Vanderbilt Law Review

Volume 33
Issue 1 *Issue 1 - January 1980*

Article 4

1-1980

General Laws, Neutral Principles, and the Free Exercise Clause

G. Michael McCrossin

NOTES

General Laws, Neutral Principles, and the Free Exercise Clause

I. INTRODUCTION

In a landmark 1959 article Herbert Wechsler pleaded for a Supreme Court commitment to make "principled" decisions.[1] A principled decision, in Wechsler's view, "is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved."[2] Wechsler did not contend that principled decisions would ignore underlying value choices.[3] Instead, he argued that the Court had a responsibility to present adequate analysis, in terms of neutral principles, in support of its decisions. Such neutral principles, although resting on underlying value judgments, should be principles upon which there is a consensus embracing both sides of a given controversy.[5] The advantage of this decisionmaking process presumably will be greater predictability and better acceptance of particular results.[6]

This Note examines several recent Supreme Court decisions considering the first amendment's free exercise clause[7] to determine whether, collectively, the decisions are results of principled decisionmaking. During the past two decades the Court has had four significant opportunities to deal with the free exercise clause.[8] In all

1. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

2. *Id.* at 19. Wechsler goes on to say that "[w]hen no sufficient reasons of this kind can be assigned for overturning value choices of the other branches of the Government or of a state, those choices must, of course, survive." *Id.*

3. Wechsler's view, at least as expanded by some of his followers, has been criticized as an attempt to supply the Court with fundamental values otherwise unavailable or difficult to obtain. *See* Ely, *The Supreme Court, 1977 Term; Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 32-33 (1978).

4. *See* Wechsler, *supra* note 1, at 21.

5. Wechsler's discussion makes it clear that neutral principles are those upon which there is a consensus. *See* Wechsler, *supra* note 1, at 9-10, 23-24, 31, 34.

6. *Id.* at 20-23.

7. The constitutional amendment guaranteeing freedom of religion contains both an establishment clause and a free exercise clause: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

8. NLRB v. Catholic Bishop of Chicago, 99 S. Ct. 1313 (1979); Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963); Braunfeld v. Brown, 366 U.S. 599 (1961).

but one,[9] the Court made important statements about the constitutional protection afforded the free exercise of religious belief. In each case the basic issue was the same: was interference with the exercise of religion unconstitutional when that interference resulted from the application of a general law that promoted a valid public policy and was nondiscriminatory on its face?[10] In short, was unintended and incidental interference by an otherwise valid law nonetheless unconstitutional?

Divergent decisions by the Court in these cases, marked by differences in their underlying rationales, suggest initially that principled decisionmaking in this context has been lacking. This Note explores the results in the free exercise decisions, concluding that the Court has failed to establish a clear set of neutral principles in this area. The Note then proposes neutral principles that could enhance both the predictability and the acceptability of future free exercise decisions.

II. Free Exercise Decisions

A. *Background*

In *Reynolds v. United States,*[11] the Court first distinguished between religious belief and action stemming from religious belief. Reynolds, a member of the Mormon Church, had been charged with bigamy after entering into a second marriage pursuant to church doctrine, which encouraged polygamy. In upholding the bigamy statute over Reynolds' contention that he was entitled to an exception based upon his right to follow freely his religious beliefs, the Court reviewed the origins of the free exercise clause and stated that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[12] The decision thus separated belief, over which the government was prohibited from exercising control, from action, over which government might exercise control if the action was "in violation of social duties or subversive of good order."[13]

The Court retreated from the rigid dichotomy between belief and action in *Cantwell v. Connecticut.*[14] Cantwell and other Jeho-

9. In *Bishop of Chicago* the Court's decision rested on statutory interpretation and did not reach the constitutional issues.

10. In the interest of simplicity, this type of law will hereinafter he referred to as a "general nondiscriminatory law."

11. 98 U.S. 145 (1878).

12. *Id.* at 166.

13. *Id.* at 164.

14. 310 U.S. 296 (1940).

vah's Witnesses were distributing leaflets and soliciting contributions on the streets of New Haven. A Connecticut statute forbade solicitation unless the solicitor's cause was approved beforehand by the secretary of the public welfare council. Noting that the constitutional provision on religion had a "double aspect," the Court stated that "it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship . . . ." as well as "safeguards the free exercise of the chosen form of religion." Thus, the first amendment embraces two concepts: "freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."[15] The Court thus left intact the protection of belief recognized in *Reynolds* but began to clarify the status of action motivated by religious belief. Without suggesting that such action lacked *any* constitutional protection when the action was violative of social duty or subversive of good order, the Court stated that "the power to regulate must be so exercised as not, in attaining a permissible end, *unduly* to infringe the protected freedom."[16] The Court then held that the Connecticut statute unconstitutionally infringed the free exercise of religion because it gave a public official discretionary power to determine whether a given cause was religious.[17]

In rendering its decision, the *Cantwell* Court emphasized that what rendered the Connecticut statute unconstitutional was its imposition of a religious test. Such a test invalidated the statute regardless of whether the law reasonably regulated the religious activity. In so holding, however, the Court stated that a regulation of solicitation that did not impose a religious test and did not *unreasonably* obstruct or delay the collection of funds would not be open to constitutional challenge, even though the solicitation was for a religious purpose.[18] Thus, *Cantwell* may be read as holding not only that a specific religious test is unconstitutional regardless of the validity of the general law, but also that a *reasonable* interference stemming from an otherwise valid general law is constitutional. The decision left unclear, however, the meaning of "reasonable" in the context of a general nondiscriminatory law that has an incidental and unintended effect on the activity of a particular religious group.

15. *Id.* at 303-04.
16. *Id.* at 304 (emphasis added).
17. *Id.* at 305.
18. *Id.*

B. Braunfeld v. Brown

The question left unanswered in *Cantwell* was raised in *Braunfeld v. Brown.*[19] Braunfeld and other members of the Orthodox Jewish faith were retail sellers of clothing and home furnishings. Because their faith required that they refrain from work on Saturday, appellants partially compensated for lost Saturday business by remaining open on Sunday. Pennsylvania enacted a statute, however, that prohibited retail sales on Sunday. Appellants challenged the statute as a violation of the free exercise clause, arguing that enforcement of the Sunday closing law in effect required them either to open on Saturday in contravention of their religious beliefs, or to suffer economic losses sufficient to cause them to cease doing business.

Writing for the majority, Chief Justice Warren held that the statute was not an unconstitutional interference with the appellants' free exercise rights.[20] After reviewing *Reynolds* and *Cantwell,* the Court concluded that the Pennsylvania statute neither made criminal any religious belief or opinion nor forced anyone to embrace any religious belief or to say or believe anything in conflict with his or her religious tenets.[21] Neither did the statute make unlawful any religious practice of appellants: "the Sunday law simply regulates a secular activity and . . . operates so as to make the practice of their religious beliefs more expensive."[22]

The Court might have been saying that when a law only indirectly impacts on the free exercise of religion, a "rational basis" for the law is sufficient to protect it from being declared unconstitutional.[23] In discussing whether Pennsylvania's law should have had

19. 366 U.S. 599 (1961). In addition to the free exercise challenge, appellants claimed that the statute constituted a law respecting an establishment of religion and violated the equal protection clause.

20. *Id.* at 609.

