael Frese received the Purple Heart for injuries he received during a hostile rocket attack in Afghanistan in 2011. See *Indiana Air Guard Chaplain Receives Purple Heart*, ASSOCIATED PRESS (Feb. 24, 2014), <http://www.armytimes.com/article/20140224/NEWS/302240015/Indiana-Air-Guard-chaplain-receives-Purple-Heart>.

man¹⁹⁹—received this recommendation for a Bronze Star while still alive:

Father Capodanno was particularly adept in putting men in the proper frame of mind before and during battle. . . . He eliminated bitterness from their hearts and instilled Christian determination and morals to be drawn against in future battles. He encouraged the men of all faiths to do more for their God, our Country, their corps and themselves.²⁰⁰

The citation to accompany Father Capodanno's Medal of Honor recounted his death as he "moved about the battlefield administering last rites to the dying and giving medical aid to the wounded . . . [and] provided encouragement by voice and example to the valiant marines."²⁰¹

Army chaplain Father Emil Kapaun displayed similar courage before he died in a prisoner-of-war camp during the Korean War.²⁰² He pulled several soldiers to safety during battle and, while a prisoner, kept up the men's spirits by sneaking "past guards to visit the enlisted huts, sharing news and encouragement and saying a brief prayer during each visit."²⁰³ On Easter Sunday, he celebrated a prohibited

ecumenical sunrise service in the ruins of a burned out church. . . . Most of the men in the officers' compound attended, including Catholics, Protestants, Jews and atheists. . . . The officers sang at the top of their lungs, hoping the music would reach the other prisoners at Pyoktong."²⁰⁴

The courageous deaths of Chaplains Capodanno and Kapaun illustrate the special calling of military chaplains to cater to the Free Exercise needs of the nation's brave men and women in their deepest hours of suffering. On the battlefield, wounded or dying military members can turn to the comfort of a chaplain to help cope with the most significant emotional crisis in their lives—an appointment that cannot be rescheduled for a more convenient time. Although no statistics are kept on such things, servicemembers who do not profess belief in a deity sometimes turn to God in those most trying of

199. *Medal of Honor Recipients: Vietnam War*, U.S. ARMY CTR. OF MILITARY HISTORY, <http://www.history.army.mil/moh/vietnam-a-1.html#CAPODANNO> (last updated Apr. 14, 2014).

200. ANN BALL, *FACES OF HOLINESS* II 255 (2001) (quoting Major Edward Fitzgerald's recommendation of Father Capodanno for the Bronze Star).

201. *Medal of Honor Recipients: Vietnam War*, *supra* note 199.

202. William C. Latham Jr., *Father Emil Kapaun*, 2012 ARMY MAGAZINE 38, 41–43, available at http://www.USA.org/publications/armymagazine/archive/2012/11/Documents/Latham_1112.pdf.

203. *Id.*

204. *Id.*

times.²⁰⁵ Traditionalists worry that an atheist chaplain would be unable to fulfill this duty: “[A]n atheist chaplain would be the last person in the world that we would want for a dying soldier who needs that last moment of counseling in their life.”²⁰⁶

Off the battlefield, the pastoral duties of a chaplain continue at home, where chaplains individually counsel servicemembers and work in programs that build up military families.²⁰⁷ Their work includes “coaching on military life, pre- and post-deployment training for Service members and their families, [and] crisis prevention and response.”²⁰⁸ They also provide support in various well-being programs, including “suicide prevention, domestic violence and intervention, sexual assault prevention and response, deployment cycle support, and battle mind training.”²⁰⁹ Notably, they are part of the military team that must inform next-of-kin about the death of their military family member.²¹⁰ Nontheists argue these duties do not require a belief in God for a chaplain to accomplish them; they are mistaken. The role of chaplain as pastoral counselor has always been a religious duty because “pastoral counseling is a formal and spiritually integrated process enabling Army constituents to change, cope, and resolve their presenting issues in a religious framework.”²¹¹ It does not seem possible for atheists to fulfill some of these roles without changing the nature of pastoral counseling by removing the spiritual from this religious framework.

How do nontheists address these concerns? They point out that nonbelieving military members have needs that are similar in kind to the spiritual needs of believers but require the expertise of one trained in humanistic philosophy.²¹² They also contend that atheist

205. This notion explains the aphorism, “[t]here are no atheists in foxholes,” often attributed to President Dwight D. Eisenhower. Alex Murashko, *Air Force Republishes Chaplain’s ‘No Atheists in Foxholes’ Article to Base Website*, CHRISTIAN POST (Aug. 14, 2013), <http://www.christianpost.com/news/air-force-republishes-chaplains-no-atheists-in-foxholes-article-to-base-website-102226/>.

206. *House Debate*, *supra* note 5, at H4943 (comments of Rep. John Fleming (R., LA)).

207. See AR 165-1, *supra* note 13, at para. 16-1 (“Pastoral care and counseling describes a broad range of activities involved in caring for and strengthening Army personnel to survive and grow through the multitude of experiences that are part of military life.”).

208. NAVY INSTRUCTION 1730.7D, *supra* note 13, at para. 5(e)(3)(a).

209. AR 165-1, *supra* note 13, at para. 16-3(f).

210. AFI 52-101, *supra* note 148, at para. 4.2 (“Chaplains are members of the notification team. They provide pastoral care and support for both next-of-kin and death notification team members.”).

211. AR 165-1, *supra* note 13, at para. 16-3(a)(3).

212. See Dao, *supra* note 11 (“Humanism fills the same role for atheists that Christianity does for Christians and Judaism does for Jews It answers questions of ultimate con-

chaplains could be trained to work with believing servicemembers in the same way that Buddhists and Hindus can work with monotheistic members.²¹³ One atheist chaplain candidate has explained how he would handle a military member seeking him out to pray:

As a pastoral caregiver, I wouldn't lead a prayer with that particular person, but I would help them with it. . . . Having come from the background of Christians, I would understand what sort of things to help the person speak about. . . . [I]t would be on the sort of terms where I would be able to work more with them philosophically.²¹⁴

Even if workable in theory, this approach might not fulfill the practical Free Exercise needs of that servicemember at the moment. It is also notable that this candidate's ability to reach out to religious military members is grounded in his former life as a Christian—a situation that will not be the case with all atheist chaplains.

In sum, it is doubtful an atheist could perform the traditionally spiritual duties of pastoral counseling that separate a chaplain's healing from that of a mental health professional.

3. Offering Advice to Leaders

Chaplains serve a “dual role as religious leaders and religious support staff officers.”²¹⁵ The final area of their duties puts them squarely into the role of staff officers. Specifically, this third category requires chaplains to offer “advice to leaders on spiritual, ethical, moral, morale, and religious accommodation issues.”²¹⁶ Although more modern in its heritage, this has been another longstanding function of the chaplain corps.²¹⁷ Significantly, of the three duty areas this one seems most suitable to chaplains of all faiths or no faith.

cern; it directs our values.” (quoting Jason Torpy, head of the MAAF) (internal quotation marks omitted)).

