1973

The Supreme Court, Compulsory Education, and the First Amendment's Religion Clauses

Philip B. Kurland

Follow this and additional works at: http://chicagounbound.uchicago.edu/journal_articles

Part of the Law Commons

Recommended Citation


This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.
I. Introduction

As a preliminary to my usual jeremiad about the work of the Supreme Court, I would like to set out what I consider to be some essential background against which the Court's decisions on schools and the religion clauses of the first amendment should be seen. I want to suggest that you consider, along with my preferred analysis of the decisions, the American idealization of the educational processes to which we have become committed and some of the countervailing forces that have been rampant in our history.

It has long been an American dream that education affords the means for upward mobility in an open society. The Supreme Court — here as elsewhere a mirror of the American commonweal, a mirror that sometimes distorts the facts — has framed much of the country's constitutional law on the unstated premise that formal education is the means by which American society remains fluid yet cohesive, pluralistic yet unitary, aspiring to be a democracy while being governed by a meritocracy. There is, however, a societal ambivalence about education. We are committed to schooling our children. Yet we tend to reject the objectives of that schooling.

Long before the service state came into existence in this country, with the advent of the New Deal in the 1930's, the states and the Nation were committed to supply the schooling by which such education was supposed to be accomplished. Although the states have assumed the major burden of their citizens' formal education, the
national commitment was evidenced even before the birth of the United States, in the provisions of the Northwest Ordinance. The words of the Northwest Ordinance are instructive. Article III reads, in part: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Please note the order of priority: Religion, first; morality, next; knowledge, last.

The movement for universal education, of course, came later, in the nineteenth century. At the beginning these undertakings by the states were limited to schooling on the most elementary levels of reading, writing, and arithmetic (plus the inculcation of Christian dogma). Today, we have reached the stage where public institutions predominate even in the realm of graduate and professional education. Gradually, but long since established, came the notion that education should not only be made available to the citizenry but that at least some part of it should be compulsory. Education became not only the privilege of the young American, it also became his duty. Additionally, the period during which such education was to be compulsory has become longer and longer.

It is thought by some of cynical nature, that at an early stage in a child's life compulsion and education become antithetical and that, with education as with money, a form of Gresham's law is operable. Bad education tends to drive out the good. Whether or not this is the reason, I think it demonstrates that increased quantitative demands have resulted in decreased qualitative standards. I think that there has been a destructive inflationary process eating at our educational systems no less than at the purchasing price of our dollars, so that more and more schooling seems to produce less and less education for those subjected to the process. But, at least until recently, it has not mattered that the facts are inconsistent with the ideal. For here, even earlier than with other aspects of the American polity, we have long measured success by egalitarian and, therefore, quantitative measures. And this has become more true in recent years, as egalitarianism has spread to many areas of American life.

Nor is it only the American who has admired himself for this commitment to universal education. In a recent issue of *Daedalus*,

entitled, *How Others See The United States*, a Greek intellectual, writing of what he hates and loves about the United States, said:\(^2\)

And here we come to your greatest contribution: education at the university level. No other country has encouraged so many young men and women to teach in their own ways. No other country has helped so many people to be trained in so many fields, old and new. When, far in the future, the history of education will be written, you will be recognized as the nation that began the change from the education of a few to the education of all. You have told me that the Russians educate many more people, but are they doing so in as many fields? Are they really educating or merely training in highly specialized fields? In any case, I doubt they would have opened their schools to more students if you had not broken the aristocratic traditions in education and helped us all.

Maybe it is distance that lends enchantment to the Greek scholar, while familiarity breeds contempt in me. Whether his or mine is the more accurate perspective, I must leave for you to judge.

Whichever is right, the American dream was clear. Schooling was expected to make every American more productive, thereby increasing his earning power. Schooling was to provide the means whereby all—or at least all who were willing to invest the necessary time, talent, and effort—could rise from the status of the economically poor to at least that of the economic middle class, from the status of the intellectually deprived to the status of the cultured, from the status of the amoral and the criminal to that of the ethical and law-abiding. And, in the process, as the community grew more civilized, the state would become the beneficiary as well as the benefactor. Thus the United States became one of the most schooled societies in the history of man.

There have been other definable consequences of mass schooling, consequences different from those high-flown objectives of public schooling. Whether these consequences have become ends rather than the means, while education of the individual has become subordinated to them, is not an easy question to answer. The facts are, however, that schooling has become one of the nation's largest enter-

---

prises, matching and exceeding in size the industries that produce food, housing, clothing, and armaments. It employs at least as many people as all the other vast bureaucracies of our government. Moreover, education has become an industry on which many other industries are dependent for their survival. While creating this huge market for labor, the educational systems have managed to keep off the labor market, for other trades, the young and the not quite so young who would otherwise compete for jobs with those who have already been through the processes. At the highest levels, educational requirements have also tended to restrict admission to the job markets. Thus, a Ph.D. is generally a prerequisite for tenured employment at the university level; an M.A. serves similar functions lower down the scale; a J.D. is necessary for lawyering, and so on. How many of these restraints assure the competence of the practitioner and how many are mere arbitrary prerequisites I do not pretend to know, although I am sure that both factors are present in the three-year curriculum of American law schools.

Recently doubt has been expressed about the desirability of widespread, compulsory formal education. Some of these expressions come from those who assert that contemporary schooling is confining of the mind and the spirit, that rather than broadening the intellect it confines it, that conformity rather than individuality is the result. Ivan Illich's recent book, Deschooling Society, perhaps best epitomizes the attack from this point of view. Even more recently have come more objective, less emotional, and more measurable data, in books such as those written and edited by Professors Moynihan and Mosteller and Professor Jencks. These data suggest, if they do not prove, that our present school systems really have remarkably little effect on the social mobility of our society or on integration of the races; these systems are not in fact a lever for improving the status or condition of the socially deprived.

