CHAPTER TWELVE

Religious Liberty

Believing . . . that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and state.

—THOMAS JEFFERSON (1802)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," begins the First Amendment. The establishment and free exercise clauses embody the American solution to one of the dilemmas of the modern world—the proper relation of state and religion, and of individuals to their God and their government. These clauses are central to the protection of religious beliefs and to the maintenance of civil peace in a religiously diverse culture.

COMPETING VISIONS

By the time the Bill of Rights became part of the Constitution in 1791, two competing visions or ways of thinking had developed that shaped laws affecting religious liberty: accommodation and separation. Even today, debates about the meaning of the religion clauses in the Constitution are often defined in terms of which of these visions is to prevail.

Accommodation is the older of the two visions and stresses freedom of religion. Alongside protection for religious practice, it seeks government acknowledgment of and
Religious Liberty

sometimes support for religion (Protestant Christianity, in particular, in the eighteenth and nineteenth centuries). Accommodationists believe that government best serves its own purposes when it encourages religion and recognizes religion's contributions to society while tolerating different faiths. Government is not to meddle in the affairs of particular denominations, but laws should respect, and reflect, dominant religious values. This seems to have been the prevailing view in most of the American states in the late 1700s and for a long time afterward. For example, the Pennsylvania Constitution of 1776 required suit legislature, as part of their oath, to affirm belief in the divine inspiration of both the Old and New Testaments in the Bible. Practically on the eve of the Constitutional Convention of 1787, Virginia came close to reinstating a general taxpayer assessment in support of religious congregations. In 1824, the Supreme Court of Pennsylvania affirmed that Christianity was part of the common law of the Commonwealth. Blasphemy was punishable as a crime in many states. Until 1961, Maryland required officeholders to declare belief in the existence of God. As public education took hold in the nineteenth century, religious instruction was part of the curriculum in many states. Brief religious exercises in public schools were widespread as late as the 1960s and remain a subject of contention. People over 55 remember "blue laws" that kept many businesses closed on Sunday, the holy day of rest for most Christians.

A second, more secular, vision that took shape in the United States was closely identified two centuries ago with leaders such as Thomas Jefferson and James Madison. It stresses separation—freedom from religion. It seeks greater distance between religion and government in a nation that is not only one of the most religious but also one of the most religiously diverse countries on earth. For separationists, both political and religious institutions are more likely to prosper if each involves itself as little as possible in the affairs of the other.

Symbolic of the separationist vision are passages in the national Constitution. In the original text of the Constitution, there is a single but nonetheless significant reference to religion. Article VI declares: "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." At the outset, by barring religious tests—a religious belief requirement—the Constitution disallowed a policy for the nation that was followed by most of the American states and virtually every other country at that time. In its leadership, the federal government could not be sectarian. In the Bill of Rights, the twin provisions of nonestablishment and free exercise have complementary objectives—preserving liberty and order. The free exercise clause preserves a sphere of religious practice free of interference by the government. Most Americans of two centuries ago probably did not crave toleration for beliefs other than their own. Given the presence of so many faiths, however, they had no choice. The violent alternative—as demonstrated in some places in the world today—was unacceptable.

Even though a few states still maintained some kind of officially supported or designated church in 1791, the establishment clause declared that the nation could not have one. Nonestablishment was thus part of the price of union. The First Amendment sets the government off limits as a prize in a nation of competing faiths. The establishment clause thus protects free exercise by disabling all groups so that none can employ public resources to advance itself and to threaten the others.

The presence of these provisions in the First Amendment, however, raises a question. Why would the states have demanded, and then ratified, a Bill of Rights that in its clauses on religion seemed to contrast sharply with laws and practices in most of the states at that time? In their own eyes, local leaders were being neither foolish nor inconsistent. If religion was to be addressed by government at all, it was
a subject for state, not national control. Ironically, the incorporation of the religion clauses into the Fourteenth Amendment in the 1940s—depicted in Table 9.1 in Chapter Nine—meant that the Riles that tied the hands of the national government with respect to religion eventually bound the states as well.

