Ch. 4: Religion and the State

I. The genesis of church-state conflict: both institutions claim authority to regulate human behavior

II. Overview of church-state relations

A. **No-establishment clause**: how much separation of church and state should there be?
1. Total-separation: (subordinating churches to a nonpolitical role) e.g., China, Egypt, Mexico, & Russia
2. Total-union: theocratic & secular totalitarian models
3. Partial-separation: contemporary swing vote: Justice Anthony Kennedy
   a. ***High wall of separation***: no government aid to any *church* but government protection of *individual* religious liberty (Justices Hugo Black in 1940s; today: Justices Stephen Breyer, Ruth Bader Ginsberg, Sonia Sotomayor, and Elena Kagan)
   b. ***Accommodation*** (or benevolent neutrality or nonpreferentialism): only nondiscriminatory government aid to religion -- government should aid all churches equally (Justice William O. Douglas in 1940s; today: Chief Justice John Roberts, Justices Antonin Scalia, Clarence Thomas, and Samuel Alito)
4. Public opinion: http://www.pewforum.org/data/

B. **Free-exercise clause**: how far can individuals go in claiming religion as justification for violating secular law?
1. Government may restrict *some* religiously motivated *behaviors*
2. Government may *not* restrict *any* religious *beliefs*

III. How far can government go?

A. *Accommodation*
1. Washington -- revolutionary army compulsory-attendance policy for church services
2. Jefferson & Washington -- religious funding of religious teachers in public education

B. *Separation*
1. Jefferson & Washington -- no tax support for religious teachers in public education
2. Madison -- no majority church in NW territories

IV. The judicial record T4.1, pp. 80-82; T4.2, p. 83; F4.1, p. 84; F4.2, p. 85

A. Pre-1940s: little attention to either separation or free-exercise issues

B. **Separationist Era: 1940s-1970s; Accommodationist Era (1970s-present)**
1. ***No-establishment (separation v. accommodation)* cases** – generally more controversial than free-exercise cases
   a. **Judicial tests** for no-establishment cases
      (1) "Lemon" rule (all three must be met to uphold a law, only one need fail to strike down a law – and the burden of proof is on the government)
         (a) Primarily secular purpose
         (b) Primarily secular result
         (c) No excessive entanglement of government in religion or of religion in government
      (2) "Children v. adults" rule:
         (a) Higher wall of separation between church and state for public-school children;
         (b) More accommodation of government aid to religion when
            i) Only adults are involved or when
            ii) Public aid is for secular instruction in parochial schools
   b. The No-Establishment Clause has generally come to mean that government:
      (1) Cannot authorize a government-approved church,
      (2) And cannot – without a compelling *secular* reason – pass laws that aid or favor one religion over another,
      (3) And cannot – without a compelling *secular* reason – pass laws that favor religious belief over non-belief,
      (4) And cannot for any reason force a person to profess or renounce a religious belief.

      In short, government must be neutral toward religion and cannot be excessively entangled with any religion – especially when children are present in public schools.

   c. **General trend**: ***separation*** — the wall is raised *mainly when children are present in public schools*
      (1) *Engel v. Vitale* (1962): struck down a NY law requiring public-school teachers to read a state-composed prayer
      (2) *Abington Township School District v. Schempp* (1963): struck down a PA law requiring the reading of Bible verse and the recitation of the Lord's Prayer in public schools
      (3) *Eperson v. AK* (1968): struck down a state law prohibiting the teaching of evolution in public schools
      (4) ***Lemon v. Kurtzman* (1971)**: struck down a state law contributing to parochial-school teachers' salaries (even for secular instruction because of excessive entanglement of government in hiring, promoting, firing decisions)
      (5) *Stone v. Graham* (1980): struck down KY law requiring posting of Ten Commandments in public schools
      (6) *Edwards v. Aguillard* (1987): struck down a LA law that required the teaching of creation science alongside evolution in public schools
      (7) *Lee v. Weisman* (1992): struck down a RI middle-school policy of organizing a "non-denominational" prayer at public-school graduation exercises
      (8) *Santa Fe Independent School District v. Doe* (2000): struck down a TX public high school's policy of sponsoring student-led, student-initiated prayer at football games (on school property, at a school-sponsored event, over the school's public-address system, by a speaker representing the student body, under the supervision of school faculty, operating according to school policy)

   d. **Exceptions**: ***accommodation*** — the wall is often lowered *when children are provided public aid for secular (not religious) instruction in parochial schools or in many other settings where adults are present*

