MARSHALL v. PACIFIC UNION CONFERENCE OF SEVENTH-DAY ADVENTISTS: EXPANDING THE APPLICATION OF EXCESSIVE ENTANGLEMENT

*By Carmen Brenneise**

Introduction

The doctrine of church–state separation is embodied in the First Amendment to the United States Constitution, which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."[1] These related provisions—the establishment clause and the free exercise clause—have presented the courts with complex questions of constitutional law concerning the government's power to regulate for the benefit of society and the conflicting right of individuals and religious organizations to be free from such regulation.[2] As a result, Jefferson's metaphorical "wall of separation"[3] between church and state has been subjected to a great deal of judicial remodeling during the past thirty years.[4] Recent

---

* Member, third-year class.

1. U.S. CONST. amend. I.

2. *See* Moore, *The Supreme Court and the Relationship Between the "Establishment" and "Free Exercise" Clauses*, 42 TEX. L. REV. 142 (1963) [hereinafter cited as Moore, *"Establishment" and "Free Exercise"*]. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 812-85 (1978) [hereinafter cited as TRIBE].

The religion clauses were made applicable to the states through the due process clause of the Fourteenth Amendment in Cantwell v. Connecticut, 310 U.S. 296 (1940) (free exercise clause) and Everson v. Board of Educ., 330 U.S. 1 (1947) (establishment clause).

3. The Supreme Court employed Jefferson's "wall of separation" language in Reynolds v. United States, 98 U.S. 145, 164 (1879). Jefferson first used this terminology in a letter to a group of Baptists in 1802. *Id.* The Court's insistence on deriving rules of law from figures of speech has caused it great difficulty in defining the proper relationship between church and state. M. HOWE, THE GARDEN AND THE WILDERNESS 1 (1965).

4. The Supreme Court's decision in Everson v. Board of Educ., 330 U.S. 1 (1947), signalled the beginning of a period of intensive judicial analysis of the religion clauses of the First Amendment, particularly the establishment clause. The Court has generally moved from a strict separation (no aid) position in *Everson* (a parochial aid case raising establishment questions) to an accommodation of religious interests theory in Zorach v. Clauson, 343 U.S. 306 (1952) (a challenge to a release time program involving establishment clause issues) and to a neutrality theory in School Dist. v. Schempp, 374 U.S. 203 (1963) (an establishment

Supreme Court decisions have expanded the individual's right to the free exercise of religion.[5] At the same time, however, the government has been expanding its role in regulating discriminatory labor practices in both the public and private sectors.[6] It was inevitable that at some point the First Amendment's religion clauses would clash with the government's exercise of power under remedial labor legislation.

Such a conflict arose in *Marshall v. Pacific Union Conference of Seventh-day Adventists*,[7] wherein the United States Department of Labor filed a complaint against the Pacific Union Conference, charging that religious organization with violations of the equal pay provisions of the Fair Labor Standards Act (FLSA).[8] The defendants claimed that enforcement of this statute would constitute impermissible governmental interference and entanglement between church and state, thus violating the church's constitutional rights under both the free exercise and establishment clauses.[9] In considering these First Amendment challenges, the *Marshall* court applied an establishment clause analysis and concluded that the church was required to obey the equal pay provisions of the FLSA.[10] In the past, however, the courts have consistently treated a religious liberty-labor legislation conflict as a free

clause challenge to prayer and Bible-reading in public schools). *See generally* P. KAUPER, RELIGION AND THE CONSTITUTION 59-67 (1964) [hereinafter cited as KAUPER, RELIGION AND THE CONSTITUTION].

5. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963). *See generally* KAUPER, RELIGION AND THE CONSTITUTION, *supra* note 4, at 40-43; Marcus, *The Forum of Conscience: Applying Standards Under the Free Exercise Clause*, 1973 DUKE L.J. 1217, 1220 [hereinafter cited as Marcus, *Forum of Conscience*].

6. *See generally* Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1083-84 (1978); Comment, *The Free Exercise Clause, the NLRA, and Parochial School Teachers*, 126 U. PA. L. REV. 631 (1978) [hereinafter cited as Comment, *Free Exercise Clause*].

7. No. CV 75-3032-R (C.D. Cal. Mar. 23, 1977) (memorandum opinion) [hereinafter cited as Pacific Union case]. In a similar suit pending in a federal district court for the Northern District of California, the Equal Employment Opportunity Commission filed a Title VII sex discrimination suit against the Pacific Press Publishing Association, a Seventh-day Adventist publishing house. EEOC v. Pacific Press Publishing Ass'n, No. CV 77-1619-CBR (N.D. Cal. 1978).

8. Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1976). The equal pay provisions of the FLSA are known as the Equal Pay Act, codified at 29 U.S.C. § 206(d)(1) (1976). The Equal Pay Act provides, in part, that an employer shall not discriminate "between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which [the employer] pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . . ." *Id.* § 206(d)(1).

9. Defendants' Memorandum of Contentions of Fact and Law at 7-8, Pacific Union case, *supra* note 7 [hereinafter cited as Defendants' Memorandum of Contentions of Fact and Law].

10. Pacific Union case, *supra* note 7, at 8. *See* notes 125-34 and accompanying text

exercise problem, and consequently have applied a balancing test to determine which interest should prevail.[11] Utilization of the establishment clause excessive entanglement defense in a labor case was therefore a unique departure from precedent.

This note first discusses the values underlying the establishment and free exercise clauses, and traces the development and application of the Supreme Court's current tests for resolving church-state controversies under each clause. Particular attention will be given to the Court's free exercise analysis of conflicts arising between religious freedom and governmental labor legislation. A short explanation of the background facts and constitutional issues raised by the *Marshall* action will follow. The memorandum opinion of United States District Court Judge Manuel Real will be discussed with particular emphasis on the court's application of the excessive entanglement doctrine.

The final section of the note attempts to develop a standard for determining the proper constitutional test to apply to religious liberty-labor legislation conflicts. It will be suggested that this particular action involved free exercise values which should be considered under a free exercise balancing test rather than under the excessive entanglement standard of the establishment clause. In the alternative, it will be suggested that the case may fall under the establishment clause through an application of the concept of benevolent neutrality.[12] The discussion will continue with an evaluation of the applicability of the entanglement doctrine to cases involving a conflict between the government's regulatory power, derived from the commerce clause, and the freedom of religion guaranteed under the First Amendment, with particular emphasis on recent religious liberty-labor legislation decisions applying the entanglement doctrine. The note will conclude with an evaluation of the significance of Judge Real's decision with respect to the defendants, those similarly situated and society at large.

infra. For a discussion of the establishment clause test, *see* notes 25-43 and accompanying text *infra*.

11. *E.g.*, Yott v. North Am. Rockwell Corp., 501 F.2d 398 (9th Cir. 1974); Linscott v. Millers Falls Co., 440 F.2d 14 (1st Cir. 1971); Gray v. Gulf, Mobile & Ohio R.R., 429 F.2d 1064 (5th Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971); Cap Santa Vue, Inc. v. NLRB, 424 F.2d 883 (D.C. Cir. 1970); Mitchell v. Pilgrim Holiness Church Corp., 210 F.2d 879 (7th Cir.), *cert. denied*, 347 U.S. 1013 (1954). For a discussion of the free exercise balancing test, *see* notes 51-57 and accompanying text *infra*.

12. For a discussion of benevolent neutrality, *see* notes 158-63 and accompanying text *infra*.

I. First Amendment Freedom of Religion Standards

In accordance with the distinct values underlying the religion clauses,[13] the Supreme Court has generally applied separate tests under each clause to determine whether the free exercise or establishment clause has been violated.[14] While the Court has had no trouble stating the purposes of these clauses, it has encountered great difficulty agreeing on the standards which should govern them.[15] The sources of free exercise and establishment problems are generally quite different,[16] and the perspective from which the alleged violations are measured differs in the two types of cases.[17] Consequently, the Supreme Court has looked to the historical values implicit in each clause to develop the respective constitutional standards.

A. Establishment Clause

1. Establishment Clause Values

The establishment clause was designed to protect against the enactment of laws which establish an official religion,[18] or which confer benefits upon some religious groups in preference to others or generally

13. The purpose of the establishment clause is to maintain church-state separation, while the free exercise clause seeks to protect the individual's religious liberty. *Compare* notes 18-24 and accompanying text *infra with* notes 44-46 and accompanying text *infra*.

14. *Compare* notes 25-43 and accompanying text *infra with* notes 51-57 and accompanying text *infra*. A court considering a religious claim under the First Amendment is faced with the threshold question: what is a religion? The Supreme Court has approached this issue but no majority opinion has squarely decided it. *See, e.g.*, Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965). For a discussion of this issue, see Hollingsworth, *Constitutional Religious Protection: Antiquated Oddity or Vital Reality?*, 34 OHIO ST. L.J. 15 (1973); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978).

15. "[I]t is far easier to agree on the purpose that underlies the First Amendment's Establishment and Free Exercise Clauses than to obtain agreement on the standards that should govern their application." Walz v. Tax Comm'n, 397 U.S. 664, 694 (1970) (Harlan, J., concurring).

16. *Compare* notes 18-24 and accompanying text *infra with* notes 44-46 and accompanying text *infra*. There are, however, some cases in which both free exercise and establishment questions are raised. *E.g.*, Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (parochial aid); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (tax exemption for religious organizations); Sherbert v. Verner, 374 U.S. 398 (1963) (religious exemption from welfare law). *See generally* Moore, *"Establishment" and "Free Exercise," supra* note 2, at 146-54.

17. *See* Galanter, *Religious Freedoms in the United States: A Turning Point?*, 1966 WIS. L. REV. 217, 267-68 [hereinafter cited as Galanter, *Religious Freedoms*]. A violation of the establishment clause "is measured by the views of the marketplace" while a denial of free exercise demands an assessment from the perspective of the religious adherent. *Id.*

18. Engle v. Vitale, 370 U.S. 421, 430-33 (1962).

aid religion.[19] The inhibition as well as the advancement of religion is prohibited by the clause.[20] The intent of the drafters of the Bill of Rights in inserting the religion clauses was to prevent the establishment of a national religion.[21] Looking to the framers' original intent, the Supreme Court in *Everson v. Board of Education*[22] stated its interpretation of the nature of the conduct forbidden by the establishment clause:

> [N]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect a "wall of separation between church and State."[23]

Recently, the Court succinctly reiterated these establishment concerns: "It is sufficient to note that for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign

19. Dodge, *The Free Exercise of Religion: A Sociological Approach*, 67 MICH. L. REV. 679, 679 (1969) [hereinafter cited as Dodge, *Sociological Approach*]. For a general discussion of the Supreme Court's interpretations of the establishment clause, see KAUPER, RELIGION AND THE CONSTITUTION, *supra* note 4, at 59-67; Piekarski, *Nyquist and Public Aid to Private Education*, 58 MARQ. L. REV. 247, 255-62 (1975) [hereinafter cited as Piekarski, *Nyquist*].

20. This concept was discussed by Professor Moore in the following statement: "Broadly speaking, a law respecting an establishment of religion is a civil regulation either favoring or disfavoring religion. It is true that the term 'respecting' in the establishment clause is a neutral term and thus encompasses laws disfavoring as well as favoring religion, but the primary element in the usual establishment case is that of favoring religion." Moore, *"Establishment" and "Free Exercise," supra* note 2, at 150 (footnotes omitted). *See generally* Galanter, *Religious Freedoms*, *supra* note 17, at 267.

21. McGowan v. Maryland, 366 U.S. 420, 440-42 (1961).

22. 330 U.S. 1 (1947).

23. *Id.* at 15-16 (citation omitted). *See generally* R. MORGAN, THE SUPREME COURT AND RELIGION 76-95 (1972) [hereinafter cited as MORGAN]; Kauper, *The Walz Decision: More on the Religion Clauses of the First Amendment*, 69 MICH. L. REV. 179, 180-81 (1970) [hereinafter cited as Kauper, *Walz Decision*]; Kurland, *The Supreme Court, Compulsory Education, and the First Amendment's Religion Clauses*, 75 W. VA. L. REV. 213, 241 (1973); Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692, 709 (1968).

in religious activity."[24]

The concern of the establishment clause, then, is to maintain a separation between government and religion. In order to maintain this separation, the Court has developed a standard for determining what degree of interaction between church and state is constitutionally permissible under the establishment clause.

2. The Establishment Clause Test

The Supreme Court currently employs a three-pronged[25] test to determine whether governmental action or a statutory regulation violates the tenets of the establishment clause.[26] This, however, was not always the applicable test. In *School District v. Schempp*,[27] the Court applied a two–part test to determine whether Bible-reading and prayer in public schools violated the neutrality required by the establishment clause. In considering the particular statute in question, the Court first inquired whether it had a secular legislative purpose, and secondly, whether the principal or primary effect of the statute was one which neither advanced nor inhibited religion.[28]

The two-pronged *Schempp* test was subsequently expanded in *Walz v. Tax Commission*[29] by the addition of a third prong.[30] The

24. Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).

