Constitutional Law -- First Amendment -- The Balancing Process for Free Exercise Needs a New Scale

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from reaching a rapid decision on the merits.[76] Only an explanation grounded in momentary reticence rather than absolute refusal is consonant with the nature of the doctrine and the history of its application.

Constitutional Law—First Amendment—The Balancing Process for Free Exercise Needs a New Scale

Personal freedoms have been affected substantially by the steadily increasing scope of governmental regulation.[1] In *Wisconsin v. Yoder*,[2] the Supreme Court granted the Amish people an exemption from the compulsory education laws of the state, basing its decision on first amendment free exercise of religion grounds. The potential tension between the free exercise of religion and extensive regulation is exacerbated in *Yoder* by a contemporary emphasis on education, by the interests of minors whose educational and religious futures are directly affected by the Court's ruling, by the question of survival of a devout separatist sect, and by the political reality that numerous exemptions will make a regulatory scheme unworkable.

Three sets of Amish parents in Wisconsin,[3] believing it sinful to expose their children to the worldliness of the county consolidated high school, held their children out of public school in violation of the Wisconsin compulsory education law, which requires attendance to the age of sixteen.[4] They were prosecuted, found guilty, and were fined five dollars each.[5] The convictions were affirmed by the state circuit court,

[76]The Court recently granted certiorari and vacated judgment, remanding to the court of appeals with instructions to dismiss as moot. 41 U.S.L.W. 3182 (U.S. Oct. 10, 1972).

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[1]A good example of this tension is a requirement that all children in a school salute the American flag and pledge allegiance. Such an exercise is forbidden to Jehovah's Witnesses by a literal reading of the Ten Commandments. In Board of Educ. v. Barnette, 319 U.S. 624 (1943), the Supreme Court held this requirement an unconstitutional infringement of free exercise.

[2]92 S. Ct. 1526 (1972).

[3]Respondents in the case were Jonas Yoder, Ardin Yutzy, members of the Old Order Amish Religion, and Wallace Miller, a member of the Conservative Amish Mennonite Church. Their children, Frieda Yoder, aged fifteen, Barbara Miller, aged fifteen and Vernon Yutzy, aged fourteen, were all graduates of the eighth grade of public school. *Id.* at 1529 n. 1.

[4]WIS. STAT. ANN. § 118.15 (1972). The pertinent provisions of the statute are:

> (1) (a) Unless the child has a legal excuse or has graduated from high school, any person having under his control a child who is between the ages of 7 and 16 years shall cause such child to attend school regularly during the full period and hours, religious holidays excepted, that the public or private school in which such child should be enrolled is in session until the end of the school term, quarter or semester of the school year in which he becomes 16 years of age.

[5]92 S. Ct. at 1529-30.

but were reversed by the Wisconsin supreme court.[6] The United States Supreme Court affirmed the Wisconsin high court by holding that the state compulsory education laws violated the free exercise of religion by the Amish parents.[7]

The legal issue addressed by the Court consisted of two parts: (1) whether enforcement of the education law was an infringement upon the parents' practice of the Amish religion, and (2) if so, could Wisconsin prove a state interest of sufficient magnitude to override this first amendment right?[8] In deciding this dual issue, the Court addressed the problems of defining the nature of religious beliefs granted protection[9] and the purpose of compulsory education laws.[10] In essence, the religious rights of the parents were balanced against the interest of the state in uniform enforcement of its law. As to the children, Chief Justice Burger, writing the opinion for the Court, stated:

> [O]ur holding today in no degree depends on the assertion of the religious interest of the child as contrasted with that of the parents. It is the parents who are subject to prosecution here for failing to cause their children to attend school, and it is their right of free exercise, not that of the children, that must determine Wisconsin's power to impose criminal penalties on the parent. . . . The children are not parties to this litigation.[11]

Analysis of the free exercise question must begin with a nineteenth century challenge to territorial polygamy laws in *Reynolds v. United States*.[12] There the Supreme Court established an action-belief dichotomy, stating, "[L]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[13]

Cantwell v. Connecticut,[14] decided in 1940, brought an end to the strict application of the *Reynolds* standard. The Court granted an ex-

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

[7]Wisconsin v. Yoder, 92 S. Ct. 1526 (1972).