213. *House Debate*, *supra* note 5, at H4942-H4943 (comments of Rep. Jared Polis (D., CO)) (“[J]ust as Catholics have to handle the needs of Jews and Muslims in the service and Buddhist chaplains handle the needs of others, they're all trained to handle the needs of soldiers.”).

214. Burnett, *supra* note 55 (quoting Jason Heap, an applicant to become one of the first atheist chaplains).

215. AR 165-1, *supra* note 13, at para. 3-1(b).

216. AFPD 52-1, *supra* note 1, at para. 1.2; *see also* AR 165-1, *supra* note 13, at para. 3-3(b)(1)(f); *Katcoff v. Marsh*, 755 F.2d 223, 228 (2d Cir. 1985) (“[The modern military chaplain] 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.”).

217. For instance, during World War II, regulations required the Army Chief of Chaplains to make recommendations to military commanders “for such action as he deems advisable to promote the moral and spiritual welfare and contentment of the Army.” AR

Chaplains advise commanders on the “religious needs of assigned personnel;” the “spiritual, ethical, and moral health of the command;” the “personal impact of command policies, leadership practices, and management systems;” the “[e]thical, moral, and humanitarian implications of operational decisions;” and the “impacts of indigenous religions on military operations.”²¹⁸ No doubt, someone with a faith-based perspective would be invaluable in taking the spiritual pulse of the overwhelming majority of members in the command who share a spiritual belief system. Still, an intuitive and personable atheist chaplain would also be able to provide competent advice to military commanders on these matters. Similarly, an atheist chaplain familiar with the legal guidance surrounding the chaplaincy could accurately advise commanders about “public prayer, memorials, prayer at official functions and meetings, visits by ecclesiastical endorsing agencies, and relations with civilian religious leaders and communities.”²¹⁹

The role of chaplains as advisors traditionally assumed they brought a special faith-based value to commanders in these areas. For that reason, some might still argue that there are aspects of this advising role that seem better suited to a chaplain of faith. For instance, the Air Force requires chaplains to provide “[a]dvice consistent with their role as visible reminders of the Holy.”²²⁰ This is clearly a faith-based role. Yet the core of the advising duty is different in kind from the chaplain’s role in conducting religious observances or providing pastoral counseling. The advice function occurs primarily in the chaplain’s role as a support staff officer, the equivalent of a commander’s legal advisor or personnel advisor. For that reason, advice to commanders takes place in a more spiritually sterile environment than the other two functions—an environment suitable to a nonbelieving chaplain.

In conclusion, atheist chaplains would be ill-suited to fulfill two out of three key roles of a modern military chaplain—at least not without redefining the spiritual core of those functions.

60-5, *supra* note 166, at para. 2(a)(1)(b). Chaplains were advisors to “the commander and staff in religious and moral activities of the command,” *id.* at para. 4(i)(1), as well as supervisors “of the spiritual welfare of the command,” *id.* at para. 4(i)(2), and the “logical consultant in all matters pertaining to public religious observances in the command and in matters involving morale, morality, and character building,” *id.* at para. 5.

218. AR 165-1, *supra* note 13, para. 3-3(f).

219. AFI 52-101, *supra* note 148, at para. 5.4.

220. *Id.* at para. 5.1.

4. The Secular Duties of a Chaplain

Before moving to the final part of the Article, it is necessary to address one other issue. Nontheists sometimes argue that the chaplaincy has become more secularized over time and that the presence of these nonreligious duties supports the admission of atheist chaplains.²²¹ This position overstates the reality and ignores changes over history.

It is true that, at various times in history, chaplains took on additional duties that did not require belief in God. In the 1800s, it was common for chaplains, especially in military forts, to hold other jobs on post, such as schoolmaster and librarian.²²² In the Navy, "[u]ntil the Government established the Naval Academy at Annapolis in 1845, the main burden of preparing junior officers [sic] for their future duties rested upon chaplains."²²³ According to Army Regulations in 1913, chaplains also provided "instruction of the enlisted men in the common English branches of education,"²²⁴ tracked "births, baptisms, marriages and deaths" in the command,²²⁵ and did other duties, such as taking "charge of the recreations and amusements of enlisted men," encouraging "correspondence between soldiers and their relatives and friends," and answering the mail on behalf of certain military members.²²⁶ None of this required religious training.

The use of chaplains in this manner began to change when military leadership recognized these additional secular duties presented a threat to the ability of chaplains to perform their core religious functions. By World War II, the duties of chaplains were regulated so commanders could not misuse chaplains by tasking them with a host of secular duties. In the words of one 1941 Army regulation: "Chaplains will not be employed on any duties other than those required of them by law, or pertaining to their profession as clergymen, except when

221. See Carroll, *supra* note 10 (interviewing Jason Torpy, head of the MAAF).

222. See NORTON, *supra* note 26, at 56.

223. 1 CLIFFORD M. DRURY, THE HISTORY OF THE CHAPLAIN CORPS, UNITED STATES NAVY, 1778-1939, at 30 (1950).

224. U.S. WAR DEP'T, REGULATIONS FOR THE ARMY OF THE UNITED STATES, Article VII, para. 44, at 17 (1913) [hereinafter REGULATIONS FOR THE ARMY].

225. *Id.* at para. 45, at 17.

226. *Id.* at para. 46^{1/2}(1), (3), (4), at 18. Some of these duties were reaffirmed in 1937 and 1941, particularly the chaplain's role in encouraging correspondence and teaching enlisted men (but only in "regiments of colored troops"). See AR 60-5, *supra* note 166, at para. 4(d)-(f).

there exists an exigency of the service.”²²⁷ This prohibition continues today in modified form, with Army commanders being prohibited by regulation from assigning chaplains to many nonreligious duties²²⁸ unless in a “temporary military emergency” the chaplain volunteers to “participate or cooperate in nonreligious noncombatant functions that contribute to the welfare of the command.”²²⁹

Nontheist arguments about the secular duties of a chaplain raise a valid point—as far as they go. Atheists would be able to perform the nonreligious duties given to chaplains in the military today. But, as demonstrated earlier, those limited secular duties do not capture the spiritual essence of the military chaplaincy.²³⁰ For that reason, if any nontheist accommodation is required at all, it should be provided outside the bounds of the traditional chaplain corps.

IV. The Redefining Impact of Atheists on the Chaplain Corps

Part II of this Article questioned whether nontheists could use the affirmative protection of the Free Exercise Clause to demand the religious accommodation of atheist military chaplains. Part III concluded that the objections to an exclusively faith-based chaplaincy did not raise viable Free Exercise claims, and that the requested accommodation was unreasonable because atheists would be unable to per-

227. See AR 60-5, *supra* note 166, at para. 4(g) (additionally, specifically forbidding chaplains from “detail as post exchange, athletic, recreation, or morale officers, or as defense counsel in courts martial”).

