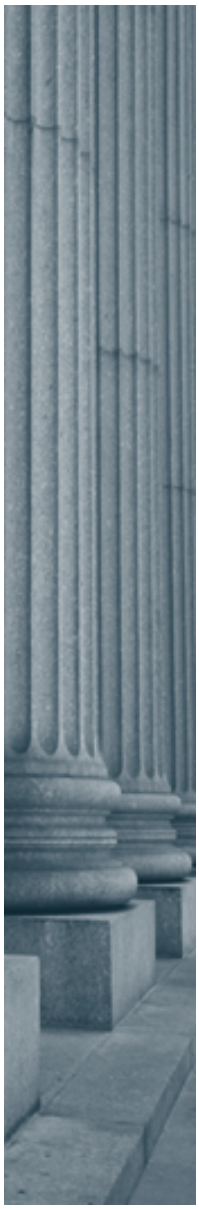
THE PEW FORUM ON RELIGION & PUBLIC LIFE

A FLUID BOUNDARY: THE FREE EXERCISE CLAUSE AND THE LEGISLATIVE AND EXECUTIVE BRANCHES

OCTOBER 2008



Courts have long grappled with questions of religious freedom, but other government bodies also help ensure protection of this cherished liberty. Indeed, some of the most significant protections in this area are derived not from landmark U.S. Supreme Court decisions interpreting the First Amendment's Free Exercise Clause – which prohibits government discrimination based on religion – but rather from federal and state statutes that extend special protections to people of faith.

These statutes protect or accommodate religious freedom in four basic ways. The first type exempts *both* religious and secular organizations from specific legal requirements. For instance, the federal government and all 50 states exempt all qualified nonprofit organizations, religious and secular alike, from income taxation.

The second type of accommodation exempts *only* people of faith or religious entities from a particular legal requirement. One of the earliest examples of such an accommodation actually dates back to the American Revolution, when Pennsylvania exempted religious pacifists – most notably, Quakers – from military conscription. Many states followed Pennsylvania's example by allowing similar exemptions during the Civil War. The federal government continued this tradition in 1864 when it amended the federal military conscription act to exempt those conscientious objectors who were members of particular religious denominations. Subsequently, the U.S. Congress has passed similar acts, broadening the scope of the exemption each time. The most recent one, passed in 1948, exempts from military service any person whose belief in a Supreme Being conflicts with participating in war.

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The third type of religious accommodation is similar to the second in that it extends only to people of faith, but this type of accommodation does not target a particular legal requirement, such as conscription; instead, it broadly exempts religious activity from all excessively burdensome laws. These general accommodations first surfaced after a 1990 Supreme Court ruling made it more difficult for people of faith to argue that they were constitutionally entitled to exemptions from legal requirements. Congress responded to this high court decision by passing laws that reinstated the court's previous, more religion-friendly interpretation of free exercise.

The fourth and final type of accommodation involves government-sponsored chaplaincies, such as the military chaplaincy. While the Supreme Court has never directly ruled on the constitutionality of the military chaplaincy, lower federal courts have upheld the practice. And the Supreme Court's other decisions on religious accommodation suggest that the high court would also find that the military chaplaincy is an exceptional instance in which the government may directly fund religious services.

ESTABLISHMENT CLAUSE LIMITATIONS

When a legislative body grants religious groups more liberty than the Supreme Court has interpreted the Free Exercise Clause to require, the government potentially violates the Establishment Clause, which prohibits the government from specially favoring religion or promoting religious belief. The Supreme Court has sought to reconcile this tension between the religion clauses by designing rules that distinguish between permissible and impermissible accommodations under the Establishment Clause. More than half a century of law in this area has produced the following five rules.

First, when a law exempts only religious believers from a generally applicable legal requirement, the law must relieve a burden that specially affects the ability of believers to practice their religion. So, for example, the government may exempt only religious employers, such as churches, from a general prohibition on religious discrimination because requiring a religious institution to hire people outside that particular religion would burden its religious mission in a way that such a requirement would not burden a secular employer.

