SCHOOL POLICY LIMITING EXCUSED RELIGIOUS ABSENCES VIOLATES FREE EXERCISE CLAUSE

Church of God v. Amarillo Independent School District, 511 F. Supp. 613 (N.D. Tex. 1981)

In *Church of God v. Amarillo Independent School District*[1] the United States District Court for the Northern District of Texas confirmed the federal courts' modern commitment to religious liberty and continuing enforcement of the free exercise clause of the first amendment.[2]

Plaintiffs, the Worldwide Church of God and twenty-four school age church members, brought suit[3] to enjoin enforcement of a school district policy that allowed only two excused absences for religious holidays in each school year.[4] Plaintiffs claimed that this policy violated their right to free exercise of religion guaranteed by the first and fourteenth amendments.[5]

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1. 511 F. Supp. 613 (N.D. Tex. 1981).

2. *Id.* at 618. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965); Sherbert v. Verner, 374 U.S. 398 (1963); Robinson v. Price, 615 F.2d 1097 (5th Cir. 1980); Moody v. Cronin, 484 F. Supp. 270 (C.D. Ill. 1979); People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964). *See generally* Marcus, *The Forum of Conscience: Applying Standards Under the Free Exercise Clause,* 1973 DUKE L. J. 1217; Pfeffer, *The Supremacy of Free Exercise,* 61 GEO. L.J. 1115 (1973).

3. Plaintiffs brought suit under 28 U.S.C. §§ 1331(a), 1343(3) (1976) and 42 U.S.C. § 1983 (Supp. IV 1980). The latter provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (Supp. IV 1980).

4. The school district's policy, enacted on March 5, 1979, provided: "Excused absences shall be granted to students for a maximum of 2 days for religious holidays in each school year." 511 F. Supp. at 615. In addition, the policy provided that students with excused absences could make up missed work and receive a grade. Students with unexcused absences, however, received a grade of zero for the work missed. *Id.* at 614-15.

Prior to the enactment of this policy, the principal, in his discretion, would determine whether an absence was excused. The criteria for evaluating an absence included "to what degree was choice a factor in the absence." *Id.* at 614. Under the policy, the principal regularly gave plaintiffs excused absences for their religious activities. *Id.*

5. *See* note 12 *infra*. The plaintiffs also contended that the policy violated the equal protection and due process clauses of the fourteenth amendment. Plaintiffs claimed that the policy discriminated against them because of their religious beliefs and by presuming that they were absent without good reason. 511 F. Supp. at 615. Having found for the plaintiffs on free exercise grounds, the district court did not need to address these additional claims. *Id.* at 618.

The Church of God required that all Church members, on penalty of loss of membership in good standing, observe seven annual holy days and a seven day Feast of Tabernacles.[6] The student plaintiffs therefore missed ten school days every year. The school district's policy required that the students receive a grade of zero for each unexcused absence.[7] The district court granted the plaintiffs' motion for summary judgment and *held*: A school district's policy limiting excused religious absences and requiring a grade of zero for every unexcused absence violates the free exercise clause of the first amendment.[8]

The first amendment reflects the traditional American commitment to two conflicting[9] values: religious liberty[10] and separation of church and state.[11] The religion clauses prohibit legislation that advances or inhibits the establishment of religion or interferes with the free exercise

6. Article 13 of the *Fundamentals of Belief* of the Church of God states that "the seven annual holy days as given to Israel by God through Moses, kept by Christ, the Apostle Paul, and the New Testament Church, as evidenced by the books of Acts and Corinthians, are to be kept today." Plaintiffs' Initial Brief in Support of Motion for Summary Judgment at 7, 11, Church of God v. Amarillo Independent School Dist., 511 F. Supp. 613 (N.D. Tex. 1981). Church of God members are required to refrain from all secular activity on designated holy days. 511 F. Supp. at 614.

7. 511 F. Supp. at 613-15.

8. *Id.* at 618.

9. *See* Walz v. Tax Comm'n, 397 U.S. 664, 668-72 (1970) (absolute prohibitions of the religion clauses have limited meaning as each clause, if expanded to a logical extreme, would tend to clash with the other); McGowan v. Maryland, 366 U.S. 420, 463 (1961) (Frankfurter, J., concurring) (no bright-line distinction between establishment and free exercise questions); Everson v. Board of Educ., 330 U.S. 1, 14-16 (1947) (religion clauses are interrelated and complementary); Galanter, *Religious Freedoms in the United States: A Turning Point?,* 1966 WIS. L. REV. 217, 267-68, 289-96 (if religious exemptions do not automatically violate establishment limitations, it remains unclear at what point they are required by the free exercise clause); Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development: Part II. The Nonestablishment Principle,* 81 HARV. L. REV. 513, 516-22, 526-28 (1968) (a formidable task for the courts to strike a balance that achieves political equality without undermining the value of voluntarism). *See also* L. PFEFFER, CHURCH, STATE, AND FREEDOM 122 (1953): "Nothing in American constitutional history . . . justifies an apportionment of values between disestablishment and freedom . . . . The struggle for religious liberty and/or disestablishment were parts of the same single evolutionary process that culminated in the First Amendment."