228. Army chaplains cannot be detailed “as an exchange, athletic, recreation, drug or alcohol, suicide prevention program manager, graves registration, welfare, morale, unit victim advocate (UVA), sexual assault response coordinator (SARC), dining facility, personal affairs, information, education, human relations, equal opportunity, next of kin notification, prisoner escort, safety, survivor assistance, or civil affairs officer.” AR 165-1, *supra* note 13, at para. 3–4. Nor can they be assigned “as military judge, trial counsel, defense counsel, financial liability investigating officer, investigating officer, or member, or adviser to investigative boards of officers.” *Id.*; see also NAVY INSTRUCTION 1730.7D, *supra* note 13, at para. 6(f)–(h) (prohibiting Navy commanders from assigning a chaplain a duty as a combatant during war; as “director, solicitor, or treasurer of funds;” or “as an investigating officer;” or to “stand watch[]” or engage in “collateral duties” that violate the chaplain’s religious practices or compromise the confidentiality of the office).

229. AR 165-1, *supra* note 13, at para. 3–4.

230. Chaplains were always seen this way. For instance, an Army regulation from 1937 described the duties of a chaplain as:

closely analogous to those performed by clergymen in civilian life, modified only by the peculiar conditions attaching to military life and especially by the necessity that each chaplain will, so far as practicable, serve the moral and religious needs of the entire personnel of the command to which he is assigned.

AR 60-5, *supra* note 166, at para. 4(a).

form all the duties required of chaplains. This final Part argues that admission of atheists could fundamentally redefine the mission of the chaplain corps and negatively impact the rights of believing military members who—unlike nontheist servicemembers—have nowhere else to turn in the military to meet their Free Exercise needs.

When evaluating the demand for atheist chaplains, the requested accommodation must be viewed through the lens of history.

[The Supreme Court] has long recognized that the military is, by necessity, a specialized society separate from civilian society. . . . [It] has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that “it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.”²³¹

This final part of the Article argues that a faith-based chaplaincy always has been viewed as a necessary part of military life and that changing its exclusively faith-based focus could negatively impact the very military members whose spiritual needs justify its existence under the Free Exercise Clause. It concludes that any attempt to bring atheist counselors into the military should be accomplished without disturbing the exclusively faith-based nature of the chaplain corps.

A. The Historically Faith-Based Identity of the Chaplain Corps

The military chaplaincy is now, and always has been, a faith-based religious organization. The term *chaplain* was formed in the Middle Ages and stemmed from *cappellanus*, the Latin word for “clergyman”²³² or “custodial priest.”²³³ The name referred to the miraculous cloak (*capella*) of Saint Martin of Tours, the fourth-century patron saint of France, a supposed fragment of which was often carried into battle by French rulers.²³⁴ The *cappellanus*, which became *chapellain* in

231. *Parker v. Levy*, 417 U.S. 733, 743 (1974) (citing *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955)); see also *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (“Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society.”).

232. See *Clergyman Definition*, ONLINE ETYMOLOGY DICTIONARY, <http://etymonline.com/?search=clergyman> (last visited May 22, 2014).

233. DRAZIN & CURREY *supra* note 23, at 4.

234. *Id.* Tradition stemming from as early as the ninth century posits that St. Martin (ca. 316-397) shared his cape with a beggar who, in a dream, was revealed to be Jesus Christ. *Id.*; Michael McCormick, *The Liturgy of War from Antiquity to the Crusades*, in *THE SWORD OF THE LORD: MILITARY CHAPLAINS FROM THE FIRST TO THE TWENTY-FIRST CENTURY* 45, 45-46 (Doris L. Bergen ed., 2004) [hereinafter *THE SWORD OF THE LORD*].

Old French and “chaplain” in English, carried the sacred relic.²³⁵ The special sanctuary where the chaplains stored it was called a “chapel.”²³⁶ This religious core of the military chaplaincy has persisted throughout history²³⁷ and across cultures.²³⁸

1. The Ancient Religious Origins of the Military Chaplaincy

The practice of military forces employing the services of clergymen stretches back to early recorded history.²³⁹ A more formalized military chaplaincy began to take shape in the fourth century;²⁴⁰ however, a wider need for chaplains arose only after the seventh century when changes in Church practice allowed soldiers to obtain continued pardon for their sins through the Sacrament of Confession.²⁴¹ In the centuries that followed, the presence of military chaplains in Western armies became common.²⁴² Those chaplain-priests who accompanied military troops “sought to maintain the morale of their fighters”

235. DRAZIN & CURREY *supra* note 23, at 4.

236. *Id.*

237. The definition of *chaplain*, which has not strayed far from its roots, is a clergyman in charge of a chapel, who is attached to a military branch or other institution. *Chaplain Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/chaplain> (last visited May 31, 2014).

238. The Spanish, French, Dutch, Swedish, and English all traveled with priests and pastors on their settlement journeys and military campaigns. See RICHARD M. BUDD, *SERVING TWO MASTERS: THE DEVELOPMENT OF AMERICAN MILITARY CHAPLAINCY, 1860-1920*, at 8 (2002).

239. Ministers of religion have accompanied troops into battle for thousands of years, even in pre-Christian times. For instance, ancient Assyrian “divination experts who tried to interpret the will of the gods” traveled with armies on military campaigns. AMANDA H. PODANY & MARNI MCGEE, *THE ANCIENT NEAR EASTERN WORLD* 134 (2005). Similarly, the Old Testament reports that the ancient Israelites brought their priests to war to encourage the troops to be courageous in battle with the knowledge that God was on their side. See *Deuteronomy* 20:1-4; *Joshua* 6:6-7. Finally, in the centuries following the death of Jesus Christ, pagan priests sometimes traveled with the pre-Christian armies of the Roman Empire. See Ralph W. Mathison, *Emperors, Priests, and Bishops*, in *THE SWORD OF THE LORD*, *supra* note 234, at 29, 30-32.

240. The historian, Eusebius, reports that Emperor Constantine carried a traveling chapel, along with clergy, on his military campaigns. Mathison, *supra* note 239, at 36. By the middle of the fifth century, the use of ad hoc chaplains is well attested, both in Roman and Barbarian military units. *Id.* at 37.

241. Prior to that time, the Church—viewing the art of war as incompatible with Christianity—had required soldiers to leave military life when they first repented of their sins. See David S. Bachrach, *The Medieval Military Chaplain and His Duties*, in *THE SWORD OF THE LORD*, *supra* note 234, at 69, 75.

