THE FREE EXERCISE CLAUSE

Introductory Comments

To the Framers, the Establishment and Free Exercise Clauses were at least compatible and at best mutually supportive. Allocating religious choices to the unfettered consciences of individuals under the Free Exercise Clause remains, at least in part, a means of assuring that church and state do not unite to create the many dangers and divisions often implicit in an established union. Similarly, forbidding the excessive identification of church and state through the Establishment Clause remains, in part, a means of assuring that government does not excessively intrude upon religious liberty. Thus, the Supreme Court has frequently recognized that "the two clauses may overlap." *Everson v. Board of Education* (1947).

Despite this harmony, serious tension has often surfaced between the two clauses. For example, spending federal funds to employ chaplains for the armed forces might be said to violate the Establishment Clause. "Yet a lonely soldier stationed at some faraway outpost could surely complain that a government which did *not* provide him the opportunity for pastoral guidance was affirmatively prohibiting the free exercise of his religion." *See Abington School District v. Schempp* (1963) (Stewart, J., dissenting). A pervasive difficulty in the constitutional jurisprudence of the First Amendment has been the struggle "to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical

extreme, would tend to clash with the other." *Walz v. Tax Commission* (1970).

Since the Supreme Court has never embraced the strict separation theory of the Religion Clauses, which would prohibit government from using religious classifications either to confer benefits or to impose burdens, the Court has increasingly sought refuge in the elusive and variable notion of "neutrality." In several cases, the Court held that religious classifications were not only permitted, but required in some instances; truly even-handed treatment of the religious and non-religious may compel exemptions from governmental mandates that exceptionally burden religious beliefs. For where a burden falls with special weight on some religions, religious blindness would produce only an illusory and hostile neutrality. Under free exercise neutrality, therefore, "the government may (and sometimes must) accommodate religious practices." *Hobbie v. Unemployment Appeals Commission* (1987).

In several rare cases, the Supreme Court has required that personal choices born of religious motivations be exempted from otherwise valid and formally neutral state requirements. Two such decisions are *Sherbert v. Verner* (1963) (unemployment benefits must be made available to a Seventh-Day Adventist who for religious reasons refused to work on Saturdays) and *Wisconsin v. Yoder* (1972) (exempting the Amish from a Wisconsin criminal law requiring school attendance, because the law would have gravely jeopardized the religion's very survival). One reason why the Court has granted only a few mandatory free exercise exemptions may be

the fear that, once easy accommodations are granted, neutrality will demand that more difficult accommodations be granted as well. This concern was voiced in *United States v. Lee* (1982), where the Court unanimously refused to exempt Amish employers from paying social security taxes; one basis for the decision was that recognizing such an exemption might require future courts to exempt religious groups from paying generally applicable income taxes.

In practice, the Court has placed significant hurdles in the way of Free Exercise claimants. Although most plaintiffs have successfully made their required showings of sincerity and religious burden, states have usually overcome these showings by demonstrating a strong need for uniform enforcement of a generally applicable statute that was not designed with any religious animus in mind.

Excerpt derived from Laurence H. Tribe, *American Constitutional Law* (Foundation Press, 2nd ed. 1988), pp. 1156-1157, 1168, 1193-1194.