Religion's special place in the Constitution also raises an obvious but perplexing problem in interpretation. What is a religion? What is a religious belief? The Supreme Court has given no definitive answer. Indeed, none may be completely acceptable. Generally, the approach in the last half-century has been to broaden the meaning of religion to include more than theistic beliefs (United States v. Seeger. 1965). Religion is usually defined from the believer's perspective (Thomas v. Review Board, 1981), and while courts may validly inquire into the sincerity of one's beliefs, they may not test their validity (United States v. Ballard, 1944). Still, "religion" presumably does not encompass every strongly held belief; otherwise, its separate enumeration in the First Amendment would be pointless.

THE ESTABLISHMENT CLAUSE

The establishment clause limits government support of religious endeavors and, more important, bars it from becoming the tool of one faith against others. Like most other constitutional limitations, however, this one is not self-defining. At the very least, the establishment clause would prohibit a "Church of the United States." But given the many ways in which government may interact with religious institutions, how does one know when a policy "respect[s] an establishment of religion?"

THE MODERN ERA. It was not until 1947 and Everson v. Board of Education that laws began receiving regular scrutiny under the establishment clause. Applying this part of the First Amendment to the states through the Fourteenth Amendment, the Court allowed a state to pay the costs of bus transportation of children attending sectarian as well as public and nonsectarian private schools. Nonetheless, drawing on Thomas Jefferson's reply to the Danbury Baptist Association of Connecticut in 1802, the decision set forth the principle that the religious clauses of the Constitution erected a "wall of separation" between church and state. Dissenting in Everson, Justice Rutledge issued a prophetic warning:

Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public schools. The other, to obtain public funds for the aid and support of various private religious schools. . . .

In my opinion both avenues were closed by the Constitution. Neither should he opened by this Court. The matter is not one of quantity, to be measured by the amount of money expended. Now as in Madison's day it is one of principle, to keep separate the separate spheres as the First Amendment drew them-, to prevent the first experiment upon our liberties; and to keep the question from becoming entangled in corrosive precedents. We should not be less strict to keep strong and untarnished the one side of the shield of religious freedom than we have been of the other.

Everson remains significant for several reasons. First, nationalization of the establishment clause means that individual state governments no longer have the final say on church-state matters within their borders. Second, because of the many ways in which state governments may interact with religion, Everson was an unmistakable
Religious Liberty

invitation for further litigation. Because the Court upheld the New Jersey law challenged in that case, a reasonable conclusion was that not every policy that arguably supported religion ran afoul of the establishment clause. Later cases would have to discern the location of constitutional limits. Third, the reach of the establishment clause remains broad because, according to *Everson*, it prohibits programs that "aid all religions," not merely those that "aid one religion" or "prefer one over the other."

**TESTING ESTABLISHMENT.** In subsequent cases the justices have devised various "tests" or criteria by which to determine when a government has violated the establishment clause.

1. **Lemon test.** So named because of its use in *Lemon v. Kurtzman* (1971), this test consists of three elements or "prongs." To pass scrutiny; (a) a policy must have a "secular purpose." (b) its primary effect must be "neutral" (that is, neither advancing nor hindering religion); and (c) it must not promote an "excessive entanglement" between government and religion.

2. **Endorsement test.** A violation of the establishment clause occurs when government sends a signal that religion is favored or preferred, thus making some people feel as "outsiders" and others as "insiders."

3. **Agostini test.** So named because of *Agostini v. Felton* (1997), which modified the Lemon test, it is an elaboration of the endorsement test. A challenged policy must have both a secular purpose and a neutral effect. A policy has the impermissible effect of advancing religion if it (a) results in indoctrination of religion by government; (b) defines its recipients or beneficiaries according to religion; or (c) creates an excessive entanglement between government and religion.

4. **Coercion test.** This test allows government to acknowledge or accommodate religion but bars any policy that coerces anyone to support or to participate in any religion or religious exercise.

5. **Child-benefit theory.** Sometimes employed in cases involving state aid to religious schools, this approach focuses on the primary beneficiaries of the challenged plan—the children, rather than the schools themselves—where the aid is a result of decisions made by families about where their children should enroll, and not a result of government decisions to aid religious schools directly.