25. It has been suggested that the Court has added "divisive political potential" as a fourth factor in this test. Meek v. Pittenger, 421 U.S. 349, 374 (1975) (Brennan, J., separate opinion, joined by Douglas & Marshall, JJ.). There has also been some resistance to Chief Justice Burger's three-pronged test in recent opinions of the Court. *See, e.g.*, Wolman v. Walter, 433 U.S. 229 (1977) (four justices joined in the part of the opinion applying the three-pronged test); Roemer v. Board of Pub. Works, 426 U.S. 736 (1976) (plurality opinion applied the three-pronged test). *But see* New York v. Cathedral Academy, 434 U.S. 125 (1977), where the Court applied the excessive state involvement test with six justices joining in the opinion. The Court has also emphasized that these "tests" are really no more than helpful signposts or guidelines. *See, e.g.*, Meek v. Pittenger, 421 U.S. 349, 358-59 (1975); Hunt v. McNair, 413 U.S. 734, 741 (1973); Tilton v. Richardson, 403 U.S. 672, 678 (1971).

26. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). For a general discussion of the Court's development of standards under the establishment clause, see Piekarski, *Nyquist*, *supra* note 19.

27. 374 U.S. 203 (1963).

28. *Id.* at 222. The secular purpose/primary effect test, although often referred to as the *Schempp* or *Allen* test, actually originated in McGowan v. Maryland, 366 U.S. 420, 445, 453 (1961). *See* 16 VILL. L. REV. 374, 375 & n.15 (1970). Although the test was first applied in *Schempp*, 374 U.S. at 222, the Court in Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971), cited Board of Educ. v. Allen, 392 U.S. 236 (1968), in its discussion of the two-pronged test. The two-part test was firmly established as a measuring standard for cases dealing with parochial school aid in *Allen*. *Id.* at 243.

29. 397 U.S. 664 (1970). *Walz* involved a challenge to a state property tax exemption granted to religious organizations for properties used solely for religious worship.

30. Several of the Justices have objected to this extension. For example, in a concurring

Court sought clearly to delineate the boundaries of permissible governmental involvement with religion under the establishment clause through the formulation of the excessive entanglement test.[31] In considering the church-state relationship, Chief Justice Burger stated: "We must also be sure that the end result—the effect—is not an excessive governmental entanglement with religion."[32] Although the entanglement terminology is an addition to the establishment clause test, the basic prohibition against governmental involvement in religious affairs is not. The First Amendment religion clauses have always been interpreted to mean that there must be some degree of separation between church and state.[33] The term "excessive entanglement" may therefore be viewed as the Court's new yardstick for measuring the degree of separation required by the establishment clause, and for determining how far the Court can go in applying the concept of benevolent neutrality in its attempt to walk the fine line between the free exercise and establishment clauses.[34]

This new doctrine, whose application forms the basis of this note, has been applied by the Court as a distinct third test,[35] and has narrowed the scope of the effect test by requiring legislation that may not

opinion in Roemer v. Board of Pub. Works, 426 U.S. 736 (1976), Justice White, joined by Justice Rehnquist, stated: "I have never understood the constitutional foundation for this added element [excessive entanglement]; it is at once both insolubly paradoxical . . . and—as the Court has conceded from the outset—a 'blurred, indistinct, and variable barrier.' " *Id.* at 768-69 (White, J., concurring, joined by Rehnquist, J.). Justice White went on to note that he did not perceive any difference between the first and third parts of the three-pronged test and that the entanglement test appeared "no less 'curious and mystifying' than when it was first announced". *Id.* at 769.

31. 397 U.S. at 674-75. In describing the area of permissible involvement, the Court declared: "The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Id.* at 669.

32. *Id.* at 674. *See generally* Kauper, *Walz Decision*, *supra* note 23.

33. "Underlying the twin religion clauses of the first amendment is the idea that the state and the churches have separate functions to perform and that the state may neither intrude into the affairs of the churches nor actively intervene in religious matters." Kauper, *Walz Decision*, *supra* note 23, at 201 (footnote omitted). The entanglement doctrine can also be seen as an outgrowth of the *Everson* total separation doctrine. Kauper, *Everson v. Board of Education: A Product of the Judicial Will*, 15 ARIZ. L. REV. 307, 325 (1973).

34. For a discussion of benevolent neutrality, *see* notes 158-63 and accompanying text *infra*.

35. The excessive entanglement test is employed by the Court as an "independent measure of constitutionality." Tilton v. Richardson, 403 U.S. 672, 684-85 (1971). *See generally* Kauper, *Public Aid for Parochial Schools and Church Colleges: The Lemon, DiCenso and Tilton Cases*, 13 ARIZ. L. REV. 567, 583 (1971); Note, *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 167-79 (1971).

have the primary effect of advancing or inhibiting religion to be struck down because of a sufficient *degree* of governmental interference with religion.[36] It would therefore be possible for a particular statute to pass the purpose and effect tests but at the same time be held unconstitutional because it would constitute too much governmental control over the internal affairs of the religious institution.[37]

The entanglement standard is far from absolute; consequently, there is some debate as to how much entanglement constitutes *excessive* entanglement and how far the doctrine should be extended.[38] The Supreme Court is itself cognizant of the fact that excessive entanglement is very difficult to evaluate. The Court in *Lemon v. Kurtzman*[39] stated, "Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[40] Some critics have also suggested that the test is both confusing and frustrating for the Court to apply.[41]

In spite of the confusing nature of entanglement, the Court has continued to rely on this concept as an integral part of its establishment clause analysis.[42] The Court does not reach the entanglement question

36. The Court in Lemon v. Kurtzman, 403 U.S. 602 (1971) (*Lemon I*), did not determine whether the legislation in question had the primary effect of advancing religion because it had already found excessive entanglement. *Id.* at 613-14. The Court emphasized the fact that total separation between church and state is not possible and therefore the Court must consider "the cumulative impact of the entire relationship arising under the statutes" to determine whether the degree of involvement is excessive. *Id.* at 614.

37. The Court in *Walz* indicated that looking at sponsorship and support does not end the inquiry; rather a court must consider each prong separately. 397 U.S. at 674.

38. *See* Note, *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 174 (1971).

39. 403 U.S. 602 (1971). *Lemon I*, a parochial school aid case, was the first decision in which the Court applied all three prongs of the establishment test. *Id.* at 612-13.

40. *Id.* at 614. The *Lemon I* Court did, however, lay down some guidelines for determining excessive entanglement: "[W]e must examine the character and purposes of the institutions that are benefited, the nature and aid that the State provides, and the resulting relationship between the government and the religious authority." *Id.* at 615.

41. *See* note 30 *supra*. Professor Giannella, one of the foremost critics of the test, contends: "[I]f the concept of 'excessive entanglement' is to be taken seriously, it raises more questions than it answers. Its broad and amorphous nature makes predictability an impossibility unless the Court refines and reduces it to more precise guidelines. . . . There is the likelihood that entanglement will turn into a convenient label to help the Court announce decisions arrived at on other grounds more difficult to articulate in terms of consistent legal theory." Giannella, *Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement*, 1971 SUP. CT. REV. 147, 148 [hereinafter cited as Giannella, *Lemon and Tilton*]. For a succinct summary of the arguments against the application of the excessive entanglement test, see Piekarski, *Nyquist*, *supra* note 19, at 263-64. *See also* Note, *Government Assistance to Church-Sponsored Schools: Tilton v. Richardson and Lemon v. Kurtzman*, 23 SYRACUSE L. REV. 113, 122-23 (1972).

42. *See* Roemer v. Board of Pub. Works, 426 U.S. 736, 745-54 (1976).

in every situation,[43] but it has become an ever present hurdle with which to contend in establishment cases. Therefore, in its consideration of establishment clause questions the Court currently evaluates the challenged legislation by considering the three separate factors of secular purpose, primary effect and excessive entanglement, and the legislation may be declared unconstitutional under any one of these analyses. A religion clause issue, however, may instead involve a free exercise question; consequently, courts must also look to the specific values of free exercise and measure the alleged First Amendment violation under the test formulated to determine constitutionality under the free exercise clause.

B. Free Exercise Clause

1. Free Exercise Values

In contrast to the values underlying the establishment clause, the purpose of the free exercise clause is to secure an individual's religious liberty by prohibiting a civil authority from invading the realm of an individual's practice of religion.[44] A free exercise claim presents two interrelated contentions: first, that a belief or practice burdened by governmental interference is religious in nature,[45] and second, that such interference is prohibited by the First Amendment's free exercise clause.[46]

---

43. For example, if the legislation fails under either of the first two prongs the Court may end its inquiry. *E.g.*, Sloan v. Lemon, 413 U.S. 825 (1973); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973); *see* Kauper, *The Supreme Court and the Establishment Clause: Back to Everson?*, 25 CASE W. L. REV. 107, 121 (1974).

44. School Dist. v. Schempp, 374 U.S. 203, 222-23 (1963). The *Schempp* Court also delineated the contrasting nature of free exercise and establishment: "[I]t is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. The distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended." *Id.* at 223. *See* Moore, *"Establishment" and "Free Exercise," supra* note 2, at 148, 151. For a general treatment of the Supreme Court's interpretation of the free exercise clause, see Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327 (1969) [hereinafter cited as Clark, *Guidelines*]; Marcus, *Forum of Conscience*, *supra* note 5.

45. An extended discussion of this issue is beyond the scope of this note. *See generally* Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965); United States v. Ballard, 322 U.S. 78 (1944); Rabin, *When is a Religious Belief Religious: United States v. Seeger and the Scope of Free Exercise*, 51 CORNELL L.Q. 231 (1966); Comment, *Defining Religion: Of God, the Constitution and the D.A.R.*, 32 U. CHI. L. REV. 533 (1965).

46. Fernandez, *The Free Exercise of Religion*, 36 S. CAL. L. REV. 546, 546 (1963). The "typical" free exercise problem arises from "the multifarious regulations of the welfare state:

Since *Reynolds v. United States*[47] was decided in 1878, the Court has applied the principle that an individual's religious *beliefs* are absolutely protected from governmental interference but the freedom to *act* in the name of religion remains subject to some regulation for the protection of society.[48] Although some critics have asserted that the belief/action distinction is no longer viable,[49] the courts continue to rely on this principle as a basic precept of free exercise analysis.[50] The purpose of the free exercise clause, then, is to protect the individual's right to freedom in his exercise of religion from interference by the civil authority. Since all conduct which is arguably religious in nature is not absolutely protected—because of the competing interests of the individual and society—the Supreme Court has developed a standard by which to measure constitutionality under the free exercise clause.

2. *Free Exercise Test*

In order to resolve the conflict between a governmental regulatory statute and an individual's right to the free exercise of religion, the

compulsory education, financing of higher education, control over business hours, child labor, licensing of occupations and activities, union activity, use of land and buildings, health measures, and old age security." Galanter, *Religious Freedoms*, *supra* note 17, at 268.

47. 98 U.S. 145 (1878). *Reynolds* was one of the Mormon polygamy cases.

48. *Id.* at 166. *See, e.g.*, Poulos v. New Hampshire, 345 U.S. 395 (1953); Prince v. Massachusetts, 321 U.S. 158 (1944); Cantwell v. Connecticut, 310 U.S. 296 (1940). *See generally* KAUPER, RELIGION AND THE CONSTITUTION, *supra* note 4, at 37-38; Comment, *Religious Accommodation Under Sherbert v. Verner: The Common Sense of the Matter*, 10 VILL. L. REV. 337, 339 & n.9 (1965) [hereinafter cited as Comment, *Religious Accommodation*].

49. *See* Marcus, *Forum of Conscience* , *supra* note 5, at 1233-35.

50. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 219-20 (1972); Gray v. Gulf, Mobile & Ohio R.R., 429 F.2d 1064, 1072 (5th Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971); Mitchell v. Pilgrim Holiness Church Corp., 210 F.2d 879, 884 (7th Cir.), *cert. denied*, 347 U.S. 1013 (1954). The Court in *Yoder* observed that "belief and action cannot be neatly confined in logic-tight compartments." 406 U.S. at 220. In some cases, the Court has gone so far as to allow an individual's action, as well as belief, to be absolutely protected by the free exercise clause. *E.g.*, Wisconsin v. Yoder, 406 U.S. at 219-20 (exemption granted from educational requirements because of undue burden on Amish religion); Sherbert v. Verner, 374 U.S. 398, 402-03 (1963) (individual's free exercise claim upheld against state's interest in maintaining unemployment fund). *See* Comment, *Religious Accommodation*, *supra* note 48, at 342. In discussing the accommodation principle, Professor Dodge stated: "[T]here is a narrow area in which the free exercise clause allows the state to accommodate religion in spite of this strong prohibition against establishment: if the legislature creates a substantial burden upon a class of citizens, it may carve out exemptions where the burden relates directly to an important aspect of religion." Dodge, *Sociological Approach*, *supra* note 19, at 705 & n.92. The California Supreme Court further expanded the scope of this protection in People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964), in which an accommodation for religious practices resulted in an exemption from a criminal statute. The California Court upheld the use of peyote in religious ceremonies despite a general criminal prohibition against its use.