10. *See* S. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA: A HISTORY 2 (1902); R. MILLER & R. FLOWERS, TOWARD BENEVOLENT NEUTRALITY: CHURCH, STATES AND THE SUPREME COURT 1-8 (1977); Freeman, *A Remonstrance for Conscience,* 106 U. PA. L. REV. 806 (1958); Summers, *The Sources and Limits of Religious Freedom,* 41 ILL. L. REV. 53 (1946).

11. *See* Zorach v. Clauson, 343 U.S. 306, 312-13 (1952); Reynolds v. United States, 98 U.S. 145, 162-64 (1878); R. MILLER & R. FLOWERS, *supra* note 10, at 3-6. *See generally* C. ANTIEAU, A. DOWNEY & E. ROBERTS, FREEDOM FROM FEDERAL ESTABLISHMENT (1964); M. HOWE, THE GARDEN AND THE WILDERNESS (1965).

of religion.[12] Excessive governmental accommodation of religion, however, can lower the "wall of separation"[13] between church and state, forcing the courts to resolve conflicts between the clauses.[14] Early cases held that although laws could not interfere with religious beliefs, they could interfere with religious actions.[15] In the 1940s the Supreme Court, primarily on first amendment free speech, press, and assembly grounds, nearly eliminated the belief-action distinction.[16] The Court

12. The religion clauses state that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

In Cantwell v. Connecticut, 310 U.S. 296 (1940), the Supreme Court held the guarantee of free exercise of religion binding upon the states. In Everson v. Board of Educ., 330 U.S. 1 (1947), the Supreme Court applied the establishment clause to the states.

13. "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and state." T. JEFFERSON, 8 JEFF. WORKS 113, *quoted in* Reynolds v. United States, 98 U.S. 145, 164 (1878). *See also* Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970).

14. *See, e.g.*, McDaniel v. Paty, 435 U.S. 618 (1978) (statute barring clergymen from holding public office held to violate right to free exercise of religion despite establishment clause claim that if he were elected, clergyman would promote the interests of one sect); Commission for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (New York state financial aid program designed to promote the free exercise of religion by providing for maintenance services and tuition reimbursement at religious elementary and secondary schools violates establishment clause); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (property tax exemptions for religious organizations held to create insignificant state involvement with religion and to help to guarantee the free exercise of all forms of religion); Zorach v. Clauson, 343 U.S. 306 (1952) ("released time" program in public schools permitting children's release during school hours for religious instruction held neither to aid religion nor to coerce children to take religious instruction).

15. *See, e.g.*, Romney v. United States, 136 U.S. 1, 45-50 (1890) (congressional act repealing the incorporation of the Mormon Church because of its unlawful promotion and practice of polygamy upheld); Davis v. Beason, 133 U.S. 333, 343-44 (1890) (conviction of Mormon who violated Idaho statute requiring as prerequisite to voter registration an oath declaring that the voter did not practice the crime of polygamy upheld); Reynolds v. United States, 98 U.S. 145, 166 (1878) (conviction under state polygamy law of Mormon who claimed that the practice of polygamy was his religious duty upheld). *See also In re* Summers, 325 U.S. 561 (1945) (Illinois bar admission requirement that applicants indicate willingness to serve in the state militia in case of war upheld against applicant whose religious beliefs prevented him from participating in violent activities); Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245 (1934) (state university policy requiring male students to take military science course upheld against student who, for religious and conscientious reasons, objected to taking the course).

16. *See* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943) (compulsory flag salute in public schools violated the spirit of the first amendment rights of free speech, press, assembly, and worship); Martin v. City of Struthers, 319 U.S. 141, 149 (1943) (municipal ordinance prohibiting door-to-door distribution of religious circulars held invalid as violative of rights to free speech and press); Murdock v. Pennsylvania, 319 U.S. 105, 108, 114 (1943) (license tax on distributors of religious literature violated first amendment freedoms of speech, press, and religion); Jamison v. Texas, 318 U.S. 413, 414 (1943) (ordinance prohibiting distribution of handbills, as applied to Jehovah's Witness, violated freedoms of press and religion); Cantwell v. Connecti-

subsequently fashioned a new heightened degree of protection for free exercise of religion from these first amendment guarantees.[17]