21. *Id.* at 603. In reaching its conclusion the Court reviewed prior cases. In addition to *Reynolds* and *Cantwell,* the Court referred to West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (state law requiring a flag salute and pledge of allegiance in public schools held unconstitutional when enforced against students whose religious beliefs prohibited flag salutes), and Prince v. Massachusetts, 321 U.S. 158 (1944) (statute making it a crime for a girl under eighteen years of age to sell literature in public places upheld despite fact that as a child of the Jehovah's Witnesses faith she believed it was her religious duty to perform that work). The Court noted that in *Barnette* the law required a student to act against religious belief, whereas in *Prince* the religious practice conflicted with the public interest. 366 U.S. at 604-05.

22. 366 U.S. at 605.

23. The "rational basis" test was developed in the context of substantive due process and the regulation of economic interests. *See, e.g.,* Nebbia v. New York, 291 U.S. 502 (1934), in which the Court held that "[i]f the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied . . . ." *Id.* at 537.

an exception for those who observed a different day of rest, for example, the Court stated that this "may well be the wiser solution to the problem" but noted that its concern was "not with the wisdom of legislation but with its constitutional limitation."[24] Alternatively, the Court may have been applying a "balancing test," in which the Court weighed the needs of the state against the restrictions imposed on the individual.[25] This view draws support from the fact that, as justification for upholding the statutes, the Court listed a series of problems that might occur if Pennsylvania were constitutionally required to make exceptions for those whose religion required an alternate day of rest.[26] What is clear, however, is that the Court did not consider the Pennsylvania law an unreasonable infringement of appellants' rights to the free exercise of their religion. Noting the great number of divergent religious beliefs, the Court said that "it cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others."[27]

Justices Douglas, Brennan, and Stewart[28] dissented. Justice Brennan's dissent points out that, when fundamental liberties such as the freedom of religion are concerned, neither a finding that a "challenged law is rationally related to some legitimate legislative end" nor that the "State's interest is substantial and important" is sufficient to allow infringement of the liberty.[29] Instead, only a "compelling state interest"[30] would suffice to override the constitu-

24. 366 U.S. at 608.

25. The "balancing test" is usually associated with procedural due process controversies in which the state's needs are weighed against the harm done to an individual liberty or interest. *See, e.g.,* Goss v. Lopez, 419 U.S. 565 (1975).

26. The Court adverted to the possibility of discriminatory competitive advantage if nonSabbatarian observers could stay open on that day, the possibility that the state would have to inquire unconstitutionally into the sincerity of such persons' religious beliefs, and the possibility of discriminatory hiring practices by Sunday employers. 366 U.S. at 608-09.

27. *Id.* at 606.

28. The Brennan and Stewart dissents follow the majority opinion in *Braunfeld. Id.* at 610-16. The Douglas dissent is incorporated in his dissent to McGowan v. Maryland, 366 U.S. 420, 561-81 (1961), another Sunday closing law decision that was handed down the same day as *Braunfeld.*

29. 366 U.S. at 611.

30. The "compelling state interest" test is the first part of the "strict scrutiny" procedure that was developed in the context of equal protection controversies involving either suspect classifications or fundamental liberties. *See, e.g.,* Dunn v. Blumstein, 405 U.S. 330 (1972); Loving v. Virginia, 388 U.S. 1 (1967); Harper v. Virginia Bd. of Educ., 383 U.S. 663 (1966). The second part of "strict scrutiny" review requires that the means utilized be the "least restrictive alternative." *See generally* Gunther, *The Supreme Court, 1971 Term; Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972); Note, *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065 (1969). In addition to the equal protection cases, the Court has sug-

tional guarantee.[31] Although Justice Stewart claims that he "substantially" agrees with Justice Brennan's view, he does not specifically refer to a "compelling state interest" standard, but emphasizes only that the Pennsylvania law "compels an Orthodox Jew to choose between his religious faith and his economic survival," a choice that "no State can constitutionally demand."[32] Thus it is unclear whether Stewart considered the infringement merely "unreasonable" and therefore unconstitutional, or agreed with Brennan that the infringement was unconstitutional because there was no "compelling state interest." By contrast, Justice Douglas' dissent claimed that the choice of Sunday as a day of rest was basically a choice made because of the majority's religious views.[33] Justice Douglas thus saw the establishment and free exercise clauses as inextricably interwoven:

> There is an "establishment" of religion in the constitutional sense if any practice of any religious group has the sanction of law behind it. There is an interference with the "free exercise" of religion if what in conscience one can do or omit doing is required because of the religious scruples of the community.[34]

In his concurring opinion[35] Justice Frankfurter, more clearly than the majority opinion, took the position that, on balance, the harm done by the state did not outweigh the community interests advanced by the statutes. Justice Frankfurter phrased the constitutional question as: "[i]n view of the importance of the community interests which must be weighed in the balance, is the disadvantage wrought by the non-exempting Sunday statutes an impermissible imposition upon the Sabbatarian's religious freedom?"[36] His conclu-

---

gested that "strict scrutiny" applies to suhstantive due process challenges of governmental interference with individual rights contained in the first ten amendments of the Constitution. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). More recently, the Court has applied the "compelling state interest" test in suhstantive due process controversies involving fundamental rights other than those specifically listed in the Constitution. *See* Roe v. Wade, 410 U.S. 113 (1973).

31. 366 U.S. at 613-14.

32. *Id.* at 616.

33. McGowan v. Maryland, 366 U.S. at 573.

34. *Id.* at 576-77.

35. *Id.* at 459-560. Justice Frankfurter's concurrence to *Braunfeld* appears as part of the *McGowan* decision. Justice Harlan joined in the opinion. In this extraordinarily long opinion Justice Frankfurter emphasizes (a) a distinction between an impact on religion made by statutes with religious objectives (which are constitutionally prohibited) and an impact made by statutes with purely secular objectives (which are not necessarily prohibited) and (b) a review of the development of Sunday laws in England and the United States, aimed at showing the present purely secular purpose of the Sunday laws.

36. *Id.* at 522. Justice Frankfurter's specific words were: "[o]n the basis of the criteria for determining constitutionality, as opposed to what one might desire as a matter of legislative policy, a contrary conclusion cannot he reached." *Id.*

sion was that it was not.

Thus in *Braunfeld,* a majority of the Court saw no unconstitutional infringement of religious rights. There was, however, no substantial agreement on the basis for this opinion. Chief Justice Warren's majority opinion left unclear whether laws indirectly impacting on religious practice need only a rational basis or must satisfy a balancing test in which the individual's right to free exercise is weighed against the public interest promoted by the law. Justices Frankfurter and Harlan applied a balancing test. Justice Stewart found the impact unreasonable without clarifying his basis for that judgment. Justice Douglas did not engage in a discussion of free exercise rights, because he considered the law void under the establishment clause. Finally, Justice Brennan found the law violative of the free exercise clause because there was no compelling state interest. There was in short, no agreement on the principles underlying the decision.

C. Sherbert v. Verner

Two years after *Braunfeld* the Court dramatically changed direction in *Sherbert v. Verner.*[37] Sherbert was a member of the Seventh Day Adventist Church, whose religious doctrine prohibited Saturday labor. After being discharged and failing to obtain other work because local employers were hiring only those able and willing to work a six-day week, Sherbert applied for unemployment compensation. The South Carolina Unemployment Compensation Act provided, however, that claimants were ineligible for benefits if they failed, without good cause, to accept available suitable work when offered by the unemployment office or the employer. The Employment Security Commission found that Sherbert's refusal to work on Saturday brought her within this restriction and declared her ineligible for unemployment benefits. Sherbert challenged these findings as an unconstitutional infringement upon her free exercise rights. The South Carolina Supreme Court rejected Sherbert's challenge, however, and upheld the findings of the Commission. The United States Supreme Court reversed.