The fact that the Court has applied different tests to a variety of factual situations at different times has generated uncertainty and sometimes exasperation. One reason may be that no one of the tests appropriately fits all or even most of the establishment clause cases that reach the Court. The result is that one case resorts to Lemon (or another test), and the next one might not. Sometimes the Court relies on none of the tests by name.

**RELIGION IN THE PUBLIC SCHOOLS.** Of all the establishment clause issues that the Court has faced, those dealing with religious expression in public schools have generated the most controversy and yielded the least inconsistency. In the first of these in 1948, the Court struck clown a released-time program for religious instruction in Champaign, Illinois (*McCollum v. Board of Education*). Students had the option of attending religion classes on site during the school day. Yet factual distinctions only four years later in *Zorach v. Clauson* led to the Court's approval of a program in New York, where similar instruction in the school day occurred off school premises. "We are a religious people whose institutions presuppose a Supreme Being," declared Justice Douglas for the majority. "When the state encourages religious instruction or cooperates with religious authorities by adjusting the
schedule of public events to sectarian needs, it follows the best of our traditions." The contrast in outcomes prompted Justice Jackson to note in dissent that Zorach would "be more interesting to students of psychology and of the judicial processes than to students of constitutional law."

The first of Justice Rutledge's "great drives," however, continued to heat in the crucible of litigation. Any satisfaction to proponents of religion in public schools brought by Zorach was short-lived. Prayers and Bible reading in schools next came under fire. Engel v. Vitale (1962) invalidated the use in New York's public schools of a short prayer, approved by the Board of Regents, to be recited during opening exercises of each school day. In 1963, eight justices went further, declaring in School District of Abington Township v. Schempp that Bible reading and recitation of the Lord's Prayer in class were also invalid. In deciding whether the "wall of separation" had been breached, Justice Clark explained, "[T]o withstand the strictures of the Establishment Clause, there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."

Engel and Schempp hardly ended the school prayer controversy. Some school districts plainly ignored the decisions. In the early 1980s President Ronald Reagan campaigned for the restoration of prayer in the schools and advocated amending the Constitution to make that possible. "God never should have been expelled from America's classrooms," he declared in his 1983 State of the Union address. So it was not surprising that the justices have continued to face the prayer issue. In 1985 Wallace v. Jaffree tested Alabama's requirement of a minute of silence "for meditation or voluntary prayer" in the public schools. More than two dozen states had enacted similar laws. Even Justice Brennan's concurring opinion in Schempp had suggested that moments of silence might not be unconstitutional. But six justices thought the Alabama law was defective. "[T]he State intends to characterize prayer as a favored practice," announced Justice Stevens. "Such an end is not consistent with the established principle that the Government must pursue a course of complete neutrality toward religion." The Court's decision, with its flurry of separate opinions, seemed Solomonic. Strongly hinted was the constitutionality of a law setting aside a moment of silence "for meditation" where it was not obvious from the record that the state's purpose was one of making an "end run" around Engel and Schempp.

By only a bare margin, however, did the Court maintain its opposition to public school prayer in 1992. In Lee v. Weisman a family contested the brief invocation and benediction to be delivered at the principal's invitation by a rabbi at a public middle school commencement ceremony in Providence, Rhode Island. Although inclusive and sensitive to different religious traditions, the prayers were nonetheless addressed to God, asking for blessings and giving thanks. "It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise," declared Justice Kennedy.

Eight years later, the Court confronted another dispute over prayer that varied from Lee in several respects (Santa Fe Independent School District v. Doe, 2000). Under attack was prayer at a high school football game. Moreover, students—not school officials—through two elections decided whether invocations should be delivered at games, and, if so, selected the person who would pray. Nonetheless, the Court maintained its stance against any official religious expression on school premises, regardless of its source or setting. "The District," wrote Justice Stevens, "asks us to pretend that we do not recognize what every Santa Fe High School student understands clearly—that this policy is about prayer. . . . We refuse to turn
a blind eye to the context in which this policy arose, and that context quells any
doubt that this policy was implemented with the purpose of endorsing school
prayer. "Santa Fe was significant for another reason as well: Six justices (not five,
as in Lee) found the policy constitutionally deficient.