Second, accommodations for religious individuals must not impose unreasonable costs on others. For example, exempting religious prisoners from general prison regulations must not endanger the safety of guards or other prisoners.

Third, accommodations must not grant religious organizations the authority to wield a power typically reserved for government,

such as the power to decide which local businesses may serve liquor.

Fourth, accommodations must not coerce participation in a religious practice. For instance, a public school must not seek to accommodate religious students by forcing all students to engage in prayer.

And fifth, accommodations must not single out particular religious groups for favorable treatment. For example, if a law generally prohibits alcohol consumption, the Establishment Clause would permit an exemption for all sacramental consumption, but it would not permit an exemption that applied only to Roman Catholic Mass.

As the Supreme Court has affirmed the constitutionality of some laws that burden religious exercise, legislatures have enacted broader religious accommodations, which in turn have raised new questions about how the Establishment Clause might limit such laws. The debate over the relationship between religious liberty and disestablishment is likely to continue, prompting courts to develop and further refine the Establishment Clause limitations on religious accommodations.

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EXEMPTING BOTH RELIGIOUS AND NONRELIGIOUS GROUPS

The form of religious accommodation most clearly permitted by the Establishment Clause is one that exempts *both* religious organizations and their secular counterparts from a *particular* legal requirement. Throughout American history, all levels of government have enacted these religion-neutral accommodations, most notably tax exemptions for both secular and religious nonprofit organizations.

The Supreme Court addressed the constitutionality of such tax exemptions in *Walz v. Tax Commission* (1970). This case involved New York state's tax exemption for property owned by nonprofit organizations, including churches and other houses of worship. In an 8-1 decision, the court held that this exemption did not violate the Establishment Clause because the state extended the exemption to all charitable organizations, not just religious ones. The court found that, in this respect, New York's property tax resembled the federal income tax code, which similarly exempts all qualified nonprofit entities, including religious groups. The court also noted that the religious-property exemption was quite narrow in that it applied only to property used exclusively for religious purposes.

Justice William O. Douglas was the lone dissenter in *Walz*. He argued that because a tax exemption is essentially a subsidy, a tax exemption for houses of worship is akin to the government funding religion. Since he would have found such funding unconstitutional, Douglas claimed that a tax exemption for religious organizations should

SUPREME COURT CASE

WALZ v. TAX COMMISSION (1970)

MAJORITY:		MINORITY:
BLACK	MARSHALL	DOUGLAS
BRENNAN	STEWART	
BURGER	WHITE	
HARLAN		

also be unconstitutional, even if the exemption applied to secular organizations.

But the Supreme Court has largely ignored Justice Douglas' concerns and, so far, has imposed only one constitutional limitation on accommodations that apply to both secular and religious organizations. In *Larkin v. Grendel's Den* (1982), the court struck down a Massachusetts law giving both churches and schools the authority to stop nearby restaurants from obtaining liquor licenses. In striking down this law, the court acknowledged that Massachusetts passed the law to achieve the permissible goal of protecting churches and schools from the ruckus associated with liquor outlets and stated that the state could have achieved this goal in permissible ways. For example, the court noted, Massachusetts could have simply banned the sale of liquor within a certain distance of a church or school. But Massachusetts chose an impermissible means of achieving this goal because it gave religious organizations a power typically reserved for government. So even though the law was religion-neutral in that it treated churches just like secular schools, it was still unconstitutional because it threatened to entangle religious and governmental authorities.

From *Larkin* flows the general rule that accommodations, whether religion-neutral or not, may never authorize religious entities to wield a government power. To date, this is the only Establishment Clause limitation on religion-neutral accommodations.

EXEMPTING RELIGIOUS GROUPS FROM SPECIFIC REQUIREMENTS

Although the most constitutionally acceptable accommodations apply equally to religious and secular organizations, the government at times has found reason to extend an exemption solely to religious believers or organizations. These religion-specific exemptions are often a response to an earlier law that significantly burdened religious practice or belief. For example, a law prohibiting all alcohol consumption would burden many religious believers in ways it would not burden their secular counterparts since alcohol is essential to many sacred ceremonies, such as a Roman Catholic Mass. Therefore, if the government were to prohibit alcohol consumption, as it did in the 18th Amendment, it would have reason to enact a religion-specific exemption permitting consumption in religious ceremonies, which the 1919 Volstead Act did.