Writing for the majority, Justice Brennan asked two questions: First, was Sherbert's disqualification by the State an infringement of her free exercise rights?; and second, if so, was any incidental burden on those rights justified by a "compelling state interest in the regulation of a subject within the State's constitutional power

37. 374 U.S. 398 (1963). During the intervening period Justices Frankfurter and Whittaker had retired and were replaced by Justices Goldberg and White.

to regulate[?]"[38] After finding that the disqualification was clearly a burden on Sherbert's free exercise of religion,[39] Justice Brennan found no compelling state interest to justify that burden.[40] The majority distinguished *Braunfeld* on the grounds that there was a "less direct burden upon religious practices" in that case and also that the Pennsylvania statute in *Braunfeld* was "saved by a countervailing factor which finds no equivalent in the instant case—a strong state interest in providing one uniform day of rest for all workers."[41] According to the *Sherbert* majority, *Braunfeld* stated that the "secular objective could be achieved . . . only by declaring Sunday to be that day of rest."[42]

Justice Stewart, who had dissented in *Braunfeld,* concurred in the result in *Sherbert* but did not join the majority opinion. Citing two establishment clause decisions,[43] Justice Stewart expressed concern that the *Sherbert* decision required a state to acknowledge and protect religion in a way that contradicted these holdings.[44] Justice Stewart also questioned the consistency of *Sherbert* and *Braunfeld.* Pointing out that the monetary impact on the appellant in *Sherbert* was considerably less than that in *Braunfeld,* Stewart concluded that in order to reach its conclusion in *Sherbert,* "the Court must explicitly reject the reasoning of *Braunfeld v. Brown.*"[45]

Justice Harlan, joined by Justice White, dissented. Justice Harlan's basic point was that the South Carolina law made ineligi-

38. *Id.* at 403 (citing NAACP v. Button, 371 U.S. 415, 438 (1963)).

39. 374 U.S. at 403-06.

40. *Id.* at 406-07.

41. *Id.* at 408.

42. *Id.* at 408-09. This contention by the majority seems clearly incorrect. The *Braunfeld* Court found nothing as strong as Brennan says it did. To the contrary, the *Braunfeld* Court was explicitly aware of the fact that 21 of the 34 states with Sunday closing laws did not find the need for a common day of rest so compelling that they could not allow exceptions for non-Sabbatarians. *See* 366 U.S. at 614. Thus, rather than finding a compelling state interest, the *Braunfeld* Court's position was that it was not unreasonable when Pennsylvania failed to do as other states had in allowing an exception. The simple fact is that the *Braunfeld* majority was not looking for the presence or absence of a "compelling state interest" as the *Sherbert* majority implied. Only Justice Brennan, in the *Braunfeld* minority, had specifically stated that the "compelling state interest" test was the appropriate one. *See* text accompanying notes 39-41 *supra.*

43. School Dist. v. Schempp, 374 U.S. 203 (1963) (holding that the establishment clause prohibited a state from requiring that passages from the Bible be read or that the Lord's Prayer be recited in the public schools); Engel v. Vitale, 370 U.S. 421 (1962) (holding that the establishment clause prohibited state officials from composing an official state prayer and requiring its recitation daily in the public schools).

44. 374 U.S. at 414. Characterizing the Court's approach to the establishment clause as "not only insensitive, but positively wooden," Stewart focused primarily on the need for the Court to re-examine its establishment clause views rather than on any mistake in the *Sherbert* result. *Id.*

45. *Id.* at 418.

ble those who for "personal reasons" were not available for work. By holding that an exception must be carved out for those whose personal reasons were religious ones, the Court had, in Harlan's view, necessarily overruled *Braunfeld*.[46] Furthermore, compelling the state to carve out an exception to its general rule of eligibility went beyond the constitutional requirements for special treatment of religion, which, Harlan stated, are "few and far between."[47] Justice Harlan thus accepted Justice Stewart's point that *Sherbert* conflicted with the Court's establishment clause opinions, but differed from Justice Stewart[48] in arguing that the conflict necessitated affirmation of the lower court in *Sherbert* rather than re-examination of the establishment clause reasoning.

Although the *Sherbert* majority stopped short of adopting the reasoning of Justice Douglas,[49] the Court nevertheless substantially agreed that the "compelling state interest" test applies whenever a general nondiscriminatory law impacts, albeit indirectly, on an individual's right to the free exercise of religion. Thus, a definite principle underlies the decision. It is unclear, however, whether such a principle can be called a "neutral" one,[50] because application of the "compelling state interest" test almost always means that the governmental action in question will be found constitutionally lacking. It seems unlikely that there could be a consensus embracing both sides of a given controversy if one side was aware that application of the allegedly "neutral" principle meant almost certain rejection of its arguments.[51]

D. Wisconsin v. Yoder

Nine years after *Sherbert* the Court again dealt with a general nondiscriminatory law and the free exercise clause in *Wisconsin v. Yoder*.[52] Several members of the Old Order Amish religion and the Conservative Amish Mennonite Church including Yoder had been

46. *Id.* at 421.

47. *Id.* at 423.

48. *See* text accompanying note 45 *supra.*

49. Justice Douglas would apparently allow no interference, even for a compelling state interest: "The result turns not on the degree of injury, which may indeed be nonexistent by ordinary standards. The harm is the interference with the individual's scruples or conscience—an important area of privacy which the First Amendment fences off from government." 374 U.S. at 412 (Douglas, J., concurring).

50. *See* text accompanying note 5 *supra. See, e.g.,* Justice Harlan's dissenting opinion in Shapiro v. Thompson, 394 U.S. 618, 661-62 (1969); Gunther, *supra* note 30, at 8-10.

51. A principle would presumably not lose its neutrality simply because the logical application of it in a given case would lead to the defeat of one side. It would lose its neutrality, however, if its application ordinarily worked against the same side.

52. 406 U.S. 205 (1972).

fined for refusing to send their children to school until they reached the age of sixteen as required by Wisconsin law.[53] The Wisconsin Supreme Court sustained the parents' free exercise claim.[54] The United States Supreme Court was nearly unanimous[55] in affirming the lower courts, but failed to apply the same "compelling state interest" standard that had been applied in *Sherbert*.[56]

The Court initially stated that in order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interfered with legitimate religious practice "it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."[57] After examining the record,[58] the Court concluded that there was a clear encroachment upon the right of free exercise of religious beliefs.

Given an encroachment on respondents' free exercise rights, the issue became whether the encroachment was justified by the State's interest in universal compulsory formal secondary education to age sixteen. The Court noted that the State's interest stemmed from a

53. The children had attended local public schools through the eighth grade. They were fourteen and fifteen at the time their parents declined to send them to the local high school for further education. *Id.* at 207 n.1.

54. State v. Yoder, 49 Wis. 2d 430, 182 N.W.2d 539 (1971).

55. Chief Justice Burger wrote the majority opinion, joined by Justices Brennan, Stewart, White, Marshall, and Blackmun. Only Justice Douglas dissented, contending that the children's rather than the parents' rights should have been considered. Because only one of the children, Frieda Yoder, stated that her views were in accord with those of her parents, Douglas concurred with the majority opinion only as to Yoder and dissented as to the others. 406 U.S. at 243. Douglas also questioned the majority's idea of what constituted "religious" belief. *Id.* at 247-49. Justices Powell and Rehnquist, recently appointed, did not take part in the decision.

