CONSTITUTIONAL LAW

STATE v. FAITH BAPTIST CHURCH: STATE REGULATION OF RELIGIOUS EDUCATION

INTRODUCTION

State v. Faith Baptist Church[1] presented the Nebraska Supreme Court with a challenge to Nebraska's compulsory education requirements.[2] The appellants challenged these requirements as being in violation of the first amendment right to free exercise of religious belief and the ninth amendment right of parents to educate their children as they see fit. The statute was also attacked on non-constitutional grounds.[3]

This survey article analyzes the holding of *Faith Baptist Church*, which is significant because it provides a useful examination of first amendment rights in light of recent Supreme Court decisions.

FACTS

On August 29, 1977, the Faith Baptist Church of Louisville, Nebraska, began operating the Faith Christian School.[4] This school is an independent Christian school[5] which utilizes the Accelerated Christian Education program (ACE).[6] ACE is a self taught program that covers the basic subjects while making extensive use of biblical passages and Christian teachings.[7]

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1. 207 Neb. 802, 301 N.W.2d 571 (1981), *appeal dismissed*, 50 U.S.L.W. 3217 (October 6, 1981).

2. *See* NEB. REV. STAT. §§ 79-201, 207, 216, 312, 238, 1707, 1247 (Reissue 1976); Nebraska State Department of Education Rules 11 (1979), 14 (1976) and 21 (1977).

3. 207 Neb. at 803, 301 N.W.2d at 573.

4. During the 1977-78 school term, nine pupils were enrolled in Faith Christian School at various grades levels from second through eleventh. During the 1978-79 term, twenty-three pupils were enrolled in various grades ranging from first through twelfth. Brief for Appellees at 7, State v. Faith Baptist Church, 207 Neb. 802, 301 N.W.2d 571 (1981).

5. There are an estimated nineteen independent Christian schools currently operating in Nebraska without state approval. Omaha World Herald, September 14, 1981, at 1, cols. 2, 3, 4, and at 2, col. 6 (evening ed.).

6. Approximately 2500 schools used ACE during 1978-79, and it is estimated that over 3000 schools will use it during 1979-80. Brief for Appellants at 11, 12, State v. Faith Baptist Church, 207 Neb. 802, 301 N.W.2d 571 (1981).

7. The court's opinion in *Faith Baptist Church* provides some examples of the ACE curriculum:

> The instruction is Bible-oriented. For example, PACE 25 in social studies is devoted to the first chapter of Genesis, and its outline topics include the Creation of the Heavens and the Earth. The Seven Days of Creation, and the Garden of Eden. PACE 7 in mathematics consists of problems in sim-

The Faith Christian School failed to comply with three state requirements in the administration of the school. It refused to provide "third-day reports."[8] These reports are used to verify student compliance with state mandatory attendance requirements.[9] The school also refused to request approval of its curriculum, as required by the State Department of Education Rule.[10] Finally, the teachers were not certified as required by Rules 14 and 21 of the State Department of Education.[11]

The members of the Faith Baptist Church refused to comply with the statutory requirements because of their religious beliefs. They believe that the Bible mandates that their children be educated in a Christian school. They believe that their school is an extension of their church, and therefore any attempt to regulate their school is the equivalent of direct regulation of their church by the state.[12]

The State of Nebraska, upon recommendation of the attorney general, sought to enjoin the operation of Faith Christian School.[13] The district court granted the injunction.[14] On appeal the church argued that equitable relief was not a proper remedy in this situation, that the state does not abide by the requirements sought to be imposed on the school, that the educational requirements violate the appellant's ninth amendment right to educate their children as they see fit and that the educational requirements violate the church members' first amendment right to the free exercise of their religion.[15]

Three of these arguments were dealt with summarily.[16] First, while criminal sanctions are the prescribed punishment for the

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ple addition and subtraction, interspersed with biblical sayings and citations. One gets the impression that the method of instruction is not unlike a correspondence course, with the addition of helping supervisors.