Supreme Court applies a balancing test.[51] Under this standard the Court attempts to weigh the burden imposed on the individual's free exercise of religion against the possible harm to the legislative scheme if religious exemption is granted. In order for the legislative scheme to survive, the government must show that its interest is compelling[52] and that there is no less restrictive alternative.[53] The balancing test has become the dominant feature of the Court's free exercise analysis and has been applied in cases raising free exercise, in contrast to establishment, considerations.

There are two balancing tests utilized by courts in First Amendment analysis: ad hoc balancing and definitional balancing.[54] The former requires a court to weigh the interests of the state against those of the individual and then determine whether the state's infringement of the individual's free exercise rights is justified.[55] The latter approach requires a court to define the actual interests being balanced and to differentiate between protected and unprotected expression.[56] Currently, the Supreme Court employs a free exercise balancing test which combines elements of both ad hoc and definitional balancing by first defining the interests of the state and the individual and then balancing those interests.[57] A survey of the Supreme Court's major free exercise decisions illustrates the evolution of this free exercise balancing test.

51. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963); Braunfeld v. Brown, 366 U.S. 599 (1961) (plurality opinion).

In contrast to the utilization of a balancing approach in free exercise questions, it has been suggested that there is no justification for *any* balancing when a conflict arises concerning an "absolute" First Amendment right. Justice Hugo Black stated that he believed that in this area, the Constitution and the Bill of Rights have withdrawn all power from the government to act and that there is therefore no justification for balancing. Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865, 874-75 (1960). A similar viewpoint was also expressed by Justice Douglas in his dissenting opinion in the *McGowan* case. After discussing the Court's balancing of the state interest in providing a common day of rest and recreation against a threat to the First Amendment freedom of religion, Justice Douglas stated, "There is in this realm no room for balancing. I see no place for it in the constitutional scheme." McGowan v. Maryland, 366 U.S. 420, 575 (1961) (Douglas, J., dissenting).

In spite of these suggestions that the balancing test has no place in the consideration of "absolute" First Amendment freedoms, the Supreme Court has continued to apply a balancing test to free exercise problems and has not indicated that it intends to abandon this standard.

52. Sherbert v. Verner, 374 U.S. 398, 403 (1963) (citing NAACP v. Button, 371 U.S. 415, 438 (1963)).

53. Braunfeld v. Brown, 366 U.S. 599, 607 (1961).

54. For an in-depth discussion of the types of balancing tests employed by the Court under the free exercise clause, see Marcus, *Forum of Conscience*, *supra* note 5, at 1239-42.

55. *Id.* at 1239-40.

56. *Id.* at 1241.

57. *Id.* at 1242.

In *Braunfeld v. Brown*[58] and *Gallagher v. Crown Kosher Super Market, Inc.*,[59] two of the Sunday-closing cases,[60] the Court applied an ad hoc balancing test to determine whether a state law barring the sale of certain commodities on Sunday violated the free exercise rights of Sabbatarians.[61] The Court held that the balancing test did not require a state's legislative scheme to be struck down as interfering with free exercise where it imposed only an *indirect* burden[62] on the free exercise of religion, unless the state could accomplish its purposes by means which would not impose such a burden.[63] The direct/indirect burden distinction was significant because it indicated that the Court considered the state's power to legislate to be of primary importance,[64] and consequently did not afford protection to those suffering an indirect burden on their free exercise unless there was a less restrictive alternative.[65] This limitation on free exercise protection was subsequently narrowed by the Court's decision in *Sherbert v. Verner*,[66] which greatly expanded the constitutional protection accorded the free exercise of religion.[67]

The *Sherbert* Court considered a case in which an individual's free exercise of religion, her freedom to worship on Saturday without the

58. 366 U.S. 599 (1961) (plurality opinion).

59. 366 U.S. 617 (1961) (plurality opinion).

60. There were four Sunday-closing cases decided by the Court on the same day. The other two were McGowan v. Maryland, 366 U.S. 420 (1961) and Two Guys v. McGinley, 366 U.S. 582 (1961). The *Braunfeld* and *Crown Kosher* cases posed a free exercise question—whether Sabbatarians could be punished for working or shopping on Sunday if their religious beliefs required them to observe another day of worship—while the *McGowan* and *Two Guys* cases posed an establishment question—whether the state can prescribe Sunday as a community day of rest. The Court never reached the free exercise issue in the latter two cases because the appellants did not allege any injury to their religious freedoms and therefore did not have standing to sue. McGowan v. Maryland, 366 U.S. at 429-30; Two Guys v. McGinley, 366 U.S. at 592.

61. A "Sabbatarian" is "one who regards and keeps the seventh day of the week as holy in conformity with the letter of the decalogue." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1969).

62. An indirect burden exists when a legislative regulation does not make a religious practice itself unlawful, but instead incidentally places a hardship, such as economic loss, on individuals who choose to engage in a particular religious activity or to refrain from acting because of certain religious beliefs. Note, *A Braunfeld v. Brown Test for Indirect Burdens on the Free Exercise of Religion*, 48 MINN. L. REV. 1165, 1166 (1964).

63. Braunfeld v. Brown, 366 U.S. 599, 607 (1961).

64. *Id.* at 606.

65. *Id.* at 607.

66. 374 U.S. 398 (1963).

67. The *Sherbert* decision is the first case in which the Court upheld a free exercise claim not supported by free speech interests. Pfeffer, *The Supremacy of Free Exercise*, 61 GEO. L.J. 1115, 1139 (1973).

loss of state unemployment benefits, conflicted with the state's interest in protecting its unemployment fund.[68] In applying a balancing test, the Court first considered whether Mrs. Sherbert's statutorily mandated disqualification from securing benefits imposed any burden on her free exercise of religion. It was determined that the ineligibility ruling forced Mrs. Sherbert "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion [Saturday worship] in order to accept work, on the other hand."[69] The Court then considered whether some compelling state interest justified such a substantial infringement on the appellant's First Amendment right. Consideration of the state's interest in protecting the fund from dilution through fraudulent claims indicated that this was not a situation giving rise to grave abuses that would endanger paramount state interests.[70] The Court therefore found that the state had failed to show the necessary compelling interest and held that the statute imposed an unconstitutional burden on appellant's right to the free exercise of religion.[71]

The *Sherbert* decision, by introducing a constitutionally required

68. The case involved a situation where a Seventh-day Adventist was discharged for refusal to work on Saturday. The state refused to grant her unemployment compensation on the ground that her refusal to work on Saturdays, causing other employers to refuse to hire her, disqualified her under the state's unemployment statute for failure to accept suitable work. 374 U.S. at 399-401.

69. *Id.* at 404. The Court also rejected the assertion that the denial of unemployment benefits was constitutional because those benefits were not Mrs. Sherbert's "right" but merely a "privilege." The Court stated that "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Id.*

70. *Id.* at 406-07. The state suggested only a *possibility* that the unemployment fund might be diluted and an employer's scheduling of Saturday work hindered by the filing of fraudulent claims by unscrupulous persons alleging religious objections to Saturday work. The Supreme Court did not consider this issue because it was not raised before the South Carolina Supreme Court. The Supreme Court was unwilling to assess the importance of an asserted state interest without the views of the state court. Even if such a contention had been made below, the Court found "no proof whatever to warrant such fears of malingering and deceit." *Id.* at 407. Moreover, even if the possibility of dilution of the fund and disruption of scheduling were present, the state would be required to show that there was no less restrictive alternative available. *Id.*

Consequently, the Court found that the state interest asserted in *Sherbert* was not as compelling as the interest in providing a uniform day of rest upheld in *Braunfeld*. In the *Braunfeld* case, the Court found great administrative burdens and competitive advantages which were not present in *Sherbert*. *Id.* at 408-09.

71. *Id.* at 406-09. *See* Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 329 (1969). The *Sherbert* Court did not actually reach the issue of whether there was a less restrictive alternative available because the state had not shown a compelling interest. 374 U.S. at 407.

accommodation[72] in an indirect burden case, indicates how far the Court has progressed in the development of its free exercise analysis.[73] Commenting on the Court's opinion in *Sherbert*, Professor Kauper stated, "The Court applied a more stringent test than it has usually applied when indirect encroachments upon First Amendment freedoms are involved. *Sherbert* opens up new vistas on religious liberty and suggests a reconsideration of results reached in some earlier cases."[74] It is still questionable, however, whether the free exercise clause should be extended so far as to create exemptions from laws of general application.[75]

The Court's other significant decision involving a special religious exemption required by the free exercise clause appeared in *Wisconsin v. Yoder*.[76] The Court in *Yoder* considered a situation in which the indi-

72. The term "accommodation" has a special meaning within the concept of discussions involving the relationship of religion and law. "The basic idea is that government may accommodate its legislation and programs to the religious character, needs, and interests of its people." Kauper, *Schempp and Sherbert: Studies in Neutrality and Accommodation*, in RELIGION AND THE PUBLIC ORDER 3, 17 (Giannella ed. 1963) [hereinafter cited as Kauper, *Schempp and Sherbert*].

73. Kauper, *Walz Decision, supra* note 23, at 181-82.

74. KAUPER, RELIGION AND THE CONSTITUTION, *supra* note 4, at 42-43. It has been suggested that *Sherbert* and *Braunfeld* cannot be reconciled since the burden on Mrs. Sherbert was of precisely the same type as that imposed on the Orthodox Jewish merchants. MORGAN, *supra* note 23, at 147; TRIBE, *supra* note 2, at 854. However, the *Sherbert* Court indicated that there was a "strong state interest" in *Braunfeld* that was lacking in *Sherbert*. Sherbert v. Verner, 374 U.S. 398, 408-09. *See* note 70 *supra*.

75. For a discussion of religious accommodation, see notes 153-57 and accompanying text *infra*. The conflicting nature of the religion clauses presents the problem that a religious exemption, allegedly required by free exercise concerns, might constitute a "special privilege" violating the establishment clause. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 29, 96 (1961). *See generally* KURLAND, RELIGION AND THE LAW 22 (1961); Galanter, *Religious Freedoms*, *supra* note 17, at 288; Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development—Part I—The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1398-99 (1967) [hereinafter cited as Giannella, *Religious Liberty*]; Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692, 705 (1968).

The *Sherbert* opinion indicated that the free exercise clause sometimes *requires* special religious exemptions and that this accommodation does not in fact constitute a violation of the establishment clause. 374 U.S. at 409. *See* KAUPER, RELIGION AND THE CONSTITUTION, *supra* note 4, at 20; Dodge, *Sociological Approach*, *supra* note 19, at 705. *See generally* Galanter, *Religious Freedoms*, *supra* note 17, at 295; Kauper, *Walz Decision*, *supra* note 23, at 197.

76. 406 U.S. 205 (1972). The defendants were members of the Amish faith who refused to send their children to public school after the eighth grade. The parents were convicted of violating the Wisconsin compulsory school attendance law. The Amish believe that secondary education, by exposing their children to worldly influences, interferes with the religious development of Amish children and their integration into the Amish way of life. The defendants therefore claimed that their free exercise rights were being violated by the state requirement of compulsory education. *Id.* at 210-11.

vidual's right to the free exercise of religion, the right of Amish parents to provide private secondary educational instruction to insulate their children from worldly influences, conflicted with the state's interest in compulsory high school education. In applying a balancing test,[77] the Court first considered the sincerity and importance of the Amish belief in separation from the outside world and what effect compulsory education would have on this interest. It was determined that the Amish religious faith and their lifestyle are inseparable and interdependent.[78] The Court further declared:

> The conclusion is inescapable that secondary schooling, exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practice of the Amish faith. . . .[79]

In view of the strong Amish interests found by the Court, it was incumbent on the state to show that its interest in compulsory education was so compelling as to override the established religious practices of the Amish.[80] The Court examined the interests which the state sought to promote through compulsory education and "the impediment to those objectives that would flow from recognizing the claimed Amish exemption."[81] The state claimed that some degree of education was necessary to prepare citizens to intelligently participate in the democratic political system and to prepare individuals to be self-reliant and

77. The Court rejected the notion that the state's interest in compulsory education was absolute to the exclusion or subordination of all other interests. *Id.* at 213-15. A balancing test was applied by the Court because the state's interest "is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children . . . ." *Id.* at 214.