In *Cantwell v. Connecticut*[18] a state statute conditioned lawful distribution of religious literature and solicitation of contributions upon procurement of a permit from a state official. The Supreme Court held that the statute violated the applicants' rights to free speech and free exercise of religion because it required the official to determine whether the applicants' cause was religious.[19] The Court stated that regulation of religious activity designed to achieve valid legislative goals is lawful only if it does not "unduly infringe" the right to free exercise of religion.[20] Although the Court expanded the scope of free exercise protection, it continued to limit religious activities if they threatened public safety, peace, or order.[21]

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cut, 310 U.S. 296, 307-11 (1940) (state statute conditioning lawful distribution of religious literature upon issuance of a permit by an official who decided whether the cause was religious violated rights of free speech and religious liberty); Schneider v. New Jersey, 308 U.S. 147, 160-65 (1939) (municipal ordinance prohibiting door-to-door distribution of circulars and solicitation of contributions, as applied to Jehovah's Witness canvassing in the name of religion, violated rights to free speech and press); Lovell v. Griffin, 303 U.S. 444, 451 (1938) (city ordinance prohibiting distribution of literature without a permit, as applied to an individual distributing religious pamphlets, violated freedom of press).

17. Pfeffer, *supra* note 2, at 1126.

18. 310 U.S. 296 (1940).

19. *Id.* at 307.

20. "[A] state may by general and non-discriminatory legislation regulate the times, the places and the manner of soliciting upon its streets . . . and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment." *Id.* at 304.

21. "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." *Id.* at 303-04. *See* Braunfeld v. Brown, 366 U.S. 599, 603 (1961) ("legislative power . . . may reach people's actions when they are found to be in violation of important social duties or subversive of good order"); Cleveland v. United States, 329 U.S. 14, 18-19 (1946) (convictions of Mormons under the Mann Act upheld because the practice of polygamy is barbarous, promiscuous, and immoral in the law); Thomas v. Collins, 323 U.S. 516, 530 (1945) (legislation can restrict first amendment liberties only if they present a "clear and present danger" to the public interest); Prince v. Massachusetts, 321 U.S. 158, 165-69 (1944) (state statute prohibiting minors from distributing literature on the public streets upheld against Jehovah's Witness as a legitimate exercise of the state's broad power to control the conduct of children); Jacobson v. Massachusetts, 197 U.S. 11, 26-27 (1905) (compulsory vaccination law upheld as a legitimate exercise of the right of a community to protect itself); Reynolds v. United States, 98 U.S. 145, 165 (1878) (the practice of polygamy is historically so odious to society that "it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life").

In *Braunfeld v. Brown*[22] the Court upheld a Pennsylvania statute prohibiting retail businesses from operating on Sunday. Petitioner was an Orthodox Jewish merchant whose religion compelled him to close his business on Saturday, the Sabbath day of his faith.[23] Petitioner contended that the law violated his right to free exercise of religion by forcing him to close a second day every week, thus placing him in a precarious economic position.[24]

The Court fashioned a "direct-indirect burden" analysis to determine the constitutionality of government actions that interfere with religious practice.[25] Chief Justice Warren, writing for the majority, held that legislation that does not outlaw the religious activity imposes only an indirect, and thus constitutional, burden on the right to free exercise of religion.[26]

The Court qualified its holding by stating that a law that indirectly burdens the exercise of religion is unconstitutional if it effectively prevents religious observance or discriminates among religions.[27] The Court found that the Sunday closing law served the state's secular interest in maintaining a general day of rest and tranquility[28] and thus only indirectly burdened Braunfeld's religious activity.[29]

Two years later, in *Sherbert v. Verner*,[30] the Court further expanded the protection of the free exercise clause. The Court held that legislation burdening the free exercise of religion was permissible[31] only when enacted pursuant to a "compelling state interest"[32] which the state

22. 366 U.S. 599 (1961). *Braunfeld v. Brown* was decided with three companion cases: Gallagher v. Crown Kosher Super Mkt., 366 U.S. 617 (1961); McGowan v. Two Guys from Harrison-Allentown, Inc., 366 U.S. 582 (1961); and McGowan v. Maryland, 366 U.S. 420 (1961).

23. 366 U.S. at 601.

24. *Id.* Petitioner specifically alleged that the law would force him to close his business altogether. *Id.*

25. *Id.* at 606-07.

26. *Id.*

27. *Id.* at 607. The Court's judgment is reminiscent of the now discredited substantive due process analysis in the area of economic regulation. *See* Nebbia v. New York, 291 U.S. 502, 537 (1934) ("[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"). *See generally* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 502 (10th ed. 1980).

28. 366 U.S. at 607-09.

29. *Id.* at 605.

30. 374 U.S. 398 (1963).

31. *Id.* at 406-07.

