CHAPTER 4

The Supreme Court, Religious Liberty, and Public Education

Congress shall make
no law respecting an
establishment of religion
or prohibiting the free
exercise thereof; or
abridging the freedom
of speech, or of the press;
or the right of the people
peaceably to assemble,
and to petition the
Government for a redress
of grievances.

FIRST AMENDMENT TO THE
UNITED STATES CONSTITUTION

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

—*West Virginia Board of Education v. Barnette*
Justice Robert H. Jackson
1943

The Supreme Court and the lower courts are the final arbiters of the Constitution. They tell us what the Constitution and, more specifically, the First Amendment mean. Their interpretation of the First Amendment's Religious Liberty clauses is critical to our understanding of the role of religion in public education.

For the first 150 years of our nation's history, there were very few occasions for the courts to interpret the religion clauses. This was due primarily to the fact that the First Amendment had not yet been applied to the states. As written, the First Amendment applied only to Congress and the federal government. In the wake of the Civil War, however, the 14th Amendment was passed. It reads in part that "no state shall ... deprive any person of life, liberty or property without due process of law ...." In the 1940 case of *Cantwell v. Connecticut*, the Supreme Court held that the free exercise of religion is one of the "liberties" protected by the due-process clause. Seven years later, the Court added the Establishment clause to the list. Together, these twin protections — free exercise and non-establishment — guarantee American religious liberty.

THE ESTABLISHMENT CLAUSE

The first of the two religion clauses reads: "Congress shall make no law respecting an establishment of religion ...." Note that the clause is absolute. It allows *no* law. It is also noteworthy that the clause forbids more than the establishment of religion by the government. It forbids even laws *respecting* an establishment of religion.

The Establishment clause sets up a line of demarcation between the functions and operations of the institutions of religion and government in our society. It does so because the framers of the First Amendment recognized that when the roles of the government and religion are intertwined, the result too often has been bloodshed or oppression.

There is much debate about the meaning of the term "establishment of religion." Although judges rely on history, the writing of the framers and prior judicial precedent, they

sometimes disagree. Some, including the late Chief Justice William Rehnquist, argue that the term was intended to prohibit only the establishment of a single national church or the preference of one religious sect over another. Others, including a majority of the justices of the current Supreme Court, believe the term prohibits the government from promoting religion in general as well as the preference of one religion over another. In the words of the Court's decision in *Everson v. Board of Education* (1947):

> The establishment of religion clause means at least this: Neither a state nor the federal government may set up a church. Neither can pass laws that aid one religion, aid all religions, or prefer one religion over another. Neither can force a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion ... Neither a state or the federal government may, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state.[1]

To help interpret the Establishment clause, the Court developed a three-part test sometimes referred to as the "*Lemon* test." The test derives its name from the 1971 decision *Lemon v. Kurtzman*, in which the Court struck down a state program providing aid to religious elementary and secondary schools. Although the test has come under fire from several Supreme Court justices, many lower courts continue to use *Lemon* as a yardstick for deciding Establishment clause cases.

Let's look briefly at each prong of the test:

Does the law, or other government action, have a bona fide secular or civic purpose? As a general rule, the purpose of activities in the public schools should be educational. If, for example, a teacher is planning an activity associated with a religious holiday such as Christmas, she should ask herself, "What educational purpose am I trying to accomplish?" If the only purpose for the activity is to celebrate the religious holiday, it probably violates the first prong of the *Lemon* test.

[1] *Everson v. Board of Education*, 330 U.S. 1 (1947).

Accommodating a student's free exercise of religion is generally considered a legitimate civic purpose and, therefore, permissible under *Lemon* — assuming, of course, that the school is not promoting the student's faith. For example, a teacher could allow an art student to paint a picture with a religious theme. In fact, to prohibit such art would probably violate the free-speech and free-exercise rights of the student. On the other hand, a teacher should not make assignments requiring such religious art.