78. *Id.* at 216-17. This determination was significant because the claims asserted by the Amish, in order to have the protection of the religion clauses, had to be based on religious rather than philosophical or personal beliefs. The Court found that the Amish lifestyle was "not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living." *Id.* at 216.

79. *Id.* at 218.

80. *Id.* at 214.

81. *Id.* at 221. The Court rejected the state's assertion that religious "actions" are not protected by the First Amendment. The Court stated that there are some areas of conduct protected by the free exercise clause and which are consequently beyond the state's power to control. *Id.* at 219-20. The Court also rejected the claim that the compulsory education law applied uniformly to all citizens and therefore did not discriminate against any religious group. 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." *Id.* at 220.

self-sufficient members of society. The Court accepted the validity of these assertions but concluded that the additional two years of required education would do little to serve these interests, especially in view of the established informal vocational educational program of the Amish.[82] Consequently, the Court determined that the state had not met the burden of showing a compelling interest in the enforcement of its compulsory education laws and that the Amish religious liberty interest must therefore prevail.

From an evaluation of the Court's opinions in *Sherbert* and *Yoder*, one can conclude that an individual's claim of free exercise is given substantial protection by the Court as against the state's right to apply general regulatory statutes. It is only when the state can show a compelling interest in the legislative scheme and no alternative method of accomplishing its purposes that a statute imposing a burden on the free exercise of religion can be upheld. The balancing test is thus the standard of constitutionality which the Court applies to claims that state action is interfering with the right to the free exercise of religion. The next section of the note discusses the application of the free exercise balancing test to one particular type of church-state controversy.

C. Balancing Test Applied to Labor Cases

The balancing test has been applied by courts in labor cases involving conflicts between the government's regulatory power, as manifested in protective labor legislation, and the free exercise of religion.[83] Cases dealing with the possible unconstitutional conflict between the First Amendment's guarantee of religious freedom and labor laws have therefore been considered under the free exercise rather than the establishment clause.[84] An analysis of several such cases illustrates the courts' focus under the balancing test in religious liberty-labor legislation conflicts.

82. *Id.* at 221-22, 235-36; *see* Kurland, *The Supreme Court, Compulsory Education and the First Amendment's Religion Clauses*, 75 W. VA. L. REV. 213, 232-33 (1973).

83. *E.g.*, Prince v. Massachusetts, 321 U.S. 158 (1944) (child labor law upheld against free exercise claim); Yott v. North Am. Rockwell Corp., 501 F.2d 398 (9th Cir. 1974) (payment of labor union dues upheld against First Amendment objection); Linscott v. Millers Falls Co., 440 F.2d 14 (1st Cir. 1971) (governmental interest in union shop outweighed free exercise interest); Gray v. Gulf, Mobile & Ohio R.R., 429 F.2d 1064 (5th Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971) (government interest in union shop under Railway Act outweighed free exercise interest); Cap Santa Vue, Inc. v. NLRB, 424 F.2d (D.C. Cir. 1970) (NLRA collective bargaining requirements upheld against free exercise claim); Mitchell v. Pilgrim Holiness Church Corp., 210 F.2d 879 (7th Cir.), *cert. denied*, 347 U.S. 1013 (1954) (FLSA held applicable to religious publishing house).

84. *See* cases cited in note 83 *supra* .

The Supreme Court in *Prince v. Massachusetts*[85] utilized the balancing test to uphold a state child labor law prohibiting the street sale of magazines by minors against a free exercise claim of the right to distribute religious literature. The Court was faced with the claim of Mrs. Prince, a Jehovah's Witness, that the state was burdening her free exercise right, as well as that of her niece, to distribute literature according to the dictates of her religion.[86] In addition, Mrs. Prince claimed that her right to authority in her own home and in the rearing of her children was being infringed.[87] Under the balancing standard, the Court considered the societal interest, as manifested in child labor legislation, in protecting children from the harmful effects of child labor.[88] The Court recognized the importance of the religious liberty claim and the parental interest in raising children, but determined that the state's interest outweighed the free exercise claim: "[T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and . . . this includes, to some extent, matters of conscience and religious conviction."[89] Consequently, the child labor law was upheld against the Jehovah Witnesses' free exercise right to redistribute religious literature.[90]

The Seventh Circuit Court of Appeals held in *Mitchell v. Pilgrim Holiness Church*[91] that the Fair Labor Standards Act (FLSA) was applicable to a church-related publishing house. The publishing house asserted that enforcement of the FLSA against the religious organization would inhibit their free exercise right to carry on religious work without governmental interference.[92] In response to the free exercise claim, the *Mitchell* court stated that the free exercise of religion was never intended as a guarantee of *immunity* for a violation of the law.[93] Looking to the specific legislative purpose of the FLSA, the court then

85. 321 U.S. 158 (1944).

86. *Id.* at 159, 161-64.

87. *Id.* at 164.

88. *Id.* at 165-67.

89. *Id.* at 167.

90. *Id.* at 170. The Court emphasized the fact that the state's power to control children's conduct is much broader than the scope of the state's authority over adults. *Id.* at 168. It has been suggested that in light of subsequent decisions such as *Sherbert* and *Yoder*, the Court's ruling in *Prince* is somewhat suspect. *See* Marcus, *Forum of Conscience*, *supra* note 5, at 1266; Giannella, *Religious Liberty*, *supra* note 75, at 1395-96.

91. 210 F.2d 879 (7th Cir.), *cert. denied*, 347 U.S. 1013 (1954).

92. *Id.* at 882; *see also* Defendants' Petition for Writs of Mandamus and Prohibition at 4, Pacific Union case, *supra* note 7 [hereinafter cited as Defendants' Petition for Writs of Mandamus and Prohibition].

93. 210 F.2d at 885. *See* Note, *King's Garden Inc. v. F.C.C.: Loosening the Political Hands of Caesar*, 2 HASTINGS CONST. L.Q. 619, 636 (1975); *cf.* Meyers v. Southwest Region

balanced the governmental interest in insuring "to the workers of the United States engaged in the production of goods for commerce a minimum wage sufficient to maintain a minimum standard of living which Congress deemed to be necessary for their well-being" against the religious organization's claim of restraint on their free exercise of religion.[94] The court held that the application of the FLSA, a remedial, nondiscriminatory labor regulation, did not violate the defendants' free exercise rights, focusing on the fact that the FLSA did not in this case *prohibit* the free exercise of religion.[95]

In another labor case, *Gray v. Gulf, Mobile & Ohio R.R.*,[96] the Fifth Circuit Court of Appeals held that an employee's discharge for refusal to pay union dues and fees in lieu of joining the union did not violate the First Amendment right to free exercise of religion. The plaintiff alleged that the requirement of payment of union dues infringed upon his free exercise of religion because of his adherence to the Seventh-day Adventist religious belief barring support of union activity.[97] The court applied the balancing standard to determine whether the specific governmental interest expressed in the Railway Act could justify the interference with plaintiff's competing interest in choosing employment without sacrificing his religious convictions. The decision emphasized the court's belief that religious liberty cannot be a superordinating factor in every case:

> We do not doubt that plaintiff Gray has a genuine and sincere religious conviction that his financial support of a labor union would be wrong, but it is simply not possible in an ordered society to allow every aspect of religious belief to stay the hand of government under the aegis of the First Amendment.[98]

With this view in mind, the court held that the governmental interest in the union shop outweighed the burden imposed on plaintiff's religious freedom and in such a situation it is the religious adherent who must suffer the burden.[99]

Conference Ass'n of Seventh Day Adventists, 230 La. 310, 88 So. 2d 381 (1956) (First Amendment does not exempt a church from the Workman's Compensation Act).

94. 210 F.2d at 884.

95. *Id.* at 883-84. It is significant to note that the *Mitchell* court, in considering a First Amendment claim in a situation quite similar to that in the *Marshall* action, spoke only in terms of free exercise and did not discuss establishment clause principles.

96. 429 F.2d 1064 (5th Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971).

97. *Id.* at 1072.

98. *Id.*

99. *Id.* "The First Amendment commands us to be vigilant in protecting the free exercise of religion, but religious conscience cannot be a superordinating factor in every situation. The hand of government is not to be stayed where a compelling governmental interest outweighs the infringement upon First Amendment rights." *Id. Accord*, Linscott v. Millers

Collective bargaining requirements under the National Labor Relations Act (NLRA) were upheld in *Cap Santa Vue, Inc. v. NRLB*[100] against an employer's claim that his religious beliefs prevented him from dealing with a labor union. The plaintiff, a member of the Seventh-day Adventist Church, asserted that he had a conscientious objection to bargaining with a labor union and that the NLRA's collective bargaining requirement therefore constituted a violation of his right to the free exercise of religion.[101] In response to the free exercise claim, the District of Columbia Circuit Court of Appeals stated that although the freedom to believe is absolute, freedom of conduct may be curtailed or regulated for the protection of society.[102] After considering the specific legislative purpose of the NLRA, the court balanced the governmental interest in collective bargaining against the plaintiff's claim of infringement on his free exercise of religion. The court found that "[t]here can be little doubt that there is a compelling public interest in applying the good faith collective bargaining requirement uniformly to all employers and labor unions."[103] Consequently, the court held that the application of the NLRA requirements to the plaintiff did not violate his free exercise rights, especially in view of the fact that the NLRA is concerned with an employer's *conduct* under the Act rather than with his *belief* in the Act.[104]

These labor decisions indicate that the courts, when confronted with a conflict between labor statutes and freedom of religion, have turned to the free exercise balancing test to resolve the constitutional questions. It should be noted, however, that the Supreme Court in recent years, even under the balancing test, has moved away from a rather narrow interpretation of free exercise to a standard which allows the protection of free exercise claims against all but the most *compelling* state interests.[105] The application of the free exercise balancing test to the labor cases essentially follows the same pattern as the Court's anal-

Falls Co., 440 F.2d 14 (1st Cir. 1971); *see* Note, *The "Free Exercise" Clause of the First Amendment to the United States Constitution is No Defense to a Union Shop Agreement Allowed Under the Railway Labor Act*, 8 HOUS. L. REV. 387 (1970).

100. 424 F.2d 883 (D.C. Cir. 1970).

101. *Id.* at 884-85.

102. *Id.* at 886-87.

103. *Id.* at 890. In Yott v. North Am. Rockwell Corp., 501 F.2d 398 (9th Cir. 1974), the Ninth Circuit held that federal labor policy overrides a First Amendment objection to payment of union dues. *Accord*, Wicks v. Southern Pac. Co., 231 F.2d 130 (9th Cir.), *cert. denied*, 351 U.S. 946 (1956).

104. 424 F.2d at 889.

105. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

ysis did in the *Sherbert, Yoder* and Sunday-closing cases.[106] The courts in the labor cases focus their attention, however, on the specific legislative purpose underlying the challenged statute rather than generalized statements of the state's interest.[107]

II. *Marshall v. Pacific Union Conference of Seventh-day Adventists*

Consideration of the decisions dealing with labor legislation-religious liberty questions indicates that the courts have traditionally analyzed these conflicts under the balancing test of the free exercise clause. It was against this background that a United States District Court in *Marshall v. Pacific Union Conference of Seventh-day Adventists*[108] was called upon to weigh the competing interests of the United States Department of Labor and the Seventh-day Adventist Church.

A. Background

On September 5, 1975, the United States Department of Labor filed suit against the Pacific Union Conference of Seventh-day Adventists under the Fair Labor Standards Act (FLSA)[109] charging violations of the Act's equal pay provisions. The statute provides that an employer shall not discriminate

> between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which [the employer] pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. . . .[110]

These provisions of the FLSA became applicable to the defendants under the Education Amendments of 1972, which stipulated that executive, administrative and professional employees of educational institutions previously exempt from the equal pay requirements were now protected by these provisions.[111]

The Department of Labor alleged that the Pacific Union Confer-

106. *See* notes 58-82 and accompanying text *supra*.

107. *E.g.*, International Ass'n of Machinists v. Street, 367 U.S. 740, 750-75 (1961); Linscott v. Millers Falls Co., 440 F.2d 14, 17-18 (1st Cir. 1971); Mitchell v. Pilgrim Holiness Church Corp., 210 F.2d 879, 883-84 (7th Cir.), *cert denied*, 347 U.S. 1013 (1954).

108. Pacific Union case, *supra* note 7.

109. 29 U.S.C. §§ 201-219 (1976).

110. Equal Pay Act, 29 U.S.C. § 206(d)(1) (1976). *See generally* Murphy, *Female Wage Discrimination: A Study of the Equal Pay Act 1963-1970*, 39 U. CIN. L. REV. 615 (1970).