The Supreme Court has held that such a religion-specific accommodation is permissible only if it satisfies various criteria. Most fundamentally, a religion-specific accommodation must be targeted to remove a specific government-imposed burden on religious exercise. In addition, the accommodation may not coerce religious participation, transfer governmental power to a religious group, impose unreasonable costs on those not eligible

THE FREE EXERCISE CLAUSE AND THE LEGISLATIVE AND EXECUTIVE BRANCHES: SIGNIFICANT SUPREME COURT RULINGS

McCollum v. Board of Education (1948)
Invalidated an Illinois program allowing students to be released from regular secular instruction so that the students could receive religion instruction on school premises.

Zorach v. Clauson (1952)
Upheld a New York program allowing students to be released from regular secular instruction so that the students could receive religious instruction off school premises.

Walz v. Tax Commission (1970)
Upheld a New York state tax exemption for property owned by non-profit organizations, including houses of worship, because the exemption extended to all charitable organizations, not just religious ones.

Larkin v. Grendel's Den (1982)
Invalidated a Massachusetts law giving churches and schools the authority to stop nearby restaurants from obtaining liquor licenses because the law transferred governmental power to religious entities.

Estate of Thornton v. Caldor, Inc. (1985)
Invalidated a Connecticut law that provided Sabbath observers with an absolute right not to work on their Sabbath because the law imposed unreasonable costs on employers and other employees.

Corporation of Presiding Bishops v. Amos (1987)
Upheld an exemption for religious organizations from a federal law prohibiting religious discrimination in the workplace because the law had imposed a burden on religious organizations that it did not impose on secular ones.

Employment Division v. Smith (1990)
Upheld the denial of unemployment compensation to two Native American drug rehabilitation counselors who had been dismissed because they had ingested the hallucinogen peyote as part of a religious ritual.

Board of Education of Kiryas Joel v. Grumet (1994)
Invalidated New York's creation of a special public-school district for a village populated primarily by an Orthodox Jewish community.

City of Boerne v. Flores (1997)
Held that the Religious Freedom Restoration Act could not constitutionally apply to state and local governments.

Cutter v. Wilkinson (2005)
Upheld the institutionalized-persons provision of the Religious Land Use and Institutionalized Persons Act because the provision eased the difficulties prisoners and others confined to institutions have in exercising their religious rights.

Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal (2006)
Held that the Religious Freedom Restoration Act protects the right of a small religious group to import and use hoasca tea, a hallucinogenic substance used in the group's religious rituals

for the exemption, or discriminate on the basis of religious group or denomination.

These rules are the product of more than 50 years of litigation over the constitutionality of religion-specific accommodations. The Supreme Court first addressed this issue in *McCollum v. Board of Education* (1948). In this case, the court considered an Establishment Clause challenge against a program in Champaign, Ill., that permitted students in public schools to be released from regular secular instruction so that the students, while still on school premises, could receive a half-hour of instruction in Judaism, Roman Catholicism or Protestantism. The schools defended the program on the ground that it was a reasonable way of relieving the burden that school attendance imposed on students' ability to learn about and practice their religion. The court rejected this argument, finding that the program violated the Establishment Clause because it used "the tax-established and tax-supported public school system to aid religious groups and to spread the faith."

The *McCollum* decision provoked a firestorm of criticism that the high court was hostile to religion. Four years later, perhaps in response to this criticism, the court ruled in *Zorach v. Clauson* (1952) that there is a way for the government to accommodate religious students in public schools without violating the Establishment Clause.

In *Zorach*, the high court upheld a New York program that was essentially identical to the one at issue in *McCollum*, with one important exception: Students in the New York program were not allowed to receive religious instruction on school property but rather were required to do so off-site. Justice Douglas' majority opinion in *Zorach* emphasized that this off-site feature made the New York program a permissible accommodation of the community's religious values. Although the vigorous dissents in *Zorach* argued that there was not a "significant difference" between the Illinois and New York programs, the *Zorach* majority opinion signaled that the government may accommodate religion in particular circumstances.