This recent and growing group of detractors of the educational systems are themselves of the intellectually elite, despairing of the schools as the means for expression of their attitude of noblesse oblige. They do not charge the schools with false objectives in seeking to attain the equality of condition of all persons, but only with an inadequacy for bringing about the egalitarian ideal. There has been at work for a much longer time a more fundamental and per-

3 D. Moynihan & F. Mosteller, Equal Educational Opportunity (1972); C. Jencks, Inequality (1972).
vasive American attitude perhaps best described by Richard Hofstadter in his book *Anti-Intellectualism in American Life*. If America has long been committed to extensive schooling, it has also been largely committed to a rejection of the life of the mind. The United States has prided itself on being a society of doers rather than thinkers. It is the doers upon whom American society has conferred its laurels; thinkers have been scorned. The reasons for this anti-intellectualism are complex, as Hofstadter has so well demonstrated. Certainly, however, there has been a parallel between the cyclical rise and fall of populist creeds and the rise and fall of anti-intellectualism. Populism is once again a growing force in our society. Certainly, too, the life of the mind has been opposed by the entrenched religious organizations, most notably those of the fundamentalist faiths. Nor has the business community, which has directly benefited from the efforts of scientists and technicians, generally taken kindly to the eggheads of our world. Indeed, the intellectuals themselves have tended to lead the cult of the irrational, as our novelists, painters, and sculptors have been demonstrating for decades.

Formal education in the Anglo-American world originally was in the control of religious organizations. They utilized education for purposes of inculcating religious dogma and religious morality even more than the secular forms of knowledge. It has been a long and hard struggle to free education from religious domination. Indeed, it was only on Sunday, October 22, 1972, that a *New York Times* story reported the demand in California for science textbooks expounding the thesis that God created the world in seven days and that it is not necessarily true that evolution of man and his environment had occurred in the way that scientists have told us.

Despite the doubts and the reasons for those doubts, the American myth of the desirability of universal compulsory education has remained firmly entrenched. The judiciary has been one of the strong adherents to this philosophy. This commitment essentially supports the decision in *Brown v. Board of Education*\(^4\) and its progeny. The concept of "equal educational opportunity," rationalized in such writings as Professor Arthur Wise's *Rich Schools, Poor Schools* and the California decision in *Serrano v. Priest*,\(^5\) is based on this unstated premise. It is, therefore, all the more noteworthy that

in 1972, in Wisconsin v. Yoder, for the first time in our history the Supreme Court made substantial constitutional inroads on the power of the states to compel formal schooling beyond the primary grades.

II. LOOKING BACKWARD TO WEST VIRGINIA V. BARNETTE

Yoder was not the first time that the Court rejected the power of states to compel public education or even to prescribe the content of that education, nor was it the first time the Court justified exemption from the state-imposed obligations on the basis of religious affiliation. The unique quality of Yoder, however, takes some explanation and I must, at this point, depart from generalities about American society and resort to the details of constitutional case law.

A. Constitutional Restraints on State Power Over Education

Let me begin by examining some of the precedents on the question of constitutional limitations on the state's power over education. The first case for consideration is Pierce v. Society of Sisters, which was one of the mainstays of the Court's opinion in Yoder.

Pierce is a badly misunderstood case, because it is frequently referred to as a decision resting on the premise of the first amendment religion clauses, when in fact those constitutional provisions were irrelevant to the decision. In 1922, Oregon, under the initiative provisions of its constitution, adopted a statute that, for all relevant purposes, made attendance at state public schools compulsory. The statute was challenged before it became effective, by the Society of Sisters, an Oregon corporation that conducted a school teaching secular and religious subjects, i.e., a parochial school, and by Hill Military Academy, an Oregon corporation conducting a school for

\[\text{\footnotesize{\textsuperscript{6}}} \text{406 U.S. 205 (1972).} \text{The Wisconsin compulsory education statute provided that children between seven and sixteen years of age must attend school regularly. Mr. and Mrs. Yoder refused to send their children to high school after completing the eighth grade, although the children were not within any exception to the compulsory education statute. The Yoders felt continued public or private school education violated the tenets of their Amish religion. The parents of the Yoder children were found guilty of violating the Wisconsin compulsory education statute. On appeal to the Wisconsin Supreme Court, the compulsory education statute was held unconstitutional as applied to members of the Amish religion who had graduated from the eighth grade, because it infringed upon their free exercise of religion. The United States Supreme Court affirmed the decision, holding that the religion clauses of the first amendment, as applied to the states by the fourteenth amendment, prohibit state action which needlessly interferes with parental guidance over the religious training of children.}\]

\[\text{\footnotesize{\textsuperscript{7}}} \text{268 U.S. 510 (1925).}\]

HeinOnline -- 75 W. Va. L. Rev. 218 1972-73
secular and military education. The challenge took the form of a suit in the United States District Court to enjoin the enforcement of the statute. The Supreme Court affirmed the lower court's injunction. A primary reliance of the plaintiffs was on such Supreme Court decisions as the Child Labor Tax Case and Coppage v. Kansas.

In short, the major arguments were put forth in terms of the "substantive due process" cases that have long since been interred. At that time, however, the Court was still enthralled, and the opinion by Mr. Justice McReynolds reads accordingly. The state was not forbidden to command attendance at public schools because of the first amendment (at that time the first amendment was not thought to be applicable to the states) but rather because of the improper interference with the business and proprietary interests of the two corporations that would have been put out of business if the statute had been allowed to become effective.

Nevertheless, there was dicta about the freedom of parents to control their children's education. Two years earlier, the Court had struck down, over the dissent of Mr. Justice Holmes, a Nebraska law that reflected the anti-German feeling in this country by banning the teaching of any language but English. Meyer v. Nebraska involved a parochial school that was engaged in the teaching of German, but nothing in that opinion rested on the religion clauses. The Court in Pierce rested its judgment in part on the decision in Meyer:  

Under the doctrine of Meyer v. Nebraska, ... we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public school teachers only. The child is not the mere creature of the state; those who nurture him and direct

---

8 Id.
9 259 U.S. 20 (1922).
10 236 U.S. 1 (1915).
11 262 U.S. 390 (1923).
his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

The *Pierce* case has long been a problem in the church and state area. For if there is a state imposed duty to attend schools, there is nonetheless a right to secure the education that the state compels in private schools. These schools, it is frequently alleged, are performing a state function for which they are entitled to payment from the public coffers. The question of the constitutionality of public aid to parochial schools is not likely to be answered with any finality so long as both *Pierce* and the compulsory education laws must be reconciled. For our purposes, however, the important point to be made about *Pierce* is that exemption from attendance at public schools was not grounded on a concept of conscience or religious freedom. Any parent able to pay the cost of private education could, whatever his reason for doing so, cause his children to be educated — or rather subjected to education — at a non-public school whose standards met those imposed by the state. *Pierce* affords no predicate for the decision reached in *Yoder*, at least as the Court delimited the exemption from the compulsory education laws that it sanctioned in the more recent case.