56. *See* text accompanying note 40 *supra*.

57. 406 U.S. at 214. Although this language might suggest an application of the "compelling state interest" test, the comparison of the competing interests, as well as other language in the opinion, make it clear that a "balancing" test was being employed. *See* note 59 *infra*.

58. [T]he unchallenged testimony of acknowledged experts in education and religious history, almost 300 years of consistent practice, and strong evidence of a sustained faith, pervading and regulating respondents' entire mode of life support the claim that enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs.

406 U.S. at 219.

Experts had testified that the Amish religion "pervades and determines virtually their entire way of life." *Id.* at 216. The Amish way of life was that of a simple, close-knit community that resisted the innovations of the modern world. Secondary schools were said to expose Amish children "to worldly influences in terms of attitudes, goals, and values contrary to beliefs," and thus substantially to interfere "with the religious development of the Amish child and his integration into the way of life of the Amish faith community . . . ." *Id.* at 218.

legitimate desire that citizens be prepared to participate effectively and intelligently in the political system and be self-reliant and self-sufficient participants in society.[59] Finding these goals valid, the Court nevertheless concluded that the State's interest in education did not extend to requiring Amish children's attendance to age sixteen.[60]

Yoder's significance lies in its substantial retreat from the "compelling state interest" standard of *Sherbert*. The *Yoder* court inquired whether the state's interest in education was "sufficient" to "override" the admitted encroachment on free exercise rights. The "sufficiency" required, however, was plainly not of the all but inflexible "compelling" variety. Instead, the Court was balancing the competing interests. This is reflected throughout the Court's opinion. For example, in discussing whether general nondiscriminatory laws can be held unconstitutional, the Court stated that "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it *unduly* burdens the free exercise of religion."[61] The Court also argued that "[b]y preserving *doctrinal flexibility* and recognizing the need for a *sensible and realistic application of the Religion Clauses* 'we have been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion.' "[62] Further, the Court noted that "[the] courts must move with great circumspection in performing the sensitive and delicate task of *weighing a State's legitimate social concern when faced with religious claims for exemption* from generally applicable educational requirements."[63]

The general tenor of the Court's discussion, however, makes it less than clear whether a "balancing" test is to be used in all cases in which there is a conflict between the free exercise clause and a general nondiscriminatory law or whether the test is proper only for those isolated instances in which the secular and religious interests were both of exceptional importance. Although the *Yoder* majority relied heavily on the special characteristics of the Amish religion, and the interests of parents in retaining control over the education

59. *Id.* at 221.

60. *Id.* at 224-25, 228-29. The Court noted that respondents had demonstrated the "adequacy of their alternative mode of continuing informal vocational education in terms of precisely those overall interests that the State advances in support of its program of compulsory high school education." *Id.* at 235.

61. *Id.* at 220 (emphasis added).

62. *Id.* at 221 (emphasis added).

63. *Id.* at 235 (emphasis added). Justice White added that "[c]ases such as this one inevitably call for a delicate balancing of important but conflicting interests." *Id.* at 237.

of their children, the Court emphasized that the state's interest in providing education was also substantial.[64] Because important interests were present on both sides in *Yoder,* it is possible to construe the decision as limited to complicated conflicts between multiple fundamental rights and substantial state interests. It is also possible to read the opinion as meaning that, even when the state interest is compelling, infringement of free exercise rights is unjustified when there is a reasonable alternative that does not impair religious rights.[65] In the latter case, the Court may have meant nothing more than the Amish style of informal "learning through doing" was a reasonable alternative to the Wisconsin requirement.[66]

E. NLRB v. Catholic Bishop of Chicago

The Court's confusion over the basis of its free exercise views continued in *NLRB v. Catholic Bishop of Chicago.*[67] The National Labor Relations Board had certified unions as bargaining agents for lay teachers in secondary schools operated by the Roman Catholic Bishop of Chicago and by the Diocese of Fort Wayne-South Bend, Indiana. When respondents refused to recognize and bargain with the unions, the NLRB issued cease-and-desist orders. The Court of Appeals for the Seventh Circuit refused to enforce the Board's orders on the ground that the NLRB's assumption of jurisdiction was foreclosed by the religion clauses of the first amendment.[68] The Supreme Court, however, affirmed the Court of Appeals' decision on purely statutory grounds.[69]

64. The Court, noting that "[p]roviding public schools ranks at the very apex of the function of a State," nevertheless stated that even this paramount responsibility was "made to yield to the right of parents to provide an equivalent education in a privately operated system." *Id.* at 213. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925).

65. The Court, by allowing a "reasonable" alternative, was not simply employing the second part of the "strict scrutiny" standard, because that would have required the Court to speak in terms of the "least restrictive alternative." *See* note 30 *supra.*

66. 406 U.S. at 212. The Wisconsin law did provide for certain recognized exceptions, one of which was for "instruction . . . elsewhere than at school." This exception, however, had to be "approved by the state superintendent as substantially equivalent to instruction given to children of like ages in the public or private schools where such children reside," which, on its face, would not cover the practice of the Amish. *Id.* at 207-08 n.2.

67. 99 S. Ct. 1313 (1979).

68. Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112 (1977). The Seventh Circuit also rejected the Board's jurisdiction on the ground that the NLRB standard failed to provide a workable gnide for the exercise of its discretion in assuming jurisdiction. *Id.* at 1118. In Roman Catholic Archdiocese of Baltimore, Archdiocesan High Schools, 216 N.L.R.B. 249 (1975), the Board had explained that its policy was to decline jurisdiction over religiously sponsored schools "only when they are completely religious, not just religiously associated." *Id.* at 250. In practice the distinction excluded seminaries but not religiously sponsored high schools.

69. 99 S. Ct. at 1322. The majority opinion was written by Chief Justice Burger, joined

Despite its failure to reach the constitutional questions, the majority touched upon the issues in dicta. Inexplicably, the Court did not look to *Braunfeld, Sherbert,* or *Yoder* for the applicable standard. Instead, the Court cited language from an establishment clause case, *Lemon v. Kurtzman.*[70] In *Lemon* the Court had held that a Rhode Island law providing a fifteen percent salary supplement for teachers in nonpublic schools and a Pennsylvania law providing for state reimbursement to nonpublic schools for courses in specific secular subjects were both unconstitutional under the religion clauses.[71] One ground for the decision was the prospect of "entanglement" of the state in religious activities.[72] In order to avoid the payment of state funds for any activities that fostered religion, both laws provided for surveillance of the program by state authorities. It was this continuing interaction between state authorities and the religious schools that the Court deemed "excessive and enduring entanglement between state and church."[73]

Without actually holding that such entanglement would be present if the NLRB took jurisdiction over labor disputes in church-related schools, the *Bishop of Chicago* Court nevertheless indicated that it considered the NLRB involvement similar to that proscribed in *Lemon.*[74] The entanglement in *Lemon,* however, involved constant state surveillance of teachers who, because of the difficulty of compartmentalizing their secular knowledge from their religious beliefs, might have injected religiously inspired views into their

by Justices Stewart, Powell, Rehnquist, and Stevens. Justice Brennan, joined by Justices White, Marshall, and Blackmun, dissented.