Returning to the issue of accommodation, the framers of the Constitution did not intend that the two religion clauses cancel each other out. Any interpretation of the Establishment clause must take into account the Free Exercise clause and vice versa. In the words of Justice O'Connor:

> Government pursues free exercise values when it lifts a government-imposed burden on the free exercise of religion ... When the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden ... the religious purpose of such a statute is legitimated by the free exercise clause.[2]

Two years later in *Bishop v. Amos*, a unanimous Supreme Court echoed Justice O'Connor's sentiments: "Under *Lemon*, it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their missions."

This does not mean the government can lift all burdens on religion. To the contrary, the justices struck down a Texas law that provided a sales-tax exemption for

The *Lemon* Test

The *Lemon* test asks three questions about the particular government action that is being challenged. (Remember, the Constitution limits the power of government, not of private citizens.) Each question must be answered in the affirmative if the government action is to be allowed under the Establishment clause. A negative answer to any of the questions means the act is unconstitutional. The questions are:

1. Does the law, or other government action, have a bona fide secular or civic purpose?
2. Does the primary effect neither advance nor inhibit religion? In other words, is it neutral?
3. Does the law avoid excessive governmental entanglement with religion?

If the answer to all three is "yes," the law passes the *Lemon* test.

[2] *Wallace v. Jaffree,* 472 U.S. 38, 83 (1985) (O'Connor, J., concurring).

religious periodicals only.[3] The Court did not believe that having citizens pay a modest sales tax when purchasing a magazine constituted any significant burden on religious exercise. On the other hand, the justices have been willing to give religion some breathing room under the Establishment clause, if the government burden is significant. For example, there is little doubt the courts would uphold the exemptions many states give students who object for religious reasons to attending sex-education classes.

Does the primary effect neither advance nor inhibit religion? In other words, is it neutral? Looking at the second prong of the *Lemon* test, a law is not unconstitutional simply because it allows individuals or churches and synagogues to advance religion, which is their very purpose. For a law to have effects that are forbidden under *Lemon*, the government itself must have advanced religion through its own actions. Allowing students to be released from school to receive religious instruction at a nearby church, for example, does not violate the Establishment clause.[4] It would violate the Establishment clause for the school to begin promoting, as opposed to merely announcing, such a meeting.

Not every government action that advances or inhibits religion is unconstitutional. Only government acts whose *primary* effect advances or inhibits religion are forbidden. Allowing a religious group to use a public school building after school hours would have an incidental or indirect effect of advancing religion. However, such a use would not violate the *Lemon* test. In fact, the Supreme Court in 1993 ruled unanimously that a public school is required to permit churches to use its facilities on the same basis as other community groups.[5]

Does the law avoid excessive governmental entanglement with religion? The final prong of the *Lemon* test prohibits "excessive governmental entanglement with religion." Rarely at issue in cases involving public education, the entanglement prong is most often associated with cases involving aid to religious schools.[6]

[3] *Bullock v. Texas Monthly,* 489 U.S. 1 (1989).
[4] *Zorach v. Clausen,* 343 U.S. 306 (1952).
[5] *Lamb's Chapel v. Center Moriches School District,* 508 U.S. 385 (1993).
[6] *Good News Club v. Milford Central School District,* 533 U.S. 98 (2001).

Entanglement problems could arise if a public school was involving itself in religious matters, such as evaluating the content of student prayers or monitoring students' religious activities. Most often the legality of a public school's policies will be determined by their purpose and primary effect.

Alternatives to the *Lemon* Test

As noted, the *Lemon* test has come under sharp criticism from some scholars and from a majority of the justices of the Supreme Court. Several justices have proposed alternative tests. The most popular thus far was proposed by former Supreme Court Justice Sandra Day O'Connor. This test asks whether a particular governmental action amounts to an *endorsement* of religion. According to Justice O'Connor, a government action is invalid if it creates a perception in the mind of a reasonable observer that the government is either endorsing or disapproving of religion. In short, she believes the Establishment clause is designed to separate one's standing in the civil society from one's standing in a church. Her fundamental concern is whether the particular government action conveys "a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[7]

Justice O'Connor's "endorsement test" has, on occasion, been subsumed into the *Lemon* test. The justices have simply incorporated it into the first two prongs of *Lemon* by asking if the challenged government act has the purpose or effect of advancing or endorsing religion.