**Religion in Other Official Settings.** Perhaps because of the impres-
sionable nature of schoolchildren and the unique role public schools have long had
in the life of the nation, the justices have been quicker to strike down religious
influences in the classroom than in other official places. In *Marsh v. Chambers*
(1983), for example, a majority of the Court found no constitutional objection to the
Nebraska practice of having a chaplain for the state legislature paid out of public
funds. Nor was a majority prepared to say that the First Amendment banned city
officials in Pawtucket, Rhode Island, from annually erecting a municipally owned
Christmas display, including a crèche, in a private park (*Lynch v. Donnelly*, 1984).
In contrast, five justices found unacceptable the display of a privately owned crèche
in the county courthouse in Pittsburgh. Pennsylvania, which was adorned by a ban-
er proclaiming "Gloria in excelsis Deo" (*County of Allegheny v. American Civil
Liberties Union*, 1989). Yet in the same case six justices had no constitutional
objection to a display on the steps of the nearby City-County Building, which
combined an 18-foot menorah and a 45-foot tree decorated with holiday ornaments.
These holdings suggest that publicly sponsored religious displays are permissible
only if they have become secularized. Government may "recognize" but not
"endorse" religion.

Yet the line between recognition and endorsement is apparently thin indeed.
For example, *McCreary County v. A.C.L.U of Kentucky* (2005) upheld a lower
court's invalidation of a courthouse display that included the Ten Commandments
intermingled with various secular documents. On the same clay *Van Orden v. Perry*
found no constitutional violation in the display of a large monument on which the
Ten Commandments had been inscribed that was sited on the Texas state capitol
grounds. The monolith in question was one of 16 monuments and 21 historical
markers located nearby that were supposed to commemorate people, ideals, and
events that comprise Texan identity.

**State Aid to Religious Schools.** Litigation involving state assistance to
religious schools—the second of Justice Rutledge's "great drives"—is a fixture on
the Court's docket. This has been true since the 1960s when state legislatures began
to devise various ways to support financially pinched private schools, most of
which were operated by the Roman Catholic Church. Some plans made private
schools and their students eligible for certain benefits already enjoyed by public
schools. Other plans signaled out private schools for special assist ance. *Lemon v.
Kurtzman* (1971) marked the Court's first decision against such programs.

*Lemon* challenged Pennsylvania and Rhode Island laws that, among other
things, provided funds for partial support of the salaries of teachers of secular sub-
jects in private schools, including religious schools. In the Court's view such fund-
ing would be acceptable only if the state could demonstrate that the plan had (1) a
"secular purpose," (2) a primary effect that was "neutral" (these elements came
from *Schempp*), and (3) an absence of "excessive entanglement" between govern-
ment and religion. This third element of the *Lemon* test first appeared in *Walz v.
Tax Commission* in 1970, which upheld state tax exemptions for real property
owned by religious and other charitable institutions, even when the property was
used for religious purposes.

Judged against *Lemon's* prongs, the Pennsylvania and Rhode Island statutes
were constitutionally defective. Although both states could demonstrate a purpose
Chapter Twelve

that was secular (supporting education), the plans were snared on a "Catch-22" combination of the second and third prongs. Although the requirement that government and religion not be excessively entangled had been used to save the tax exemption in Walz, that same standard proved fatal in Lemon. Efforts by the state to ensure a neutral effect were bound to create excessive entanglement. Absent such entanglement, the state could not assure a neutral effect.