32. *Id.* at 406.

could not have addressed through less restrictive means.[33] In *Sherbert* the appellant, a member of the Seventh-Day Adventist Church, was discharged by her employer because she refused to work on Saturday, her Sabbath.[34] The Supreme Court held that the state's denial of unemployment compensation benefits because appellant refused to accept available employment requiring Saturday work violated her right to free exercise of religion.[35] The Court found that the eligibility requirements for compensation forced the employee to make an unjust choice between following the precepts of her religion and keeping a job.[36] The Court found no compelling state interest to justify that burden.[37]

Current free exercise doctrine relies primarily on *Wisconsin v. Yoder*,[38] in which the Supreme Court refined the *Braunfeld* and *Sherbert* criteria and established a three-part balancing test.[39] First, a court must determine whether the religious belief or practice is religious rather than secular.[40] Second, the court must determine whether the

33. *Id.* at 407. The cases cited by the Court in support of these criteria dealt with first amendment guarantees other than the free exercise of religion. NAACP v. Button, 371 U.S. 415, 438 (1963) (free speech); Shelton v. Tucker, 364 U.S. 479, 487-90 (1960) (freedom of association); Talley v. California, 362 U.S. 60, 64 (1960) (free speech); Thomas v. Collins, 323 U.S. 516, 530 (1945) (free speech); Martin v. Struthers, 319 U.S. 141, 144-49 (1943) (freedom of speech and press); Schneider v. New Jersey, 308 U.S. 147, 161 (1939) (freedom of speech and press). *See* 374 U.S. at 403, 406, 407-08.

34. 374 U.S. at 399.

35. *Id.* at 410.

36. *Id.* at 404.

37. *Id.* at 406-09. The state suggested that a ruling in favor of Sherbert would encourage the filing of fraudulent claims with a concomitant reduction in unemployment compensation funds and would disrupt the schedules of employers who required Saturday work. *Id.* at 407.

38. 406 U.S. 205 (1972).

39. *Id.* at 214-29, 234-36.

40. *Id.* at 215. The Supreme Court originally held that courts could not consider the validity of a religious claim in free exercise cases. *See* United States v. Ballard, 322 U.S. 78, 86 (1944), in which the Court said that "[f]reedom of thought, which includes freedom of religious belief, is basic in a society of free men . . . . It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of orthodox faiths." *See also* Cantwell v. Connecticut, 310 U.S. 296 (1940) (state statute conditioning lawful solicitation of money for a religious cause upon receipt of a permit issued by an official who determines whether the cause is religious held invalid because such a religious test acted as censorship of religion).

Although admitting that the determination of what is a religious belief is "a most delicate question," 406 U.S. at 215, the *Yoder* Court concluded that "the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests." *Id.* at 215-16.

The *Yoder* decision suggests that religious beliefs, to invoke constitutional protection, must have an institutional quality. "It cannot be overemphasized that we are not dealing with a way of

law or regulation burdens the free exercise of religion.[41] Finally, the court must balance this burden against the state's interest in upholding the law at issue,[42] the inconvenience a religious exemption would cause to the state,[43] and, if the state's interest is stronger, the availability of a less restrictive alternative.[44]

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life and mode of education by a group claiming to have recently discovered some 'progressive' or more enlightened process for rearing children for modern life." *Id.* at 235. *See id.* at 215-19. The "institutional quality" requirement suggests that courts will grant claims of "conscience" less protection than claims by orthodox religions. Kurland, *The Supreme Court, Compulsory Education, and the First Amendment's Religion Clauses,* 75 W. VA. L. REV. 213, 238 (1973). For cases upholding claims of conscience, see Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965).

Nevertheless, in Brown v. Dade Christian Schools, Inc., 556 F.2d 310 (5th Cir. 1977), *cert. denied,* 434 U.S. 1063 (1978), the Court of Appeals for the Fifth Circuit applied the following criteria to find that a sectarian school's policy of racial segregation was not based on a religious interest entitled to free exercise protection:

> Whether a belief is "religious" and thus deserving of some protection by the First Amendment does not depend on whether the belief is true or false. Nor does it depend on whether the belief is reprehensible to the majority of society. Instead, . . . the "religious" nature of a belief depends on (1) whether the belief is based on a theory "of man's nature or his place in the Universe," (2) which is not merely a personal preference but has an institutional quality about it, and (3) which is sincere.

Id. at 324 (citations omitted).

Recent cases have upheld the religious legitimacy of the holiday observances mandated by the Church of God. *See, e.g.,* Neiderhuber v. Camden County Vocational & Technical School Dist. Bd. of Educ., 495 F. Supp. 273 (D.N.J. 1980) (dismissal of public school teacher for taking leave to observe holy days of Church of God violated free exercise of religion); Edwards v. School Bd., 483 F. Supp. 620 (W.D. Va. 1980) (school board, in dismissing teacher's aid for taking leave of absence to observe Church of God holy days, violated Title VII requirement that employer accommodate employees' religious practices), *vacated in part,* 658 F.2d 951 (4th Cir. 1981); Rankins v. Commission on Professional Competence, 24 Cal. 3d 167, 593 P.2d 852, 154 Cal. Rptr. 907 (1979) (dismissal of public school teacher for observing Church of God holy days violated first amendment, Title VII, and California Constitution).