Other Supreme Court justices have proposed tests that allow more government support for religion than either the *Lemon* or endorsement tests. These justices support the adoption of a test developed by Justice Anthony Kennedy and known as the "coercion test." Under this test the government does not violate the Establishment clause unless it (1) provides direct aid to religion in a way that would tend to establish a state church, or (2) coerces people to support or participate in religion against their will.[8] Under such a test, the government would be permitted to erect such religious symbols as a Nativity scene standing alone in a public school or other public building at Christmas.[9] But even the coercion test is subject to varying interpretations, as illustrated by the Rhode Island graduation prayer decision in which Justice Kennedy and Scalia, applying the same test, reached different results.[10]

In more recent Establishment clause cases, the justices again reverted to *Lemon*, albeit in a somewhat modified form. The Court identified three primary criteria for determining whether government action has a primary effect of advancing religion: 1) no government

[7] *Lynch v. Donnelly,* 465 U.S. 668, 688 (1984).
[8] *County of Allegheny v. A.C.L.U.,* 492 U.S. 573 (1989) (Kennedy, J., dissenting).
[9] *County of Allegheny v. ACLU,* 492 U.S. 573 (1989).
[10] See *Lee v. Weisman*, 505 U.S. 577 (1992).

indoctrination, 2) no defining the recipients of government benefits based on religion, and 3) no excessive entanglement between government and religion.[11]

*Although the Supreme Court is divided about which test to use in interpreting the Establishment clause, "neutrality" is a principle applied consistently in cases involving public schools. A majority of the Court agrees that school officials must be neutral among religions and between religion and non-religion. This means that under the First Amendment school officials may neither inculcate nor inhibit religion; they must protect the religious-liberty rights of students of all faiths or none.**

THE FREE EXERCISE CLAUSE

The second of the Religious Liberty clauses of the First Amendment states that the government shall make no law prohibiting the free exercise of religion. Although the text is absolute, the courts have had to place some limits on the exercise of religion. To take an easy example, courts would not hold that the First Amendment protects human sacrifice even if some religion required it. While the freedom to believe is absolute, the freedom to act on those beliefs is not.

As with the Establishment clause, the Supreme Court developed a test to help judges interpret the Free Exercise clause. First used in the 1963 case of *Sherbert v. Verner*, this test is sometimes referred to as the *Sherbert* test. While the test's application was curtailed in the 1990 decision of *Employment Division v. Smith*, many state courts and legislatures continue to look to *Sherbert* when addressing free-exercise issues. The test has four parts: two that apply to any person who claims his free-exercise rights have been violated and two that apply to the government agency accused of violating those rights.

In order to claim the protections of the Free Exercise clause, a person (in this case a student) must show that his actions (1) are motivated by a sincere religious belief, and (2) have been substantially burdened by the government.

Sincere Religious Belief

Notice that the religious beliefs need not be logical, rational or even sensible. Certainly, they need not be popular. They need only be sincere. Thus, the fact that a student's objection to something in the curriculum may seem unreasonable to the teacher is irrelevant. If the objection is sincere, it *may* be protected under the Free Exercise clause. Also, the fact that a person does not believe in God or a divine being does not mean his beliefs fall outside the protection of the Free Exercise clause. Many religions, such as Buddhism or Taoism, may be non-theistic. Courts tend to take a *functional* as opposed to *creedal* approach to religion. If the belief system functions like a religion in the life of the individual, it is likely to be protected for First Amendment purposes.

[11] *Agostini v. Felton,* 521 U.S. 203 (1997).

* Although there is some consistency in how the Supreme Court applies "neutrality" in the public schools, the Court's 2002 decision in the Cleveland voucher case (*Zelman v. Simmons Harris*, 122 S.Ct. 2460), illustrates that the Justices remain divided over how to apply the Establishment clause to questions of school funding. Five Justices viewed the Cleveland voucher program as a neutral program involving parental choice while four justices saw the program as providing government aid to religion.