70. 403 U.S. 602 (1971). The language (entanglement) initially was used by the Court in another establishment clause case, Walz v. Tax Commission, 397 U.S. 664, 674 (1970). The idea, however, is a hybrid of both free exercise and establishment concepts. *See* text accompanying note 73 *infra.*

71. The lower court found that twenty-five percent of Rhode Island's elementary students attended nonpublic schools and ninety-five percent of these students attended Roman Catholic schools. In Pennsylvania, contracts had been made with schools, most of which were Roman Catholic, that enrolled more than twenty percent of the students in the state. 403 U.S. at 602.

72. Even though the support was aimed at secular subjects or at teachers of these subjects, the Court found that "a dedicated religious person, teaching in a school affiliated with his or her faith and operated to incubate its tenets, will inevitably experience great difficulty in remaining religiously neutral." *Id.* at 618.

73. *Id.* at 619.

74. 99 S. Ct. at 1319. Touching upon the Board's argument that it could avoid "excessive entanglement" because it would resolve only factual issues, the Court said it was "not compelled to determine whether the entanglement is excessive" but was making only a "narrow inquiry whether the exercise of the Board's jurisdiction presents a significant risk that the First Amendment will be infringed." *Id.* at 1319-20. The Chief Justice's opinion left unclear what distinction exists between "excessive entanglement" and a "significant risk of First Amendment infringement." His opinion also fails to indicate why the admitted interference that would occur would significantly risk contravening the first amendment.

teaching of otherwise secular subjects.[75] The suggested entanglement in *Bishop of Chicago* involved the supervision of elections and the resolution of labor disputes on a case-by-case basis.[76] Why this kind of involvement, which on its face appears the same as the admittedly legitimate intrusions of health and fire inspectors or of those enforcing the compulsory attendance laws, is really the same kind of entanglement as that envisioned in *Lemon* is not explained.[77]

The Court of Appeals' discussion of the constitutional issues in *Bishop of Chicago* is an excellent example of the confusion generated in the wake of *Yoder*.[78] The court first noted that the activity of the NLRB would constitute interference with the Bishop's free exercise of his authority over the teachers in his diocese. The court reasoned that the Board would inevitably become "entangled in doctrinal matters if, for example, an unfair labor practice charge followed the dismissal of a teacher . . . for teaching a doctrine that has current favor with the public at large but is totally at odds with the tenets of the Roman Catholic faith."[79] The court added that in such a case the Board would have to look into the real cause for discharge, stating that "[t]he scope of this examination would necessarily include the validity as a part of church doctrine of the reason given for the discharge."[80]

---

75. As an example of possible mingling of religious belief and a secular subject, Justice Douglas in his concurring opinion in *Lemon* used an arithmetic problem: "'If it takes forty thousand priests and a hundred and forty thousand sisters to care for forty million Catholics in the United States how many more priests and sisters will be needed to convert and care for the hundred million non-Catholics in the United States?'" 403 U.S. at 634-35. There were no findings that such teaching actually occurred in the instant school.

76. The most likely areas of conflict arising under the National Labor Relations Act would be problems arising from a claim of unfair labor practices under § 8 and problems arising from the selection and certification of a bargaining unit under § 9. *See* 29 U.S.C. §§ 158, 159 (1976); Bastress, *Government Regulation and the First Amendment Religion Clauses—An Analysis of the NLRB Jurisdiction Over Parochial Schools and Their Teachers*, 17 DUQ. L. REV. 291 (1978-79); Kryvoruka, *Church, the State and the National Labor Relations Act: Collective Bargaining in the Parochial Schools*, 20 WM. & MARY L. REV. 33 (1978); Comment, *The Free Exercise Clause, the NLRA, and Parochial School Teachers*, 126 U. PA. L. REV. 631 (1978).

77. The Court did note that resolution of some labor disputes would "necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission," and added that it was "not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but the very process of inquiry leading to findings and conclusions." 99 S. Ct. at 1320. Had the Court followed a free exercise analysis it might have averted to the view in *Yoder* that, if a law is to be held unconstitutional, the state must be interfering with a "legitimate religious belief"—a term covering both good faith and a causal connection between the individual's claim and established religious views. 406 U.S. at 214, 215-16.

78. *See* text accompanying notes 64-66 *supra*.

79. 559 F.2d at 1125.

80. *Id.* It is unclear if "validity" referred to whether the reason for discharge actually

Interference alone, however, is insufficient to render the activity unconstitutional, since there are some types of permissible governmental infringement on the operation of church schools. These include fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws.[81] The court compared these legitimate interferences with those that the court thought would be created by the Board's activity, concluding that they were dissimilar because "[l]aws on matters such as fire inspections . . . do not have the clear inhibiting potential upon the relationship between teachers and employers with which the present Board order is directly concerned."[82] The logic here is strained, if not lacking. Admittedly, interfering with the Bishop's operation of the school through imposition of a fire regulation or a building code and inspecting to see that the regulation is followed is not the same as interfering through regulation of labor-management relations. Admission that there is a difference, however, does not provide a reason why one type of interference should be proscribed and another not.

The Court of Appeals also employed the "entanglement" approach of *Lemon v. Kurtzman*.[83] The court was no more instructive than the Supreme Court in explaining why the "entanglement" was "excessive" or even why it was basically similar to the type proscribed in *Lemon*. Perhaps recognizing the weakness of its arguments, the court also touched briefly upon what might be called a "compensatory justice" argument. Noting that religious groups were forced to finance their schools without governmental aid because of religious permeation of the curriculum, the court stated that such schools should "be equally freed of the obviously inhibiting effect and impact of the restrictions of the National Labor Rela-

stemmed from church doctrine or whether the doctrine was itself true. There is evidence in the opinion, however, that the court thought the Board would be forced to make decisions on the truth of the doctrine itself rather than merely recognizing its existence. Discussing the statement of the Board's counsel that the Board would "try to make some reasonable accommodation to the religious purposes of the school," *id.* at 1128, the court stated that a reasonable accommodation on the presentation of a doctrinal issue in an unfair labor practice case "would implicitly appear to us to involve the necessity of explanation and analysis, and probably *verification and justification*, of the doctrinal precept involved . . . ." *Id.* at 1129 (emphasis added). Why the Board would have to "verify" and "justify" a religious doctrine, however, is never made clear. If the Board had to "justify" the doctrine of the employer in this case, then logically it would also have to "justify," for example, General Motors' intent to manufacture Chevrolets, should the corporation ever discharge an employee who insisted on making Fords instead. That, of course, would be nonsense. If, however, the Board does not have to "justify" the religious doctrine, then it is not clear why the Board's interference is impermissible.

81. *Id.* at 1124. *See also* 403 U.S. at 614.

82. 559 F.2d at 1124.

83. *Id.* at 1125-26.

tions Act . . . ."[84] On its face the statement is simply incomprehensible, because there is no reason why, if a school is correctly denied state aid as an unconstitutional establishment, it should receive compensation in the form of an excuse from adhering to valid state regulation.[85] Furthermore, the court made its statement immediately after noting that "those who undertake to teach young people in parochial schools which have been denied state aid because of their pervasive religious nature are as such teachers denied the important protective rights of the National Labor Relations Act . . . ."[86] In protecting the free exercise rights of the church authorities running the schools, the court thus appears willing to sacrifice the teachers' rights to an admitted governmental benefit.[87]

F. Summary

Following *Reynolds* and *Cantwell,* interference with religious belief was clearly prohibited by the free exercise clause and interference with activity motivated by religious belief was prohibited if the interference imposed a religious test. It was equally clear that state restriction of the latter activity through general nondiscriminatory laws would be tolerated under certain conditions.[88] The important free exercise clause decisions during the past two decades may be seen as varied attempts to define the situations in which such state restriction is constitutionally valid. *Braunfeld* left unclear whether state interference would be tolerated if it merely had a "rational basis"—was "not unreasonable"—of if a "balancing" test in which the state interest is weighed against the harm done to the individual right must be met.[89] *Sherbert* opted for the "compelling state interest" test. *Yoder,* stepping back from the near absolutism of *Sherbert,* is probably best understood as applying a "balancing" test, although the special circumstances and peculiar complexity of the interests there render this view uncertain.[90] These decisions, however, have failed to present a clear set of neutral principles upon

84. *Id.* at 1130.