242. See McCormick, *supra* note 234, at 51-52. Chaplains became even more common after the rise of the Carolingian monarchy in the ninth century and the run-up to the First Crusade at the end of the eleventh century. *Id.*

through "pastoral care," "liturgical services," and helping the troops "purify themselves before battle."²⁴³

In the twelfth and thirteenth centuries, the Catholic Church formalized the role of military chaplains in various canonical documents.²⁴⁴ In a papal bull in 1238, Pope Gregory defined the duties of military chaplains as "to hear confessions, assign penances, and carry out the other sacraments," as well as to "provide moral encouragement to the men through sermons . . . [and] to make them feel better about their military service."²⁴⁵ The Church intended these priests to serve a purely spiritual function, as evidenced by a "longstanding canonical prohibition in effect against priests and bishops carrying arms or fighting."²⁴⁶ Chaplains would continue this religious role as an important feature of military life in the centuries to come.

2. The Colonial Chaplaincy and the American Revolution

Even after the Protestant Reformation, the religious duties of chaplains remained largely the same, as conquistadors and colonists explored the New World.²⁴⁷ This continued through the British colonial period, with English colonists adopting the practice of their home country.²⁴⁸ Chaplains engaged in the major campaigns of the colonial

243. *Id.* at 54-55. Chaplains played an important morale-building role, *See* Roy J. Honeywell, *Chaplains of the United States Army* 6-8 (1958), because "soldiers fight better when they are sure that their cause is morally right and when they are sustained by religious faith." *Id.* at 7.

244. *See* Bachrach, *supra* note 241, at 70-71. The most notable of these canonical documents were written by Bishop Ivo of Chartres (1090-1115), Pope Innocent III (1198-1216), and Pope Gregory IX (1227-1241). *Id.*

245. *Id.* at 70.

246. *Id.* at 71. In fact, the canonical prohibition stemmed from Canon 2 of the Council of Ratisbon (Regensburg), which prohibited "the servant of God in every way from bearing arms or fighting in the army or going against the enemy, except those alone who because of their sacred office, namely, for celebrating of mass and caring for the relics of the saints, have been designated for this office." HONEYWELL, *supra* note 243, at 7. The evidence indicates, however, that many did not adhere to this prohibition against fighting. *See id.* ("Feudalism brought some departures from this noncombatant rule. When lands were given to monasteries or other religious foundations, it became necessary for the abbots or bishops to assume their full responsibilities to their vassals. Often this meant both religious and military leadership, and numbers of these suzerain-chaplains died with sword or axe in hand."); DRAZIN & CURREY, *supra* note 23, at 4 (noting that soldier-priests frequently fought in combat).

247. *See* BUDD, *supra* note 238. In fact, the first Christian martyrs in North America were Spanish missionaries in the 1500s. *See* 1 PARKER C. THOMPSON, *FROM ITS EUROPEAN ANTECEDENTS TO 1791: THE UNITED STATES ARMY CHAPLAINCY* 1-2 (1978) (describing the deaths of several Catholic missionaries).

248. *See* BUDD, *supra* note 238, at 8-9 (noting that the colonial militias organized their chaplains using the English tactical model—placing one chaplain in each military regi-

period against the Native Americans,²⁴⁹ including the major event of King Philip's War in the 1670s.²⁵⁰ During the French and Indian War, the colonists extensively relied on chaplain spiritual services, with George Washington complaining at one point that his unit's lack of a chaplain reflected "dishonor upon the regiment."²⁵¹ The colonists valued chaplains because of the positive impact their spiritual services had on the morale of the soldiers during a military campaign.²⁵²

At the dawn of the American Revolution, colonial militias appointed chaplains to their units—some chosen by governors and others by military commanders.²⁵³ Once the war began, the Continental Congress first encouraged²⁵⁴ and then officially created a military chaplaincy as a separate branch within the Continental Army.²⁵⁵ The

ment "as the resident professional in spiritual matters"). This can be seen throughout the colonial period. For instance, in 1690, Massachusetts appointed four chaplains to accompany its military expedition into Quebec against the French. *See* DRAZIN & CURREY *supra* note 23, at 7. Yet not all military chaplains accompanied the men in the field during time of war. In some instances, chaplains were given peacetime roles at military forts. *See id.* (citing an instance in 1702 where Reverend Joseph Smith was assigned by Massachusetts for three years to Brookfield).

249. In 1637, when colonists in Connecticut drafted an army of only ninety men to rebuff Native American raids from the Pequot Nation, they appointed a chaplain to serve the needs of these soldiers. *See* DRAZIN & CURREY *supra* note 23, at 6; HONEYWELL, *supra* note 243, at 11-12.

250. *See* THOMPSON, *supra* note 247, at 17-21 (describing chaplain involvement in King Philip's War).

251. *Id.* at 57 (internal quotation marks omitted). The true value of chaplains can be seen in their salaries, which exceeded those of other junior officers. *See* DRAZIN & CURREY *supra* note 23, at 9.

252. *See* THOMPSON, *supra* note 247, at 70 (noting how chaplain "care involved visiting the sick and wounded, and spiritual counseling to anxious souls"). From a practical perspective, commanders viewed morality and godliness as essential components of an effective military force, assisting with discipline and the proper conduct of war. *See* WILLIAM E. DICKENS, JR., ANSWERING THE CALL: THE STORY OF THE U.S. MILITARY CHAPLAINCY FROM THE REVOLUTION THROUGH THE CIVIL WAR 7 (1999). As George Washington noted, military chaplains "improve morale and discourage gambling, swearing, and drunkenness." *Id.* Washington similarly blamed the absence of a chaplain for the sad state of the "the drunken and demoralized troops he commanded." DRAZIN & CURREY, *supra* note 23, at 9. Chaplains made an impact by offering daily prayers and preaching to the men, who were often required by law to attend such devotions or else face punishment. *Id.* at 7.

253. DICKENS, *supra* note 252, at 8.

254. *See id.* (stating that Congress encouraged "the churches to supply ministers for the army").

255. *See* DICKENS, *supra* note 252, at 8. After creating the chaplaincy on July 29, 1775, Congress made various authorizations for chaplains throughout the Revolution, eventually settling on one chaplain per brigade, with pay equal to that of a colonel. *See id.* at 9-10. The creation of a military chaplaincy in the Continental Navy was less explicit. In 1776, the Continental Navy passed regulations requiring religious services, although it was apparently up to the captain to procure a chaplain for his ship. *See id.* at 19. The Continental Congress clearly contemplated the need and use of chaplains, as demonstrated by the Con-

non-American armies of the Loyalists, Hessians, and French also employed regimental chaplains.²⁵⁶ During the Revolution, chaplains primarily served the spiritual needs of the soldiers.²⁵⁷ In addition to preaching, conducting religious services, and attempting to keep the soldiers as moral as possible, chaplains also tended to the personal needs of the sick and wounded, helped to prepare them for a good death if necessary,²⁵⁸ and encouraged them that God was on their side.²⁵⁹

3. The Birth and Growth of the U.S. Military Chaplaincy

After passage of the U.S. Constitution in the late eighteenth century, the chaplaincy faced neither resistance nor serious constitutional doubt, despite its spiritual core.²⁶⁰ In 1791, with the U.S. Army sized at a mere two regiments, the same Congress that passed the First Amendment authorized the position of military chaplain to be part of

tinental Congress's January 1776 mention of chaplains splitting the ship's "prize money," and the November 1776 setting of a Navy chaplain's pay. See DRURY, *supra* note 223, at 3-4.