The Court's rulings in state-aid cases since Lemon, however, have not been a model of consistency. A series of decisions demonstrate the complexities. In Grand Rapids School District v. Ball and Aguilar v. Felton, decided together in 1985, the Court, voting 5-4, barred the use of state and federal funds, respectively, for shared-time programs providing enrichment and remedial instruction by public school teachers on religious school premises. Even though no money changed hands between government and religious schools, the programs were deemed constitutionally defective for at least two reasons: First, public employees might succumb to their surroundings and inject religion into the instruction; second, the program fostered a symbolic union of church and state. As Justice Brennan explained in Ball, "Teachers in a religious atmosphere may well subtly (or overtly) conform their instruction to the environment in which they teach, while students will perceive the instruction in the context of the dominantly religious message of the institution." Moreover, government "promotes religion as effectively when it fosters a close identification of its powers with those of any—or all—religious denominations as when it attempts to inculcate specific religious doctrines." The result of Ball and Aguilar was that such programs could continue only by moving instruction into publicly owned and maintained trailers parked off site.

In 1993, an equally narrow majority in Zobrest v. Catalina Foothills School District moved away from the 1985 rulings in one major respect. James Zobrest, who is deaf, enrolled in a Roman Catholic high school in Tucson, Arizona. He and his parents asked the local school district to provide a sign-language interpreter to attend classes with him. Under the Individuals with Disabilities Education Act and its Arizona counterpart, an interpreter would have been provided had James attended either public school or a nonsectarian private school. Because James attended a church-operated school, however, the school board declined his request. In the board's view, providing an interpreter at public expense for James would violate the establishment clause. The Supreme Court disagreed. Rather than aiding the sectarian school, the district would be assisting only the child. James merely wanted to take advantage of a government program designed to benefit a broad class of disabled persons. As the dissenters were quick to note, for the first time the Court approved a policy that paid a public employee to perform an official function in a sectarian classroom.

Building on Zobrest, Agostini v. Felton (1997) revisited the precise question addressed, and presumably settled, in Ball and Aguilar. Again voting 5-4, the Court concluded that, with respect to on-site instruction, the 1985 rulings were wrong: The establishment clause tolerates both enrichment and remediation by public employees in sectarian schools—instruction of the sort already provided in the public-schools. Dissenters wondered how far the ruling might extend. If enrichment and remediation were acceptable, what about ordinary instruction in between?

Agostini made two important modifications in the Lemon-Ball-Aguilar analysis. First, once a secular purpose has been demonstrated, Lemon's concern over entanglement is now but one of three independent elements used to assure a neutral effect. A policy does not meet the neutrality criterion if it (1) results in indoctrination
of religion by government; (2) defines its recipients or beneficiaries according to religion; or (3) creates an excessive entanglement. Second, unlike *Ball-And Aguilar Agostini* does not presume that indoctrination or a symbolic union will result from the absence of excessively entangling oversight. Thus *Agostini* removes the Catch-22 that had so often been fatal to school-aid programs.

*Mitchell v. Helms* (2000) demonstrates the extent of the changes *Agostini* has brought to the establishment clause. The five justices in the *Agostini* majority plus Justice Breyer upheld the inclusion of religious schools under a provision of the Education Consolidation and Improvement Act of 1981 that provides federal funds to local educational agencies that in turn lend instructional materials and equipment (including library materials and computer hardware and software) to public and private schools for use in "secular, neutral, and nonideological" programs. Just as *Agostini* did not presume that indoctrination would result from the instruction in question, *Mitchell* did not presume "diversion"—that is, the use of publicly funded equipment for religious purposes. Accordingly, *Lemon*-based *Meek v. Pittenger* (1975) and *Wolman v. Walter* (1977), insofar as they disallowed the lending of instructional materials to religious schools or to their students, were overruled. The *Mitchell* majority differed, however, on whether evidence of actual diversion of government aid to religious purposes, after the aid had been distributed according to religiously neutral criteria, should be a factor in assessing effect.

The Court’s school voucher decision in *Zelman v. Simmons-Harris* (2002) yielded the most lenient construction to date of the establishment clause, both in terms of the dollar amount and the number of sectarian schools involved. For the majority, the outcome was consistent with religion-friendly decisions like *Zobrest*. For the dissenters, approval of vouchers represented a "dramatic departure from basic Establishment Clause principle."