The next important set of cases derives from the compulsory flag-salute regulations and laws that were promulgated at a time when the free world was engaged in a life-and-death struggle for its existence against powers that have since become its strongest allies. The compulsion to salute the flag was attacked by Jehovah's Witnesses as a requirement that they engage in an activity inconsistent with their fundamental religious beliefs. In *Minersville School District v. Gobitis* the Court held, in an opinion by Mr. Justice Frankfurter, that the state could constitutionally compel this exercise. The Court distinguished *Pierce* and resisted the claims that the first amendment exempted particular religious sects:

We are dealing here with the formative period in the development of citizenship. Great diversity of psychological and ethical opinion exists among us concerning the best way to train children for their place in society. Because of these differences and because of reluctance to permit a single, iron-cast system of education to be imposed upon a

---

13 310 U.S. 586 (1940).
14 *Id.* at 598-600.
nation compounded of so many strains, we have held that, even though public education is one of our most cherished democratic institutions, the Bill of Rights bars a state from compelling all children to attend the public schools. *Pierce v. Society of Sisters.* . . . [It is interesting that Justice Frankfurter left the bases of *Pierce* no more defined than the "Bill of Rights" at large.] But it is a very different thing for this Court to exercise censorship over the conviction of legislatures that a particular program or exercise will best promote in the minds of children who attend the common schools an attachment to the institutions of their country.

What the school authorities are really asserting is the right to awaken in the child's mind considerations as to the significance of the flag contrary to those implanted by the parent. In such an attempt the state is normally at a disadvantage in competing with the parent's authority, so long—and this is the vital aspect of religious toleration—as parents are unmolested in their right to counteract by their own persuasiveness the wisdom and rightness of those loyalties which the state's educational system is seeking to promote. Except where the transgression of constitutional liberty is too plain for argument, personal freedom is at best maintained—so long as the remedial channels of the democratic process remain open and unobstructed—when it is ingrained in a people's habits and not enforced against popular policy by coercion of adjudicated law. That the flag-salute is an allowable portion of a school program for those who do not invoke conscientious scruples is surely not debatable. But for us to insist that, though the ceremony may be required, exceptional immunity must be given to dissidents, is to maintain that there is no basis for a legislative judgment that such an exemption might introduce elements of difficulty into the school discipline, might cast doubts in the minds of other children which would themselves weaken the effect of the exercise.

Mr. Justice Stone dissented, alone. For him the constitutional guarantee of religious freedom precluded the enforcement of the flag-salute on those whose religious tenents condemned it.

The *Minersville* case was not the last word on the subject. Just
a few years later, in *West Virginia State Board of Education v. Barnette*, the Court reversed itself. It is important, however, to understand the premises of its second opinion on the subject, written by Mr. Justice Jackson. The Court did not rest its invalidation of the compulsory flag-salute on the religious freedom clause of the first amendment. Mr. Justice Jackson made this pellucidly clear: 

Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory right to infringe constitutional liberty of the individual. It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find the power to make the salute a legal duty.

The *Gobitis* decision, however, assumed, as did the argument in that case and in this, that power exists in the State to impose the flag salute discipline upon school children in general. The Court only examined and rejected a claim based on religious beliefs of immunity from an unquestioned general rule. The question which underlies the flag salute controversy is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution.

Justices Black and Douglas, who had voted with the majority in *Gobitis*, reversed their positions and chose to assert that religious freedom and not the general first amendment inhibitions on compelled thought and belief grounded the right to abstain. It is clear, however, that the exemption from the flag-salute duty created by *Barnette* was available to all who would assert it, without the need to show that religious beliefs dictated the abstention.

What the issue would have been—or how it would have been decided—in the absence of compulsory education laws is a matter for speculation. Only a few years earlier, the Court had held that

---

15 319 U.S. 624 (1943).
16 Id. at 634-36.
compulsory military training at a state university was not invalid against a challenge that religious beliefs forbade the student from participating in military training. In *Hamilton v. Regents*, the Court pointed out that the students were given a choice of attending the state university and undertaking the obligations of military training or not attending the university, in which case they would not be subjected to military training. "The fact that they are able to pay their way in this university but not in any other institution in California is without significance upon any constitutional or other question here involved." One may doubt, as I do, the viability of the *Hamilton* case in our day. But one must doubt, too, that its invalidity would rest on religious freedom grounds as distinguished from broader first amendment grounds.

Certainly, then, neither *Pierce* nor *Barnette* affords a religious freedom ruling in the context of compulsory education. Such freedoms from compulsory education as these cases may prescribe are equally available to all those who may claim them, without regard to the religious affiliation or beliefs of those asserting the rights.

There is, however, one case that does afford exemption from compulsory attendance at public schools on religious grounds. I refer to the second of the released-time cases, *Zorach v. Clauson*. The case was purportedly decided on establishment rather than freedom of religion grounds. Earlier, in *McCollum v. Board of Education*, the Court had ruled that releasing students from public school activities for the purpose of securing religious indoctrination was invalid because the establishment clause forbade it. Mr. Justice Black, writing for the Court said:

Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment . . . .

Although *Zorach* purported to distinguish rather than overrule

---

17 293 U.S. 245 (1934).
18 *Id.* at 262.
21 *Id.* at 209-10.
McCollum, the distinction was palpably an accommodation to public outcry: What Mr. Dooley once called "[f]ollowing the election returns." Mr. Justice Douglas's opinion for the Court in the second released-time case said:\footnote{22}{343 U.S. at 315.}

In the McCollum case the classrooms were used for religious instruction and the force of the public school was used to promote that instruction. Here, as we have said, the public schools do no more than accommodate their schedules to a program of outside religious instruction. We follow the McCollum case. But we cannot expand it to cover the present released time program unless separation of Church and State means that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people. We cannot read into the Bill of Rights such a philosophy of hostility to religion.

