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Constiutional Law - Balancing Test Employed to Resolve Conflict Between State Statute and Resulting Burden on Free Exercise of Religion - State Interest in Compelling Compulsory High School Attendance Outweighed by Resulting Burden on Free Exercise of Amish Religion

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RECENT DEVELOPMENTS

CONSTITUTIONAL LAW — BALANCING TEST EMPLOYED TO RESOLVE CONFLICT BETWEEN STATE STATUTE AND RESULTING BURDEN ON FREE EXERCISE OF RELIGION — STATE INTEREST IN COMPELLING COMPULSORY HIGH SCHOOL ATTENDANCE OUTWEIGHED BY RESULTING BURDEN ON FREE EXERCISE OF AMISH RELIGION.

Wisconsin v. Yoder (U.S. 1972)

Respondents,[1] members of the Old Order Amish Religion and the Conservative Amish Mennonite Church, were convicted of violating a Wisconsin statute requiring them to send their children under age sixteen to a public or approved private school.[2] Although willing to allow attendance through the eighth grade in small, local schools,[3] the respondents contended that to compel them to send their adolescent children to a larger, consolidated high school would force exposure to worldly values and lifestyles in opposition to Amish religious tenets. As a result, respondents argued that enforcement of the statute would jeopardize the salvation of themselves and their children and endanger their religiously grounded, insulated, communal life by forming a barrier to the cohesive integration of their young.[4] Accordingly, respondents claimed that the free exercise clause of the first amendment required that an exception to the compulsory

1. Three prosecutions were joined for hearing in the Wisconsin Supreme Court: State v. Yoder, No. 92 (Old Order Amish); State v. Yutzy, No. 93 (Old Order Amish); State v. Miller, No. 94 (Conservative Amish Mennonite Church). State v. Yoder, 49 Wis. 2d 430, 182 N.W.2d 539 (1971).

2. 5 WIS. STAT. ANN. § 40.77(1)(a) (1966) requires persons having a child between the ages of seven and sixteen years under their control to send the child to a public or approved substitute school during the regular sessions. The statute may be enforced by fines of not less than five dollars nor more than fifty dollars, or by imprisonment of not more than three months, or both. *Id.* at § 40.77(3).

3. Respondents' children Frieda Yoder, age 15, Barbara Miller, age 15, and Vernon Yutzy, age 14, attended public school through the eighth grade. The Amish have no objection to education through the first eight grades in such schools because they believe in the necessity of a basic education and because there is a lack of exposure to outside values in local schools of exclusively Amish makeup. 406 U.S. 205, 212 (1972).

4. Respondents introduced unchallenged expert testimony in the trial court to the effect that their religious dictates forbid materialism and competitive values, and require a way of life insulated from the social mainstream. 406 U.S. at 209–13. *See generally* J. HOSTETLER, AMISH SOCIETY (1963); J. HOSTETLER & G. HUNTINGTON, CHILDREN IN AMISH SOCIETY (1971); W. SCHREIBER, OUR AMISH NEIGHBORS (1962); E. SMITH, THE AMISH PEOPLE (1958); Casad, *Compulsory High School Attendance and the Old Order Amish: A Commentary on State v. Garber,* 16 U. KAN. L. REV. 423 (1968); Littell, *Sectarian Protestantism and the Pursuit of Wisdom: Must Technological Objectives Prevail?*, in PUBLIC CONTROLS FOR NONPUBLIC SCHOOLS (Erickson ed. 1969); Note, *The Right Not to be Modern Men: The Amish and Compulsory Education,* 53 VA. L. REV. 925 (1967).

education requirement be granted in their case.[5] Wisconsin did not dispute the nature of the Amish faith or the interference with free exercise of religion caused by enforcement of the statute.[6] Rather, the state contended that despite these considerations its interests in compulsory education commanded a uniform enforcement of the statute.[7] The Supreme Court of Wisconsin applied the balancing test explicated in *Sherbert v. Verner,*[8] and reversed the trial court, granting an exemption from the statutory requirements for Amish children past the eighth grade.[9] Utilizing the same test, the Supreme Court of the United States affirmed, *holding* that the state's strong interest in compelling the secondary school attendance of respondents' children was outweighed by the concomitant deleterious effect which such compulsion worked on the free exercise of respondents' religious beliefs. *Wisconsin v. Yoder,* 406 U.S. 205 (1972).