207 Neb. at 805, 301 N.W.2d at 574.

8. NEB. REV. STAT. § 79-207 (Reissue 1976), provides that: "On the third day on which the public, private, denominational and parochial schools are in session at the beginning of each school year, each teacher in a class I district shall send to the County superintendent a list of the pupils enrolled in his school with the age, grade, and address of each, and in all other districts such report shall be made to the superintendent of such district." *Id.*

9. *See* NEB. REV. STAT. § 79-207 (Reissue 1976).

10. The Faith Christian School refused to request approval, even though the State had told them that their curriculum would be approved upon request. 207 Neb. at 805, 301 N.W.2d at 574; Nebraska State Department of Education Rule 14 (1976).

11. 207 Neb. at 805, 301 N.W.2d at 574.

12. *Id.* at 806, 301 N.W.2d at 574.

13. *Id.* at 803, 301 N.W.2d 573.

14. *Id.*

15. *Id.*

16. *Id.* at 807-09, 301 N.W.2d at 575-76.

cited violations, an injunction is appropriate when there have been "continuing and flagrant" violations of the law.[17] Second, the court found that the state was not in violation of its own laws.[18] Finally, the ninth amendment challenge was considered together with the first amendment challenge.[19] Yet in considering these two challenges together, the court effectively ignored the ninth amendment challenge.

BACKGROUND

Until recently, challenges to state laws as being in violation the free exercise clause have met with limited success.[20] For example, anti-polygamy laws were upheld as a reasonable police power measure, even though polygamy is a major tenet of the Mormon religion.[21] A Massachusetts statute which prevented the distribution of religious materials by children was upheld as a valid attempt to prevent child labor.[22] As recently as 1961, the Supreme Court upheld Sunday closing laws in order to assure a "uniform day of rest," even though these laws posed a serious threat to the success of businesses owned by Orthodox Jews.[23] Free exercise of religion is a fundamental right, infringement of which can only be justified by a compelling state interest;[24] nonetheless, the Court has been quick to find state interests of such stature.[25]

In an analogous situation, the Court has supported compulsory education laws.[26] The rationale for this posture is that education is essential to a properly functioning society.[27] Thus, even when the Court found it was unconstitutional for a state to require a child to attend a *public* school in *Pierce v. Society of Sisters*,[28] it reaffirmed the right of a state to compel a child to attend *some* school.[29] Therefore, given the limited success of free exercise challenges in general and the well-settled fact that compulsory education is a compelling state interest, it appeared unlikely after

17. *Id.* at 807, 301 N.W.2d at 575.
18. *Id.* at 807-09, 301 N.W.2d at 575-76.
19. *Id.* at 809, 301 N.W.2d at 576.
20. Marcus, *The Forum of Conscience: Applying Standards Under the Free Exercise Clause*, 22 DUKE L.J. 1217, 1218 (1973) [hereinafter cited as Marcus].
21. Reynolds v. United States, 98 U.S. 145, 161-68 (1878).
22. Prince v. Massachusetts, 321 U.S. 158, 176 (1944).
23. Braunfeld v. Brown, 366 U.S. 599, 608-09 (1961).
24. Marcus, *supra* note 20, at 1217-18.
25. *Id.*
26. Riga, *Yoder and Free Exercise*, 6 J. OF L. & EDUC. 449 (1977).
27. Brown v. Board of Education, 347 U.S. 483, 493 (1954).
28. 268 U.S. 510, 534 (1925).
29. *Id.* at 534.

Braunfeld v. Brown[30] that a free exercise challenge to a compulsory education statute would be successful.