[8]*Id.* at 1532.

[9]Beliefs which are "philosophical and personal, rather than religious . . . [do] not rise to the demands of the Religion Clause." *Id.* at 5133.

[10]The Court used Jefferson's argument that some education is necessary to prepare for active citizenship and to become self-sufficient members of society. But the Court qualified this purpose by viewing the goal as preparation "for life in the separated agrarian community that is the keystone of the Amish faith." *Id.* at 1536.

[11]*Id.* at 1541.

[12]98 U.S. 145 (1878).

[13]*Id.* at 166.

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

emption from the law for the protection of religiously motivated actions and the former action-belief standard was limited to cases where the regulation safeguarded important interests of the community.[15] *Cantwell* ruled that a statute forbidding a person to solicit for a religious cause before obtaining a certificate from a designated state official was an unconstitutional infringement of free exercise and of free expression. The Court went on to say:

> 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. . . . [The state may] safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment.[16]

The type of interest which may be regulated by the government in the face of free exercise objections is exemplified by *Prince v. Massachusetts*.[17] The Massachusetts statute under attack prohibited the sale of magazines or pamphlets by children under a certain age; it was applied to prevent a nine-year-old girl from distributing Jehovah's Witness material on the streets. The Court rejected the claimed right of the guardian to bring up the child according to her own beliefs, asserting that neither the rights of religion nor the rights of parenthood are beyond limitation:

> Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience.[18]

Even though an exemption to Sunday closing laws was denied Or-

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[15]In other cases involving free exercise, such as compelling Jehovah's Witness children to salute the flag and taxing the right to distribute religious material, the Supreme Court granted exemptions, thus emphasizing the move from *Reynolds*. Board of Educ. v. Barnette, 319 U.S. 624 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943).

[16]310 U.S. at 303-04. *Cantwell* is a hybrid problem involving claims for free exercise of religion and freedom of speech. The Court used a "clear and present danger" standard to solve the problem of the breach of peace possibility (free expression), *id.* at 311, and ruled the solicitation statute was a previous restraint on the free exercise of religion (free exercise), *id.* at 305.

[17]321 U.S. 158 (1944).

[18]*Id.* at 166.

thodox Jewish merchants in *Braunfeld v. Brown*,[19] the Court set forth more rigid requirements for the state to justify uniform application of the law. The merchants would not operate their stores on Saturday, their Sabbath, and sought an exemption allowing them to remain open part of the day on Sunday in order to recover some of the business lost on Saturday. The majority upheld the law, basing its rationale on the importance of the state objective in providing a day of rest for its citizens.[20] An exemption for the Sabbatarians would have provided an administrative problem of such magnitude as to render the entire statutory scheme unworkable. Thus a new factor was introduced into the balancing formula; the state had to show a justifiable purpose for the uniform regulation and why an exemption to its coverage should not be granted.

The standard that the Court applied in *Yoder* was first explicitly set forth in *Sherbert v. Verner*.[21] There a Seventh Day Adventist was denied unemployment compensation because she refused available employment conditioned on her working a six-day week, including Saturday, her Sabbath. The Supreme Court reversed, establishing the current test for free exercise questions. A state may impose restrictions on actions, even when the conduct accords with one's religious convictions, but only if there is a *compelling state interest* for such regulation.[22] Therefore, if the Supreme Court had found that the South Carolina unemployment compensation law had not infringed Ms. Sherbert's free exercise of her religion, or if it had found that any incidental burden on the free exercise were justified by a compelling state interest, the Court would have been able to sustain her disqualification.[23] The forced choice between following the precepts of her religion and foregoing all compensation or foregoing her religion and accepting work was certainly a burden on free exercise.[24] Moreover, the state failed to show any vital interest in the regulation. For example, the possibility of fraudulent

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[19]366 U.S. 599 (1961).