111. Education Amendments of 1972, 29 U.S.C. § 213(a)(1) (1976). The defendant had previously been exempt. *See generally* Ross & McDermott, *The Equal Pay Act of 1963: A*

ence had violated the FLSA through the head-of-household pay scale employed in 147 church schools and colleges within California.[112] Under this scheme, an employee classified as head-of-household was paid a higher wage and given "fringe benefits" such as health coverage, rent allowance and educational scholarships for dependent children.[113] The designation head-of-household theoretically applied to any individual who was the sole or majority supporter of a family;[114] in practice, however, this classification was generally applied only to married men.[115]

In response to the Labor Department's allegations, the defendants argued that their pay scale was in line with the FLSA and that even if it was not, the First Amendment granted them absolute protection from governmental regulation.[116] In the alternative, the defendants claimed that their right to free exercise of religion would be violated by the governmental investigation, surveillance and regulation necessary to insure compliance with the equal pay regulations of the FLSA. The

Decade of Enforcement, 16 B.C. INDUS. AND COM. L. REV. 1, 8-9 (1974) [hereinafter cited as Ross & McDermott].

112. Plaintiffs' Pretrial Memorandum of Fact and Law at 10, Pacific Union case, *supra* note 7.

113. L.A. Times, Apr. 5, 1977, (Metro), at 1, col. 2; Ms., Apr., 1978, at 22. For a detailed description of how the head-of-household system worked in one Seventh-day Adventist institution, see Plaintiff's Supplemental Brief Re Class Action Proceedings, Silver v. Pacific Press Publishing Ass'n, No. CV 73-0168 (N.D. Cal. 1973).

114. L.A. Times, Apr. 5, 1977, (Metro), at 1, col. 2.

115. *Id.*

116. Defendants' Memorandum of Contentions of Fact and Law, *supra* note 9, at 7-9. The defendants argued that the First Amendment religious liberty guarantees provide *complete* immunity from laws of general operation whenever such a law or regulation conflicts with some religious belief or practice. Defendants' Petition for Writs of Mandamus and Prohibition, *supra* note 92, at 22. To support this contention they relied upon James Madison's statement in his *Memorial and Remonstrance Against Religious Assessments* that "We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance." Everson v. Board of Educ., 330 U.S. 1, 64 (1947) (Rutledge, J., dissent app. I).

The defendants' reliance on this short statement of Madison's, viewed out of its proper historical and textual context, is unsupportable. It is very difficult and hardly practical for a modern court to apply the religion clauses using an historical perspective to interpret ideas which are based on outdated social, political and economic conditions. Giannella, *Religious Liberty*, *supra* note 75, at 1383. Professor Giannella has stated that "[a]s the social, political, and economic milieu evolves, so must the content given the first amendment." *Id.* at 1383-84.

Notwithstanding Madison's statement, the courts have not granted total immunity to religious organizations and individuals in the free exercise area. The Court's adherence to the belief/action doctrine, although it is no longer an absolute distinction, and its formulation and application of the balancing test, conclusively indicate that claims of free exercise of religion do not provide complete immunity from the regulations imposed by civil laws, particularly those laws enacted to protect the public peace, health and welfare.

Pacific Union Conference asserted that this governmental action constituted an unconstitutional interference with the church's relationship with its denominational "ministers and missionaries" and with the religious mission of the school system.[117] Finally, in advancing the establishment clause claim, the defendants contended that the Labor Department regulation necessary under the FLSA would constitute a significant intrusion into the work of the church and its relationship with its religious workers, thereby constituting an excessive entanglement between government and church.[118] On the basis of these freedom of religion claims, the defendants moved for summary judgment. Judge Real was therefore required to consider the constitutionality of the application of the FLSA to a religious organization.

B. Memorandum Opinion on Motion for Summary Judgment

After resolving the question of jurisdiction,[119] the district court ruled on the defendants' motion for summary judgment. The court first evaluated the free exercise claims and then considered the establishment clause challenge. The defendants had asserted that their employer-employee relationship was protected against enforcement of the FLSA's equal pay provisions because such enforcement would inhibit the religious organization's free exercise of its religious belief that the government should not become involved in the employment relation-

117. Defendants' Petition for Writs of Mandamus and Prohibition, *supra* note 92, at 2: "For [Seventh-day Adventists] the education of their young . . . is an essential part of their church's divine mission. The church considers it intolerable, both as a matter of constitutional law and as a matter of fact and doctrine, that agents of the government conduct investigation, surveillance and regulation of their religious activity." *Id.* at 4.

118. Defendants' Proposed Findings of Fact and Conclusions of Law on Motion for Summary Judgment at 4, Pacific Union case, *supra* note 7.

119. The question of the court's jurisdiction over a particular question must be determined before the court can validly consider the substantive issues. M. GREEN, BASIC CIVIL PROCEDURE 3-4, 11 (1972). Here the question was raised as to whether the court had jurisdiction over a case involving the wages paid to non-clergy religious employees. The jurisdiction of civil courts has been rather narrowly defined in this area. *See* Watson v. Jones, 80 U.S. (13 Wall.) 679 (1872). There are several situations where the civil courts will generally refuse to become involved in religious disputes of an ecclesiastical nature: (1) church property disputes, (2) cases where the claims of both parties are based on religious factors and (3) matters involving the clergy. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 724-25 (1976). *See* Presbyterian Church v. Mary Elizabeth Blue Hull Church, 393 U.S. 440, 449 (1969); Kedroff v. St. Nicolas Cathedral, 344 U.S. 94, 120-21 (1952); L. PFEFFER, CHURCH, STATE, AND FREEDOM 301-02 (rev. ed. 1967).

An extended discussion of this issue is beyond the scope of this note. *See generally* TRIBE, *supra* note 2, at 871-80; Casad, *The Establishment Clause and the Ecumenical Movement*, 62 MICH. L. REV. 419 (1964); Note, *Judicial Intervention in Church Property Disputes—Some Constitutional Considerations*, 74 YALE L.J. 1113 (1965); Comment, 1977 UTAH L. REV. 138.

ship between the church and its parochial school employees.[120]

The court initially stated that if there was a conflict between the FLSA provisions and the church's conduct which impinged upon the church's religious freedom, the government would be required to show a compelling interest.[121] The court went on to note, however, that under the *Braunfeld* rule, courts will not "strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion. . . ."[122] In order to determine whether or not the church's beliefs were being burdened, the court looked to the writings of Ellen White, a recognized prophet of the church. In her book *Evangelism*, commenting on inferior wages for women, she stated:

> This is making a difference, and selfishly withholding from such workers [women] their due. God will not put His sanction on any such plan. Those who invented this method may have thought they were doing God-fearing, soul-loving labours. But there will be an account to settle by and by, and then those who now think this exaction, this partiality in dealing, a wise scheme, will be ashamed of their selfishness.[123]

Relying on this statement, the court determined that the defendants could not prove an impingement on their exercise of religion.[124]

After dismissing the free exercise claims, the court went on to discuss the establishment clause challenge primarily in terms of the excessive entanglement prong of the establishment test.[125] To determine whether the Labor Department's proposed actions constituted an impermissible involvement with defendants' religious activities, the court looked at excessive entanglement from both a qualitative and quantitative perspective: "Qualitative in that the standard must respect the concern for separation of church and state. Quantitative in the sense that—on a consideration of the nature of the intrusion into religion—it

120. Defendants' Petition for Writs of Mandamus and Prohibition, *supra* note 92, at 4.

121. Pacific Union case, *supra* note 7, at 3.

122. *Id.* at 3-4 (quoting Braunfeld v. Brown, 366 U.S. 599, 606 (1961)). The *Braunfeld* Court characterized this permissible type of legislation as that which does not make unlawful the religious practice itself. *Id.* The court's reliance on the *Braunfeld* rule is questionable in view of the Supreme Court's decision in Sherbert v. Verner, 374 U.S. 398 (1963). *See* note 74 *supra*.

123. E. WHITE, EVANGELISM 492-93 (1946).

124. Pacific Union case, *supra* note 7, at 4-5. It can be questioned whether this one statement by a church prophet should have been taken by the court as a specific, inclusive statement of official church policy. In contrast, the defendants pointed to the Biblical injunction that the man should be the head of the house. Defendants' Petition for Writs of Mandamus and Prohibition, *supra* note 92, at 13, 22-23. *See Ephesians* 5:21-33.

125. For a discussion of excessive entanglement, *see* notes 29-43 and accompanying text *supra*.

cannot be 'excessive.' "[126] Because of these considerations, courts must carefully consider the cumulative impact of the entire relationship.[127] The opinion indicated that "[e]ntanglement is not . . . an absolute principle of application of the First Amendment to all contact between religious organizations and government."[128] It is therefore necessary for a court addressing an entanglement problem to also consider the *substance* of what is to be accomplished by the legislation, rather than merely looking to the form in which the purpose of the Act is to be carried out.[129] In this regard, the *Marshall* court ascertained that the Secretary of Labor's only interest was to see that the defendants' employees were assured the minimum and nondiscriminatory wage guaranteed to them under the equal pay provisions of the FLSA.[130] The court indicated the proper perspective from which entanglement must be viewed: "Excessive entanglement cannot be measured simply quantitatively by the size of the religious organization involved. [There are also] qualitative concerns which are the essence of the prohibition against the 'establishment of religion.' These qualitative concerns require consideration of the *nature of the intrusion*. . . ."[131] Viewed from a qualitative and quantitative perspective, the proposed Labor Department actions were found by the court not to constitute excessive entanglement because "the involvement of the Secretary in the enforcement of the wage provisions of the FLSA is minimal."[132]

The court finally asserted that it is the right and the duty of the

126. Pacific Union case, *supra* note 7, at 5.

127. *Id.* at 5-7, (citing Lemon v. Kurtzman, 403 U.S. 602, 612-14, 622 (1977)); Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970). *See generally* Note, *Excessive Entanglements: A New Dimension to the Parochial Aid Controversy Under the First Amendment*, 3 LOY. CHI. L.J. 73, 81-82 (1972).

128. Pacific Union case, *supra* note 7, at 6.

129. *Id.* at 7.

130. *Id.* This is the same interest which the Seventh Circuit upheld in Mitchell v. Pilgrim Holiness Church, 210 F.2d 879 (7th Cir.), *cert. denied*, 347 U.S. 1013 (1954), a similar fact situation analyzed under the free exercise clause. *See* notes 91-95 and accompanying text *supra*. The *Mitchell* court indicated the governmental interest in the following statement: "Here we have a remedial measure seeking to insure to the workers of the United States engaged in the production of goods for commerce a minimum wage sufficient to maintain a minimum standard of living which Congress deemed to be necessary to their well-being." 210 F.2d at 884.

131. Pacific Union case, *supra* note 7, at 7 (emphasis in the original). *See* note 126 and accompanying text *supra*.

132. Pacific Union case, *supra* note 7, at 8. The court had previously stated that "the audit procedures herein are no more onerous or intrusive than those required by the tax exemption approved in *Walz*, Walz v. Tax Comm'n, 397 U.S. 664 (1970). The Secretary, neither statutorily nor by reason of this opinion, has wholesale license . . . to institute a pervasive scheme for supervision of defendants' religious activities." *Id.* at 7 (citation added).

judiciary, in such a controversy, to determine whether the interest in maintaining an orderly society intrudes on religion in an unconstitutional and not a theological sense. The court concluded by stating, "[I]t is with this principle in mind that this Court finds no constitutional infirmity in the application of the provisions of the FLSA to defendants' educational activities."[133] The case was scheduled to go to trial in October, 1977, but several days before the trial was to commence the defendants signed a consent decree and the case was dismissed with prejudice.[134]

Judge Real's utilization of the excessive entanglement test in a labor legislation-religious liberty conflict departed from the precedents of the Supreme Court's First Amendment freedom of religion decisions.[135] The next section of the note will discuss whether this expanded application of excessive entanglement is justified in view of prior Court decisions.

III. Excessive Entanglement: A Proper Standard to be Applied in Labor Legislation Cases?

Had the *Marshall* court followed the precedents of past labor legislation-religious liberty decisions, it would have decided the case under the free exercise balancing standard. A consideration of the concepts underlying the free exercise and establishment clauses, and of the Court's treatment of cases arising under them, suggests that *Marshall* may not be an establishment case in the traditional sense but may be

133. *Id.* at 8. *See, e.g.*, Board of Educ. v. Barnette, 319 U.S. 624, 644 (1943) (Black & Douglas, JJ., concurring opinion); KAUPER, RELIGION AND THE CONSTITUTION, *supra* note 4, at 43.