41. 406 U.S. at 218. *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963); Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc., 380 N.E.2d 1225, 1228 (Ind. 1978).

42. 406 U.S. at 221. *See* State *ex rel.* Swann v. Pack, 527 S.W.2d 99, 113 (Tenn. 1975), *cert. denied,* 424 U.S. 954 (1976).

43. 406 U.S. at 221, 236. This interest is considered if the plaintiff seeks exemption from an otherwise constitutional law. *See, e.g.,* Johnson v. Motor Vehicle Div., 197 Colo. 455, 458, 593 P.2d 1363, 1365, *cert. denied,* 444 U.S. 885 (1979); *In re* Jenison, 267 Minn. 136, 137, 125 N.W.2d 588, 589 (1963).

44. 406 U.S. at 225. This requirement is applicable if a plaintiff challenges the constitutionality of a law on free exercise grounds, rather than seeking an exemption from a valid law. *See* note 43 *supra*. Cases applying the "less restrictive alternative" requirement include Sherbert v. Verner, 374 U.S. 398, 407 (1963); Johnson v. Motor Vehicle Div., 197 Colo. 455, 458, 593 P.2d 1363, 1365, *cert. denied,* 444 U.S. 885 (1979); Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc., 380 N.E.2d 1225, 1229 (Ind. 1978); State *ex rel.* Swann v. Pack, 527 S.W.2d 99, 114 (Tenn. 1975), *cert. denied,* 424 U.S. 954 (1976).

The "less restrictive alternative" test suggests a "strict scrutiny" approach akin to equal protection analysis. In *Church of God*, the classification of religion, rather than sports or sickness, *see*

In *Yoder* members of the Old Order Amish religion and the Conservative Amish Mennonite Church violated Wisconsin's compulsory school attendance law by refusing for religious reasons to allow their children to attend public school after the eighth grade.[45] The Court applied the three-part balancing test[46] and concluded that application of Wisconsin's compulsory school attendance law to the Amish infringed the free exercise of their religion.[47]

Yoder represents the latest stage in the evolution of the free exercise doctrine.[48] The *Yoder* analysis emphasized the balancing of competing interests over the *Sherbert* "compelling state interest" rule for analyzing free exercise claims.[49] Although the *Yoder* test broadened the

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note 64 *infra*, for purposes of determining unexcused absences was "suspect." The classification is particularly suspect because the policy has an impact upon a "fundamental" first amendment right. The "strict scrutiny" approach requires judicial assessment of the existence of a "compelling state interest" and a "least restrictive alternative" means to effect this interest. *See generally* G. GUNTHER, *supra* note 27, at 670-71; Note, *General Laws, Neutral Principles, and the Free Exercise Clause,* 33 VAND. L. REV. 149, 153 n.30, 160 n.65 (1980).

45. The law required school attendance until age 16. Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).

46. *Id.* at 217. *See* notes 39-44 *supra* and accompanying text. In assessing the sincerity of plaintiff's beliefs, the Court stated that "the values and programs of the modern secondary school are in sharp conflict with the fundamental mode of life mandated by the Amish religion . . . ." 406 U.S. at 217. The Court then determined the severity of the burden and stated 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." *Id.* at 219.

The Court then found that the state's interest in compulsory education was de minimus in comparison with the respondents' contrary interest in complying with the fundamental tenets of their religion.

> [A]ccommodating the religious objections of the Amish by foregoing one, or at most two, additional years of compulsory education will not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society.

Id. at 234.

47. *Id.*

The *Yoder* decision is arguably the result of analysis based on the "less restrictive alternative" principle. The Amish alternative of a productive, self-sufficient, and virtuous lifestyle could satisfy the state's interests in preparing young people for self-reliant and intelligent participation in politics and society without any burden on the Amish religion. *See* Note, *supra* note 44, at 160.

48. Several later cases have applied the *Yoder* test. *See, e.g.,* Robinson v. Price, 615 F.2d 1097 (5th Cir. 1980); Moody v. Cronin, 484 F. Supp. 270 (C.D. Ill. 1979).