Here is the only precedent for the proposition that the compulsory education laws must bow to religious preference of students or their parents. As may be readily seen, it does not suggest that religious freedom compels such a law, but only that the state is free to enact such a law if it chooses to do so. Because the Court then considered, as it continues to consider, the two religion clauses of the first amendment as though they were separate commands rather than a single one, Zorach v. Clauson cannot be read as a predicate for the religious freedom holding in Wisconsin v. Yoder. It is not surprising therefore that Zorach receives no mention in any of the Yoder opinions.

B. Exemption from Validly Imposed State Obligations for Religious Reasons

Let me turn to my second proposition: Cases exempting persons from validly imposed state duties on religious grounds afford little if any support for the Yoder conclusion. Here the Court admittedly finds more support than in my first category, but the precedents are far from persuasive.

The cases on this subject begin with the Court's famed decision in Reynolds v. United States,\footnote{23}{98 U.S. 145 (1878).} a case on which Yoder certainly casts

\footnote{22}{343 U.S. at 315.}
\footnote{23}{98 U.S. 145 (1878).}
deep shadows. The Church of the Latter Day Saints prescribed polygamy as a part of its religious beliefs, at least under certain conditions. A law of the United States for the Territory of Utah made polygamy illegal. Reynolds, a practicing Mormon, was indicted and brought to trial on a charge of polygamy. The trial court refused defendant's instruction that if the jury found that "he was married [the second time] — in pursuance of and in conformity with what he believed at the time to be a religious duty... the verdict must be 'not guilty.'" Instead, the trial judge told the jury that if the defendant "deliberately married a second time, having a first wife living" his doing so "under the influence of a religious belief that it was right—under an inspiration, if you please, that it was right," did not relieve him of criminal liability. Commenting upon this matter the Supreme Court said:

Upon this charge and refusal to charge the question is raised, whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land. The inquiry is not as to the power of Congress to prescribe criminal laws for the Territories, but as to the guilt of one who knowingly violates a law which has been properly enacted, if he entertains a religious belief that the law is wrong.

The opinion for a unanimous Court was written by Mr. Chief Justice Waite and sustained the validity of the statute as applied. The primary line of reasoning was that the history behind the relevant constitutional principle demonstrated that "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order." The Court went on to hold that if the law is within the scope of governmental authority and of general application, it may — indeed probably must — be applied without regard to the religious convictions of those whose acts constitute willful violations of that law. To permit individuals to be excused from compliance with the law solely on the basis of religious beliefs is to subject others to punishment for failure to subscribe to those same beliefs.

The Reynolds opinion was reaffirmed by the Court in Davis v.

---

24 Id. at 162.
25 Id.
26 Id. at 164.
Beason,27 in 1890, and again in Cleveland v. United States,28 in 1946. Although it is hard to escape the similarity between these cases and Yoder, the Mormon polygamy cases played no real role in that decision. Reynolds was cited by the majority in Yoder twice. Once in support of the proposition that: “It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers.”29 The second time30 was within a quotation from Sherbert v. Verner.31

Mr. Justice White, in his concurring opinion in Yoder, disposes of the analogous polygamy issue by citing Cleveland v. United States for the conclusion that: “The challenged Amish religious practice here does not pose a substantial threat to public safety, peace, or order; if it did analysis under the Free Exercise Clause would be substantially different.”32 It should be noted that language in Chief Justice Burger's opinion for the Court, “health, safety, and general welfare,” was transmuted in Justice White's opinion to “public safety, peace, or order.” Whichever formula is used, the question remains why polygamy falls within the state's ken but abstention from schooling falls without it. Certainly there has been no showing that the practice of polygamy has resulted in greater evils than the prevention of schooling.

Jacobson v. Massachusetts33 involved a challenge to a compulsory smallpox vaccination law. The challenge has a contemporary ring:34

The defendant insists that his liberty is invaded when the state subjects him to fine or imprisonment for neglecting or refusing to submit to vaccination; that a compulsory vaccination law is unreasonable, arbitrary and oppressive, and, therefore, hostile to the inherent right of every free man to care for his own body and health in such way as to him seems best; and that the execution of such a law

27 133 U.S. 333 (1890).
29 406 U.S. at 220.
30 Id. at 230.
31 Id. at 230.
33 406 U.S. at 239 n.1.
34 197 U.S. 11 (1905).
35 Id. at 26.
against one who objects to vaccination, no matter for what reason, is nothing short of an assault upon his person.

But the right for which Jacobson was unsuccessfully contending was not premised on the religious freedom proposition of the first amendment, despite its frequent citation. It too is, therefore, irrelevant to our inquiry here.

The Selective Draft Law Cases,\textsuperscript{35} deriving from the first World War, did present a relevant question. There, the draft law exempted from military service any "member of any well-recognized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organizations . . . ."\textsuperscript{36} A challenge to the statute was made under the separation clause; the defendants did not claim to be conscientious objectors, and the issue was quickly dispatched:\textsuperscript{37}

And we pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act to which we at the outset referred, because we think its unsoundness is too apparent to require us to do more.

I submit that the decision is as sound as the reasons that Mr. Chief Justice White adduced to support it.

Again, however, the analogy to the \textit{Yoder} case must be noted, although the Selective Draft Law Cases involved an exemption granted by the government and not allegedly compelled by the Constitution. It was, perhaps, for that reason that the Court in \textit{Yoder} made no mention of them. More likely, however, it was because Mr. Chief Justice White's opinion was, for all practical purposes, rejected by the Court in two recent decisions, in which the Court insisted on expanding the congressional exemption from the draft to include not merely those who were adherents to established pacifist religions but to all who conscientiously objected to bearing arms.

\textsuperscript{35} 245 U.S. 366 (1918).
\textsuperscript{36} Act of May 18, 1917, ch. 15, § 4, 40 Stat. 78 (1919).
\textsuperscript{37} 245 U.S. at 389-90.
United States v. Seeger,\(^38\) in 1965, and Welsh v. United States,\(^39\) in 1970, made it clear that religiously oriented exemptions were certainly constitutionally suspect if not invalid. Perhaps, however, it is these later opinions that are doomed for extinction. In the Welsh case, Chief Justice Burger, and Justices White and Stewart were of the view that tying the exemption to religious affiliation was perfectly consistent with the first amendment's requirements. Justices Blackmun, Powell, and Rehnquist did not participate in that decision. The revival of Chief Justice White's ruling in the Selective Draft Law Cases may be expected any time that Congress once again mandates exclusion from military service solely for those with religious affiliations. When that question is again put to the Court, it would not be surprising if Yoder is cited in support of a conclusion of constitutional validity.