85. To the extent that there is validity in the argument that aid and regulation should go hand-in-hand, the analysis offered in this Note implies that the establishment clause rationale should be reexamined. If regulation for valid state purposes is constitutional, is it not conceivable that aid for valid state purposes is also constitutional?

86. 559 F.2d at 1130.

87. The court did not advert to the fact that its position appears to be an implicit denial of the holding in *Sherbert,* in which the Supreme Court held that Sherbert could not be denied unemployment compensation by reason of her religious practices. *See* notes 37-42 *supra* and accompanying text.

88. *See* text accompanying notes 11-18 *supra.*

89. *See* text accompanying notes 19-36 *supra.*

90. *See* text accompanying notes 52-66 *supra.*

which lower courts can base their decisions. This was evident in the Seventh Circuit's decision in *Bishop of Chicago* and by the Supreme Court's subsequent failure to address the constitutional issue when it reviewed the lower court's decision.[91] Thus, the Court stands in need of neutral principles upon which to decide free exercise controversies.

III. General Laws and Freedom of the Press: A Parallel Problem

Before proposing principles that could avoid the problems inherent in the Court's free exercise decisions, it is pertinent to examine how the Court has handled a parallel situation. *Associated Press v. NLRB*[92] presented the question whether the National Labor Relations Act, as applied to the Associated Press, constituted an unconstitutional abridgement of freedom of the press.[93] The Associated Press contended that "there must not be the slightest opportunity for any bias or prejudice personally entertained by an editorial employee to color or distort what he writes" and claimed that it "cannot be free to furnish unbiased and impartial news reports unless it is equally free to determine for itself the partiality or bias of editorial employees."[94] The Court held that the NLRB's order that the Associated Press reinstate the discharged employee was constitutional, reasoning that there was no abridgment of freedom of the press when the discharge was solely for union activity.[95] The Court reasoned that "[t]he publisher of a newspaper has no special immunity from the application of general laws."[96] The Court noted, however, that, if the discharge had resulted from the employee's inability to implement his employer's policy of unbiased and impartial reporting, any NLRB action interfering with such discharge would have violated the employer's free press rights.[97] The parallel between *Associated Press* and *Bishop of Chicago* is obvious: both

91. *See* text accompanying notes 67-86 *supra.*

92. 301 U.S. 103 (1937).

93. The Associated Press had discharged an employee. The American Newspaper Guild, a labor organization, then filed a charge with the National Labor Relations Board, claiming unfair labor practices. The Board issued a cease-and-desist order and enjoined Associated Press to offer the employee reinstatement and back pay.

94. *Id.* at 131.

95. *Id.* at 132.

96. *Id.*

97. *Id.* Justice Sutherland, joined by Justices Van Devanter, McReynolds, and Butler, dissented, arguing that freedom of the press was a fundamental liberty and that no governmental restriction was permissible: "[d]ue regard for the constitutional guaranty requires that the publisher . . . of news shall be free from restraint in respect of employment in the editorial force." *Id.* at 140.

considered the impact of the same general nondiscriminatory law—the National Labor Relations Act—upon a fundamental freedom; yet the results are diametrically opposed.

Both the Seventh Circuit and the Supreme Court took note of *Associated Press* in reaching their *Bishop of Chicago* decisions.[98] The lower court found the situations inapposite, stating that "[f]ailure of a newspaper employee to carry out a publisher-employer's policy would not bear on freedom of the press; a failure of a lay teacher to carry out a bishop-employer's policy would directly interfere with the exercise of religion."[99] Perhaps realizing that the statement is not entirely clear, the court added that the cases differed because, first, reasons for discharge in the case of news media have nothing to do with freedom of the press, but doctrinal reasons for discharge in the case of the religious schools would involve the religion clauses, and second, the discharge in *Associated Press* did not actually involve a claim of bias, whereas the "necessity of bargaining and negotiating with faculty members on conditions of employment inevitably involves . . . infringement of the First Amendment Religon Clauses."[100] Neither point adequately distinguishes the cases. On the first point, a reporter or editor would certainly be as prone to maintain his or her own point of view, as opposed to the publisher's order, as would a teacher in the face of a bishop's commands. Thus, what constitutes an interference with freedom of either religion or the press must be the same event: a NLRB requirement that either the publisher or the bishop retain an employee who allegedly frustrates the former's ability to promulgate his views. If that interference is unconstitutional in the one case, it is difficult to understand why it would not be unconstitutional in the other.[101] As to the second point, it is immaterial whether one case involved actual bias or not; rather, the issue is whether a particular NLRB action unconstitutionally interferes with the employer's fun-

98. 559 F.2d at 1126; 99 S. Ct. at 1322.

99. 559 F.2d at 1127.

100. *Id.*

101. A dominant theme of the Court of Appeals' argument was that union activity by the teachers would inevitably raise "working conditions" questions that involved church doctrine. *Id.* at 1123. Surely it can be assumed that reporters and editorial workers are as prone to raise policy questions in their bargaining over working conditions as are teachers. To take comparable possibilities, why would NLRB protection of the attempts of liberal reporters to influence a conservative paper's editorial policy through union activity be less unconstitutional than the same protection afforded teachers attempting to influence a bishop's religious views? Does the Seventh Circuit think that freedom of the press is only a general freedom, rather than the freedom to publish certain specific views, so that only NLRB ordered total cessation of publication would be unconstitutional rather than forced employment of a worker who frustrated publication of the employer's views? It is certainly not clear.

damental liberty. If the employee's discharge results from his bias, then NLRB action against the employer is an unconstitutional infringement of either the latter's free exercise or free press rights. The problem with the court's analysis is that it assumes that all discharges of religious school teachers will *inevitably* result in a free exercise violation, but does not make the same assumption as to discharges of reporters. Instead, the court is willing to look at each discharge of reporters to determine if there actually is an interference. The court, however, offers no explanation for this disparate treatment.

The Supreme Court was no more illuminating in its treatment of the question raised by *Associated Press.* In *Associated Press* the Board's jurisdiction was sustained because there was "nothing to suggest that application of the Act would infringe First Amendment guarantees . . . ." Whereas in *Bishop of Chicago* "the record affords abundant evidence that the Board's exercise of jurisdiction over teachers . . . would implicate the guarantees of the Religion Clause."[102] The issue thus remains why there is an assumed infringement in one situation but not in the other.

IV. PROPOSAL

A. Two Rejected Models

Two approaches to decisionmaking may be considered as possible models for the principled decisionmaking called for by Wechsler.[103] Both the "compelling state interest" test used in *Sherbert*[104] and the balancing approach used in *Yoder*[105] are sufficiently coherent and well-developed to serve as models for future decisionmaking in this area.[106] Before suggesting a third model, it is helpful to examine why these possible models should be rejected.