In *Sherbert v. Verner*,[31] the Court significantly changed its approach to free exercise cases.[32] In *Sherbert*, a Seventh Day Adventist was fired because she refused to work on Saturdays because of her religious beliefs.[33] She looked for another job but was unable to find one which did not require her to work on Saturday.[34] She then applied for unemployment, but the state denied her application because she had refused offers of available work.[35] The Court found that this was an unconstitutional infringement of the challenger's right to free exercise of her religion.[36]

In *Sherbert*, the Court used a three prong test. Under this test, if the individual demonstrates that his actions are sincerely religious and have been interfered with as a result of a state regulation, "then the state must demonstrate that it has a compelling interest in the regulation," and this interest could not be promoted by any less restrictive means.[37] Applying this test, the Court found the statute unconstitutional because there was an infringement of a sincere religious practice.[38] The state failed to show that there was no less restrictive means by which it could prevent fraudulent claims, which the state argued was its compelling interest.[39] *Sherbert*, therefore, marked a significant change in the Court's approach to free exercise cases,[40] since *Sherbert* was the first case in which the Court required a state to treat a group of individuals differently because of the free exercise clause.

In *Wisconsin v. Yoder*,[41] the Court adopted the *Sherbert* test in deciding a free exercise challenge to Wisconsin's compulsory edu-

30. 366 U.S. 599 (1961).
31. 374 U.S. 398 (1963).
32. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 851-53 (1978).
33. 374 U.S. at 399-402.
34. *Id.*
35. *Id.*
36. *Id.* at 403, 409.
37. Marcus, *supra* note 20, at 1242.
38. 374 U.S. at 403.
39. *Id.* at 406-09.
40. That Sherbert v. Verner, 374 U.S. 398 (1963), marked a radical change in the Court's approach to free exercise cases is demonstrated by comparing the holdings of Braunfeld v. Brown, 366 U.S. 599 (1961), and *Sherbert*. In *Braunfeld* the state goal of "uniform Sundays" was sufficient to justify a law which threatened the livelihood of Orthodox Jews. 366 U.S. at 611. However, in *Sherbert* the state's desire to prevent fraudulent applications for unemployment was not sufficient to justify denying the challenger unemployment benefits for 22 weeks. 374 U.S. at 417, 418. Justice Stewart, concurring in *Sherbert*, made note of this discrepancy. He argued that *Braunfeld* should be overruled. *Id.* at 417, 418.
41. 406 U.S. 205 (1972).

cation statutes.[42] Amish[43] parents challenged the constitutionality of Wisconsin's compulsory education laws which required their fourteen and fifteen year old children to attend a public high school rather than receive vocational training in the Amish community.[44] The challengers argued that sending their children to a public high school was contrary to their religious beliefs, and would eventually lead to the dissolution of their community.[45]

The Court found in favor of the Amish.[46] It relied heavily on the fact that the Amish religion is a well established one whose adherents are productive and forthright members of society.[47] The Court found specifically that the vocational training offered by the Amish community was a satisfactory means of obtaining the state's goal of education.[48] Therefore, a less restrictive alternative to compulsory education existed and the state had failed to meet its burden.[49]

It has been argued that the holding of *Yoder* was actually very narrow.[50] The Court's heavy reliance on the history of the Amish can be interpreted to limit the protection of the first amendment to well established religions.[51] Even if this interpretation proves to be correct, *Yoder* is still a watershed opinion for organized religions.[52]

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42. *Id.* at 214.

43. *Id.* at 209-13. The Amish religion was founded by the Swedish Anabaptists in the beginning of the 16th century. The religion deemphasizes material success and places considerable importance on a simple agrarian lifestyle. Members of the Amish faith believe that any failure to isolate one's self from the contemporary world jeopardizes a person's chance for salvation. It is essential that children participate in the activities of the community. The community's prosperity depends, in part, on the children's labor and the children rely on the community to prepare them for adult baptism, which occurs during late adolescence. *Id.*

44. 406 U.S. at 207-09 (1972).

45. *Id.* at 209.

46. *Id.* at 234.

47. *Id.* at 211, 222.

48. *Id.* at 233.

49. *Id.*

50. Kurland, *The Supreme Court, Compulsory Education, and the First Amendment's Religion Clauses*, 75 W. VA. L. REV. 213, 237 (1973) [hereinafter cited as Kurland].