Certainly the most difficult hurdle for the Yoder Court was to be found in Prince v. Massachusetts,\(^40\) and the Court recognized this. There a guardian of a child had been convicted for violating the child labor law by permitting the child to engage in the sale of magazines of the Jehovah's Witness sect. The sale of newspapers and magazines by children in public places was specifically banned by Massachusetts law. Although a long series of cases had established that proselyting by Jehovah's Witnesses was a protected religious activity,\(^41\) if not by the religion clauses then by the free speech clauses of the first amendment, the Court in the Prince case upheld the conviction because of the state's special interest in protecting its children. There Mr. Justice Rutledge wrote for the Court:\(^42\)

The State's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and in matters of employment. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure

\(^{38}\) 380 U.S. 163 (1965).
\(^{40}\) 321 U.S. 158 (1944).
\(^{42}\) 321 U.S. at 168-69.
this against impending restraints and dangers within a broad range of selection. Among evils most appropriate for such action are the crippling effects of child employment, more especially in public places, and the possible harms arising from other activities subject to all the diverse influences of the street. It is too late now to doubt that legislation appropriately designed to reach such evils is within the state's police power, whether against the parent's claim to control of the child or one that religious scruples dictate contrary action.

The State of Wisconsin claimed that its interest in the development of its young citizens included the power to compel the attendance of young children at school, including high school. The Court in Yoder, however, found the Prince case distinguishable:

Finally, the State, on authority of Prince v. Massachusetts, argues that a decision exempting Amish children from the State's requirement fails to recognize the substantive right of the Amish child to a secondary education, and fails to give due regard to the power of the State as parens patriae to extend the benefit of secondary education to children regardless of the wishes of their parents. Taken at its broadest sweep, the Court's language in Prince might be read to give support to the State's position. However, the Court was not confronted in Prince with a situation comparable to that of the Amish as revealed in this record; this is shown by the Court's severe characterization of the evils that it thought the legislature could legitimately associate with child labor, even when performed in the company of an adult.

This case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred. The record is to the contrary, and any reliance on that theory would find no support in the evidence.

Never, I submit, has the concept of the importance of secondary education received such a blow from the judiciary. Secondary edu-

\[43\] 406 U.S. at 229-30.
cation may not be regarded by a state as essential to "the physical or mental health of the child or to the public safety, order, or welfare" of the state. What is the justification for compulsory secondary education then? How could a state ever meet the burden placed on it by the Court here to show that it has a valid interest in educating its children beyond the primary grades?

The Court did have and did use one decision to the effect that a benefit conferred by a state on others could not be denied to a person who failed to qualify for it because his religious beliefs prevented him from doing so. That was the case of *Sherbert v. Verner,* where the Court held that a state law was invalidly applied to deny unemployment benefits to a worker who was disqualified by his religious beliefs from working on Saturday and, therefore, could not hold himself available for jobs that required Saturday work. In that case, Mr. Justice Brennan had written for the Court:

> We turn first to the question whether the disqualification for benefits imposes any burden on the free exercise of appellant's religion. We think it clear that it does. In a sense the consequences of such a disqualification to religious principles and practices may be only an indirect result of welfare legislation within the State's general competence to enact; it is true that no criminal sanctions directly compel appellant to work a six-day week. But this is only the beginning, not the end, of our inquiry. . . . Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her 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 in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

The essential difficulties with *Sherbert v. Verner* were two. First, it seemed an ad hoc rather than a principled judgment. Second, it

---

45 Id. at 403-04.
was inconsistent with the Court's earlier decisions in the Sunday Closing Law Cases. Indeed, four members of the Court, Justices Douglas, Harlan, Stewart, and White thought that the judgment in *Sherbert v. Verner* overruled those opinions that sustained the validity of Sunday Closing Laws as applied to those whose religion required them to abstain from work on a day other than Sunday.

The use of *Sherbert v. Verner* in *Yoder* was tangential. Essentially the Court relied on it to suggest that the burden was on the state to demonstrate—perhaps beyond a reasonable doubt—that it would suffer injury if the special treatment were afforded the Amish because of their religious beliefs.

This, then, was the state of the constitutional case law when the Court decided the *Yoder* case. There was no support for invading compulsory education laws, even to satisfy the religious preferences of some citizens. There was little support for the proposition that religious beliefs entitled the believers to exemptions from state-imposed duties not available to others.

III. LOOKING FORWARD FROM WISCONSIN V. YODER

In his Epistle to the Galatians, Paul wrote: "The fruit of the Spirit is love, joy, peace, long-suffering, gentleness, goodness, faith, meekness, temperance." And he added: "Against such there is no law." It would seem that the Court's opinion in *Yoder* was based on this text, although the respondents, who followed the Old Amish religion, derived their doctrine from the Epistle to the Romans: "[B]e not conformed to the world." The Court's opinion, in any event, opened with a homily to the simple life of the simple people and continued as a paean of praise.

*Wisconsin v. Yoder* is, without doubt, an innovative opinion; whether it will also prove to be a seminal one remains to be seen. Its first major contribution to the new jurisprudence of the religion clauses of the first amendment was a new standard of measurement. The role of the judiciary, we are told, is to balance the interests of the state against the interests of religion. But here, as elsewhere, the outcome is likely to depend upon where the burden of persuasion is

---

placed. The test proposed by the Court certainly puts the burden on the state:

\[\ldots [\text{I}n \text{ order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.}\]

The test proposed smacks of that which some of the Justices — but not Chief Justice Burger — have applied under the equal protection clause. There, once it is found that the statute under attack adversely affects a "fundamental interest," a state is required to justify its legislation by a demonstration of a countervailing "compelling state interest." In 1972, Chief Justice Burger wrote in condemning the "compelling state interest" standard: "To challenge such lines by the 'compelling state interest' standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection." It was the Chief Justice, nevertheless, who utilized the equivalent standard in the \textit{Yoder} case. "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."