After the denial of summary judgment, the defendants filed a petition with the Ninth Circuit Court of Appeals for writs of mandamus and prohibition. In this petition the defendants alleged that the enforcement of three discovery orders, allowing the Labor Department's representatives to enter the church school premises in order to examine payroll records, would violate their religious liberty guarantees. Defendants' Petition for Writs of Mandamus and Prohibition, *supra* note 92, at 2-4. The Court of Appeals refused to grant relief by way of mandamus and the defendants then requested that Justice Rehnquist, sitting as Circuit Justice, stay enforcement of the discovery orders. Justice Rehnquist denied the defendants' request on procedural grounds and suggested that the Supreme Court would consider the defendants' constitutional claims, if at all, after the case went to trial at the district court level followed by an appeal to the Ninth Circuit Court of Appeals. 434 U.S. 1305, 1309 (1977).

134. The defendants, for the purpose of settlement and without admitting any violations of the FLSA, agreed to (1) pay plaintiff $650,000 as a total settlement and (2) conform their pay practices to the equal pay provisions of the FLSA. Stipulation for Future Compliance and Order of Dismissal with Respect to Pacific Union Conference of Seventh-day Adventists at 1–3, Pacific Union case, *supra* note 7.

135. *See* notes 83-107 and accompanying text *supra*.

considered under the entanglement test as an application of the concept of benevolent neutrality. It is therefore necessary to consider whether a standard for determining the proper test under the religion clauses can be distilled from prior Supreme Court opinions.

A. Standard for Determining the Proper Test

The religion clauses of the First Amendment are by nature somewhat conflicting,[136] and cases arising under them cannot always be classified solely as establishment or free exercise problems.[137] Justice Frankfurter recognized the conflicting nature of the clauses when he stated that "[a]ny attempt to formulate a bright-line distinction is bound to founder."[138] The Court's difficulty in this area was further emphasized by Chief Justice Burger in *Walz v. Tax Commission*:[139] "The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."[140] Although there are situations in which the two clauses overlap, it is significant to note that they prohibit two quite different types of governmental interference with religious freedom. A free exercise claim requires a showing of a direct, governmental infringement upon an individual's religious beliefs or activities, while the establishment clause may be violated by laws that have the effect of establishing an official religion, regardless of their impact on individuals.[141]

The categorization of an issue as free exercise or establishment may be of great importance. For example, in two of the Sunday-clos-

136. This "conflicting" nature can be observed in a free exercise situation that requires some accommodation for an individual or religious organization which might be seen as an establishment of religion. Such a question arose in Sherbert v. Verner, 374 U.S. 398 (1963), wherein the Court was required to determine whether the exemption from eligibility requirements for unemployment compensation granted to Mrs. Sherbert constituted an "establishment" of the Seventh-day Adventist religion in South Carolina. In a discussion ancillary to the main holding, the Court held that there was no establishment but rather an implementation of the governmental obligation of neutrality. *Id.* at 409-10.

137. Duffy, *A Review of Supreme Court Decisions on Aid to Nonpublic Elementary and Secondary Education*, 23 HASTINGS L. J. 966, 967 (1972).

138. McGowan v. Maryland, 366 U.S. 420, 463 (1961) (Frankfurter, J., separate opinion). *See also* Tilton v. Richardson, 403 U.S. 672, 677 (1971); Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970).

139. 397 U.S. 664 (1970).

140. *Id.* at 668-69.

141. Engel v. Vitale, 370 U.S. 421, 430 (1962). *See generally* Moore, *"Establishment" and "Free Exercise," supra* note 2, at 142.

ing cases,[142] where the Court was required to determine whether an individual had standing to challenge the constitutionality of a legislative enactment, the Court held that the claimants had standing on the establishment clause issue but not on the free exercise issue.[143] The categorization of an issue will also determine which of the two separate tests will be applied by the Court: free exercise balancing[144] or the three-pronged establishment test.[145] These separate tests may result in a law being declared constitutional as to one clause and unconstitutional as to the other clause.

In considering cases raising establishment or free exercise questions, the Supreme Court has not advanced specific standard for determining whether a particular situation requires an application of the free exercise or the establishment clause test. Historically, however, the two clauses have been recognized as setting forth separate constitutional requirements.[146] In spite of the fact that a bright-line distinction cannot be drawn between the two clauses, the Court has provided general indications as to whether a case should be considered from the perspective of the establishment clause or the free exercise clause. These indications must be isolated as aids in determining whether the *Marshall* case should have been considered under the free exercise or establishment clause or a combination thereof.

In the "typical" establishment case, the primary element is a civil regulation *favoring* religion. The Supreme Court establishment decisions have all involved some type of governmental *aid* to religion.[147] On the other hand, the primary purpose of free exercise is to prevent a "disfavoring" or prohibition of religion through "coercion against per-

142. Two Guys v. McGinley, 366 U.S. 582 (1961); McGowan v. Maryland, 366 U.S. 420 (1961). *See* note 60 *supra.*

143. 366 U.S. at 592; 366 U.S. at 529-30. *See* Moore, *"Establishment" and "Free Exercise," supra* note 2, at 147.

144. *See* notes 51-57 and accompanying text *supra.*

145. *See* notes 25-43 and accompanying text *supra.*

146. Moore, *"Establishment" and "Free Exercise," supra* note 2, at 147, 149. *See generally* Duffy, *A Review of Supreme Court Decisions on Aid to Nonpublic Elementary and Secondary Education*, 23 HASTINGS L.J. 966, 967 (1972). For a discussion of free exercise and establishment clause values and tests, *see* notes 18-57 and accompanying text *supra.*

147. Moore, *"Establishment" and "Free Exercise," supra* note 2, at 150 & n.33. *See, e.g.*, Wolman v. Walter, 433 U.S. 229 (1977) (textbooks and instructional materials); Roemer v. Board of Pub. Works, 426 U.S. 736 (1976) (aid to private colleges); Meek v. Pittenger, 421 U.S. 349 (1975) (textbooks); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (money grants and tuition reimbursements); Hunt v. McNair, 413 U.S. 734 (1973) (construction financing); Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973) (testing and record-keeping costs); Tilton v. Richardson, 403 U.S. 672 (1971) (construction grants); Lemon v. Kurtzman, 403 U.S. 602 (1971) (teachers' salaries, textbooks, and instructional materials); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (tax exemption).

sonal religious practices."[148] It should be noted that a law disfavoring religion could be dealt with under either clause because "establishment" requires that legislation must neither advance *nor inhibit* religion.[149] However, these "disestablishment" cases have traditionally been dealt with under the free exercise clause.[150] Consequently, the religion clause cases have generally fallen into two categories: prohibitive coercion and advancement. The cases dealing with some prohibitory effect on religion or the practice thereof have been viewed as raising free exercise considerations,[151] while situations involving the advancement of religion through governmental involvement have been analyzed under the establishment clause.[152]

In some circumstances, however, the two clauses may conflict. This conflict between the requirements of each clause can most readily be observed in the situation where the legislature is forced to grant a religious exemption to a law of general application in order to accommodate an individual's right to the free exercise of religion.[153] If the state grants such an exemption, the question arises whether this accommodation constitutes an establishment of religion.[154] The Court's opinion in *Sherbert v. Verner*[155] suggests that in some instances, in spite of

148. Moore, *"Establishment" and "Free Exercise," supra* note 2, at 148, 151.

149. *See* notes 18-20 and accompanying text *supra*.

150. Moore, *"Establishment" and "Free Exercise," supra* note 2, at 151.

151. School Dist. v. Schempp, 374 U.S. 203, 223 (1963). *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972) (state educational requirement interfering with Amish beliefs); Sherbert v. Verner, 374 U.S. 398, 403-04 (1963) (denial of unemployment benefits for refusal to work on Saturdays); Gallagher v. Crown Kosher Super Mkt., 366 U.S. 617, 630 (1961) (economic loss from Sunday-closing laws); Braunfeld v. Brown, 366 U.S. 599, 601-02 (1961) (economic loss from Sunday-closing laws).

152. *See, e.g.*, Wolman v. Walter, 433 U.S. 229 (1977) (textbooks and instructional materials); Roemer v. Board of Pub. Works, 426 U.S. 736 (1976) (aid to private colleges); Meek v. Pittenger, 421 U.S. 349 (1975) (textbooks); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (money grants and tuition reimbursements); Hunt v. McNair, 413 U.S. 734 (1973) (construction financing); Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973) (testing and record-keeping costs); Tilton v. Richardson, 403 U.S. 672 (1971) (construction grants); Lemon v. Kurtzman, 403 U.S. 602 (1971) (teachers' salaries, textbooks and instructional materials); Epperson v. Arkansas, 393 U.S. 97 (1968) (anti-evolutionary limitation on public school study); Board of Educ. v. Allen, 392 U.S. 236 (1968) (textbooks); School Dist. v. Schempp, 374 U.S. 203 (1963) (Bible reading); Engel v. Vitale, 370 U.S. 421 (1962) (prayer); Zorach v. Clauson, 343 U.S. 306 (1952) (release time for religious instruction); Illinois *ex. rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948)(release time for religious instruction); Everson v. Board of Educ., 330 U.S. 1 (1947) (bus transportation).

153. *E.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

154. *See* Dodge, *Sociological Approach*, *supra* note 19, at 705; Giannella, *Religious Liberty*, *supra* note 75, at 1398-99.

155. 374 U.S. 398 (1963).

the prohibition against establishment, the free exercise clause *requires* the legislature to grant a special religious exemption to accommodate the free exercise rights of the individual,[156] and that this accommodation does not in fact constitute a violation of the establishment clause.[157]

It is in this area of tension between the two clauses that the Supreme Court has attempted to apply the concept of neutrality in order to accommodate the competing interests of the establishment and free exercise clauses.[158] The establishment clause, viewed alone, requires a strict neutrality between government and religion. However, the judicially-created concept of benevolent neutrality balances free exercise against establishment and is weighted in favor of free exercise. The operation of this concept is described by Professor Kauper:

> In order to advance religious freedom or the religious interest of the people or in order to prevent discrimination on religious grounds in its laws or programs, government in some cases may, and in other cases must, subordinate the strict neutrality in religious matters required by the establishment clause to the larger and relative neutrality inspired by the necessity of balancing establishment against free exercise. The accommodation concept becomes the judicial vehicle for harmonizing the two clauses in the interests of this larger and benevolent neutrality which in an over-all sense is directed to the end of protecting and advancing religious liberty.[159]

If unlimited accommodation were allowed, however, it would defeat the purpose of the establishment clause. It was therefore necessary to develop a test to determine the permissible degree and extent of involvement between government and religion. The Supreme Court in *Walz v. Tax Commission*[160] introduced the excessive entanglement test to provide such a standard.[161] The Court recognized the need for a

156. *Id.* at 409-10. The special exemption requirement is restricted to the narrow area where the legislation in question imposes a substantial burden on the free exercise rights of a class of citizens. Dodge, *Sociological Approach*, *supra* note 19, at 705. In addition, Professor Giannella asserts that "[t]he courts will not require the state to grant an exemption from economic regulations to religious interests, if a preferential benefit would be conferred." Giannella, *Religious Liberty*, *supra* note 75, at 1398.

157. 374 U.S. at 409-10. *See* KAUPER, RELIGION AND THE CONSTITUTION, *supra* note 4, at 20; Dodge, *Sociological Approach*, *supra* note 19, at 705. *See generally* Kauper, *Walz Decision*, *supra* note 23, at 295.

158. For a general discussion of the concepts of neutrality and accommodation, see Kauper, *Schempp and Sherbert*, *supra* note 72, at 3.

159. *Id.* at 27-28.

160. 397 U.S. 664 (1970).

161. *Id.* at 674. In evaluating the underlying policy considerations, it is important to consider the reasons advanced by the Court for applying the entanglement standard. Two

"benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."[162] The acceptance of benevolent neutrality indicated the Court's intention to allow the greatest possible area in which free exercise could flourish; at the same time, the development of the entanglement test indicated the Court's concern that the involvement allowed under benevolent neutrality would not constitute a violation of the establishment clause.

Since freedom of religion cases do not always fall under one clause or the other, there is a gray area between them where the Court has attempted to apply this concept of benevolent neutrality. Statutes which do not violate the principle of strict neutrality because their primary purpose and effect neither advance nor inhibit religion, but which do constitute some degree of church-state involvement, would fall into the area of benevolent neutrality and would be measured against the excessive entanglement standard. Although cases dealing with "disestablishment" of religion have traditionally been treated as free exercise questions, it can be argued that they can also be considered under the establishment clause. Because of the Court's interpretation that establishment protects against both advancement and inhibition of religion, the governmental action in question could be measured under the excessive entanglement standard to determine whether the resultant church-state relationship is impermissibly entangling.