But the court did not take the first steps toward precisely identifying these circumstances until 1987, when it held in *Corporation of Presiding Bishops v. Amos* that the government may accommodate religious practices without accommodating their secular counterparts if the accommodation removes a government-imposed burden that specially affects religious practice or belief.

SUPREME COURT CASE

ZORACH V. CLAUSON (1952)

MAJORITY:		MINORITY:
BURTON	REED	BLACK
CLARK	VINSON	FRANKFURTER
DOUGLAS		JACKSON
MINTON		

SUPREME COURT CASE

CORPORATION OF PRESIDING BISHOPS V. AMOS (1987)

MAJORITY:		
BLACKMUN	O'CONNOR	STEVENS
BRENNAN	POWELL	WHITE
MARSHALL	REHNQUIST	
	SCALIA	

In *Amos*, the high court considered the constitutionality of an exemption for religious organizations from the federal prohibition of religious discrimination in the workplace. The case arose after the Church of Jesus Christ of Latter-day Saints fired an employee because he was not in good standing as a member of the church. Even though the Civil Rights Act of 1964 generally bars such discrimination, the employee could not bring a suit under this law because a 1972 amendment exempted religious employers. So the employee claimed that this exemption favored religious over nonreligious employers, in violation of the Establishment Clause.

The Supreme Court unanimously upheld this religion-specific accommodation because the exemption fulfilled "the proper purpose of lifting a regulation that burdens the exercise of religion." In other words, the exemption was constitutional because the Civil Rights Act of 1964 burdened religious organizations in a way it did not burden secular ones.

But the court in *Amos* also suggested that, when there is no such government-imposed burden, an accommodation that applies only to religious believers violates the Establishment Clause. This is consistent with the Supreme Court's earlier decisions, such as *Abington School District v. Schempp* (1963). In *Schemmp*, the court held that the government may not accommodate religious students by allowing public school teachers to lead Bible readings because school attendance laws do not prevent children from reading the Bible away from school.

A further limitation on religion-specific accommodations is that, just like religion-neutral accommodations, they must not transfer governmental power to religious groups. Indeed, just as the government may not grant a liquor-licensing power to churches and schools, as the court held in *Larkin*, the government may not grant such authority only to churches.

In addition, religion-specific accommodations must not impose unreasonable costs on third parties. This principle proved crucial in *Estate of Thornton v. Caldor* (1985), which invalidated a Connecticut law that provided Sabbath observers with an absolute right not to work on their Sabbath. The court found the accommodation unconstitutional because it imposed unreasonable costs on employers and other employees who might have to change their days and hours to permit a worker to refrain from working on the Sabbath.

Finally, religion-specific accommodations must not discriminate on the basis of religious group. The Supreme Court established this limitation in *Board of Education of Kiryas Joel v. Grumet* (1994), a case that arose from a controversy over education in the Village of Kiryas Joel, N.Y. The village is populated primarily by Satmar Hasidic Jews, but the surrounding town includes many non-Satmars. Disabled Satmar children, unlike their nondisabled counterparts, attended the town's public schools with non-Satmar children so that the Satmars could receive special services for the disabled offered only in the public schools. But after Satmar parents complained

SUPREME COURT CASE

BOARD OF EDUCATION OF KIRYAS JOEL V. GRUMET (1994)

MAJORITY:		MINORITY:
BLACKMUN	O'CONNOR	REHNQUIST
GINSBURG	SOUTER	SCALIA
KENNEDY	STEVENS	THOMAS

that their disabled children found it difficult to be educated with non-Satmar students, New York created a special public school district in the village specifically for the disabled Satmar children. The high court struck down this special district, asserting that New York had unconstitutionally singled out the Satmar group for favorable treatment by failing to assure that similar groups would also receive their own school districts.