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. The issue in those cases is resolved in the determination whether a fundamental interest is adversely affected. So, too, it would seem that the "state interest of sufficient magnitude" standard of the Chief Justice will be conclusory, but the question will first have to be determined whether the challenged state action "interferes with the practice of a legitimate religious belief."

The "legitimate religious belief" of the Amish was that schooling

\[\footnotesize{47 \text{ 406 U.S. at 214.} \quad 48 \text{ Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972).} \quad 49 \text{ 406 U.S. at 215.}}\]
after the elementary grades would pervert the values that are of the essence of the Amish faith:50

The trial testimony showed that respondents believed, in accordance with the tenets of the Old Order Amish communities generally, that their children's attendance at high school, public or private, was contrary to the Amish religion and way of life. They believed that by sending their children to high school, they would not only expose themselves to the danger of the censure of the church community, but, as found by the county court, also endanger their own salvation and that of their children. The State stipulated that respondents' religious beliefs were sincere.

The Court then proceeded to set forth the virtuous nature of the Amish life:51

Amish society emphasizes informal learning-through-doing, a life of "goodness," rather than a life of intellect, wisdom, rather than technical knowledge, community welfare rather than competition, and separation, rather than integration with contemporary worldly society.

Formal high school education beyond the eighth grade is contrary to Amish beliefs not only because it places Amish children in an environment hostile to Amish beliefs with increasing emphasis on competition in class work and sports and with pressure to conform to the styles, manners, and ways of the peer group, but because it takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life. During this period, the children must acquire Amish attitudes favoring manual work and self-reliance and the specific skills needed to perform the adult role of an Amish farmer or housewife. They must learn to enjoy physical labor.

The interests of a state in securing attendance at high school, on the other hand, was regarded by the Court as less than substantial. The Court recognized only "two primary arguments" for compulsory education:52

50 Id. at 209.
51 Id. at 211.
52 Id. at 221.
Some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society.

The Court made no mention of the public school systems as a means of integrating a larger community. It disregarded Brown v. Board of Education, just as it rejected the arguments in the released-time cases that suggest that religion is a divisive force that can and frequently does fragment the larger community. The distinction between religious separation and racial separation was never clearly delineated. Certainly a state would be in violation of the Constitution, however, if it compelled rather than permitted the exclusion of the Amish from the public schools in order to protect the Amish children from the taints of the worldly society. Is there the possibility that the Court will allow blacks and Chinese to opt out of the public school systems in order to maintain their communities? Not based on the religion clauses, but why not under the similar standards of the equal protection clause?

The Court held that the two reasons underlying the State's case were inadequate to overcome the claims for religious freedom:\[53\]

It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live, but it is quite another if the goal of education be viewed as the preparation of a child for life in the separated agrarian community that is the keystone of the Amish faith.

Besides, the Amish children were not being deprived of education, but only of that form of schooling that the State afforded — nay compelled — for all others:\[54\]

It is neither fair nor correct to suggest that the Amish are opposed to education beyond the eighth grade level. What this record shows is that they are opposed to conventional formal education of the type provided by a certified

\[53\] Id. at 222.
\[54\] Id. at 223-25.
high school because it comes at the child's crucial adolescent period of religious development.

Insofar as the State's claim rests on the view that a brief additional period of formal education is imperative to enable the Amish to participate effectively and intelligently in our democratic process, it must fall. The Amish alternative to formal secondary school education has enabled them to function effectively in their day-to-day life under self-imposed limitations on relations with the world, and to survive and prosper in contemporary society as a separate, sharply identifiable and highly self-sufficient community for more than 200 years in this country.

Further, said the Court, it was only sixty years ago that the states were satisfied to require no more than a grammar school education, which presumably suggests that such an education is all that is really necessary to prepare a youngster for his role as a citizen in this country. Then, too, the additional requirement for attendance to the age of sixteen is really concomitant with the desire to keep the young off the job market, thus assuring that they will not be put to work in undesirable occupations and will not compete with their elders for the limited number of jobs available. But this consideration—it can't be called a legislative judgment—is irrelevant to the Amish:

For, while agricultural employment is not totally outside the legitimate concerns of the child labor laws, employment of children under parental guidance and on the family farm from age 14 to age 16 is an ancient tradition that lies at the periphery of the objectives of such laws. There is no intimation that the Amish employment of their children on family farms is in any way deleterious to their health or that Amish parents exploit children at tender years. Any such inference would be contrary to the record before us. Moreover, employment of Amish children on the family farm does not present the undesirable economic aspects of eliminating jobs that might otherwise be held by adults.

There can be no doubt that what impressed the Court most

---

55 Id. at 229.
about the desire of the Amish to live their simple way of life without interference from the State of Wisconsin was what the Chief Justice constantly referred to as their "success." This theme was enunciated repeatedly in the Court's opinion:

Whatever their idiosyncrasies as seen by the majority, this record strongly shows that the Amish community has been a highly successful social unit within our society even if apart from the conventional "mainstream." Its members are productive and very law-abiding members of society; they reject public welfare in any of its usual modern forms. The Congress itself recognized their self-sufficiency by authorizing exemption of such groups as the Amish from the obligation to pay social security taxes.

Another reference later in the opinion proclaimed:

Aided by a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society, the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State's enforcement of a statute generally valid as to others.

The conclusion was an easy one for the Court. When the ideal of the simple community life of the Amish was weighed against the dubious value of high school education, the latter was not permitted to interfere with the former. The description of the Amish life was recognized as an idealized version, if not by the majority, then by Justice Douglas and the dissenting judge on the Wisconsin Supreme Court.

If no more were involved, the opinion would be marked by "liberals" as a most desirable one in its emphasis on the primacy of the freedom of religion clause. This primacy would be not only over other state interests that used to be regarded as "compelling," but

56 Id. at 222.
57 Id. at 235.
would be a primacy over the companion establishment clause, as well as a rejection of the neutrality principle that once threatened to become dominant in the Court's thinking in this area. The Chief Justice disposed of both the neutrality concept and the establishment clause quickly and concisely, if not cogently:58

A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirements for government neutrality if it unduly burdens the free exercise of religion. . . . The Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise.