[20]*See id.* at 608-09.

[21]374 U.S. 398 (1963).

[22]The conduct so regulated must pose some substantial threat to public safety, peace, or order. *Id.* at 403.

The state interest itself must be *compelling*. "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'" *Id.* at 406 (citation omitted).

[23]*Id.* at 403.

[24]Significantly, the South Carolina statute allowed an exemption for workers who refuse to work on Sunday due to religious objections. *Id.* at 406.

claims threatening dilution of the enemployment fund was not compelling. The Court said that the state would have to demonstrate that no alternate forms of regulation would combat abuses without infringing first amendment rights.[25]

The importance of the *Sherbert* test is illustrated by two subsequent cases. In one, the Supreme Court vacated a judgment of contempt for a refusal of jury duty based on free exercise claims and remanded for consideration in light of *Sherbert*.[26] The Minnesota high court then reversed its original ruling, holding that the state had not shown a sufficient interest in obtaining competent jurors to require the overriding of free exercise rights.[27] In another case, the California Supreme Court held that the state could not apply its narcotics laws to prevent the use and possession of peyote by Navajo members of the Native American Church for religious ceremonies.[28] The state sought to demonstrate a compelling interest in preventing the deleterious effects of the drug, but the court observed that no such effects had been shown.[29] To the further state contention that the use of peyote obstructed possible enlightenment the court responded, "We know of no doctrine that the state, in its asserted omniscience, should undertake to deny to defendants the observance of their religion in order to free them from the suppositious [*sic*] 'shackles' of their 'unenlightened' and 'primitive condition.' "[30]

One of the basic tenets of the Amish faith is withdrawal from the contemporary world and an emphasis on simple agrarian lifestyle. Members believe that exposure to the worldly curricula and life of consolidated high schools would be harmful to their children and perhaps detrimental to their own salvation.[31] The existence of Amish communities in many sections of the country and the passage of compulsory education laws thus made it inevitable that the question of free exercise infringement would arise in compelling Amish children to attend school until a certain age. The Amish had litigated this question in state courts many times, but cases previous to *Yoder* were decided on the obsolete

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[25]*Id.* at 407.

[26]*In re* Jenison, 265 Minn. 96, 120 N.W.2d 515, *vacated and remanded mem.*, 375 U.S. 14, *rev'd per curiam*, 267 Minn. 136, 125 N.W.2d 588 (1963).

[27]*In re* Jenison, 267 Minn. 136, 137, 125 N.W.2d 588, 589 (1963).

[28]People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

[29]*Id.* at 722, 394 P.2d at 818, 40 Cal. Rptr. at 74.

[30]*Id.* at 723, 394 P.2d at 818, 40 Cal. Rptr. at 74.

[31]*See generally* Casad, *Compulsory High School Attendance and the Old Order Amish: A Commentary on State v. Garber*, 16 KAN. L. REV. 423 (1968).

Reynolds action-belief dichotomy.[32] This was true even in *State v. Garber*,[33] a 1966 case decided three years after *Sherbert*. There the Kansas court stated, "The question of how long a child should attend school is not a religious one."[34]

In light of the legal background, *Yoder* appears as a logical progression from the holdings in *Cantwell* and *Sherbert*. Once the *Sherbert* standard[35] is accepted as applicable here, the Court's holding seems quite reasonable. There are a number of weaknesses in the Court's reasoning, but these objections are readily answerable once the implicit premise of the Court is granted—that ideal education for the Amish means preparation for an Amish life and the minimal contacts with contemporary society that such a life entails.[36] Yet the Court's characterization of education and its purpose seems polar to the emphasis given in *Brown v. Board of Education*[37] and the subsequent public school integration cases. In *Brown* the Court stated:

> [E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. . . . Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[38]

The purpose attributed to education will *ipso facto* determine the importance of the state's interst.[39] The materialistic description of the

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[32]*E.g.*, State v. Garber, 197 Kan. 567, 419 P.2d 896, *cert. denied*, 389 U.S. 51 (1966); State v. Hershberger, 103 Ohio App. 188, 144 N.E.2d 693 (1955); Commonwealth v. Beiler, 168 Pa. Super. 462, 79 A.2d 134 (1951). The language in *Beiler* is typical: "Religious liberty includes absolute right to believe but only a limited right to act." 168 Pa. Super. at 468, 79 A.2d at 137.

[33]197 Kan. 567, 419 P.2d 896 (1966), *cert. denied*, 389 U.S. 51 (1967).

[34]*Id.* at 574, 419 P.2d at 902.

[35]*See* text accompanying note 8 *supra*.

[36]"It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live, *but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community* that is the keystone of the Amish faith." 92 S. Ct. at 1536 (emphasis added).

[37]347 U.S. 483 (1954).

[38]*Id.* at 493.

[39]*See* State v. Yoder, 49 Wis. 2d 430, 451, 182 N.W.2d 539, 549 (1971) (Heffernan, J., dissenting): "The purpose of education is not alone to provide a mass of educated and, hence, taxable citizens, but is, in addition, intended to educate the individual for life. The government's

purpose of compulsory education by the Court in *Yoder*[40] in effect establishes the state's interest as an uncompelling one, and even though the state's interest in *Yoder* (compulsory education) is dissimilar to the state's interest in *Brown* (compulsory segregation),[41] the Court's position on education seems to have changed considerably. Significantly, however, the petitioner in *Brown* wanted open opportunities in public schools, while the Amish merely desired to be left out of public schools. This difference between *Brown* and *Yoder* probably accounts for the different emphases given public education and to some extent explains the Court's rather uninspired view of the role of schooling in the latter.

The implicit premise of the Court in *Yoder*, that education for the Amish means preparation for Amish life, is the chief weakness of the decision. The rights of those children who might later want to leave the Amish faith were neither adequately represented nor adequately considered by the Court. In the past the Court has considered the state's interest in the welfare of the child, even when faced with a free exercise claim by the parent. For instance, in *Prince v. Massachusetts*,[42] the Court stated, "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."[43] Indeed, in the very nature of government, the state's regulative authority over children is broader than over adults, particularly with regard to public activities and in matters of employment.[44]

The rights of children as persons have only recently been established by the Court, mostly in regard to procedures in juvenile proceedings,[45] but these cases have established the trend toward recognizing that

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concern is not with enforcing a regulatory scheme. [It is] that religion, morality, good government, and happiness are all dependent upon education. This is the compelling government nterest."

[40]*See* 92 S. Ct. at 1536-40.

[41]Notwithstanding the dissimilarity of the state's interests, both White in concurrence (joined by Brennan and Stewart), 92 S. Ct. at 1544, and Heffernan in dissent in the Wisconsin court, 49 Wis. 2d at 449, 182 N.W.2d at 548, used the *Brown* philosophy to emphasize the importance of the state's interest in education.

[42]321 U.S. 158 (1944).

[43]*Id.* at 170; *see* text accompanying notes 17-18 *supra.*

In spite of the sweeping language employed by the Court, the ruling was limited to the facts of the case. 321 U.S. at 171.

[44]*Id.* at 168. The Court's position has not changed since *Prince. See, e.g.*, Ginsberg v. New York, 390 U.S. 629 (1968).

[45]*E.g., In re* Winship, 397 U.S. 358 (1970); *In re* Gault, 387 U.S. 1 (1967); Kent v. United States, 383 U.S. 541 (1966).

"children themselves have constitutionally protectible interests."[46] The consideration of those constitutional interests seems especially applicable in a situation where the life options given the child may be substantially narrowed by granting an exemption from a regulatory statute.