256. BUDD, *supra* note 247, at 10.

257. See generally THOMPSON, *supra* note 247 (describing the role of chaplains during the American Revolution and providing numerous examples of spiritual and pastoral care). Some chaplains, however, took up arms and fought. See JOEL T. HEADLEY, CHAPLAINS AND CLERGY OF THE REVOLUTION 121 (1864) ("There was a class of clergymen in the Revolution who regarded the struggle so sacred that they felt it their duty to fight sometimes as well as pray."); HONEYWELL, *supra* note 243, at 51 (noting "no obligation for chaplains to refrain from belligerent acts was recognized during the early years of the war," and that several chaplains "led militia companies, acting as their chaplains at the same time").

258. For instance, after the Battle of Concord on April 19, 1775, Chaplain David McClure addressed the concerns of a wounded American soldier: "I conversed with him a short time on the prospect of death, and a preparation for that solemn scene; to which he appeared to pay serious attention." DRAZIN & CURREY *supra* note 23, at 13 (quoting Chaplain David McClure).

259. Consider this sermon preached to colonial soldiers on the eve of the Battle of Brandywine on September 11, 1777, which would be lost by the outnumbered Americans under Washington's command: "[R]emember, soldiers, that God is with you. The eternal God is with you, and fights for you. God! the awful, the infinite, fights for you and you will triumph." HEADLEY, *supra* note 257, at 401 (internal quotation marks omitted).

260. Some scholars point out that James Madison—influential due to his prime role in drafting the Constitution and First Amendment—voiced concerns about the military chaplaincy later in his life. See Andy G. Olree, *James Madison and Legislative Chaplains*, 102 Nw. U. L. REV. 145, 189 (2008) (explaining that Madison's writings after his presidency reflect a belief the military chaplaincy was unconstitutional, although a "closer question" than that of legislative chaplaincies). But while Madison was in office, without protest or caveat, he nominated several chaplains to the U.S. Senate for confirmation and signed two bills into law authorizing military chaplains. See *id.* at 185-86 (justifying Madison's Presidential action as "mere formalit[ies]" that do not reveal his true views on the chaplaincy).

the Army's small, permanent support staff.²⁶¹ It was not until the 1850s that anyone seriously questioned the legitimacy of the chaplaincy, with several groups unsuccessfully petitioning Congress to abolish it.²⁶²

For the next century the chaplaincy continued to grow. The tasks of chaplains remained as they were in the past and included the duty to conduct "appropriate religious services" on Sundays²⁶³—a compulsory practice for military members during the entire nineteenth century.²⁶⁴ During the Civil War, the chaplain corps thrived in the Union and Confederacy, even as it became more religiously diverse. Up to that time, chaplains had always been Protestant Christians; however, Congress modified the law to allow chaplains who were "regularly ordained minister[s] of some religious denomination"—leading to the first Jewish and Catholic U.S. Army chaplains.²⁶⁵

The spiritual role of the chaplain remained intact during the entirety of the twentieth century. For instance, Army Regulations in World Wars I and II described the important role of chaplains to provide soldiers "counsel as to their moral welfare"²⁶⁶ and to "strive to promote morality, religion, and good order" in their units.²⁶⁷ It was not until the 1970s and 1980s that concern arose regarding the extent

261. See NORTON, *supra* note 26, at 1. The chaplain position carried no rank and was paid six hundred dollars a year—more than a captain's pay. *Id.* at 1–2. Moreover, "the chaplaincy was authorized at a time when religious interest in the United States was at an unusually low ebb and spiritual deadness characterized the American churches." *Id.* at 1. Nevertheless, Congress still authorized as many Navy chaplains as there were ships in service that warranted them (though it appears only two chaplains were retained in the three years following Congress's authorization). See DRURY, *supra* note 223, at 15.

262. See DRURY, *supra* note 223, at 64–66; NORTON, *supra* note 26, at 76–78 (describing various efforts in the 1850s to abolish the military chaplaincy and the defense of the chaplaincy by laymen).

263. NORTON, *supra* note 26, at 51 (internal quotation marks omitted); see also DRURY, *supra* note 223, at 24 (quoting the Secretary of the Navy in 1811 while describing the duties of chaplains as "to read prayers at stated periods; to perform all funeral ceremonies; to lecture or preach to the crew on Sundays; to instruct the midshipmen & volunteers in writing, arithmetic, navigation, & lunar observations, & when required to teach other youths of the ship").

264. See NORTON, *supra* note 26, at 52 (citing GENERAL REGULATIONS OF THE ARMY OF THE UNITED STATES 34 (1841)). Not only did soldiers need to attend services, officers could be criminally punished by court-martial under the Second Article of War if they engaged in "indecent or irreverent behavior at church." *Id.*

265. *Id.* (internal quotation marks omitted). The first Navy Catholic chaplain arrived in 1888 and the first Jewish chaplain in 1917. DRURY, *supra* note 223, at 117, 168.

266. REGULATIONS FOR THE ARMY, *supra* note 224, at para. 46½(2), at 18. This important role for chaplains was reaffirmed in later regulations in 1941. See AR 60-5, *supra* note 166, at para. 4(a).

267. AR 60-5, *supra* note 166, at para. 4(b).

of religious evangelization by chaplains in the military environment. Military leadership began to emphasize that "[n]o chaplain is authorized to proselytize soldiers or their families."²⁶⁸ The 1978 constitutional challenge in *Katcoff* may have sharpened sensitivities in this area, but the need to support the spiritual needs of servicemembers was always recognized as critical to national security.²⁶⁹ Since the 1980s, the chaplaincy has continued to adapt to the increasing diversity of religion in the military, including the acceptance of Muslim, Hindu, and Buddhist chaplains—while always maintaining its faith-based focus.

In sum, history reflects that the chaplaincy has always been faith-based. The demand for atheist chaplains challenges the spiritual core of that organization for the first time in history.

4. A Continuing Free Exercise Need

During the 1980s, the Second Circuit in *Katcoff* concluded that members of the military "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."²⁷⁰ With the overwhelming majority of military members still associating with Christianity and other faith-based religions,²⁷¹ the Free Exercise rationale for the chaplaincy remains strong today. Indeed, it is perhaps more compelling in today's highly deployed military environment.