The Court then complimented itself, almost astonished at how well it had walked the "tight rope" without falling either into the error of a "semblance of established religion" or the error of infringing "the autonomy and freedom of religious bodies."59 The Chief Justice's authority for this self-congratulation was his own opinion in Walz v. Tax Commission.60 In that case the Court had sustained the validity of property tax exemptions for churches.

The opinion would, indeed, have been a landmark for religious liberty, were it not for the narrowed concept of what religions are protected by the provisions of the first amendment. Individual conscience is not to be afforded this protection. Only the long-established churches are to be the beneficiaries of the broadened protection. This was both implicit and explicit in the Chief Justice's opinion.

The ancient lineage of the Amish religion was emphasized frequently. Three hundred years of history dating back to the founding of the Amish religion in Europe and its presence for two hundred years in America obviously lent credence to its claim for noninterference by Wisconsin. The simple life, which the Court admired and protected, however, must be in response to the commands of such a long-lived and well-established religious tradition in order to come within the protection of the first amendment. The Court holds no

58 Id. at 220-21.
59 Id. at 221.
truck with contemporaries who would also aspire to return to an agrarian democracy without interference by the states. It matters not how conscientious the belief of the moderns may be, only an established church can lend support to a claim of religious freedom. This the Court made clear:  

A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claim would not rest on a religious basis. Thoreau’s choice was philosophical and personal rather than religious and such belief does not rise to the demands of the Religion Clauses.

The Court repeated its proposition that the good way of life was not sufficient to provide an exemption from the rigidities of a state educational system: "It cannot be overemphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some 'progressive' or more enlightened process for rearing children for modern life."  

The distinction between the religion of the individual and the religion of an organized church was also underlined by the dispute between the majority and Justice Douglas. Justice Douglas’s dissent questioned whether the freedom from compulsory education was a freedom that belonged to the child or to the child’s parents. It must be remembered that in Yoder it was a five dollar fine imposed on the parents that created the issue. Only they were in jeopardy from the

61 406 U.S. at 215-16.
62 Id. at 235.
compulsory education law. For this reason, the Court did not decide whether the option as to high school education of the child, belonged to the parent or the child:

Contrary to the suggestion of the dissenting opinion of MR. JUSTICE DOUGLAS, our holding today in no degree depends on the assertion of the religious interest of the child as contrasted with that of the parents. It is the parents who are subject to prosecution here for failing to cause their children to attend school, and it is their right of free exercise, not that of their children, that must determine Wisconsin's power to impose criminal penalties on the parent. . . .

Our holding in no way determines the proper resolution of possible competing interests of parents, children, and the State in appropriate state court proceedings in which the power of the State is asserted on the theory that Amish parents are preventing their minor children from attending high school despite their expressed desires to the contrary. Recognition of the claim of the State in such a proceeding would, of course, call into question traditional concepts of parental control over the religious upbringing and education of their minor children recognized in this Court's past decisions. It is clear that such an intrusion by a State into family decisions in the area of religious training would give rise to grave questions of religious freedom comparable to those raised here and those presented in Pierce v. Society of Sisters, 268 U.S. 510 (1925). On this record we neither reach nor decide those issues.

But there are various ways of not deciding a question. One would have to be obtuse in order not to see which way Chief Justice Burger was leaning on the question that he did not decide. Certainly the citation of Pierce v. Society of Sisters gives a clue, especially when we remember that Pierce presented no religious freedom issue at all. The Chief Justice labeled this a question of invasion of religious freedom. One may draw inferences from this since it was his position that once such a question is presented it becomes the burden of a state to prove by an extraordinarily high standard of proof that

---

63 Id. at 230-32.
its interests in education outweigh those of the parents in the imposition of religion on their children.

Mr. Justice Stewart's assertion, in which he was joined by Mr. Justice Brennan, established a greater neutrality on the question whether the children have the option of attending school. He said: "It is clear to me . . . that this record simply does not present the interesting and important issue in Part II of the dissenting opinion of MR. JUSTICE DOUGLAS. With this observation, I join the opinion and the judgment of the Court." It is significant to me that only these two Justices chose this form of denial of resolution of the question rather than the pregnant disclaimer of the Chief Justice.

For Mr. Justice Douglas, not only was the question clearly presented by the case, but the answer to the question was abundantly clear:

It is the future of the student, not the future of the parents, that is imperiled in today's decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. The child may decide that that is the preferred course, or he may rebel. It is the student's judgment, not his parent's, that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny. If he is harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may be stunted and deformed. The child, therefore, should be given an opportunity to be heard before the State gives the exemption which we honor today.

The difficulty that I have with the opinion of Justice Douglas goes to the balance struck by the Court, in which he joined. If it is true that denial of a high school education in fact results in a "stunted and deformed" life, as Justice Douglas asserts, why is he willing to say that Wisconsin has failed to carry the burden of establishing a countervailing interest as in *Prince v. Massachusetts*, a coun-

---

64 Id. at 237.
65 Id. at 245-46.
tervailing interest sufficient to justify the compulsory education law even at the high school level.

The current Court's devotion to the rights of churches rather than the rights of individual conscience — the two are certainly not the same — was also evidenced in *Walz v. Tax Commission*, which sustained the exemption of churches from state property taxes. Certainly the question was different there, for that case was seen as solely a question of establishment. The question was different there, too, because the exemption was one that had been created by a state legislature and not one that was imposed on a state legislature by the Court as in *Yoder*. But again, over the lone dissent of Mr. Justice Douglas, Chief Justice Burger, speaking for the Court, and the concurring opinions, argued in terms of the corporate interests of the churches rather than the individual adherents to the religious beliefs of those churches. It was organized religion that was accorded the exemption from taxation that others had to bear. It was the contributions of organized religion to our society that justified the exemption for at least some of the Justices. It was left to *Yoder* to make clear the distinction between churches and religious beliefs, between the corporate institutions and individual conscience. But I suspect that newly conceived religions would be entitled to exemption from compulsory education.

For me, the judgment would be different. If I were compelled to read the establishment and freedom clauses separately, I should think that the freedom clause speaks for the protection of individual conscience and the establishment clause speaks for a ban on assistance, not to individuals, but to churches. I think it meaningful that the establishment clause has been translated into one that is read to command separation of church and state. It was the evil of the organized churches' domination of civil government that was sought to be abated by the establishment clause; it was the abolition of the evil of state compulsion on individual conscience that was the objective of the freedom clause.