The Court has in the past been frequently confronted with situations in which a state's interest in the enforcement of its laws conflicts with the individual's interest in the free exercise of his religion. Treatment of such disputes has progressed through three evolutionary stages.

In its initial period of doctrinal development, the Court, in the late nineteenth century, faced the conflict between state law and the religiously based polygamy of the Mormons — most notably in *Reynolds v. United States.*[10] Fearful that a statutory exemption based on the free exercise clause would "make the professed doctrines of religious belief superior to the law of the land,"[11] the *Reynolds* Court founded a longstanding distinction between religious *belief* and religious *action.* The effect of this distinction was to shield the individual's religious beliefs from statutory interference, while "[r]eligiously motivated action was to be subjected to the police power of the state to the same extent as would similar action springing from other motives."[12] This first stage of the Court's doctrinal evolution afforded the utmost in simplicity: religiously grounded *belief* was characterized as superior to conflicting state regulations; religiously grounded *action* had to conform to the requirements of state statutes. The labelling of the interest itself provided the resolution of the problem.[13]

As the scope of state social regulation burgeoned during the 1940's, the Court was spurred to its second stage. *Reynolds* prohibited behavioral variation from statutory requirements, and, as the number of requirements

5. 406 U.S. at 209. The first amendment provides in part: "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

6. 406 U.S. at 219.

7. *Id.*

8. 374 U.S. 398 (1963).

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

10. 98 U.S. 145 (1878). For a similar case *see also* Davis v. Beason, 133 U.S. 333 (1890).

11. 98 U.S. at 167.

12. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development. Part I: The Religious Liberty Guaranteed,* 80 HARV. L. REV. 1381, 1387 (1967).

13. *See* Clark, *Guidelines for the Free Exercise Clause,* 83 HARV. L. REV. 327, 328 (1969).

increased, the number of prohibited variations mounted accordingly.[14] Two effects were apparent. First, the policy of uniformly enforcing an increasing number of state laws meant that governmental pursuit of relatively insignificant ends was often allowed to restrict religious behavior of great significance to certain religious groups. Second, the restrictions often prohibited conduct of religious origin when such prohibition did not serve the purpose for which the regulation was designed, *i.e.*, as restricting the possession of alcohol curtailed the use of sacramental wine.[15]

These considerations paved the way for the Court, in *Cantwell v. Connecticut*,[16] to assert that the first amendment "embraces two concepts, freedom to believe and freedom to act,"[17] marking the first clear abandonment of the belief-action distinction.[18] *Cantwell* freed Jehovah's Witnesses from a potentially arbitrary state licensing requirement, allowing them to perform their religiously required solicitation without regard to the state law.[19] Mr. Justice Roberts, writing for a unanimous Court, hinted at the need to balance the state's interest in uniform enforcement against the effects of an outright ban on conflicting religiously motivated action in stating:

> We must determine whether the alleged protection of the State's interest . . . has been pressed, in this instance, to a point where it has come into fatal collision with the overriding interest protected by the federal compact.[20]

The Court had thus shifted its characterization of the interests involved to recognize that neither religious belief nor *action* could be subordinated to state statutory requirements of only minimal importance. The Court was willing to accommodate religious acts when the purpose of the statute,[21] or the means by which the statute was enforced,[22] was directed at no significant state goal *and* when denial of an exemption would result in a severe burden on the free exercise of religion.[23] However, where the legislation had a more