Since the Global War on Terror began, over 2.4 million servicemembers have been deployed to Afghanistan and Iraq alone, with many of these members serving multiple tours of duty.²⁷² In addition, the United States continues to send its soldiers, sailors, marines, airmen, and coastguardsmen to the four corners of the globe as part of

268. *Katcoff v. Marsh*, 755 F.2d 223, 228 (2d Cir. 1985) (summarizing the basic rules that governed chaplains in the military environment).

269. The Second Circuit in *Katcoff* explained why military commanders throughout history have insisted chaplains accompany the men into battle: "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." *Id.*

270. *Id.* at 227.

271. See Dao, *supra* note 11.

272. See Juliette F. Spelman et al, Post Deployment Care for Returning Combat Veterans, 27 J. GEN. INTERN. MED. 1200, 1200 (2012), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3514997/>.

the normal routine of modern military service.²⁷³ In many instances, especially in deployed environments like Afghanistan or Africa, members would be entirely deprived of the ability to freely exercise their beliefs but for the chaplaincy. Even within the continental United States, good reasons weigh in favor of allowing the presence of military chaplains.²⁷⁴ They perform functions that cannot be adequately served by civilian clergy,²⁷⁵ although on an ad hoc basis civilians can be contracted to fill crucial needs.²⁷⁶

With religious military members in need both at home and abroad of access to the spiritual healing mediated by military chaplains, the integrity of chaplaincy must be protected now more than ever. The program should remain intact and vigorously defended from changes that could negatively impact its crucial religious services.

273. See DEP'T OF DEF., Total Military Personnel and Dependent End Strength by SERVICE, REGIONAL AREA, AND COUNTRY (2012), available at https://www.dmdc.osd.mil/appj/dwp/getfile.do?fileNm=SIAD_309_Report_P1212.xlsx&filePathNm=milRegionCountry. According to year-end DOD statistics for 2012, the U.S. military had approximately 72,000 personnel in Europe; 54,000 in the East Asia/Pacific areas; 4800 in the North Africa/Near East/South Asia areas; 500 in Sub-Saharan Africa; 2000 in other areas in the Western Hemisphere; and 200 in the Former Soviet Union. *Id.*; see also Brief for the Appellees at 4, *In re Navy Chaplaincy*, 697 F.3d 1171 (D.C. Cir. 2012) (No. 12-5027), 2012 WL 1951338 (“Naval personnel are deployed to nearly 500 geographical duty assignments, over thousands of miles of open ocean and countries around the globe.”).

274. See *Katcoff v. Marsh*, 755 F.2d 223, 227 (2d Cir. 1985) (“[L]ocal 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”); Rosen, *supra* note 13, at 1147-48. Rosen explains that military bases have been less centered in urban areas since the 1980s and that home base chaplains may still be justified based on activities with local groups that benefit overall morale of the troops, such as the burial of members at Arlington National Cemetery. *Id.* The corps requires chaplains to be part of everyday life for members, who may be returning from deployment in need of a spiritual advisor who understands the rigors of military life. See discussion *supra* Part III.D.2. Also, if chaplains were only permitted in remote or deployed locations, it might negatively impact recruitment and retention.

275. DRAZIN & CURREY *supra* note 23, at 43 (arguing that “civilian clergy could not function on the battlefield” and that a civilian chaplaincy “would be replete with problems; a supervisory nightmare”). There is also doubt that civilians would be protected by the Geneva Convention, whose rules only shelter military chaplains. *Id.* at 57.

276. See AR 165-1, *supra* note 13, para. 5-4(a) (“Contracting the Services of civilian clergy is authorized as an exception to policy when the Army is unable to provide a military Chaplain to meet the religious worship and sacramental needs of Soldiers and their Family members.”). This is not a new development. World War II regulations also authorized commanding officers—when a chaplain was unavailable—to use money from the chaplain’s funds “to provide religious guidance and services of worship for their commands through civilian agencies of the community.” AR 60-5, *supra* note 166, at para. 9(b).

B. The Negative Impact of Incorporating Atheists into the Chaplain Corps

The most compelling argument for atheist chaplains is the one that appeals to notions of fairness and inclusion.²⁷⁷ Nontheists present this request as an incremental step, not a radical redefinition. As the president of one secular group said, the chaplaincy includes monotheists, polytheists, and pantheists, and "once they extend to nontheists the chaplaincy will have embraced all of the servicemembers and the breadth of life stances and deeply held personal philosophies."²⁷⁸ This suggests that atheists will not fundamentally change the nature of the chaplaincy. But there is a serious risk that expanding the chaplain corps in this way will have a significant and lasting impact on how chaplain services are delivered to believing members who have nowhere else to go in the military for religious services.

1. The Exceptionalism of a Faith-Based Chaplaincy

The previous Part of this Article recounted the millennia-long history of the military chaplaincy and showed that the spiritual role of the chaplain has been the essential reason for the position's existence. Indeed, the vigor and accessibility of a faith-based chaplain corps is the cornerstone of the Free Exercise rights of most military members, who still profess some belief in a higher reality.²⁷⁹ Other individuals can perform the secular duties sometimes delegated to chaplains, but no one except a chaplain can—in an official capacity—minister to the spiritual needs of military members. As Representative John Fleming argued during the debate over the DOD Appropriations Bill: "The military is 99.9 percent secular. The only thing that we add to it that is nonsecular is the chaplaincy."²⁸⁰

The chaplain corps is peerless in its ability to cater to the religious needs of the military member. One Air Force chaplain described it this way: "[C]haplains are uniquely qualified to provide that which no one else on the battlefield can . . . care for the soldier's spiritual

277. See *House Debate*, *supra* note 5, at H4942 (comments of Rep. Jared Polis (D., CO)) ("[O]ver 20 percent of the members of our military identify as nonbelievers. While, of course, their needs should be catered to by members of the chaplaincy from diverse faiths, it's only fair to have their humanism, or outlooks, represented.")

278. *Chaplains Wanted for Atheists in Foxholes*, *supra* note 7.

279. See *Katcoff*, 755 F.2d at 228 ("[The military] 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.")

280. *House Debate*, *supra* note 5, at H4943.

well-being.”²⁸¹ The example of chaplains throughout history—such as Father Capodanno and Father Kapaun—exemplifies this exceptional role. Without such chaplains, the brave men and women of the U.S. Armed Forces would have little chance to worship God communally in the religious service of their faith group, and they might have no one to turn to who can advise them on matters involving such things as the Holy, the afterlife, and faith-based moral decisions. Only a chaplain from a faith-based background can cater to these critical needs.

Faith-based chaplains are exceptional because they carry out functions that other members of the armed forces cannot perform. Due to the almost entirely secular nature of the military, commanders, first sergeants, and other military leaders are neither trained nor authorized to use their official positions to advise servicemembers on religious matters. Similarly, mental health practitioners and doctors must remain neutral on religious matters, as must military lawyers, scientists, and other personnel. While some recognition of God and religion is still authorized in the military,²⁸² day-to-day military life is largely bereft of the divine. Indeed, secular groups have vigilantly guarded the neutrality of the official military workplace in recent years, successfully purging references to God from it.²⁸³ This makes the worth of the faith-based chaplaincy ever more valuable.