These cases provide strikingly different ways of thinking about aid to religious schools. One might as well have two sets of eyeglasses through which to view the problem. Through one pair, students in church-related schools are merely the beneficiaries of government programs that extend benefits to a broad class of people without reference to religion. Through the other pair, government is an active participant in and underwriter of educational programs in religious schools, providing materials and services that the schools otherwise would have to purchase themselves, or do without.

**THE FREE EXERCISE CLAUSE**

Cases under the establishment clause typically test public policies that arguably aid religion. In contrast, cases under the free exercise clause challenge public policies that seem to burden religion.

Religious persecution—that is, penalizing people because of their religious beliefs—was undoubtedly the most obvious evil the free exercise clause was intended to prevent. Debate about this part of the First Amendment today, however, usually involves laws of general application that are religiously neutral in their content but in their application work a hardship on members of one faith or another. A law might forbid believers from doing what their faith requires, or it might require them to do something their faith forbids. Does the free exercise clause entitle them to a faith-based exemption from an otherwise valid law? The answer given to that question largely follows from how judges perceive the free exercise clause itself.
Chapter Twelve

Does it embody merely a nondiscrimination principle that protects believers from hostile legislation, or does it also elevate religious practice to a preferred status? Of course, chaos would result if everyone received an exemption from a law just because it ran counter to the tenets of one's faith. Still, the free exercise clause suggests that the government should not always prevail when the commands of the state and the dictates of faith pull in opposite directions.

This conflict lay at the heart of the first major decision under the free exercise clause, *Reynolds v. United States* (1879) upheld application of a law criminalizing polygamy in federal territories to a Mormon whose religion included the practice of polygamy. Chief Justice Waite emphasized the sovereignty of the individual over religious belief but the sovereignty of the state over conduct, a distinction that prevailed for over eight decades. "Congress was deprived of all legislative power over mere opinion," he wrote, "but was left free to reach actions which were in violation of social duties, or subversive of good order."

**The Flag-Salute Cases.** In one of the first applications of the free exercise clause to the states, the Court sustained a policy requiring all schoolchildren, over the religious objection of Jehovah's Witnesses, to salute the American Flag (*Minersville School District v. Gobitis*). Justice Frankfurter's opinion even garnered support from liberal Justices Black, Douglas, and Murphy. Only Justice Stone dissented. In an effort to win Stone's support, Frankfurter wrote his colleague at length in a letter reprinted in this chapter, arguing that the case be decided "in the particular setting of our time and circumstances." "It is relevant," he pleaded, "to make the adjustment we have to make within the framework of present circumstances and those that are clearly ahead of us." The year was 1940, soon after Hitler unleashed his diabolical blitzkrieg in Europe and as British forces were being evacuated from the beaches at Dunkirk.

Two years later, Black, Douglas, and Murphy, in a remarkable about-face, recanted.-

Since we joined in the opinion in the Gobitis case, we think this is an appropriate occasion to state that we now believe that it was also wrongly decided. Certainly our democratic form of government functioning under the historical Hill of Rights has a high responsibility to accommodate itself to the religious views of minorities however unpopular and unorthodox those views may be. The First Amendment does not put the right freely to exercise religion in a subordinate position. We fear, however, that the opinion in these and the Gobitis case do exactly that. (*Jones v. Opelika*, 1942).

Encouraged by the *Opelika* dissent and the appointment of Justices Jackson and Rutledge, Walter Barnette and several other Jehovah's Witnesses brought suit to enjoin enforcement of the flag salute against their children. Voting 6-3 (*West Virginia State Board of Education v. Barnette*), the Court reversed itself in 1943, holding that First Amendment freedoms may be restricted "only to prevent grave and immediate dangers." There are few instances in the Court's history in which the change of views and of judicial personnel were so quickly reflected in judicial decisions. However, *Barnette* turned on the free speech clause, not the free exercise clause. The flag-salute rule was unconstitutional as applied to anyone, regardless of whether the objection was religiously based, so the *Reynolds* rule remained in force.