49. J. NOWACK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 878 (1978); Note, *supra* note 44, at 159, 164.

The major criticism of the Supreme Court's history of free exercise analysis is that the decisions are ad hoc and unprincipled. The decisions present no objective criteria for the lower courts to follow in order to reconcile conflicting state and religious interests. *See* Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970) ("[t]he considerable internal inconsistency in the opinions of the Court de-

scope of inquiry into the conflicting interests, the "compelling state interest" standard survived as a significant element within the more exhaustive *Yoder* analysis.[50] The *Yoder* analysis highlights the fundamental conflict between the establishment and free exercise clauses of the first amendment.[51] The modern trend toward more social legislation reflects a growing legislative concern for the citizenry, but it also affects their lives, including their religious lives, more frequently.[52]

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rives 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"); T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 53-56 (1966) (ad hoc balancing test provides no guiding doctrine and thus leaves the courts to use their own judgment); Clark, *Guidelines for the Free Exercise Clause,* 83 HARV. L. REV. 327, 329-30 (1969) (formlessness of ad hoc balancing test results in uncertainties for parties and courts); Kurland, *supra* note 40, at 244 (Supreme Court has never established a doctrinal base for evaluating the religion clauses); Marcus, *supra* note 2, at 1242 (balancing test is ad hoc because court must determine whether or not a claimant's beliefs are religious and whether or not the state has interfered with those beliefs); Note, *supra* note 44, at 150, 164-65 (divergent Supreme Court decisions based on differing rationales indicate need for "neutral principles that could enhance both the predictability and the acceptability of future free exercise decisions"). *But see* Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part I. The Religious Liberty Guarantee,* 80 HARV. L. REV. 1381, 1384 (1967) (ad hoc judgment can be subjected to objective criteria). For examples of proposed models for free exercise analysis, see Clark, *supra*; Note, *supra* note 44; Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities,* 90 YALE L.J. 350 (1980).

50. *See* Wisconsin v. Yoder, 406 U.S. 205, 221 (1972); Robinson v. Price, 615 F.2d 1097, 1099 (5th Cir. 1980); Note, *supra* note 44, at 160.

51. *See* notes 9-14 *supra* and accompanying text.

52. *See* Thomas v. Review Bd. of the Ind. Employment Security Div., 450 U.S. 707, 721 (1981) (Rehnquist, J., dissenting) (increase in social welfare legislation exacerbates the tension between free exercise and establishment clauses because such legislation touches the individual at so many points in his life); McGowan v. Maryland, 366 U.S. 420, 461-62 (1961) (Frankfurter, J., concurring) ("[s]tate codes and the dictates of faith touch the same activities"); Galanter, *supra* note 9, at 268 ("[f]orbearance toward religious scruples can be seen as a response to the problem of reconciling personal liberty with increasing governmental activity"); Giannella, *supra* note 49, at 1389 (conflict between the religion clauses has emerged with expanded scope of government activity and the application of the first amendment provisions to the states and thus requires affirmative accommodation of the clauses); Giannella, *supra* note 9, at 522-26 ("[t]he importance of the principle of political neutrality increases with the expanding role of government").

In Thomas v. Review Bd. of the Ind. Employment Security Div., 450 U.S. 707 (1981), the Supreme Court held that Indiana's denial of unemployment compensation benefits to a Jehovah's Witness who quit his job upon transfer to an armament manufacturing division violated his right to free exercise of religion. Petitioner's religious beliefs prohibited his direct participation in the production of weapons. In a vigorous dissent, Justice Rehnquist berated the Court for its overindulgence of religious liberty. *Id.* at 722-23 (Rehnquist, J., dissenting). He asserted that the Court unwisely required payment of unemployment compensation to an individual on the basis of his

In *Church of God v. Amarillo Independent School District*[53] the district court applied the balancing test developed in *Braunfeld*, *Sherbert*, and *Yoder*[54] and held that the school district's policy limiting excused religious absences violated peitioners' right to the free exercise of religion.[55]

The court commenced by acknowledging that the first and fourteenth amendments protect religious practitioners from both direct and indirect infringement of the pursuit of their religious beliefs.[56] The court first evaluated the sincerity of the plaintiffs' religious belief,[57] recognizing that this determination was a "most delicate question."[58] The judge applied the definition of religious belief propounded in *Brown v. Dade Christian Schools, Inc.*[59] and concluded that the observance of the Church of God's holy days and Feast of Tabernacles constituted a legitimate religious practice.[60]

The court found that the burden imposed on plaintiffs' beliefs was analogous to the burdens imposed in *Sherbert* and *Neiderhuber v. Camden County Vocational and Technical School District Board of Education*.[61] The state's action forced the students to choose between

religious beliefs. He concluded that a judicial espousal of the restrictive "direct-indirect burden" mode of free exercise analysis, *see* notes 25-27 *supra* and accompanying text, and an establishment clause analysis restricted to striking down only intentional governmental assistance to religion would allow the Court to ease the tension between the two clauses. *Id.* at 722-23, 726-27 (Rehnquist, J., dissenting).