Substantial Burden

Sincere beliefs alone, however, do not make a free-exercise claim. In order to claim the protections of the Free Exercise clause, a student must also show that his religion has been substantially burdened by the government. Remote or incidental burdens will not suffice. Usually, coercion — direct or indirect — is required. If, for example, a school prohibited a student from handing out religious tracts to her classmates, this would probably be a "substantial" burden on her religious exercise. Requiring her to conduct her proselytizing at a reasonable time and place during the school day would not. Although some experts criticize its decision, at least one federal appeals court has ruled that merely exposing students to ideas that may offend their religion does not amount to a substantial burden on their religious exercise.[12]

As noted, a burden on religious exercise need not be direct in order to be protected by the Constitution. Indirect burdens that penalize one for exercising his faith may also be illegal. For example, in the *Sherbert* case, the plaintiff was denied unemployment-compensation benefits because she refused to accept work on her Sabbath. The Supreme Court reversed, holding that Mrs. Sherbert could not be put to the "cruel choice" of having to give up either her government benefits or her religious convictions.[13]

Compelling State Interest

Even if a person has shown that her actions are motivated by a sincere religious belief and have been substantially burdened by the government, the inquiry is not over. Under the *Sherbert* test, the government will still prevail if it can show that (1) it is acting in furtherance of a "compelling state interest," and (2) it has pursued that interest in the manner least restrictive, or least burdensome, to religion.

A "compelling state interest" has been described as "an interest of the highest order"[14] and must involve such paramount concerns as public health and safety. Although public schools clearly have a compelling interest in the education and welfare of children, a school must demonstrate that it has a compelling interest in applying a particular policy to a particular child. For example, the courts have recognized a compelling interest in compulsory-attendance laws, but in *Wisconsin v. Yoder*, the Supreme Court held that the

[12] *Mozert v. Hawkins County Board of Education,* 827 F.2d. 1058 (6th Cir. 1987).
[13] *Sherbert v. Verner*, 374 U.S. 398 (1963).
[14] *Wisconsin v. Yoder,* 406 U.S. 205 (1971).

state did not have a compelling reason to force Amish families to send their children to school beyond the eighth grade. The Court has also ruled that students may not be forced to salute the flag or recite the Pledge of Allegiance.[15] Similarly, a school may have a compelling interest in teaching children how to prevent the spread of AIDS through sex-education classes, but the school may not have a compelling reason to teach this to a child whose parents object on religious grounds. As a result, many states provide exemptions from their sex-education programs.

Least Restrictive Means

Even if the school has a compelling interest, it may have to pursue that interest in the manner least restrictive of a complaining student's religion. In other words, the school should choose a course of action that does not violate the student's religion if such a course of action is available and feasible for the school.

If, for example, a student objects to a particular reading assignment on religious grounds, the school may be required to assign an alternate selection. If requests for exemption become too frequent or too burdensome for the school, a court might find the school's refusal to offer additional alternatives to be justified. For students in such a situation, the only reasonable alternative may be home schooling or a private religious school.

While courts may occasionally be willing to order alternative assignments for individual students, as a general rule they will not alter the curriculum for the entire class unless the assigned material amounts to an establishment of religion.[16] The courts have also held that the mere fact that assigned material coincides with the doctrines of a particular religion — be it Catholicism or secular humanism — does not mean that the school has violated the Establishment clause. In fact, it is unconstitutional to allow a person's religion to determine the curriculum for all others.[17]

As noted, the application of the *Sherbert* test was sharply curtailed by the 1990 Supreme Court decision, *Employment Division v. Smith*. In *Smith*, a slim majority of the justices ruled that burdens on religious exercise no longer had to be justified if they were the unintended result of laws of general application. After *Smith*, only laws that (1) were intended to prohibit the free exercise of religion, or (2) violated other constitutional rights such as freedom of speech were subject to the compelling-interest test. Thus, a state could not pass a law stating that Native Americans are prohibited from using peyote, but it could accomplish the same result by prohibiting the use of peyote by everyone. In each case, the central religious ritual for some American Indians would be illegal.