A starting point for any discussion of how the Court should deal with conflicts between public policy and religious beliefs is Justice Frankfurter's statement in *McGowan v. Maryland* that commends itself both by its historical correctness and its sound common sense:

> By its nature, religion—in the comprehensive sense in which the Constitution uses that word—is an aspect of human thought and action which profoundly

102. 99 S. Ct. at 1322.

103. *See* text accompanying notes 1-6 *supra.*

104. *See* text accompanying note 40 *supra.*

105. *See* text accompanying notes 61-63 *supra.*

106. The "rational basis" test that may have been used in *Braunfeld,* is not considered since the freedoms of the first amendment are sufficiently important to warrant more than the minimal protection afforded by the "rational basis" test. *See* text accompanying notes 23-24 *supra.*

> relates the life of man to the world in which he lives. Religious beliefs pervade, and religious institutions have traditionally regulated, virtually all human activity. It is a postulate of American life, reflected specifically in the First Amendment to the Constitution but not there alone, that those beliefs and institutions shall continue, as the needs and longings of the people shall inspire them, to exist, to function, to grow, to wither, and to exert with whatever innate strength they may contain their many influences upon men's conduct, free of the dictates and directions of the state. However, this freedom does not and cannot furnish the adherents of religious creeds entire insulation from every civic obligation. As the state's interest in the individual becomes more comprehensive, its concerns and the concerns of religion perforce overlap. State codes and the dictates of faith touch the same activities. Both aim at human good, and in their respective views of what is good for man they may concur or they may conflict. No constitutional command which leaves religion free can avoid this quality of interplay.[107]

The *Sherbert* "compelling state interest" test, of course, does not necessarily deny that there are occasions when state interference with free exercise rights would be justified. The Court has had no problem in holding certain state interests, such as public safety and health, sufficiently compelling to justify some interference with religious liberty.[108] This test, however, fails as an appropriate model for principled decisionmaking in the free exercise area for two reasons. First, the test, as applied, has failed to recognize that governmental action has become increasingly pervasive in all areas of human life. As Frankfurter noted, the state's concerns and the concerns of religion overlap "[a]s the state's interest in the individual becomes more comprehensive."[109] There is no doubt that the framers of the Constitution would have no more difficulty than twentieth century judges in recognizing a compelling interest when concerned with prevention of disease or fire. It is equally clear, however, that the contemporary regulatory and welfare apparatus would amaze those same framers and probably would not represent to them a compelling state interest. The effective and efficient rendering of such new services is, nevertheless, as much a necessity in today's world as the more traditional health and safety services. Thus, in practice the "compelling state interest" test fails to recognize as compelling anything but what today amounts to the barest necessity. In this light, the test clearly provides no means by which a court can assess the relatively compelling nature of a particular state interest in relation to a particular religious interest. Unless one is to maintain that no public interest justifies interference with religious freedom except those few that all societies have always recognized as truly "compelling," the test provides no means of evaluating the dynamic

107. 366 U.S. at 461-62 (separate opinion).
108. *See, e.g.*, 403 U.S. at 614.
109. *See* text accompanying note 107 *supra*.

relationship between governmental and religious interests.

The second reason for rejecting the "compelling state interest" test is that it provides no norm for evaluating the extent to which a genuinely compelling interest should be permitted to interfere with free exercise rights. For example, the Seventh Circuit in *Bishop of Chicago* acknowledged that compulsory school attendance laws are permissible interferences with religious schools.[110] If this were so because the state interest in education was compelling, the same compelling quality presumably would extend to the state's requirement of a number of days in attendance. Would it then be within permissible constitutional limits for a religiously affiliated elementary school, which found that it could save scarce funds while still meeting minimal achievement standards, to lose its state accreditation because it held classes for only 120 days instead of 180 days?[111] The basic problem is, if one accepts the Frankfurter overview, that the context requires a balancing of the various interests. The "compelling state interest" test is not a balancing test and cannot, in practice or theory, adequately deal with the problems of infringement of free exercise rights by general nondiscriminatory laws.

The *Yoder* "balancing" test, however, is no more adequate as a model for principled decisionmaking than the "compelling state interest" test. The problem is not that the test itself has any inherent theoretical faults. Rather, the problem is that the Court has failed, apparently by design, to give the test a clear expression. The reasons for that design perhaps can be drawn from Chief Justice Burger's discussion of the religion clauses in *Walz v. Tax Commission.*[112] In *Walz* the Chief Justice asserted that "[t]he Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution" and that "[t]he considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles."[113] The Chief Justice seems to be saying that, because the

110. 559 F.2d at 1124.

111. The question cannot be answered by turning to the "least restrictive alternative" branch of the strict scrutiny analysis, *see* note 30 *supra,* because in such a quantitative determination the "ends" and "means" are virtually indistinguisbable, unless one is prepared to contend that there is no contemporary state interest whatsoever in keeping children in school for a certain period of the day and a certain length of time during the year, irrespective of what the children learn during that time. For a discussion of reasons additional to academic ones for compulsory state education requirements, see Wisconsin v. Yoder, 406 U.S. at 227-28.

112. 397 U.S. 664 (1970).

113. *Id.* at 668.

religion clauses are cast in "absolute terms" and would tend to clash with each other "if expanded to a logical extreme,"[114] the Court should discontinue its effort to differentiate the two clauses as precisely as possible. Whether that was really the intention of the Court is not entirely clear. The practical effect of the Court's mingling of the two clauses can be seen, however, in the Seventh Circuit's attempt in *Bishop of Chicago* to apply the Supreme Court's mixture of religion clause arguments. The *Bishop of Chicago* court finally admitted that it had been unable to decide the case in terms of either a free exercise or establishment clause analysis and had instead relied on the religion clauses "jointly."[115]

B. A Clarified "Balancing" Test

If one agrees that the very nature of the clash between general nondiscriminatory laws and free exercise rights requires a balancing test, then the Burger Court's choice of balancing was correct. If, however, one also agrees that the choices within a balancing test should be predictable rather than ad hoc, then the Burger Court's test must be rejected because of its failure to provide a clear framework. In light of this appraisal, the first and fundamental principle is as follows:

> (1) The decision in any controversy involving the impact of a general nondiscriminatory law upon free exercise rights must be based upon a balancing of the competing interests.

The most significant aspect of this basic principle—that which makes it "neutral" and therefore initially acceptable to both sides of a given controversy—is that it is not outcome determinative in any substantive way. Prior to analysis of the various factors in a given controversy, the principle does not operate in favor of any one set of interests. The principle operates "instrumentally"—it commands *how* the court is to reach its decision rather than *what* the decision must be.[116]

A second principle would obviate the confusion generated by

114. *Id.* at 668-69.

115. 559 F.2d at 1131. In a decided understatement the court said that "[o]ur treatment of the Religion Clauses jointly has been because of our belief that there has been some blurring of sharply honed differentiations." *Id.*

116. It must be candidly admitted that instrumental principles may not have been what Wechsler had in mind when he called for the use of neutral principles. Principles governing *how* the Court approaches a controversy, however, are as much in need of neutrality as are principles governing *what* the Court decides. Furthermore, the fact that neutral instrumental principles should guide the Court's approach does not preclude the development of neutral principles for resolution of questions such as how important a given public policy is or how useful or necessary chosen means to effect the policy are.

the *Yoder* Court's use of balancing. The second principle is:

> (2) In balancing the competing interests, the following factors must always be considered:
>
> (a) the public policy promoted by the law;
>
> (b) the means used to achieve that policy;
>
> (c) the causal relationship between belief and the restricted activity;
>
> (d) the harm done to religious belief.