51. *See* Wisconsin v. Yoder, 406 U.S. 205, 241-49 (1972). Justice Douglas' dissent in *Yoder* argued that the majority failed to recognize the protections the first amendment affords philosophical ideals and religious beliefs, as established in United States v. Seeger, 380 U.S. 163, 168 (1965), and Welsh v. United States, 398 U.S. 333, 342 (1970).

52. Since *Yoder*, several courts have heard free exercise challenges to compulsory education laws. Two courts have upheld compulsory education laws when the challengers claimed that their religion prevented them from sending their children to any school, public or parochial. Hill v. State, 381 So. 2d 91 (Ala. App. 1979), *rev'd on other grounds*, 381 So. 2d 94, and State v. Kausoboski, 87 Wis. 2d 904, 275 N.W.2d 101 (Wis. App. 1978). On the other hand, two state supreme courts have struck

ANALYSIS

Interpreting the Yoder *Test*

A difficulty with the *Yoder* test is that the Court never indicated how this test was to be interpreted.[53] This difficulty is compounded by two factors. First, since few courts have applied the *Yoder* test,[54] it is not possible to discover the test's parameters.[55] Second, the Court has established a doctrinal basis in the area of the religion clauses;[56] therefore, from a theoretical perspective, it is difficult to determine how the test should be applied.[57]

Commentators have disagreed in their interpretations of the *Yoder* test. One has suggested that the approach used in *Yoder* is similar to that used in equal protection cases.[58] Under the equal protection cases, the invocation of the compelling state interest standard is a statement of a conclusion rather than a measure of constitutionality; in other words the choice of the test is outcome determinative.[59] If the state is to prevail in an equal protection case, it must be able to demonstrate that no protected interest has been adversely affected.[60]

Another interpretation of *Yoder* sees a court using an ad hoc balancing test similar to that used in free speech cases.[61] Under this approach the specific interest of the challenger is weighed against the interests of the state.[62] This approach gives a court much more flexibility in adjudicating cases,[63] and is much less likely to result in successful free exercise challenges than the equal protection approach.

In *Faith Baptist Church*, the Nebraska Supreme Court ac-

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down compulsory education requirements as applied to independent Christian Schools. Kentucky v. Rudasill, 589 S.W.2d 877 (Ky. 1977), *cert. denied*, 466 U.S. 938 (1980), and State v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976).

53. 207 Neb. at 813, 301 N.W.2d at 578.

54. *Yoder* is the only case where the Court has applied this test to a free exercise challenge of compulsory education laws. For state court decisions *see* note 52 *supra*.

55. It is not clear how helpful state court decisions will be in other states. The Nebraska Supreme Court easily distinguished cases from Ohio and Kentucky with factual situations very similar to *Faith Baptist Church*. *See* 207 Neb. at 814-16, 301 N.W.2d at 578-79.

56. Kurland, *supra* note 50, at 244.

57. See notes 117-25 and accompanying text *infra*.

58. Kurland, *supra* note 50, at 232.

59. *Id.*

60. There is language in both *Yoder* and *Sherbert* which supports this interpretation. If this interpretation is correct, then *Yoder*'s impact will be significant. It would be virtually impossible for a state to defeat a valid free exercise challenge.

61. Marcus, *supra* note 20, at 1239-47.

62. *Id.*

63. *Id.*

knowledged both of these approaches.[64] It noted that the *Yoder* Court emphasized that the state has a compelling interest, that the rationale of *Yoder* was not cogent, and that the *Yoder* court relied heavily on balancing.[65] In the end, the Nebraska court concluded that balancing is the proper method for adjudicating free exercise cases.[66]

Applying the Yoder *Test*[67]

The first part of the *Yoder* test is an examination of the challenger's sincerity.[68] It is well established that this examination is limited to the sincerity of the challenger's beliefs and does not extend to the "truth or verity" of the belief itself.[69] The rationale for not questioning a challenger's beliefs is that a court is not a competent or proper forum for determining the validity of religious beliefs.[70] However, it has been argued that it is no easier to determine the sincerity of a belief than it is to determine the "truth or verity" of a belief.[71] As a result, the majority of state courts which have considered cases similar to *Yoder* have simply presumed that the challengers' beliefs were sincere.[72] The Nebraska Supreme Court granted that the members of the Faith Christian Church were sincere in their beliefs, but the court appeared somewhat reluctant to do so.[73]

Applying the second part of the *Yoder* test, the court found

64. 207 Neb. at 813, 301 N.W.2d at 578.