In contrast, the rest of the military structure offers a widely available, nonreligious perspective on such matters as discipline, ethics, core values, and every other matter pertaining to military life. If a supervisor is struggling with how to manage a troubled servicemember, military leaders stand at the ready with practical, experience-based advice that is necessarily devoid of religious dogma, doctrine, and faith-based solutions. Similarly, counseling on personal matters involving family, friends, or emotional concerns can be handled by trained therapists and doctors, who also must necessarily approach such matters from a nonreligious perspective. Apart from the chaplaincy there is no official source available to military members where their spiritual questions and struggles can be addressed in a faith-based context.

Put another way, if every military member were an atheist, the chaplain corps would be entirely unnecessary because the needs of

281. Beckwith, *supra* note 168 (ellipses in original).

282. See U.S. AIR FORCE, REVISED INTERIM GUIDELINES CONCERNING FREE EXERCISE IN THE AIR FORCE (2006) (recognizing Air Force members’ “personal commitment to the Constitution’s protection for free exercise of religion”).

283. See *Achievements*, MILITARY RELIGIOUS FREEDOM FOUND. (last visited May 31, 2014), <http://www.militaryreligiousfreedom.org/achievements/> (outlining claimed victories on behalf of nontheists).

these secular servicemembers would be filled through the “99.9 percent”²⁸⁴ of the military that is secular. It is precisely the faith-based requirements of religious military members that justify the existence of the chaplaincy.

2. Fundamentally Redefining the Chaplain Corps

Contrary to the suggestion of secularists, the acceptance of atheist chaplains will likely change the chaplain corps’s age-old mission into something new and different. One expert predicted “‘it would redefine the chaplaincy if a non-faith person becomes a chaplain.’”²⁸⁵ Similarly, during the House debate on the DOD Appropriations Act, one Congressman argued that the admission of atheist chaplains would “ruin[] the integrity of the chaplaincy.”²⁸⁶ This is not mere political rhetoric.

To illustrate, consider the viability of the Army chaplaincy’s motto in a corps that contains members who do not believe in any higher reality. One Army chaplain doubted how atheists could “sincerely subscribe to the Army chaplain motto, *Pro Deo et Patria*—for God and country.”²⁸⁷ That chaplain has it backwards; rather than the atheist chaplain, it is the Army Chaplain Corps itself that will likely need to change in order to embrace all segments of a chaplaincy that encompasses nontheists. As with any military organization, the need for camaraderie, *esprit de corps*, and good order and discipline will require the Army chaplaincy to take a new motto that is inclusive of all its members, both believers and nonbelievers, since the status quo would marginalize atheist chaplains.

Similarly, consider how the chaplaincy currently views its essential mission and core values. In a recent version of the Army Chaplain Corps’s *Strategic Roadmap*, the Chief of Chaplains explained the Army’s vision of the chaplaincy as “a community of many faiths, traditions and beliefs. . . . Regardless of faith or denomination, we draw strength from our belief in a higher power, and our determination to

284. *House Debate*, *supra* note 5, at H4943.

285. Weber, *supra* note 51 (quoting Paul Vicalvi of the National Association of Evangelicals Chaplain Commission).

286. *House Debate*, *supra* note 5, at H4942 (comments of Rep. Jim Bridenstine (R., OK)). Rep. Jim Bridenstine stated: “As a Navy pilot with combat tours in Iraq and Afghanistan, I recognize that war affects all servicemembers—believers and atheists. However, those without faith have plenty of options . . . to seek emotional support.” *Id.*

287. Carroll, *supra* note 10 (italics added) (quoting Army Chaplain Lieutenant Colonel Carlton Birch) (internal quotation marks omitted).

care for others.”²⁸⁸ Notice how carefully the Army has drafted its current vision statement—broad enough to include faiths of all varieties now represented in its chaplain corps. The document goes on to explain, “[c]haplains share a common bond—an acknowledgement of the validity and vitality of religious faith and an abiding commitment of service to Soldiers, their families, leaders, the Army and the nation.”²⁸⁹

No longer, once atheist chaplains come on board. A chaplaincy that embraces both faith and faithlessness within the same ministry cannot continue to hold such a vision. Inevitably, assimilation of non-belief will unhinge the common bond and transform the organization’s mission into one that does not uniformly recognize the validity of faith. Indeed, the corps’s vision will need to be re-envisioned in an even broader sense—perhaps finding that the community “draws its strength from either a higher power or from within humankind itself,” and that the chaplains are joined by a bond that “acknowledges the validity and vitality of either religious faith or secular self-determination.” No matter how the words are massaged, they will not be able to hide the fact that the mission has shifted from its historical roots.

The change of motto and vision will inevitably be followed by changes in practice. For instance, nonsectarian events sponsored by the entire chaplain corps—such as luncheons, retreats, and the like—will need to jettison a purely faith-based approach in exchange for a more secular model. An event sponsored by an organization that can no longer prefer belief over unbelief will need to leave out references to God. In wartime, the effects will be even more pronounced, with a growing desire to change the practices of past chaplains, such as Father Capodanno, who ministered to the troops during battle and encouraged them with words about an afterlife. Perhaps even chaplaincy-sponsored prayer would need to be purged of references to a Supreme Being or an immortal soul, with those words reserved for those of the same faith background who attend opt-in services held in private, designated locations.²⁹⁰

288. U.S. ARMY CHAPLAIN CORPS, THE CHIEF OF CHAPLAINS STRATEGIC ROADMAP: CONNECTING FAITH, SERVICE, AND MISSION 16 (2014), available at http://www.chapnet.army.mil/pdf/strategic_map.pdf.

289. *Id.*

290. This entire concern about limiting the ability of chaplains to invoke a deity in prayer raises the possibility that the military’s attempt to force an inclusive political correctness on chaplains will run into constitutional problems under the Religion Clauses. For instance, the D.C. Circuit was relieved that it could avoid the “rather troubling constitutional question: whether chaplains in the armed services can be required to endorse ‘plu-

Finally, in a world of limited assets there is also the problem of diverting scarce chaplain resources away from those in spiritual need. There are already too few chaplains to meet the growing needs of servicemembers, even as the military downsizes its chaplain corps.²⁹¹ As Representative John Fleming argued: "[T]here is a limited number of chaplains. And if we begin to displace chaplains who are actually from religious organizations with those who are atheists . . . then that's going to limit even the number that's going to be available to the others."²⁹² As one possible parallel, consider the Dutch military chaplaincy, which employs over thirty humanist counselors and only ninety Christian chaplains.²⁹³ The problem of limited resources can contribute to the overall decline in chaplain services.