(1) *Everson v. Board of Education* (1947): upheld a NJ law compensating parents of all children, including those attending parochial schools, for bus transportation
(2) *Board of Education v. Allen* (1968): upheld a NY law providing the same free (secular) textbooks to both public and parochial-school students
(3) *Mueller v. Allen* (1983): upheld a MN law providing income tax deductions for the cost of tuition, secular textbooks, and transportation for elementary and secondary students in public or parochial schools
(4) *Lynch v. Donnelly* (1984): upheld a Pawtucket, RI Christmas nativity display placed among other holiday symbols; *Allegheny v. ACLU* (1989): upheld a Pittsburgh, PA Chanukah menorah *placed among other holiday symbols*, including Christian symbols
(5) *Rosenberger v. VA* (1995): struck down a UVA regulation that denied funds to public-university student organizations that promoted a religious perspective. The majority ruled that UVA's regulation too narrowly interpreted the *no-establishment* clause and that "religion-neutral" state funding was ok.
(6) *Brown v. Gilmore* (2001): let stand a VA statute authorizing a moment-of-silence in public schools

2. ***Free-exercise* cases**:
   a. **Judicial tests**:
      (1) Government may compel or restrict *behavior* but not affirmation or rejection of religious *beliefs*.
      (2) The burden of proof is on the government. Since the 2006 *Gonzales v. O Centro Espirita* ruling,
         (a) The stricter ***Sherbert v. Verner*** standards of proof limit the federal government:
            i) A *compelling interest of the highest order* is required to justify a federal restriction of the free exercise of religion, and
            ii) the *least-restrictive means* must be used to achieve the compelling interest, and
            iii) that restriction does not expressly target a particular religion for hardship but is *generally applicable* to all citizens.
         (b) The weaker ***Oregon v. Smith*** standards of proof apply to state governments – unless a state chooses to impose the stricter (Sherbert) standards on itself (and many states have done so).
   b. **General trend**: the *libertarian* doctrine – an individual's right to freely exercise religious beliefs (including both non-traditional-Christian beliefs and non-Christian beliefs) has priority over community norms or interests
      (1) *WV v. Barnette* (1943): struck down WV flag-salute law — overturned the *Gobitis* (1940) (Barnette was a Jehovah's Witness)
      (2) ***Sherbert v. Verner* (1963)**: prohibited the SC Employment Security Commission from denying unemployment benefits to persons whose religious beliefs (Seventh-Day Adventist) conflicted with working on their sabbath (Saturdays)

      (3) *Gonzales v. O Centro Espirita* (2006): granted the Union of the Plants Christian Church a preliminary injunction preventing the confiscation of imported hallucinogenic tea or the arrest of any members using the drug while the district court trial is pending. The Court ruled that: 1) Congress overstepped its constitutional authority by making the Religious Freedom Restoration Act (1993) applicable to the states; 2) however, the Court left in place the RFRA's restoration of the *compelling-interest* and *least-restrictive-means* tests when the federal government abridges or denies the free exercise of religious freedom. While the RFRA is no longer applicable to the states, many states have passed their own mini-RFRAs, achieving the same effect.
   c. **Exceptions**: the *communitarian* doctrine – compelling community norms or interests have priority over an individual's right to freely exercise religious beliefs (especially if those religious beliefs are unorthodox and held by unpopular minority religions labeled as "cults")
      (1) *Reynolds v. US* (1878): upheld law prohibiting polygamy
      (2) *Bob Jones Univ. v. US* (1983): upheld the denial of tax-exempt status to racially discriminatory schools that base their policies on religious belief
      (3) ***OR v. Smith* (1990)**: upheld the denial of unemployment benefits to Native Americans who used an illegal drug, peyote, for sacramental purposes; and in the process significantly weakened in the 1963 *Sherbert* standard by dropping the *compelling-interest* and *least-restrictive-means* tests and substituting an easier-to-demonstrate, *reasonable-grounds* test

V. **Politics of church-state relations**
   A. Diverse coalitions:
      1. Not simply pro-religion v. anti-religion
      2. Not simply Christian v. anti-Christian
      3. Not simply conservative v. liberal
   B. Loser's tactics:
   C. Overall evaluation: compromise is working
      1. Churches are relatively independent of government
      2. Government protects the religious rights of persons of diverse faith
      3. No widespread religious violence that has plagued other societies

VI. **The constitutional revolution in perspective**
   A. Judicial appointments
   B. The dilemma in balancing the no-establishment and free-exercise clauses
      1. The accommodation and free exercise of (majority) religion comes at the expense of religious diversity
      2. But the protection of religious diversity comes at the expense of the accommodation and freedom of (majority) religion(s)