EXEMPTING RELIGIOUS GROUPS FROM GENERAL REQUIREMENTS

Most religion-specific legislative accommodations, such as those discussed above, have focused on exempting religious individuals and organizations from *particular* laws. But in 1993, Congress departed from this more-focused approach by passing the Religious Freedom Restoration Act (RFRA), which generally protects people of faith from *all* laws that unduly burden their religious practices. The impetus for RFRA was the Supreme Court ruling in *Employment Division v. Smith* (1990), which made it much more difficult for religious people to gain exemptions from laws that interfered with or burdened their religious liberty. The *Smith* decision upheld the denial of unemployment compensation to two Native American drug rehabilitation counselors who had been fired for ingesting the hallucinogen peyote as part of a religious ritual. (A more detailed analysis of the *Smith* case is available in the Pew Forum's *A Delicate Balance: The Free Exercise Clause and the Supreme Court*.) Viewing *Smith* as a dangerous limitation on religious freedom, Congress passed RFRA to restore the situation as it existed before *Smith*.

Prior to *Smith*, courts applied the "compelling interest" standard when considering free exercise claims. Under this standard, a law that "substantially burdens" a person's ability to practice his or her religion cannot be constitutionally applied to that person unless the government demonstrates that this application of the law in question is necessary to achieve a "compelling government interest," which includes only the government's most powerful interests, such as protecting the nation's security.

For example, the Supreme Court applied the compelling interest standard in *Wisconsin v. Yoder* (1972) to exempt Amish children from a Wisconsin law requiring school attendance until age 16. The court found that forcing the children to attend school beyond the age of 14 would substantially burden their ability to practice their faith, as "the values and programs of the modern secondary school are in sharp conflict with the fundamental mode of life mandated by the Amish religion." Furthermore, the court found, Wisconsin did not have a compelling interest in requiring Amish children to attend high school since the Amish community provides "vocational education for [its] children in the adolescent years." (A more detailed analysis of the *Yoder* case is available in *A Delicate Balance: The Free Exercise Clause and the Supreme Court*.)

In *Smith*, however, the Supreme Court nearly eliminated the compelling interest standard by holding that the standard applies only to laws that specifically discriminate against a religious group or activity. All other laws, the court ruled, should be upheld against challenges based on the Free Exercise Clause if they merely further a "legitimate government interest," which includes almost any government function, such as regulating for the

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public welfare. The upshot of *Smith* is that the government may substantially burden religious exercise as long as in doing so it treats religious practices just as it treats nonreligious ones.

The *Smith* decision sent shock waves through faith communities and interest groups that focus on religious liberty. In 1993, a broad coalition of these groups successfully lobbied Congress to pass RFRA, which sought "to restore the compelling interest test … and to guarantee its application in all cases where free exercise of religion is substantially burdened." In other words, RFRA effectively overruled *Smith* and subjected all governmental action – federal, state and local – to the pre-*Smith* compelling interest standard.

Four years after Congress enacted RFRA, the Supreme Court in *City of Boerne v. Flores* (1997) invalidated the statute as it applied to state and local governments. The court based its decision in *Boerne* on the federal government's limited power to regulate the states. More specifically, the high court held that while the 14th Amendment gives Congress the authority to enact laws that "enforce" the court's existing religious liberty standard against the states, it does not authorize Congress to overturn this standard and create a new one in its place. The court acknowledged, however, that Congress might have been able to take such sweeping action if it had identified at least some instances in which the *Smith* standard had inadequately protected religious believers from state governments. Justice John Paul Stevens, in a concurring opinion, took his analysis a step further, arguing that RFRA was also unconstitutional as applied to the federal government because the statute violated the Establishment Clause by "provid[ing] the [c]hurch with a legal weapon that no atheist or agnostic can obtain."

But Justice Stevens' argument did not prevail, and the decision left RFRA intact as it applies to the federal government, as illustrated in *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal* (2006). The case arose after the federal government suppressed the importation of hoasca tea, which contains a hallucinogen that is used by a small religious group as a sacrament. The federal government argued that while its suppression of the importation and use of the sacramental tea had substantially burdened the group's religious exercise, this suppression was permissible under RFRA because the government had a compelling interest in protecting the group's members from the tea's harmful effects. Moreover, the government argued, permitting the group to import the tea

SUPREME COURT CASE

CITY OF BOERNE v. FLORES (1997)

MAJORITY:		MINORITY:
GINSBURG	STEVENS	BREYER
KENNEDY	THOMAS	O'CONNOR
REHNQUIST		SOUTER
SCALIA		

would harm society in general, as it would undermine the government's efforts to keep hallucinogens off the illicit drug market. But the high court found that the government lacked a compelling interest in denying the religious group access to the tea because the government did not prove either that the hallucinogen is dangerous when used in the quantities consumed by the group or that there is an illicit market for hoasca tea in the U.S.