The *Sherbert* requirement of a compelling state interest in order to uphold uniform enforcement in effect gives the free exercise side of the scale an additional weight. This advantage is theoretically justifiable on the basis of the importance of insuring adequate protection to the free exercise of religion. However, this reasoning fails when there are other important interests to be protected that are not included in the balance. In *Yoder*, the most important omission in the balancing process is the child's interest in further education. Indeed, a close examination of the children's rights may well counterbalance the compelling interest requirement.

The opposing interests of the Amish children are the educational growth of those children who will later leave the community (state's interest) versus the rights of those children who will remain (free exercise).[47] The Court should weigh the following considerations. The man or woman who leaves the Amish community with but an eighth grade education is not being afforded the educational guarantees of *Brown*. How much will the loss of one or two years of formal education stunt his capacity for growth?[48] Is this lack of education an important enough factor to allow the state to find a way to protect his growth at the expense of his parents' religious beliefs? On the other side of the scale, the child who is forced to attend public school against the precepts of his chosen faith and lifestyle is not being adequately prepared for his life inside the Amish community and may even be damaged by exposure to the outer world. How much has the additional exposure to the worldliness of high school injured his opportunity for satisfied life within the community? Is this injury a sufficient factor to allow an exemption for all Amish children beyond the eighth grade? In order to protect the rights of some of the children, an order affecting the lives of all the

[46]92 S. Ct. at 1547 (Douglas, J., dissenting in part).

[47]The estimated number of these departing children is important and should be considered in the balancing test. Justice White, in concurring with the result reached, stated that "[t]here is evidence in the record that many children desert the Amish faith when they come of age." 92 S. Ct. at 1545 (White, J., concurring). Douglas also noted the evidence of the exodus and suggested offering each child his preference about whether or not to continue his education. *Id.* at 1548 (Douglas, J., dissenting in part).

[48]Only one or two years of compulsory education are lost since the pertinent Wisconsin statute compels education only to age sixteen. *See* note 4 *supra*.

children would seem to be necessary. Allowing a child to make his own decision is not a viable alternative where the religion and way of life of a devout sect stand firmly against further formal education.

Quite obviously the majority opinion in *Yoder* did not consider the rights of the children. A dissenting opinion in the Wisconsin Supreme Court decision suggested that a *guardian ad litem* should have been appointed to represent those interests,[49] and the suggestion has merit. The Supreme Court might well have ruled the same way had the children been represented, especially since the rights of the two groups of children are almost equally balanced.[50] Nevertheless, because the case was decided without accounting for this crucial aspect of the case, the Court made its important ruling in a practical vacuum.[51]

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Constitutional Law—Standards for the Right to Speedy Trial

The right to speedy trial, guaranteed by the Constitution,[1] has seldom been dealt with by the United States Supreme Court. It was not until 1967 with the case of *Klopfer v. North Carolina*[2] that the right to speedy trial was established as "fundamental" and applied to the states through the due process clause of the fourteenth amendment. Concurring in *Dickey v. Florida*,[3] Justice Brennan subsequently pointed out that the Court had never attempted to set standards by which the right to speedy trial is to be judged. In the recent case of *Barker v. Wingo*,[4] the Supreme Court undertook the task of providing constitutional guidelines to be used by both state and federal courts in assessing this

[49]49 Wis. 2d at 452 n.1, 182 N.W.2d at 549 n.1 (Heffernan, J., dissenting).

[50]The rights of those who lose the two years of education seem to be more substantial to this writer; even this small additional factor might warrant a different result.

[51]*See generally* Dixon, *Religions, Schools and the Open Society: A Socio-Constitutional Issue*, 13 J. PUB. L. 267, 304 (1964).

[1]U.S. CONST. amend. VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

[2]386 U.S. 213 (1967), *noted in* 46 N.C.L. REV. 387 (1968).

[3]398 U.S. 30, 39 (1970).

[4]92 S. Ct. 2182 (1972).