If the reading of the *Yoder* case that I have offered here is the correct one, it is hardly to be considered a case that struck a broad blow for individual freedom. It simply transferred the power over the individual from the government to the church. The long history

---

of the emancipation of the Anglo-Saxon peoples from the control of its organized religions suggests that such action as the Court took in *Yoder* may not be an exercise in freedom at all, but only a decision to render unto Caesar that what is Caesar's and to the church that which is the church's.

It should be noted that the decision here falls outside the major area of controversy of the church-state cases. Surely the question that is currently most pressing is that of financial assistance to parochial schools, and from this problem derives a very large part of the contemporary controversy over the meaning of the first amendment's religion clauses.

There is a tension between the *Yoder* case and the school aid cases, albeit not a very strong one. It should be recalled that in the previous term, the Court had sustained the validity of government grants to church-related schools at the higher levels of education, so long as the contributions were not directly used for purposes of religious indoctrination. *Tilton v. Richardson*\(^{67}\) sustained federal construction grants to church-affiliated colleges. At the same time, government grants to church parish schools, theoretically at least limited to non-religious activities in those schools, was held invalid in *Lemon v. Kurtzman*.\(^{68}\) Under these two earlier cases, the bite of the first amendment was felt at the lower levels of education but not at the higher. In *Yoder*, the bite of the first amendment was at the higher level but not at the lower. In *Yoder*, the Court held that the freedom of religion clause does not exempt students from compulsory schooling at the primary grades of public education; students are only exempt at the high school grades. There is, of course, a rational explanation for this difference. But it is dependent on a total separation of the freedom and establishment clauses.

If the *Yoder* decision did not speak directly to parochial school assistance, it might nevertheless prove a useful tool for justifying such assistance. The combination of *Pierce*, which permitted private schools to assume state educational duties, *Walz*, which permitted economic benefits to be directly conferred on churches by way of tax exemption, and *Yoder*, which held that a long-standing religious commitment to a particular kind of nonsecular education is protected by

\(^{67}\) 403 U.S. 672 (1971).

\(^{68}\) 403 U.S. 602 (1971).
the freedom of religion clause, could well be read to justify—if not to compel—legislative assistance to students at private schools.

In addition to the syllogistic argument that might be derived from the combination of *Yoder*, *Walz*, and *Pierce*, there are the patent political facts that would suggest the amenability of the public to such a change. Both President Nixon and Senator McGovern came out strongly in the 1972 election campaign for aid to parochial education. If the past decisions of the Court do, indeed, restrain the state and national governments from making direct grants to parochial schools, there remains the method of the *Walz* case, the utilization of tax benefits and exemptions rather than grants. Economists might suggest, however, that the result is the same whether a grant is made or an exemption from a tax is offered. Reality of this kind was rejected in *Walz* and may well be rejected when the question of tax credits and tax exemptions is raised, as it surely will be, by future federal legislation and already existing state laws.

It must be recognized that the Amish are a small sect. Never did they present a threat of religious establishment. The Catholics, who would be the primary beneficiaries of a parochial aid system, might well be seen differently. Professor John Roche long ago suggested that the constitutional church-state principles included a rule that the smaller the clerical establishment the greater the exemption from the establishment clause. Thus, the myriad of cases dealing with Jehovah's Witnesses, with the exception of the *Prince* case, tended to afford them protections from the state that others might not have secured. The exemption of the Peyote Indians from the ban on the use and distribution of the peyote drug affords another example of the benefits of smallness.

Whatever else *Yoder* did, it clearly undermined the authority of a large number of precedents. Certainly, as Mr. Justice Douglas suggests in his dissent, *Yoder* would seem to be inconsistent with the line of cases permitting the prosecution of Mormons for polygamy. It is likely, however, that many members of the Court would regard the state interest in preventing polygamy, even in this day and age, as a more compelling interest than the interest in educating children beyond the primary grades. *Prince v. Massachusetts*69 must also be regarded as an unworkable precedent, for surely the street proselyt-

---

ing of children on behalf of their religion and under the guidance of their parents would meet all the qualifications that the Court established for the Amish here. If the Sunday Closing Law Cases were not killed by Sherbert v. Verner, they must be considered to have been destroyed by Yoder.

The question remains whether other state interests will be treated as lightly as the state interest in high school education. Both the majority and the minority opinions clearly indicated that a different result might have been forthcoming if the Amish had refused to send their children for elementary education. This is not a suggestion of a doctrinal difference, but rather of the personal beliefs of the Justices about the importance of bare literacy, which they would compel even against religious objections, and the higher intellectual attainments that the state believes are to be derived from upper-school training, which the Court belittled in Yoder.

So, too, Yoder might well have marked the end of both Seeger and Welsh, with their notions of religion as a matter of personal conscience rather than church affiliation.

The fact is that the Court in the area of the religion clauses has never established a doctrinal base. It has, as the Court suggested in Yoder, tread a narrow path, moving right or left as the Justices' personal predilections and fears moved them. Yoder, like its predecessors, is unlikely to be the base for sound doctrine. It has, however, temporarily established the rejection of the principles of neutrality; it has established the primary nature of the freedom of religion clause and the subordinate role of the establishment clause; it has, like the decision in Walz, indicated that the Court thinks of religion in terms of established churches and not in terms of individual beliefs. Yoder is, indeed, a pretty kettle of fish. It remains to be seen whether the Court will be able to digest the brew that it has concocted.

A critic finds it difficult to be hard on a Court that dealt so gently with the Amish and their virtues. The dream of the return of the United States to the agricultural democracy of Jefferson's time is one that many have indulged. It is not possible for all to make the trip backward in time. All the more reason, it may be said, to preserve the rare species that we have. The result of Yoder then is

to be applauded, on humanitarian grounds if no other. Maybe it is really an ecology case and not a religious case. The worry remains whether bad law is made by easy cases more often than by hard cases. But *stare decisis* having become even more outmoded than the Amish seventeenth century way of life, perhaps the implications of *Yoder* ought not to concern us unduly. For certainly it may be said that the ways of the Court, too, are wonderful to behold.