Although the *Marshall* court's expanded application of excessive entanglement may therefore be justifiable, Judge Real should have given the defendants' free exercise claim more careful consideration. Since different tests are employed by the Court to determine constitu-

---

such reasons were suggested in *Walz*: first, to protect religion and religious institutions from governmental interference with religious beliefs and practices, *id.* at 669-70, and second, to prevent religio-political strife, *id.* at 676. *See* Giannella, *Lemon and Tilton*, *supra* note 41, at 171; Kirby, *Everson to Meek and Roemer: From Separation to Détente in Church-State Relations*, 55 N.C.L. REV. 563, 569 (1977); Morgan, *The Establishment Clause and Sectarian Schools: A Final Installment?*, 1973 SUP. CT. REV. 57, 65; Zoetewey, *Excessive Entanglement: Development of a Guideline for Assessing Acceptable Church-State Relationships*, 3 PEPPERDINE L. REV. 279, 287 (1976).

Since it is recognized that some church-state involvement is inevitable in government aid cases, the entanglement test was created to delineate the boundaries of what constitutes permissible governmental involvement. Walz v. Tax Comm'n, 397 U.S. at 670.

162. 397 U.S. at 669. The *Walz* Court stated the effect of this principle: "Each value judgement under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so. Adherence to the policy of neutrality that derives from an accommodation of the Establishment and Free Exercise Clauses has prevented the kind of involvement that would tip the balance toward governmental control of churches or governmental restraint on religious practice." *Id.* at 669-70.

tionality under each of the clauses, it is possible for a party to prevail under one test but not under the other.[163]

B. A Free Exercise Analysis

The free exercise challenge, which the *Marshall* court dismissed without extended discussion, was the very basis of the religious liberty claims of the defendants.[164] They adamantly maintained that their free exercise of religion would be seriously burdened by the Secretary of Labor's interference with the church's employer-employee relationship in religious schools.[165] Once these free exercise claims were advanced, the court should have determined whether the defendants had standing to sue under the free exercise clause, and if they did, it should have applied the balancing test.

In applying the free exercise test, a court has to determine whether there is the coercion of a religious belief which is necessary for standing under the free exercise clause.[166] The *Marshall* court determined that an application of the FLSA to the defendants did not impinge on their religious beliefs because the defendants did not believe in sex discrimination.[167] The defendants were not arguing, however, that sex discrimination itself was protected by the First Amendment, but rather that they should be free from governmental involvement in the relationship between the church and its religious employees.[168] Therefore, the defendants arguably had a free exercise belief that was affected by the FLSA equal pay provisions and should have been granted standing.

If standing were established, the defendants would have been required to illustrate the importance of the religious practice for which the exemption was requested, and to show that there was governmental interference with that practice.[169] On the other hand, the government would have been required to show that it had a compelling interest in denying a religious exemption to the FLSA's equal pay provisions. In order to overcome such a showing, the defendants would have to convince the court that the privity of their church employer-employee rela-

163. *See* notes 142-45 and accompanying text *supra.*

164. For a summary of the defendants' free exercise claims and the *Marshall* court's treatment of them, see notes 116-24 and accompanying text *supra.*

165. Defendants' Petition for Writs of Mandamus and Prohibition, *supra* note 92, at 2. *See* Catholic Bishop v. NLRB, 559 F.2d 1112 (7th Cir. 1977), *cert. granted*, 98 Sup. Ct. 1231 (1978); Caufield v. Hirsch, 46 U.S.L.W. 2025 (E.D. Pa. July 7, 1977).

166. *See* note 60 *supra.*

167. *See* note 124 and accompanying text *supra.*

168. *See* note 117 and accompanying text *supra.*

169. *See* notes 45 & 46 and accompanying text *supra.*

tionship is of great importance to the exercise of their religious mission, and that the Labor Department's enforcement procedures would constitute an impermissible burden on this exercise of religion.

An analysis of the present action indicates that the government would very likely be able to show a compelling interest in denying a religious exemption to the nondiscriminatory application of this remedial labor legislation. The government could show the importance of the social and economic values underlying the FLSA,[170] and that there was no less restrictive alternative available.[171] In contrast, it appears unlikely that the defendants would be able to show that the minimal Labor Department actions would interfere with their free exercise of religion.[172] If it had applied the balancing standard, the *Marshall* court would therefore probably have reached the same conclusion that it did under the excessive entanglement analysis.

As has been discussed in a previous section,[173] the *Marshall* court also could have considered this case under the establishment clause as an application of benevolent neutrality if the free exercise claim was dismissed for lack of standing or on the merits.

C. The Establishment Clause Analysis

If standing were denied under the free exercise clause, the only

170. The Supreme Court recognized the social and economic importance underlying the equal pay provisions of the FLSA in Corning Glass Works v. Brennan, 417 U.S. 188 (1974). The opinion referred to the congressional purpose underlying the Equal Pay Act, which was "to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry." *Id.* at 195. In discussing the importance of the Act, Secretary of Labor Wirtz stated: "The present practice of paying discriminatory wage rates on the basis of sex has an undesirable effect on many aspects of the life of our Nation. It tends to affect adversely the general purchasing power and the living standard of workers. It offers an unfair competitive advantage for employers who follow this practice. The resulting low wage levels often prevents [sic] the maximum utilization of worker skills to the detriment of morale and, in turn, of production." 109 CONG. REC. 2889 (1963) (statement of Secretary Wirtz). For a discussion of the background and legislative history of the Equal Pay Act, see Ross & McDermott, *supra* note 111, at 2-6.

171. If the government were able to show that a significant number of non-clergy employees were covered by the Act, it would be able to prove that a religious exemption would entail actual harm to the total regulatory program.

172. The *Marshall* court, under its excessive entanglement analysis, found that the Labor Department's proposed actions would constitute a *minimal* interference with the defendants' First Amendment rights, and that the resulting involvement was no more intrusive than that sanctioned by the Supreme Court in Walz v. Tax Comm'n, 397 U.S. 664 (1970). *See* note 132 and accompanying text *supra*. The Labor Department actions under the Equal Pay Act consist of investigation of employers' wage scales either as a result of a complaint or pursuant to a random general investigation. Murphy, *Female Wage Discrimination: A Study of the Equal Pay Act 1963-1970*, 39 U. CIN. L. REV. 615, 622 (1970).

173. *See* notes 158-62 and accompanying text *supra*.

alternative would have been to attack the legislation as a violation of the establishment clause. The FLSA has a secular purpose, and it is not a law having the primary effect of advancing religion. Consequently, in order to bring this case within the confines of the establishment clause it would be necessary to show that enforcement of this statute against the defendant religious organization would constitute an *inhibition* of religion. This "disestablishment" approach is not a common one, but it appears that a court may hold a law to be in violation of the First Amendment if it in some way works to "destroy" rather than encourage religion.[174] The *Marshall* action could therefore be decided under the excessive entanglement test because the second prong of the Supreme Court's establishment clause analysis speaks in terms of preventing the government from aiding *or inhibiting* religion.[175]

The government's proposed action in *Marshall* arguably constituted an indirect inhibition of the defendants' religious practices since it involved governmental regulation and investigation of the defendants' relationship with its religious employees.[176] The concept of benevolent neutrality, however, requires that the government allow the greatest area possible in which religion can flourish.[177] There is always some danger of governmental intrusion into religious activities either through a posture of aid or inhibition. The dangers of governmental intrusion can be minimized through doctrines directly limiting the entanglement of government in religious affairs. It was for the specific purpose of limiting this governmental involvement that the excessive entanglement doctrine was introduced.[178] Even though the entanglement test was conceived to deal with the relationship between government and religion resulting from governmental *aid*, it can be argued that the same basic concern, that of governmental interference with religious beliefs or practices, is engendered by governmental involvement with religion under labor legislation. It is therefore logical to conclude that the excessive entanglement test can also be applied to situations where the government becomes involved with a religious organization through its implementation of remedial labor legislation where that involvement constitutes a disestablishment or inhibition of religion.[179]

174. *See* note 20 and accompanying text *supra*; *see also* Pacific Union case, *supra* note 7, at 5.

175. School Dist. v. Schempp, 374 U.S. 203, 222 (1963). *See* notes 20 & 149 and accompanying text *supra*.

176. *See* notes 117 & 118 and accompanying text *supra*.

177. *See* notes 158-62 and accompanying text *supra*.

178. *See* notes 31-34 and accompanying text *supra*.

179. *See* Comment, *Free Exercise Clause*, *supra* note 6, at 661.

The *Marshall* court's application of the entanglement standard, even though not suggested by prior court decisions, was thus a reasonable extension of the excessive entanglement doctrine.

It appears that the *Marshall* court would have reached the same result through an application of either the free exercise balancing standard or the three-pronged establishment test. However, in two recent cases involving similar constitutional issues, the courts applied both free exercise and establishment clause standards and reached results contrary to the holding in *Marshall*.[180]

D. Recent Decisions

1. Caulfield v. Hirsch

In July, 1977, a federal district court held in *Caulfield v. Hirsch*[181] that the application of the Taft Act[182] to parochial schools, allowing the National Labor Relations Board (NLRB) to conduct a representative election among lay teachers for Catholic elementary schools, violated both the free exercise and establishment clauses.[183] Even though the *Caulfield* court considered establishment clause values, the decision was based primarily on free exercise grounds.[184]

Under a free exercise analysis the court examined several specific concerns arising from the church-state relationship under the Taft Act. The court took into account the pervasive authority of the Board over

180. Catholic Bishop v. NLRB, 559 F.2d 1112 (7th Cir. 1977), *cert. granted*, 98 S. Ct. 1231 (1978); Caulfield v. Hirsch, *summarized in* 46 U.S.L.W. 2025 (E.D. Pa. July 7, 1977). For an extensive discussion of the free exercise questions raised in these cases, see Comment, *Free Exercise Clause*, *supra* note 6.

181. *See Summary*, 46 U.S.L.W. 2025 (E.D. Pa. July 7, 1977).

182. Labor Management Relations Act, 29 U.S.C. §§ 141-187 (1976). The purpose of the Act is to prevent industrial strife and promote the free flow of commerce. The authority of the National Labor Relations Board is derived from the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976). The Board has the authority to make rules and regulations and has a wide scope of powers to prevent unfair labor practices. 29 U.S.C. §§ 156-161 (1976). Under the FLSA, the Administrator of the Wage and Hour Division of the Department of Labor has broad powers to investigate and inspect records, question employees, make regulations and orders and institute injunction proceedings and file complaints. 29 U.S.C. §§ 201-219 (1976).

183. *See* 46 U.S.L.W. at 2025.

184. In considering the free exercise claims, the court looked to Wisconsin v. Yoder, 406 U.S. 205 (1972), *see* notes 76-82 and accompanying text *supra*, for a three part test. This test requires a court to "(1) ascertain whether the claims presented were religious not secular; (2) determine whether the religious conduct was burdened or constrained in some cognizable fashion by reason of the application of the legislation in question; and (3) inquire whether the interest sought to be protected by the legislation is sufficiently compelling to override the interest in permitting an unburdened exercise of religion." 46 U.S.L.W. 2025.

the employment area and its authority to compel bargaining on terms and conditions of employment.[185] It also noted that the divisiveness of a competitive interface between lay and religious teachers would harm the religious mission of the school.[186] Finally, it was asserted that the free exercise clause was violated because the Board would be required to interpret ecclesiastical concerns.[187] The court determined that there was a burden on free exercise: "To governmentally compel the schools to bargain with a union over ecclesiastical concerns would certainly constitute a constraint upon the free exercise of religion. The crux of the problem is that the terms and conditions of employment at some point become inseparable from the religious mission of the schools."[188]

Since a burden on free exercise was shown, the court went on to consider whether the government could demonstrate the compelling interest necessary to the infringement of the schools' First Amendment right. In this regard:

> The importance of the Taft Act's purpose is not questioned; however, in balancing the competing interests, the schools' religious liberty interest must prevail. In this sensitive constitutional area, only the gravest abuses, endangering paramount interests, give occasion for permissible governmental limitation. Nonapplication of the Taft Act to these schools simply does not conjure up an impression of grave abuses endangering paramount federal interests.[189]

After resolving the free exercise claims in favor of the schools, the court turned to an evaluation of the church-state relationships under the excessive entanglement doctrine of the establishment clause. The court noted that the Board has broad investigatory powers which allow it to compel the church schools to produce information.[190] The Board also has the authority to bargain over curriculum and teacher discipline and to determine the validity of employment practices.[191] In view of these considerations, the court found that the resulting relationships violated the establishment clause "[b]ecause the entangling relationships that arise under the Taft Act may result in numerous conflicts and confrontation between the [NLRB] and the church school . . . [and] are, in

185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.* For a discussion of the *Marshall* defendants' similar free exercise claims, *see* note 117 and accompanying text *supra*.
189. 46 U.S.L.W. at 2025. *Cf.* Ross & McDermott, *supra* note 111, at 5 n.26 (importance of Equal Pay Act).
190. *See* 46 U.S.L.W. at 2025.
191. *Id.*

the court's view, excessive. . . ."[192]

The *Caulfield* decision is significant because the court, although primarily concerned with the free exercise claim, also applied an establishment clause analysis to a labor legislation-religious liberty conflict. The opinion indicates that where these two interests collide, governmental limitations on the exercise of religion will be allowed only when grave abuses endangering paramount governmental interests are present. The *Caulfield* court did not perceive the nonapplication of the Taft Act to have this requisite character. The court's decision indicates the primary importance which it attaches to religious liberty claims in this sensitive constitutional area.