**The Checkered Career of Religiously Based Exemptions.** The first occasion in which the Supreme Court, resting its decision squarely on the free exercise clause, ordered a faith-based exemption to an otherwise valid policy came in
Religious Liberty

**Sherbert v. Verner** (1963). (Earlier decisions in addition to *Barnette* had invalidated application of state laws to religiously inspired conduct, but the Court treated these as free speech cases.) South Carolina law denied unemployment compensation to someone available for work who refused to accept a job. Adell Sherbert, a Seventh-Day Adventist, refused to work on Saturday and lost her job because of her refusal but was otherwise available for work. No one claimed that South Carolina intended to persecute members of this particular church, but as applied to her, the policy required her to choose between a job and religious disobedience on the one hand, and no compensation and religious obedience on the other. A majority of the justices found the law unconstitutional as applied to Adell Sherbert, because it unduly burdened her faith. The state had not convinced the justices that it had compelling reasons for denying the unemployment benefits. Faith trumped law.

This decision encouraged adjudication of other free exercise claims. For example, *Sherbert* was authority for *Wisconsin v. Yoder* (1972), which exempted Old Order Amish from a state law requiring parents to send their children to school until the age of 16. An all-but-unanimous bench concluded that the rule compelled the Amish, who are a separatist sect and who do not provide formal education beyond the eighth grade, "to perform acts undeniably at odds with fundamental tenets of their religious beliefs. . . . (C)ompulsory school attendance . . . carries with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region. . . ." Balanced was the threat to the faith posed by the law against the state's interest in uniform minimum school attendance for all.

Neither *Sherbert* nor *Yoder*, however, should suggest that all free exercise claims during this period prevailed over government regulations. Especially when federal law was challenged, the Court appeared reluctant to apply the free exercise clause with full force, as was seen in *United States v. Lee* (1982), which denied Amish an exemption from certain Social Security taxes. In 1988 the Court refused to block a road-building project by the U.S. Forest Service despite the Service's own finding that the road "would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples" (*Lyng v. Northwest Indian Cemetery Protective Association*). Significantly, the claim by the Native American group went beyond most claims based on the free exercise clause. They did not ask for an exemption from application of a law but for the cancellation of the government's project.

Then in 1990, five justices not only refrained from expanding the Sherbert principle but took a step that confined Sherbert to its facts. *Employment Division v. Smith* ruled against two drug counselors who were fired from their jobs after they ingested peyote (a hallucinogen) as part of a religious ritual of the Native American Church. Oregon officials had denied them unemployment compensation because their loss of employment resulted from "misconduct." Under state law, peyote was a controlled substance, and its use was forbidden, even for religious purposes. The two ex-counselors cited scientific and anthropological evidence that the sacramental use of peyote was an ancient practice and was not harmful. The Supreme Court, however, concluded that when action based on religious belief runs afoul of a valid law of general application (even when, as in this case, the litigants had not been criminally charged), the latter prevails. Law trumped faith. *Smith* left Sherbert dangling by a hair.

*Smith* was widely criticized by religious organizations and civil liberties groups, and Congress responded. Believing that the Court in *Smith* made it too easy
for government to infringe on religious liberty. Congress in 1993 passed the Religious Freedom Restoration Act. Resting on Congress' enforcement powers under Section 5 of the Fourteenth Amendment, RFRA sought to reverse Smith and to restore Sherbert v. Verner fully in situations where laws of general application conflicted with religious liberty. A test of RFRA did not take long to materialize. A Catholic church in Boerne, Texas, wanted to enlarge its building. Because of a historic preservation ordinance, however, the city refused to issue a permit. Under RFRA, Archbishop Flores argued, the city would need compelling justification to block construction; otherwise the church could proceed, even if a Wal-Mart or a Blockbuster Video could not. In City of Boerne v. Flores (1997) the Court ruled that Congress' noble intentions exceeded its authority. Smith embodied the meaning of the free exercise clause, and according to it the church could claim no faith-based exception under the preservation ordinance. Because RFRA altered that meaning, the act was unconstitutional, at least as applied to state laws and policies.