[15] *Barnette v. West Virginia State Board of Education,* 319 U.S. 624 (1943).
[16] *Mozert v Hawkins County Board of Education,* 827 F.2d. 1058 (6th Cir. 1986); *Smith v. Board of Commissioners,* 827 F.2d. 684 (11th Cir.1987).
[17] *Epperson v. Arkansas,* 393 U.S. 97 (1968); See also *Edwards v. Aguillard* 482 U.S. 578 (1987).

In the three years following *Smith*, more than 50 reported cases were decided against religious groups and individuals. As a result, more than 60 religious and civil-liberties groups, including the American Civil Liberties Union, Concerned Women for America, People for the American Way and the National Association of Evangelicals, joined to draft and support the passage of the Religious Freedom Restoration Act. The Act, which was signed by President Clinton on November 17, 1993, restored the compelling-interest test and ensured its application in all cases where religious exercise is substantially burdened.[18]

Although the Religious Freedom Restoration Act (RFRA) was applied to public schools, its tenure was short-lived.[19] On June 25, 1997, the Supreme Court, by a vote of 6-3, struck the Act down as applied to state and local government. The case *City of Boerne v. Flores* holds that Congress overstepped its bounds by forcing states to provide more protection for religious liberty than the First Amendment, as interpreted by the Supreme Court in *Employment Division v. Smith,* requires. RFRA continues to apply to the federal government, however, as indicated by the Court's more recent decision in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S. Ct. 1211 (2006).

Some states – such as Texas, Rhode Island and Connecticut – have passed their own Religious Freedom Restoration Acts which do apply to the public schools. In other states – such as Minnesota, Massachusetts, and Wisconsin – the courts have

[18] Public Law 103-141 codified at 42 USC sections 2000bb through 2000bb-4 (1993).
[19] *Cheema v. Thompson,* 67 F. 3d 883 (9th Cir. 1995).

held that the compelling-interest test is applicable to religion claims by virtue of the state's own constitution. In many states, however, we are uncertain about the level of protection that applies to free exercise claims.

Some argue that in virtually every case involving a public school, the religion claim can be linked with the parents' constitutional right to control the upbringing of their children, thereby triggering the compelling interest test even under *Smith*. Others maintain that parents and students no longer can force schools to accommodate their religious concerns. Regardless of how this legal dispute is finally resolved, schools fulfill the *spirit* of the First Amendment when they accommodate the religious claims of students and parents where feasible.

CONCLUSION

The Establishment and Free Exercise clauses protect the liberty of conscience of every citizen by providing the legal basis for religious freedom in the United States. Though frequently criticized, the three-part *Lemon* test remains the principal yardstick for deciding cases under the Establishment clause. This test and its likely replacements require the government to be neutral among religions as well as between religion and non-religion. The standard for free-exercise claims is less certain, but schools are encouraged to accommodate religion when they can. Taken together, the two clauses are intended to ensure fairness and neutrality in the schools with respect to religion. Schools must at times accommodate students' religious rights, but teachers and other school personnel may neither advance nor inhibit religious faith.

The Religious Liberty clauses should not be thought of as at odds with one another — one favoring freedom of religion and the other opposed to an establishment of it. The framers wrote the provision forbidding establishment in order to safeguard the principle of religious liberty. Both clauses secure the rights of believers and nonbelievers alike to be free from government involvement in matters of conscience. Together, they secure religious freedom. In the words of the Williamsburg Charter, the two Religious Liberty clauses are "mutually reinforcing provisions [that] act as a double guarantee of religious liberty." It declared that the two clauses were:

> [E]ssentially one provision for preserving religious liberty. Both parts, No Establishment and Free Exercise, are to be comprehensively understood as being in the service of religious liberty as a positive good. At the heart of the Establishment clause is the prohibition of state sponsorship of religion and at the heart of Free Exercise clause is the prohibition of state interference with religious liberty.