2. Catholic Bishop v. NLRB

Less than a month after the *Caulfield* decision, a federal court of appeals in *Catholic Bishop v. NLRB*[193] struck down a National Labor Relations Board (NLRB) order that the Catholic bishops in Chicago and northern Indiana bargain with unions representing lay teachers in local seminaries and high schools.[194] The Court of Appeals for the Seventh Circuit held that the NLRB had no jurisdiction in teacher-employee relationships in parochial schools because such involvement by a governmental agency would violate First Amendment guarantees of church-state separation.

The plaintiffs asserted that NLRB jurisdiction over their parochial school employment relationships would violate their freedom of religion rights under both the free exercise and establishment clauses.[195] The court chose to consider these claims jointly "rather than dwelling on the differentiations between the dual aspects of the Religion Clauses of 'establishment' and 'free exercise' of religion."[196] In order to measure the constitutionality of an application of the NLRA to the parochial schools, the court focused on several specific concerns arising from this church-state relationship. The court first considered the essential nature of the schools to determine what effect the required bargaining would have on their function. The court found that parochial schools involve a substantial religious character, activity and purpose, and that teachers employed in such institutions are expected to assist in

192. *Id.*
193. 559 F.2d 1112 (7th Cir. 1977), *cert. granted*, 98 S. Ct. 1231 (1978).
194. *Id.* at 1131.
195. *Id.* at 1114.
196. *Id.* at 1131. "Our treatment of the Religion Clauses jointly has been because of our belief that there has been some blurring of sharply honed differentiations." *Id.*

carrying out the religious mission of the schools.[197] It was further determined that "the very threshold act of certification of the union" impinges on the bishop's authority[198] and that the requirement of bargaining would impose a chilling effect on the bishop's exercise of control over the schools' religious mission.[199] Looking at the relationships resulting from an application of the NLRA, the court found that there was bound to be entanglement in doctrinal matters, particularly in situations of teacher dismissal where the Board would be required to determine whether the dismissal was for religious reasons or because of the teacher's involvement in union activities.[200] The court looked to the reasonable accommodation doctrine[201] to see if some compromise could be reached, but it was determined that any attempted accommodation would itself constitute excessive governmental involvement.[202]

In reaching the decision that the NLRB had no jurisdiction over the teacher-employee relationships in parochial schools, the court did not overlook the substantial importance of the national policy embodied in the National Labor Relations Act. However, the court did not find this interest to be compelling:

> A church which chooses to educate its own young people in schools which it is required essentially to finance without governmental aid should because of the essentially religious permeation of its curriculum be equally freed of the obviously inhibiting effect and impact of the restrictions of the National Labor Relations Act in conducting the teaching program of those schools.[203]

In conclusion, the court declared that there was not only sovereign involvement by the NLRB in the religious activity of the church under the establishment clause but "undoubtedly, in our view, also curtail-

197. *Id.* at 1121-22 (citing Lemon v. Kurtzman, 403 U.S. 602, 616-19 (1971); Meek v. Pittenger, 421 U.S. 349, 365-66 (1975)).

198. Catholic Bishop v. NLRB, 559 F.2d at 1123. This was said to violate the church law requiring the bishop to be "the sole repository of authority." *Id.*

199. *Id.* at 1124. The court stated: "The Board's order to bargain unquestionably . . . inhibits the bishops' authority to maintain parochial schools in accordance with ecclesiastical concern." *Id.* at 1123.

200. *Id.* at 1125.

201. *See* Note, *Establishment Clause Neutrality and the Reasonable Accommodation Requirement*, 4 HASTINGS CONST. L.Q. 901 (1977).

202. Catholic Bishop v. NLRB, 559 F.2d at 1128-30. The court stated: "A 'reasonable accommodation' by the Board 'to the religious purposes of the school' 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, all of which would itself erode the protective wall afforded by the constitutional right." *Id.* at 1129.

203. *Id.* at 1130.

ment of the free exercise of religion."[204]

The *Catholic Bishop* decision is significant because it indicates the willingness of a circuit court to uphold religious liberty interests against significant and far-reaching governmental labor regulations. The opinion demonstrates, as did the *Caulfield* decision, that some courts are beginning to exert control over governmental regulation in the area of religious employment relationships, and that these courts consider the religious liberty interest to be of primary importance. Against these religious liberty claims only paramount governmental interests will survive.

3. Analysis

These recent decisions appear to be inconsistent with the *Marshall* opinion, especially with respect to the courts' differing approaches to the free exercise claims.[205] The free exercise challenges in the three cases were similar in that "the church" in each case was claiming that governmental involvement in their employment relationships with parochial school teachers—a relationship alleged to be a part of the religious mission of both the Catholic and Seventh-day Adventist churches and so guided by church doctrine—constituted a violation of their free exercise right to be free from governmental coercion.[206] The defendants in *Marshall* asserted that the governmental action under the FLSA would consist of continuing official surveillance involving extensive review of records, interviews and comparisons of job descriptions.[207] The *Caulfield* and *Catholic Bishop* defendants similarly claimed that their free exercise would be burdened by governmental entanglement in doctrinal matters, interference with the bishops' authority over parochial school matters,[208] possible divisiveness between lay and religious faculty members and numerous conflicts between the church and the NLRB.[209]

Despite the strikingly similar fact situations which gave rise to the litigation in these cases, it may be possible to distinguish *Marshall* from

204. *Id.* at 1131.

205. For a discussion of the *Marshall* court's free exercise analysis, *see* notes 121-24 and accompanying text *supra*.

206. *Compare* Catholic Bishop v. NLRB, 559 F.2d at 1122 *and* Caulfield v. Hirsch, *summarized in* 46 U.S.L.W. at 2025 *with* Defendants' Petition for Writs of Mandamus and Prohibition, *supra* note 92, at 4.

207. Defendants' Petition for Writs of Mandamus and Prohibition, *supra* note 92, at 4; *see also* Pacific Union case, *supra* note 7, at 2-3.

208. Catholic Bishop v. NLRB, 559 F.2d at 1123, 1125.

209. *See* Caulfield v. Hirsch, *summarized in* 46 U.S.L.W. at 2025.

the Catholic school cases. It appears that the enforcement of the Taft Act and the subsequent NLRB regulation and surveillance might constitute a greater burden on the free exercise of the religious mission of the Catholic school system than would the application of the FLSA to the Seventh-day Adventist school system.[210] In conjunction with this concern one should also consider the burden imposed by the Taft Act through the complexity of bargaining and the inherent requirement of compromise, the adversary nature of the bargaining process and the tendency toward doctrinal involvement.[211]

In addition, the *Caulfield* court placed great emphasis on the fact that the NLRB might become involved with ecclesiastical concerns. If a lay teacher were disciplined or dismissed, the court pointed out, the NLRB would be allowed to determine whether the disciplinary action was for reasons related to the religious mission of the school or to discourage union participation.[212] Such a consideration would require the Board to interpret a matter of ecclesiastical concern, a matter that exceeds the limit of the Board's constitutional authority.[213] Echoing the same concerns, the court in *Catholic Bishop* devoted a substantial portion of its opinion to a consideration of the possible accommodation which the NLRB might be required to allow the Catholic schools in order to prevent interference with ecclesiastical concerns and decisions.[214] This accommodation in turn might lead to an establishment of religion.[215] The accommodation problem would only arise in

210. In the *Marshall* opinion, Judge Real noted that "[t]he Secretary neither statutorily nor by reason of his opinion, has wholesale license [as defendants urge] to institute a pervasive scheme for supervision of defendants' religious activities." Pacific Union case, *supra* note 7, at 7 (footnote omitted). The court went on to state that "[t]here is no indication whatsoever that such investigations [by the Labor Department] would be any more onerous than those conducted by other Federal and State authorities to see that health and safety laws are complied with or checks by the Internal Revenue Service to see that defendants meet the requirement for income tax exemption." *Id.* at 9 n.3.

211. One commentator noted: "The parochial school teacher cases do not fit into the line of analysis applied in cases like *Mitchell*, *Marshall* and *Prince* because the NLRA does not intrude on the freedom of religion as minimally as the FLSA or the child labor laws. None of these statutes contemplates the broad regulatory framework that is established by the NLRA. The detailed proscriptions and adjudicative processes necessary to regulate bargaining are simply not germane to the issues of minimum and equal wages or of the protection of child workers." Comment, *Free Exercise Clause*, *supra* note 6, at 668.

212. *See* 46 U.S.L.W. at 2025.

213. *Id.* For a summary of the jurisdictional limitations of a court over ecclesiastical matters, *see* note 119 *supra*.

214. 559 F.2d at 1128-30. *See* note 202 *supra*.

215. 559 F.2d at 1128-30. *See* Judge Sprecher's concurring opinion, *id.* at 1131. For a recent discussion of the establishment clause and the reasonable accommodation requirement, see Note, *Establishment Clause Neutrality and the Reasonable Accommodation Requirement*, 4 HASTINGS CONST. L.Q. 901 (1977).

Marshall if the court granted the church an exemption from complying with the requirements of the FLSA.

Finally, the entanglement considerations of these three cases can be distinguished on the grounds that the relationship between the NLRB and the Catholic school system required constant and continuing surveillance of and involvement with the parochial school system, while the Labor Department's investigation of the defendants' pay scales required only infrequent involvement.[216] Thus it could be determined that the Labor Department's investigation of the defendants' records was a minimal contact which did not exceed the constitutional bounds of permissible entanglement.[217] These distinctions are significant but they are not absolute and clear-cut; consequently, it remains to be seen how the Supreme Court will treat similar claims.[218]

Conclusion

The most significant aspect of the *Marshall* opinion is Judge Real's utilization of the excessive entanglement doctrine. His analysis of the constitutional issues indicates this particular court's willingness to extend the application of the excessive entanglement doctrine to cases involving a collision between governmental interests, expressed through nondiscriminatory remedial labor legislation, and First Amendment free exercise and establishment clause claims. By applying excessive entanglement to a labor legislation case the opinion represents a significant departure from the Supreme Court's application of this doctrine,[219] and it remains to be seen whether the courts will generally apply this extended concept of entanglement.

The *Marshall* opinion recognized the importance of the religious liberty interests threatened by governmental regulation of the internal affairs of a religious organization, but concluded that the societal interest in enforcing equal pay legislation against religious organizations

216. *See* notes 210 & 211 and accompanying text *supra*. The *Lemon I* Court emphasized that prior decisions did not require *total* separation between church and state but that they were concerned with the *cumulative* impact of governmental involvement with parochial schools. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971). *See* Giannella, *Lemon and Tilton*, *supra* note 41, at 171, 174.

217. It might be useful to compare the Labor Department's contacts in *Marshall* with the governmental contacts in Tilton v. Richardson, 403 U.S. 672 (1971), a case involving a one-time, single-purpose construction grant, which the Court found to be "minimal" and consequently not violative of the establishment clause. *Id.* at 688.

218. The Supreme Court has granted certiorari in the *Catholic Bishop* case so it will have an opportunity to consider the religious liberty-labor legislation conflict in detail in the next session of the Court. 98 S. Ct. 1231 (1978).

219. *See* note 84 and accompanying text *supra*.

justified the "minimal" interference with the defendants' religious liberty.[220] Considered from a religious freedom perspective, there is no indication that the *Marshall* decision constitutes a direct curtailment of religious liberty since the prohibited act (sex discrimination) does not constitute a religious belief of the Seventh-day Adventist church.[221] However, the application of the FLSA to this religious organization arguably imposes an indirect burden on the defendants' right to the free exercise of religion since it does constitute governmental involvement with the employment relationship between the defendant and its nonclergy employees. It therefore appears that the court should have weighed the competing interests under the free exercise balancing test.

Judge Real's opinion illustrates the unwillingness of the courts to grant blanket exemptions from civil laws to religious organizations claiming *absolute* First Amendment protection. Whether such a situation is viewed from the perspective of the free exercise balancing test or the establishment clause excessive entanglement doctrine, it appears that courts will not always bar the government from enforcing remedial labor regulations against individuals or organizations. There is some question as to how much involvement between church and state the courts will allow in this sensitive area. There are several court decisions which appear to be in conflict and it seems likely that, in the near future, the Supreme Court will be faced with the difficult task of determining the proper relationship between government and religion in the area of labor relations.

220. Pacific Union case, *supra* note 7, at 7-8.

221. *See* notes 123 & 124 and accompanying text *supra*.