It is immediately obvious that these factors involve, in so far as the state interest is concerned, a consideration of both ends and means. The factors also require the courts to scrutinize both the harm done to the religious belief and the connection between the belief and the particular action that is restricted by the state law.[117] The proposal assumes that the court will attempt an evaluation of the importance of the law's ends and means in relation to the contemporary situation and that the court will not hesitate to inquire into both the existence of a given article of religious faith and the connection between that article of faith and the action allegedly motivated by it. The proposal does not suggest, however, that a court should make any judgment concerning the truth of any religious belief.[118]

The final principle, perhaps more of a corollary of the first two than a separate requirement, is:

> (3) The "entanglement" argument should not be applied to cases involving the impact of general nondiscriminatory laws on free exercise rights.

Quite apart from the difficulties encountered in using this argument,[119] the major objection to the "entanglement" argument is that it adds nothing to the analysis provided by the preceding two principles. Although there may be some justification for discussing "entanglement" in an establishment clause setting, it is unclear how government interference with religious activity that is judged constitutional under the proposed balancing test can then be attacked because the interference involves "entanglement" between government and religion. For instance, in the context of state aid to parochial schools there is a direct church-state relationship—the giving of funds. There is also a second-level relationship—

117. Thus, the position proposed here bears some marked similarity to the "sliding scale" approach espoused by Justice Marshall for use in equal protection controversies. *See* San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 70-133 (1973) (Marshall, J., dissenting).

118. *See* note 80 *supra.*

119. *See* text accompanying notes 74-77 *supra.*

governmental surveillance to safeguard the proper use of funds. Finally, there is a third-level relationship—the political process engaged in by those seeking to obtain or deny access to funds. It is primarily the second and third level relationships that generate the forbidden "entanglement."[120] In the context of interference with free exercise rights the supposed "entanglement" is nothing more than the relationship generated by the impact of the general nondiscriminatory law. Thus, there is no second or third level of relationship. Finally, the "entanglement" argument is not saved by stating that it is not any entanglement that is proscribed, but only "excessive" entanglement. If the interference caused is "excessive" entanglement, the same result should obtain upon consideration under the second "neutral" principle of the ends and means of the law and the harm done to the religious interest.

To better understand the proposal, it is helpful to survey the probable results of imposition of these principles upon the recent decisions in this area. The outcome in *Braunfeld* would almost certainly have been different. Although it remains clear that the public interest in a standard day of rest is of some importance, it is uncertain that the public interest would have been substantially harmed had Pennsylvania allowed exceptions for nonSabbatarians, since a considerable number of states other than Pennsylvania had done so.[121] In light of the clear nexus between the activity of the Orthodox Jews and their religious beliefs as well as the substantial financial harm they suffered in following those beliefs, it seems likely that a balancing test would have resulted in the Sunday closing law being struck down.

Meanwhile, the outcome in *Sherbert* would probably have remained the same, but the underlying principles would have been something other than the "compelling state interest" test that was actually applied. Given the ease with which the State Commission could have allowed an exception for those unemployed because of religious reasons and the importance of abstention from work on Saturday to a Seventh Day Adventist, it would have been relatively easy for the Court to strike down the law under the proposed balancing test. Similarly, the outcome in *Yoder* would also have been unchanged, although a decision using the proposed principles certainly would have clarified the reasoning behind the decision.

The Court of Appeals in *Bishop of Chicago,* using the proposal, should have employed free exercise considerations rather than the mixed religion clause considerations that the court actually used.

120. *See* 403 U.S. at 619-24.

121. *See* text accompanying note 42 *supra.*

Precisely what the outcome would have, or should have, been is more difficult to predict than in the preceding cases. The court, however, would have had to more carefully examine the harm done to religious belief and the connection between the religious belief and activity. For example, the need for church authorities to control the labor-management relations with lay teachers in church operated schools may not result from any causal connection between religious doctrine and the activity. The Roman Catholic Church certainly has not proscribed membership in or dealings with unions as a matter of faith.[122] Furthermore, there is no indication that the hiring and firing of teachers is any more an intrinsically religious activity than the building of a church or the sale of bingo cards. It is fairly obvious, however, that a Board decision requiring a religious school to retain a teacher who is in fact teaching what the particular religious group considered antithetical to the faith would seriously harm that group's ability to exercise their beliefs. Although an exception from the Board's normal procedures for discharges that involve both "good cause" and anti-union bias[123] might itself raise an establishment clause issue,[124] the decision in *Sherbert*[125] concerning a similar establishment issue appears to preclude such an attack. In any event, the free exercise issue would be separated from the establishment issue and each could be resolved appropriately.[126]

---

122. To the contrary, the Roman Catholic Church has been a solid supporter of the labor movement in the United States. *See, e.g.*, H. BROWNE, THE CATHOLIC CHURCH AND THE KNIGHTS OF LABOR (1949). *See generally* J. RYAN & J. HUSSLEIN, THE CHURCH AND LABOR (1920).

123. For a discussion of the problems generated by the application of the Board's procedures to parochial schools in this situation, see Comment, *supra* note 76, at 649-58.

124. 559 F.2d at 1127-29. One commentator has said that

> [a]lthough there may be no reason in principle why the Board and the courts could not carefully tailor the Board's jurisdiction to protect first amendment rights, such a process is not necessarily benign in practice and may be costly, both financially and psychologically, for the free exercise of the religious mission of the schools.

Comment, *supra* note 76, at 661-62. *But see* Kryvoruka, *supra* note 76, at 83:

> As in other sectors of the economy, the religious employer may not cherish the responsibility to bargain with the elected representatives of its employees. This responsibility, however, may not be avoided merely because the employer is affiliated with a church or because its employees are working in a religiously associated environment. There is no constitutional right to commit unfair labor practices.

125. 374 U.S. at 409-10.

126. The question of what principled methodology should be employed in establishment clause controversies is beyond the scope of this Note. A brief survey of the line of cases beginning with Board of Educ. v. Allen, 392 U.S. 236 (1968), and moving through Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973), to Meek v. Pittinger, 421 U.S. 349 (1975), however, suggests that Justice Stewart's 1963 comment concerning the Court's "wooden" approach in tbis area is still valid. *See* note 44 *supra*.

V. CONCLUSION

Decisions in the past decades involving the impact of general nondiscriminatory laws on free exercise rights reveal that the Court has been inconsistent at best. The Court itself has attempted to establish a principled basis for its decisions, ranging from the "not unreasonable" or "rational basis" standard of *Braunfeld* through the "compelling state interest" test of *Sherbert* to the "balancing test" manqué of *Yoder*. The net result of the Court's failure to establish a clear set of neutral principles in this area has been thorough confusion, such as that manifested by the Seventh Circuit's decision in *Bishop of Chicago,* and the Supreme Court's own reluctance to consider the issues therein.

The Court has an obligation both to make decisions and to present reasons that make clear that the decisions are not the result of temporary passion or reasoning not based upon the existing consensus of national thought. This Note's proposal that interference with free exercise rights caused by the unintended and incidental impact of otherwise valid general laws should be subjected to a balancing test with clearly articulated relevant factors may not generate immediate acceptability or predictability of decisions. In time, however, it should have that effect and, to that extent, should fulfill the reasonable and legitimate desires of those who believe that principled decisionmaking is the *sine qua non* of the Court.

G. MICHAEL MCCROSSIN