Although the court found in favor of the religious group in *O Centro Espirita*, not many other religious organizations have prevailed under RFRA. Indeed, federal agencies have largely ignored the statute, and federal courts have often weakened RFRA by narrowly interpreting what constitutes a "substantial burden on religious exercise," which is required to trigger the compelling interest inquiry. Indeed, courts have tended to find a substantial burden only when religious requirements directly conflict with legal requirements. For example, courts regularly reject prisoners' RFRA claims if the challenged restriction interferes with optional religious practices, such as wearing a cross on a jewelry chain.

At the state level, a dozen states across a broad political spectrum responded to the *Smith* decision by enacting their own RFRAs. These state RFRAs apply the pre-*Smith* compelling interest standard to all government action taken within that state. But state courts have often limited state RFRAs by narrowly interpreting what constitutes a substantial burden on religious exercise.

Given the *Boerne* decision and the limited impact of the state RFRAs, Congress found that there was still a need for federal legislation applying the pre-*Smith* compelling interest standard, at least in some instances, to state and local governments. Congress hoped that if it created a law that applied this standard only in those circumstances in which religious liberty was most vulnerable, the Supreme Court would uphold the law as a permissible exercise of federal power. In 1998, Congress conducted hearings focusing on the regulation of land use and prisons, two areas known for generating many religious liberty disputes. Based on these hearings, Congress determined that many state and local governments, in regulating land use and prisoners, were not sufficiently sensitive to religious freedom and tended to discriminate against unpopular or unknown faiths.

Although the court found in favor of the religious group in O Centro Espirita, *not many other religious organizations have prevailed under the Religious Freedom Restoration Act.*

Based on its findings, Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), which, as its name suggests, applies the pre-*Smith* compelling interest standard specifically to two types of regulations: those that concern the use of land by religious entities, such as churches, and those that deal with the exercise of religion by prisoners and others similarly confined to state institutions.

After several lower courts entertained challenges to RLUIPA's constitutionality, with some upholding and others invalidating the statute, the Supreme Court agreed to hear one of these cases, *Cutter v. Wilkinson* (2005). The case arose after Ohio prison

SUPREME COURT CASE

CUTTER v. WILKINSON (2005)

MAJORITY:	REHNQUIST
BREYER	SCALIA
GINSBURG	SOUTER
KENNEDY	STEVENS
O'CONNOR	THOMAS

officials claimed that the statute's institutionalized persons provision could not constitutionally apply to how the state treats people incarcerated for committing a crime. In the lower court, the prison officials made a federalism argument that had prevailed in *Boerne* – that Congress had violated the constitutionally required division of power between the state governments and the federal government. But by the time the case reached the Supreme Court, the Ohio prison officials had discarded that argument because the state accepts federal funding to run its prisons and Congress therefore has the authority under the U.S. Constitution's Taxing and Spending Clause to regulate how Ohio treats its prisoners. Instead, the Ohio prison officials drew from Justice Stevens' concurrence in *Boerne* and argued that RLUIPA's institutionalized persons provision violated the Establishment Clause by favoring religion over nonreligion.

In its decision in *Cutter*, the high court unanimously rejected this Establishment Clause challenge on the ground that RLUIPA's institutionalized persons provision removed "exceptional government-created burdens on private religious exercise." Mindful of potential constitutional problems, however, the court's opinion in *Cutter* emphasized two existing Establishment Clause limitations on how courts may apply the institutionalized persons provision. First, the high court noted, the Establishment Clause prohibits discrimination based on religious affiliation and thus requires courts to apply RLUIPA in a way that "does not differentiate among *bona fide* faiths." Second, the justices pointed out, the Establishment Clause prohibits religion-specific accommodations from imposing unreasonable costs on third parties, and courts therefore may not grant exemptions under RLUIPA in a way that endangers prison authorities or other prisoners.