65. *Id.*

66. See *id.* This conclusion had a significant effect on the holding in *Faith Baptist Church*. By relying on a balancing approach, the court was able to uphold Nebraska's compulsory education requirements, even though these requirements infringed on the applicant's right to free exercise.

67. Before applying the *Yoder* test, the Nebraska Supreme Court in *Faith Baptist Church* noted that Meyerkorth v. State, 173 Neb. 889, 115 N.W.2d 585 (1962), appeared to be dispositive. 207 Neb. at 809-12, 301 N.W.2d at 576-77. In *Meyerkorth*, the challengers alleged that statutes and regulations providing for compulsory attendance, certification of teachers, and approval of curriculum were an unconstitutional infringement of their right of free exercise. The court upheld the statutes. While *Meyerkorth* was controlling prior to *Yoder*, there is little room to argue that *Yoder* is not controlling in the present case. It appears that the Nebraska Supreme Court refers to *Meyerkorth* simply to establish the defense with which courts have treated compulsory education requirements in the past.

68. *See* note 37 and accompanying text *supra*.

69. United States v. Ballard, 322 U.S. 78, 86-87 (1944).

70. Fowler v. Rhode Island, 345 U.S. 67, 79-80 (1953).

71. United States v. Ballard, 322 U.S. at 92-95 (1944) (Jackson, J., dissenting).

72. *See, e.g.*, Comment, 67 KY. L.J. 415, 420 (1978-79).

73. The court noted that the challenger's school had only been operating for two years, 207 Neb. at 812, 301 N.W.2d at 577. Chief Justice Krivosha referred to an ancient Rabbinic principle which contradicts the challenger's interpretation of the Bible. 207 Neb. at 819, 301 N.W.2d at 581 (separate opinion). Whatever the reason

that the statute did not interfere with the defendant's sincerely held beliefs. However, the court's reasoning on this point was less than clear. At one point the court stated:

> The refusal of the defendants to comply with the compulsory education laws of the State of Nebraska as applied in this case is an *arbitrary* and *unreasonable* attempt to thwart the legitimate, reasonable, and compelling interests of the State in carrying out its educational obligations, under a claim of religious freedom.[74]

The above language is a strong indication that the court questioned the validity of the defendant's claim. However, since the court granted the sincerity of the defendant's belief,[75] it is also obliged to grant that its free exercise has been infringed upon.[76] In dealing with the third part of the *Yoder* test, the court noted that the state clearly has a compelling interest in this case,[77] and went on to consider whether standardized tests were an effective, less restrictive means of obtaining this end.[78]

Analyzing decisions similar to *Yoder*, it appears that the accuracy of standardized tests may become a significant issue in this area.[79] Once a court reaches the third part of the *Yoder* test and finds that the state has a compelling interest, the outcome of the case will turn on whether there is a less restrictive means to

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for these passing attempts to challenge the appellant's sincerity, this was not a significant issue in the case.

The court may be protecting itself in case it later develops that the *Yoder* test is similar to the equal protection test. *See* notes 60-62 and accompanying text *supra*. In this case the court's decision could only be supported if it could be shown that either the challenger's beliefs are not sincere or their religious practices have not been infringed upon.

74. 207 Neb. at 817, 301 N.W.2d at 580 (emphasis added).

75. *See* note 71 and accompanying text *supra*.

76. The defendants alleged that the state is neither a competent nor a proper body to regulate their school, 207 Neb. at 806, 301 N.W.2d at 574. Since this allegation is directly related to the defendant's beliefs, in order for the state to prevail it must show the members of Faith Baptist Church are not sincere in their beliefs.