In *Thomas* Justice Rehnquist also stated that incorporation of the first amendment guarantees into the fourteenth amendment increased the instances of conflict between the two clauses. 450 U.S. at 721 (Rehnquist, J., dissenting). *See also* Giannella, *supra* note 9, at 514.

53. 511 F. Supp. 613 (N.D. Tex. 1981).

54. *Id.* at 615.

55. *Id.* at 618.

56. *Id.* at 615. The court indicated that although the excused absence policy did not directly outlaw the plaintiffs' practice of their religion, it nevertheless constituted an indirect burden on their free exercise right within the meaning of Braunfeld v. Brown, 366 U.S. 599 (1961). 511 F. Supp. at 615. *See* text accompanying notes 23-29 *supra*.

57. 511 F. Supp. at 616. *See* note 40 *supra*.

58. 511 F. Supp. at 616. *See* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

59. 556 F.2d 310 (5th Cir. 1977), *cert. denied,* 434 U.S. 1063 (1978). For the quotation of this definition of religious belief from *Brown*, see note 40 *supra*.

60. 511 F. Supp. at 616. *See* Neiderhuber v. Camden County Vocational & Technical School Dist. Bd. of Educ., 495 F. Supp. 273 (D.N.J. 1980); Edwards v. School Bd., 483 F. Supp. 620 (W.D. Va. 1980), *vacated in part,* 658 F.2d 951 (4th Cir. 1981); Rankins v. Commission on Professional Competence, 24 Cal. 3d 167, 593 P.2d 852, 154 Cal. Rptr. 907 (1979). *See also* note 40 *supra*.

61. 495 F. Supp. 273 (D.N.J. 1980).

In *Sherbert* the plaintiff was forced to choose between abandoning a fundamental tenet of her

incurring academic penalties for following the precepts of their religion and abandoning one of the fundamental tenets of their religion[62] by attending school. The state urged that requiring regular school attendance to allow students maximum academic development[63] and to avoid overworking the teachers[64] was a compelling interest. The court was not convinced, however, that the state's interest justified the burden on the free exercise of religion.[65]

Finally, the court denied that its decision, which forced teachers to take affirmative action to accommodate plaintiffs' religious practice, violated the establishment clause.[66] The court declared that upholding plaintiffs' free exercise right against the school district's excused absence policy only reflected the government's neutral stance in reconciling conflicting state and religious interests.[67] The court failed to articulate the exact reasons why its ruling did not compromise the government's secular role. Instead the court referred to *Zorach v. Clauson*,[68] in which the Supreme Court upheld a school's "released time"[69] program against an establishment clause challenge. The court viewed *Zorach* as authority for declaring that the state has a duty to respect

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religion prohibiting Saturday work and keeping a job that required Saturday work. *See* notes 34-36 *supra* and accompanying text. In *Neiderhuber* a schoolteacher was "compelled to forfeit his position in order to follow his religious convictions." 495 F. Supp. at 278.

Neiderhuber points to modern cases that use constitutional principles in assessing free exercise claims under Title VII of the Civil Rights Act of 1964. *Id.* The Act provides that it is unlawful for any employer "to fail or refuse to hire or to discharge an individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion." 42 U.S.C. § 2000e-2(a)(1) (1976). Furthermore, the employer is required "to reasonably accommodate to an employee's or prospective employee's religious observance or practice" if such accommodation would not work "undue hardship on the conduct of the employer's business." *Id.* § 2000e(j) (1976). *See* TWA, Inc. v. Hardison, 432 U.S. 63 (1977); Jordan v. North Carolina Nat'l Bank, 565 F.2d 72 (5th Cir. 1977); Huston v. Local 93, Int'l Union, UAW, 559 F.2d 477 (8th Cir. 1977); Rankins v. Commission on Professional Competence, 24 Cal. 3d 167, 593 P.2d 852, 154 Cal. Rptr. 907 (1979).

62. 511 F. Supp. at 616.

63. *Id.* at 617. "Yet even this paramount responsibility must yield when the application of a law or regulation significantly burdens the free exercise of religion." *Id.* at 618.

64. *Id.* at 618. Because the teachers could accommodate students' absences for sickness and sporting activities and no teachers had previously complained of an excessive workload, the court held that the administrative burden to the state could not override plaintiffs' religious interest. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. 343 U.S. 306 (1952).

69. The program was designed to allow students to leave public school before the end of the day in order to attend religious school. 343 U.S. at 308.

and accommodate the religious interests of its citizens.[70]

The district court's routine application of the principles of constitutional analysis set forth in *Yoder* and *Sherbert* reflects judicial reluctance to address the problems highlighted by the history of free exercise analysis. Although application of the balancing test does produce just results, as exemplified by its application in *Church of God*, the test has three major disadvantages.