Admitting atheist chaplains will inevitably cause fundamental change to how the chaplain corps delivers the spiritual services that have been at its core for the past 235 years. What is unclear, however, is how severely this redefinition of the chaplaincy will harm the Free Exercise rights of believing servicemembers.

3. Proposing an Alternative

When determining whether the Free Exercise Clause mandates atheist chaplains, the impact on the mission of the corps as a whole should be an important consideration. Indeed, in light of the real possibility of harm to those religious servicemembers who have always relied on the chaplaincy, military leaders should ask whether redefining the chaplaincy is truly necessary. One possible alternative would be to create a specialized secular position to provide humanistic counseling to nontheist servicemembers in a context entirely outside the historical, faith-based chaplaincy. This would address the concerns of secular groups while preserving the integrity of the traditional chaplain corps.

Proponents of nontheist chaplains often point to the Netherlands as an ally that has incorporated humanist chaplains in its armed forces

ralism' in their religious practices." *Veitch v. England*, 471 F.3d 124, 127 (D.C. Cir. 2006) (avoiding the issue but noting "Veitch's argument that a chaplain cannot be obliged to preach counter to his or her religious beliefs consistent with the First Amendment is hardly a frivolous claim"). A similar claim could be brought in the future by chaplains forced to modify their practices to include the pluralism of atheism in the chaplaincy.

291. For instance, in 2011, the Air Force cut its chaplaincy by approximately ten percent. See Scott Fontaine, *Air Force Looks to Make Cuts in Chaplain Force*, AIR FORCE TIMES (Nov. 27, 2010), <http://www.airforcetimes.com/article/20101127/NEWS/11270304/Air-Force-looks-make-cuts-chaplain-force>.

292. *House Debate*, *supra* note 5, at H4943 (comments of Rep. John Fleming (R., OK)).

293. Fisher, *supra* note 185 (interviewing a female humanist chaplain stationed in Afghanistan in 2009).

since 1964. But even in that country—which is far more secular and progressive on social issues than the United States—the military has designated their humanists as something *other than* chaplains by opting instead for the term “counselors.”²⁹⁴ More significant, according to one high-ranking humanist chaplain, the Dutch chaplaincy is quite different than that found in the United States. For instance, Dutch “[h]umanist counsellors are appointed as civil servants not commissioned officers . . . and work outside the military hierarchy. . . . Chaplains are not formally subject to the orders of the military commanders.”²⁹⁵ This is a different model than that existing in the U.S. Armed Forces and cannot practically serve as an example for the U.S. to emulate.²⁹⁶

The Free Exercise Clause may not require an accommodation for nontheist military members; however, policymakers may decide otherwise. If military or civilian leaders decide that principles of fairness and inclusion justify action, they should look elsewhere than the chaplain corps for a solution, in order to preserve the rights of believing servicemembers.

Conclusion

The motto of the U.S. Army chaplaincy—“For God and Country”—honors the millennia-old reality of an exclusively faith-based military chaplain corps catering to the Free Exercise needs of religious servicemembers. The recent push for atheist military chaplains challenges this historic tradition based mostly on fairness arguments seeking inclusion for nontheists. In essence, secularists are seeking a religious accommodation under the Free Exercise Clause, claiming that the current services available from theist chaplains and nonreli-

294. Torpy, *supra* note 183.

295. *Id.*

296. Unlike the Dutch, religious programs in the U.S. military are supervised by commanders who offer “equitable support for religious, spiritual, moral, and ethical activities of all personnel in their commands”; provide “opportunity, time, and facilities for the free exercise of religion in accordance with law, regulations, and mission requirements;” and “[a]ccommodate special religious practices of personnel in their commands.” AR 165-1, *supra* note 13, at para. 1-9(a)-(c). For that reason, the U.S. military chaplaincy is a cadre of commissioned officers who “perform a unique role, serving both as clergy or . . . professional representative[s] of a particular religious denomination and as . . . commissioned [military] officer[s].” *In re Navy Chaplaincy*, 697 F.3d 1171, 1173 (D.C. Cir. 2012) (internal citation omitted) (internal quotations marks omitted). Therefore, the commissioned officer status of U.S. military chaplains creates a different dynamic and mission than used in the Netherlands.

gious mental health professionals are not adequate to meet the needs of nontheist servicemembers.

Legal scholars have thoroughly explored the nature of the term *religion* under the Free Exercise Clause, and some have proposed approaches that would broaden the word to embrace even atheism. Yet, considering the Framers' original view of religion—combined with inconsistent treatment of the issue by the U.S. Supreme Court—the better definitional approach should stay narrow enough to maintain the original distinction between religion and nonreligion. As a consequence of this narrower definition, however, nontheists would be unable to invoke the affirmative protections of the Free Exercise Clause.

Even if atheism were treated as a religion, the demand for atheist chaplains would require further evaluation under the Free Exercise Clause. Secularist concerns about the confidentiality and adequacy of mental health counseling miss the mark because these complaints are not grounded in religious practice and because confidentiality outside the chaplaincy is sufficient. In addition, worries about theist chaplains are mostly unfounded because chaplains are trained to minister to people of all faiths or no faith. Finally, the proposed accommodation would not solve the stated problem because the admission of a few atheist chaplains would not change the fact that almost all nontheists would still need to rely on the services of theist chaplains.

More significant, atheist chaplains could not perform two out of three required spiritual duty areas within the chaplain corps—at least not without redefining those essential duties. Secularists could not hold the faith-based religious observances envisioned by federal law and military regulation. Nor could they fulfill all the duties of “pastoral counseling,” which “is a formal and spiritually integrated process” that helps military members “change, cope, and resolve their presenting issues in a religious framework.”²⁹⁷ In contrast, atheists would likely be able to satisfy the third duty area as a commander's support staff officer, providing advice on various religion-related areas, since this duty takes place in a more spiritually sterile environment.

Finally, the admission of atheists could fundamentally redefine the mission of the chaplain corps and negatively impact the rights of believing military members who—unlike nontheist servicemembers—have nowhere else to turn in the military to meet their Free Exercise needs. The mission of the chaplain corps has been faith-based for

297. AR 165-1, *supra* note 13, at para. 16-3(a)(3).

thousands of years and would suffer if it were forced to embrace a non-faith-based view. It would need to re-form itself from the inside, which would result in a near complete loss of its historical spiritual identity. Worse, it would be hampered in delivering the spiritual services needed by religious military members both in garrison and on the battlefield.

If the policymakers or the courts conclude that nontheists should receive the benefit of atheist counseling, this should occur without harming the Free Exercise rights of believing servicemembers through a redefinition of the chaplain corps. Instead, the military services should create a specialized secular position to provide humanistic counseling to nontheist servicemembers in a context entirely outside the historically faith-based chaplaincy.