77. The Court stated: "The cases we have cited from the Supreme Court of the United States should leave no doubt as to the critical interest which the State has in the quality of education provided its youth." 207 Neb. 817, 301 N.W.2d 579. While this is certainly correct (*see* notes 26-30 and accompanying text *supra*), it is arguable that this is not the issue. The defendants did not challenge the state's interest in education, they challenged the state's interest in regulating the Faith Christian School. *See* Brief for Appellants, State v. Faith Baptist Church, 207 Neb. 802, 301 N.W.2d 571. Further, the *Yoder* court carefully considered the specific interests of both the state and the Amish community. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972). Consequently, the Nebraska Supreme Court should have balanced the state's interest in regulating Faith Christian School against the defendant's free exercise rights.

78. 207 Neb. at 817, 301 N.W.2d at 579.

79. *See, e.g.*, Kentucky v. Rudasill, 589 S.W.2d 877, 884 (Ky. 1979).

achieve the state's goal.[80] Presently, standardized tests are the only less restrictive alternative which have been suggested.[81] Standardized tests are appealing because they offer a means of evaluating a student's performance without significantly imposing upon the school.

Although people generally agree that education is a desirable goal, disagreements arise quickly when one attempts to establish how that goal can best be obtained.[82] There is also considerable debate on how a state's attempt to achieve this goal should be measured. Standardized tests are at the center of this debate. In *Wolman v. Walter*,[83] the United States Supreme Court stated that standardized tests are a means of insuring that minimum standards are met.[84] In *Kentucky v. Rudasill*,[85] the Kentucky Supreme Court found that standardized tests are an effective, less restrictive means to insuring the state's goal of education in cases similar to *Yoder*.[86] However, others have argued that standardized tests are inaccurate and culturally biased.[87]

The Nebraska Supreme Court adroitly avoided this issue.[88] It found that even if standardized tests were accurate, they were not timely.[89] The court explained this by pointing out that the fact that a student was receiving a deficient education would not be discovered until year's end, and in many cases this would be too late.[90] Therefore, the court found that standardized tests were not an effective alternative to the state's compulsory education requirements.[91]

The Religion Clauses of the First Amendment

The first amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."[92] In recent times the establishment clause and the free exercise clause have come to be viewed as antagonis-

80. *See* note 37 and accompanying text *supra*.
81. *See, e.g.*, Kentucky v. Rudasill, 589 S.W.2d 877, 884 (Ky. 1979).
82. Contrary to the majority opinion, Chief Justice Krivosha argued that there is no set formula which will insure a quality education. 207 Neb. at 821, 301 N.W.2d at 581 (Krivosha, J., separate opinion).
83. 433 U.S. 229 (1977).
84. *Id.* at 238-40.
85. 589 S.W.2d 877 (Ky. 1979).
86. *Id.* at 884.
87. Comment, 67 KY. L.J. 415, 429 (1979).
88. 207 Neb. at 817, 301 N.W.2d at 579.
89. *See also* Comment, 67 KY. L.J. at 427-29 (1979).
90. 207 Neb. at 817, 301 N.W.2d at 579.
91. *Id.*
92. U.S. CONST. amend. I.

tic to each other.[93] It is feared that if a court attempts to protect an individual's right of free exercise it risks violating the establishment clause.[94] This attitude is a relatively recent development in the history of the Constitution.

"To the Framers, the religion clauses were at least compatible and at best mutually supportive."[95] There were three distinct schools of thought concerning the relation between church and state at the time the constitution was drafted.[96] The Framers all believed that church and state should be kept separate, but their rationales for doing so were considerably different. The evangelical view urged separation so that the worldly influences of the state would not corrupt religion.[97] The Jeffersonian view urged separation out of a fear that religion might corrupt the state,[98] and the Madisonian view urged separation on the premise that each would function best if left alone.[99] Although each of these views was striving for the same result, the application of a specific view could make a substantial difference in interpreting clashes between the two clauses.