First, the inherent ad hoc nature of the test precludes consistent application of the balancing formula.[71] Lower courts must rely on the judges' own values in balancing competing state and religious interests.[72] The values of the judiciary may represent those constituting a consensus of American society,[73] but without clearly delineated standards for evaluating free exercise claims,[74] the ad hoc balancing test leads to inconclusive and unreliable decisions.[75]

Second, the court required an institutional quality about plaintiffs' religious beliefs to find that the accomodation requested served a legitimate religious function.[76] The court's decision to follow the *Yoder* digression suggests that only plaintiffs whose beliefs satisfy this institutional standard will have success in asserting claims of religious discrimination[77] or in claims for religious exemption from valid laws.[78] Although claims based on principles of individual choice have suc-

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70. *Id.* at 313-14.

71. *See* note 49 *supra*.

72. *See* T. EMERSON, *supra* note 49, at 54; Giannella, *supra* note 49, at 1385.

73. *See* Giannella, *supra* note 49, at 1385 (the Supreme Court "has followed a course that ultimately intimates a judicial approval of established orthodox values"); Note, *supra* note 44, at 174 (the Court's decisions must not be the result of "temporary passion" or reasoning based on other than the consensus of national thought).

74. *See* note 49 *supra* and accompanying text.

75. *See* T. EMERSON, *supra* note 49, at 54-56 (using the ad hoc test, a court could reach either conclusion in almost every case; as a result, neither government nor the individual has notice of the rights essential to be protected); Note, *supra* note 49, at 356-57 (courts have not consistently defined what constitutes a cognizable religious claim).

76. *See* Wisconsin v. Yoder, 406 U.S. 205, 235 (1972); Brown v. Dade Christian Schools, Inc., 556 F.2d 310, 324 (5th Cir. 1977), *cert. denied,* 434 U.S. 1063 (1978). *See also* note 40 *supra*.

77. Cases addressing the discriminatory effect on free exercise by government action include McDaniel v. Paty, 435 U.S. 618 (1978); Sherbert v. Verner, 374 U.S. 398 (1963); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); Neiderhuber v. Camden County Vocational & Technical School Dist. Bd. of Educ., 495 F. Supp. 273 (D.N.J. 1980).

78. Numerous cases have addressed claims for exemptions from valid laws. *See, e.g.,* Wisconsin v. Yoder, 406 U.S. 205 (1972); Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965); Braunfeld v. Brown, 366 U.S. 599 (1961).

ceeded in the past, particularly in the context of the military draft laws,[79] rigid application of the institutional quality requirement may cause the demise of future successful conscientious objections.[80]

Third, the court's decision exacerbates the tension[81] between the establishment clause and the free exercise clause by forcing school districts to take affirmative action[82] to accommodate religious practice. Although the court's decision is consistent with past Supreme Court rulings,[83] it arguably violates the establishment clause prohibition against advancing a particular religion.[84]

Application of the *Yoder* balancing test produced just results in *Church of God*, primarily because the state's interests were not as compelling as those in *Yoder*.[85] The court did not have to contend with a difficult balancing process. Faced with a substantial burden on plaintiffs' right to free exercise of religion to achieve a state interest of lesser importance, the court easily found in favor of the Church of God.

In evaluating a free exercise challenge to a school district's excused absence policy, the United States District Court for the Northern District of Texas chose the safest path to decision by following a mechanical balancing test formulated over twenty years of Supreme Court analysis.[86] Although the decision made little contribution to the consti-

79. *See* Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965).

80. *See* Kurland, *supra* note 40, at 244. *But see* Marcus, *supra* note 2, at 1230.

81. *See* notes 9-14 & 50-51 *supra* and accompanying text.

82. *See* note 66 *supra* and accompanying text.

83. *See* cases cited at note 14 *supra*.

84. *See* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 772 (1973); Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971); Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970); Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968); School Dist. of Abington v. Schempp, 374 U.S. 203, 222 (1963); Everson v. Board of Educ., 330 U.S. 1, 18 (1947).

85. The school district's interest in requiring daily attendance is less compelling than a state's interest in preventing a child's removal from school altogether. Although the Church of God has an important interest in not allowing the undermining of a fundamental tenet of its religion, the sanctity of an entire religious and secular community was jeopardized in *Yoder*.

86. Braunfeld v. Brown, 366 U.S. 599 (1961) is the origin of the modern balancing test. In its "direct-indirect burden" analysis, the Court also needed to weigh the competing state and religious interests to assess the impact an exemption from the Sunday closing law would have on the state as well as the burden upon the claimants' free exercise of religion. *Id.* at 607.

tutional interpretation of the free exercise clause, it exemplified and preserved the courts' overall commitment to religious liberty.[87]

R.J.S.

87. *See* cases cited at note 2 *supra*.