As noted in Chapter Two, however, the Court remains willing to apply RFRA to congressional policies. Concluding that the government failed to establish the compelling interest RFRA requires, a unanimous bench in Gonzales v. 0 Centro Espirita (2006) blocked application of the Controlled Substances Act to a sect that receives communion by drinking an hallucinogenic tea. Moreover, in 2000 Congress passed a partial substitute for RFRA. The Religious Land Use and Institutionalized Persons Act declares that no "government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest." The law applies "even if the burden results from a rule of general applicability" and includes regulations by entities receiving federal funds and regulations that affect interstate commerce. Cutter v. Wilkinson (2005) upheld the statute against a facial challenge on establishment clause grounds after prisoner inmates in Ohio sued under the act because corrections officers had failed to accommodate their "nonmainstream" religious practices. "There is room to play in the joints between the Free Exercise Clause and the Establishment Clause," said the Court, with the act fitting comfortably within the interstice.

Neither does Smith mean that the Court has declared open season on religious practice. The free exercise chaise still guards against government hostility to religion that is covert as well as overt, as the Court declared unanimously in Church of the Lukumi Babalu Aye, Inc. v. Hialeah in 1993. The city council of this Florida city had passed a series of ordinances banning animal sacrifice, a central element of worship in Santeria, an Afro-Cuban religion. The ordinances prohibited nothing except religious practice and so amounted, in Justice Kennedy's words, to a "religious gerrymander." Because they were hardly religiously neutral, the Court judged them alongside the "compelling interest" test that the Court had applied in Sherbert. This was a standard the city could not meet.

VALUES INTENSION

Even though the religion clauses work together to guard religious freedom, they focus on different threats and so at times may be in tension. Rigorous insistence on
Religious Liberty

Religious liberty may infringe free exercise. Rigorous application of free exercise values may create an establishment of religion. In granting the exemption that Adell Sherbert wanted, for example, the Court not only recognized the religious basis of her claim but aided religion as well. This is no isolated conflict. Reference has already been made to property tax exemptions for nonprofit organizations, including religious institutions, which the Court upheld in *Walz*. No one can deny that such exemptions amount annually to an enormous public subsidy, yet excluding religious institutions from the list of tax-exempt organizations would penalize groups because of their religious nature.

The conflict also arises in public education. Most public schools allow student clubs to meet in the school building during the school day or during a special activity period before or after classes. Because of the Supreme Court's interpretation of the establishment clause banning school-sponsored religious exercises, however, administrators in some schools have not extended the same opportunity to student religious clubs. But denying members of religious clubs a privilege that all other student organizations enjoy is arguably a violation of the free exercise as well as the free speech clauses of the First Amendment. If the Chess Club and the Scuba Diving Club may meet, why not the Bible Club? Congress addressed this issue in 1984 when it passed the Equal Access Act that directs schools receiving federal financial assistance to follow a nondiscriminatory policy. In a case challenging nonrecognition of religious clubs at a high school in Omaha, Nebraska, the Court sided with the students and upheld the act (*Westside Community Schools v. Mergens*, 1990). A similar result followed in *Good News Club v. Milford Central School* (2001), reprinted in Chapter Eleven. Clearly, neither decision could satisfy fully the values of both the establishment and free exercise clauses.

In the coming years, these and other controversies will continue to probe the fuzzy boundaries of the establishment and free exercise clauses. The framers bequeathed certain values by way of a written Constitution and left it to later generations to apply those values to situations the framers could not foresee. The establishment clause calls for separation, while the free exercise clause leaves Americans free to work for objectives dictated by their faiths. Together, they guarantee that the division mandated by the one will forever be tested because of the freedom ensured by the other.

**KEY TERMS**

- establishment clause
- free exercise clause
- accommodation
- separation
- religious test
- Lemon test
- endorsement test
- Agostini test
- coercion test
- child-benefit theory
- released time
- shared time
- faith-based exemption
- Religious Freedom
- Restoration Act
- Religious Land Use and Institutionalized Persons Act
QUERIES

1. The First Amendment's free speech clause protects expression of opinions and beliefs, including religious ones. Should the free exercise clause provide special protection for religious practice?