Eventually the two principles of voluntarism and separatism emerged from the Supreme Court's examination of the history of the first amendment.[100] Voluntarism is strongly supportive of free exercise. It holds that no religion should be advanced by the state for fear that this may inadvertantly affect an individual's religious practices.[101] Separatism, for the most part, adheres to the Madisonian view.[102] This view urges that state and church be kept independent, not because of constitutional concerns, but simply because each will function best when separate.

Attempts by the Court to reconcile the differences between the free exercise clause and the establishment clause have taken three distinct forms. Initially, the Court adopted the "strict separation" theory.[103] Under this approach a state could give no aid to organized religion. Because of the difficulty of determining what

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93. Comment, 67 KY. L.J. at 417-18 (1979).
94. *Id.*
95. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 814 (1978) [hereinafter cited as L. TRIBE].
96. *Id.* at 816.
97. *Id.*
98. *Id.*
99. *See* Casad, *The Establishment Clause and the Ecumenical Movement*, 62 MICH. L. REV. 419, 421 n.6 (1964).
100. L. TRIBE, *supra* note 95, at 818.
101. Walz v. Tax Commission, 397 U.S. 664, 719-27 (1970). (An essay by James Madison is quoted in Appendix II, Douglas, J., dissenting).
102. L. TRIBE, *supra* note 95, at 819.
103. *See, e.g.*, Everson v. Board of Education, 330 U.S. 1, 15-16 (1947).

constitutes aid, the Court eventually moved away from this approach in favor of the neutrality theory.[104] This neutrality approach provides that a state act is permissible as long as it is neutral in its application to religion.[105] This approach circumvented the difficulty of the strict separation theory. A state was allowed to aid or to decline to aid religion as long as it treated religious and non-religious groups alike. However, the Court's holding in *Sherbert v. Verner*[106] marks a sharp departure from the neutrality theory. In *Sherbert* the state was required to treat an individual differently in order not to violate the free exercise clause.[107]

The holding of *Sherbert* makes it clear that the free exercise clause will occasionally require a state to make exceptions for a religious group, and that this is not a violation of the establishment clause.[108] Underlying this superficial clarity are four widely divergent opinions. The majority opinion, authored by Justice Brennan, found that the establishment clause was not violated.[109] Justice Douglas, concurring, argued that the establishment clause was not an issue in this case.[110] Justice Stewart, also concurring, argued that while the holding of *Sherbert* would violate the establishment clause as defined in prior cases,[111] these earlier cases are incorrect and should be overruled.[112] Justice Harlan, dissenting, felt that the establishment clause allows exceptions, but it does not compel them.[113]

Commentators have taken equally divergent views. One has argued that the establishment clause absolutely prohibits the special treatment of religious groups.[114] Others argue that the establishment clause is to be interpreted loosely when it conflicts with the free exercise clause.[115] In general, American courts have adopted the latter approach.[116]

The Nebraska Supreme Court did not address the relation of the two religion clauses in *Faith Baptist Church*.[117] However, the

104. L. TRIBE, *supra* note 95, at 820.
105. *Id.* at 821.
106. 374 U.S. 398 (1963).
107. *Id.* at 399-410. See notes 31-40 and accompanying text *supra*.
108. *Id.* at 409.
109. *Id.*
110. *Id.* at 413.
111. *See* notes 20-25 and accompanying text *supra*.
112. 374 U.S. at 415, 418.
113. *Id.* at 423.
114. P. KURLAND, RELIGION AND LAW 68 (1962).
115. Marcus, *The Forum of Conscience: Applying Standards Under the Free Exercise Clause*, 22 DUKE L.J. 1217, 1238 (1973).
116. *See* J. NOWAK, R. ROTUNDA AND J. YOUNG, CONSTITUTIONAL LAW 849 (1977).
117. 207 Neb. 802, 301 N.W.2d 571 (1981).