Lower courts have generally applied RLUIPA according to these two Establishment Clause limitations. For example, prisoners have been much more successful in pursuing RLUIPA claims when their requests have not raised security concerns than when their claims have raised such concerns.

While *Cutter* upheld RLUIPA's institutionalized persons provision, the Supreme Court has not yet ruled on the constitutionality of the land use provision, which applies to laws governing how religious individuals and entities may use land. The reasoning in *Cutter*, however, would appear to apply with equal force to the land use provision. This would suggest that this provision also complies with the Establishment Clause as long as there is sufficient evidence that land use laws place special burdens on religious entities.

Although the Supreme Court has not yet taken a case dealing with the land use provision, many lower courts have decided such cases, and some of these lower court decisions have interpreted the language broadly to protect religious freedom. For example, in *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin* (2005), the 7th U.S. Circuit Court of Appeals found that even land use regulation causing mere "delay, uncertainty and expense" can substantially burden religious organizations, thus triggering the compelling interest test.

GOVERNMENT PROVISION OF RELIGIOUS SERVICES

Although as a general rule the government may not provide religious resources, such as houses of worship or clergy, there is an exception to this rule: The government may fund or sponsor a religious activity if the government does so to accommodate the religious needs of people who, due to government action, no longer have access to religious resources. The military chaplaincy is the primary example of this sort of government-supported religious experience.

While the Supreme Court has never addressed the constitutionality of the military chaplaincy, the 2nd U.S. Circuit Court of Appeals rejected an Establishment Clause challenge against the chaplaincy in *Katcoff v. Marsh* (1982). In its opinion, the 2nd Circuit noted that the chaplaincy has a lengthy historical record, going back to the Continental Congress. The 2nd Circuit also declared that members of the armed forces have a right under the Free Exercise Clause to a government-provided opportunity to worship.

Later Supreme Court decisions, such as *Smith*, have cast doubt on the 2nd Circuit's conclusion in *Katcoff* that the Free Exercise Clause *requires* the chaplaincy's existence. Nevertheless, it appears likely that the Supreme Court would agree with the 2nd Circuit's reasoning that, given the government's absolute control over the armed forces, the Establishment Clause *permits* the chaplaincy as a means of accommodating religious members of the military.

This rationale for the military chaplaincy would appear to apply in other contexts as well. For example, both the federal government and many state governments provide chaplains for institutionalized persons, such as prisoners. Given that institutionalized persons are similarly under the government's absolute control, it seems likely that a court would uphold such a provision of religious services. Some states and localities, however, go further and sponsor chaplaincies for employees, such as police officers and firefighters, who are subject to some but not absolute government control. Because these employees can worship or seek religious counseling away from the workplace, the argument for a government-subsidized chaplaincy in these contexts appears weaker than the arguments for military and prison chaplaincies.

LOOKING AHEAD

The accommodation of religion raises some of the most difficult questions in church-state relations because it involves so many different and complicated areas of constitutional law. Most fundamentally, in seeking to promote religious liberty, such accommodations often appear to favor religion over nonreligion and thus seem to violate the Establishment Clause. Balancing these two competing constitutional values of religious liberty and disestablishment is a challenging task. Further constitutional problems can arise because a legislative accommodation, by expressing distrust in the judiciary's ability to protect religious liberty, can potentially encroach on judicial authority, thereby blurring the separation of powers, a principle that lies at the core of the Constitution. Moreover, if the

federal government enacts an accommodation that unduly extends its own power over state governments, that accommodation might violate the doctrine of federalism.

With all of these questions in the air, it is not surprising that there is much uncertainty about the future of religious accommodation. As former Chief Justice Warren Burger once wrote, the law governing the accommodation of religion "cannot be an absolutely straight line." Given the fluidity of these constitutional boundaries, sparring among judges, politicians and citizens over how to navigate the course of religious liberty is likely to continue.

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