court's holding implies that the members of a religious group are not entitled to special treatment because of their religious beliefs. For example, when addressing the issue of the validity of teacher certification requirements, the court relies on *Application of Urie*.[118] In *Urie*[119] the American Bar Association's requirement that an individual graduate from an accredited law school before being admitted to the bar was challenged on equal protection and due process grounds.[120] The Alaska Supreme Court upheld these requirements as an effective means of controlling the quality of the members of the bar.[121]

The court's reliance on *Urie* could be interpreted to support the proposition that the establishment clause absolutely prohibits the special treatment of religions.[122] In *Urie* a law student challenged the ABA requirements as being unconstitutional on their face.[123] This is a radically different situation from *Yoder*,[124] where the challengers sought an exemption from the states education requirements for the members of the Amish religion.[125] To the extent that the court relies on this interpretation of the establishment clause, it is placing an improper burden on the defendants.[126]

The Dissent

Chief Justice Krivosha concurred in that part of the majority opinion which upheld "reasonable regulations" for the control and duration of basic education; however, he dissented from the portion of the opinion which upheld teacher certification require-

118. 617 P.2d 505 (Alaska 1980).

119. 207 Neb. at 816, 301 N.W.2d at 579.

120. 617 P.2d at 506-08.

121. *Id.* at 508.

122. Chief Justice Krivosha, concurring in part and dissenting in part, appears to take a similar approach. When addressing the teacher certification requirement, he argued that the requirement is invalid as to all private schools, not just Faith Baptist Church. 207 Neb. at 818-27, 301 N.W.2d 580-84 (Krivosha, C.J., separate opinion).

123. 617 P.2d at 506.

124. The very nature of an equal protection or due process challenge assures that a court's decision will affect all people facing a similar government regulation, whereas with a free exercise challenge the court's decision will only affect members of a similar religion which are facing the same government regulation. *See* J. NOWAK, R. ROTUNDA and J. YOUNG, CONSTITUTIONAL LAW 477, 517, 849 (1977).

125. 406 U.S. 205 (1972).

126. The burden placed on defendants is the same as that placed on the state in an equal protection or due process case. This is substantially different and more difficult to overcome than the burden which *Yoder* prescribed for free exercise cases.

ments.[127] In his dissent the Chief Justice argued that the Nebraska Board of Education's imposition of teacher certification requirements is contrary to Nebraska's compulsory education statutes.[128] There are two requirements which support his position: first, a teacher must have a Bachelor of Arts degree or its equivalent and, secondly, a Bachelor of Arts is the maximum degree of education which the state can require of its teachers. In addition, the State Board of Education can lift the certification requirements in emergency situations.[129] Krivosha argued that by making a Bachelor of Arts degree necessary to obtain certification the state board has made it impossible for a person with the equivalent of a Bachelor of Arts degree to become a teacher.[130] This may constitute the exercise of undelegated legislative authority and therefore be void,[131] since the fact that teacher certification requirements will be waived in some instances demonstrates that the requirements are not indispensable.[132]

Krivosha's argument is weakened by the fact that the state board has not expressly violated any statutes.[133] At most the board is acting contrary to the legislators' intent. Further, the legislature gave the state board broad powers to enact the rules and regulations which it deemed necessary.[134]

CONCLUSION

Factually the challengers in *Faith Baptist Church* have a weak case. They do not fit the well established religion classification nearly as well as the Amish, and the impositions which they have suffered are relatively minimal. Further, while the holding of *Yoder* is a clear victory for established religions, its rationale is somewhat murky. In light of the uncertain state of the law, the Nebraska Supreme Court has made a reasonable effort to accommodate the free exercise rights of the Faith Baptist Church.

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127. 207 Neb. at 803, 301 N.W.2d at 573.
128. *Id.* at 824-26, 301 N.W.2d at 583-84.
129. *Id.*
130. *Id.* at 825, 301 N.W.2d at 583.
131. *Id.*
132. *Id.* at 825, 301 N.W.2d at 583, 584.
133. *See* NEB. REV. STAT. §§ 79-1247.05 to 1247.06 (Reissue 1976); Department of Education Rule 21-701.
134. NEB. REV. STAT. § 79-328 (Reissue 1976).