14. *See* Giannella, *supra* note 12, at 1388.
15. *Id.*
16. 310 U.S. 296 (1940).
17. *Id.* at 303.
18. *See* Galanter, *Religious Freedom in the United States: A Turning Point?*, 1966 WIS. L. REV. 217, 236 (1966).
19. 310 U.S. at 309–11.
20. *Id.* at 307. *See also* Martin v. City of Struthers, 319 U.S. 141 (1943), where the Court, on a freedom of speech rationale, spoke of the need of "weighing the conflicting interests." *Id.* at 143.
21. *See* Murdock v. Pennsylvania, 319 U.S. 105 (1943). The Court concluded that a licensing fee imposed on Jehovah's Witnesses' solicitation served no state purpose since it was "fixed in amount and unrelated to the scope of activities of petitioners or to their related revenues" and thus was not "a nominal fee imposed as a regulatory measure to defray the expense of policing the activities in question." *Id.* at 113.
22. Thus, in *Cantwell*, the Court found that the enforcement of the legislation served no purpose since the conduct of defendants was not "noisy, truculent, overbearing or offensive" and enforcement was thus not required. 310 U.S. at 308.
23. In *Murdock*, the Court found that the regulatory measure had a profound suppressive effect on defendant's religious freedom. 319 U.S. at 114. In *Cantwell*, the consequence of enforcement was deemed "a censorship of religion as the means of determining its right to survive." 310 U.S. at 305.

direct bearing on a reasonable state interest *or* where it exerted a more indirect effect on the free exercise of religious acts, challengers to the statute did not fare as well.[24] Thus, although recognizing a new breed of competing interests, the Court had tipped the balance in favor of the state before the weighing had begun.

The Court entered a third stage in *Sherbert v. Verner*.[25] The applicability of a balancing procedure was reaffirmed, but in *Sherbert* the Court transformed it into something very different from that which had been previously applied. *Sherbert* dealt with a South Carolina statute which predicated unemployment compensation on the availability for work when offered.[26] Appellant, a member of the Seventh Day Adventist Church, was denied such benefits when she refused to accept Saturday work because of her religious beliefs.[27] The state contended that the granting of an exemption would impinge upon the state's regulatory scheme insofar as it would increase the danger of fraudulent unemployment claims.[28] The Court balanced the interests at stake and awarded the benefits sought by appellant.[29]

The balancing test which the *Sherbert* Court applied is significant for two reasons. First, the Court was confronted with an *indirect* burden on the free exercise of religious activity. Although no action was specifically prohibited, the practice of specific acts was made more difficult. This represented an expansion of the types of free exercise claims the Court was now willing to protect against statutory infringement and was a significant departure from the Court's earlier position which stressed the need for a severe free exercise violation[30] to outweigh even a less than major state concern.[31] Second, *Sherbert* recast the types of state interest needed to outweigh the newly cognizable free exercise burdens, and *contra Caldwell,* shifted the burden to the state to prove the existence of endangered state interests of a much higher magnitude than that which had

24. *See, e.g.,* Prince v. Massachusetts, 321 U.S. 158 (1944), where defendant was convicted of violating child labor statutes when there was no showing of direct harm to the child. *See* Mr. Justice Murphy's dissent, *id.* at 175. *See also* Heisler v. Board of Review, 156 Ohio St. 395, 102 N.E.2d 601, *appeal dismissed,* 343 U.S. 939 (1952).

In *Heisler,* plaintiff was denied unemployment benefits when he failed to accept Saturday work on religious grounds. The Supreme Court found no "substantial federal question." 343 U.S. at 940. Apparently, an exemption was not warranted because the financial burden placed on the free exercise of religion was not as direct or onerous as in *Murdock* or *Cantwell.*

25. 374 U.S. 398 (1963).

26. 14 S.C. CODE ANN. §§ 68-1 to 68-404 (1962).

27. 374 U.S. at 399.

28. *Id.* at 407.

29. *Id.*

30. *See* Heisler v. Board of Review, 156 Ohio St. 395, 102 N.E.2d 601, *appeal dismissed,* 343 U.S. 939 (1952). The *Sherbert* Court would find a requisite free exercise burden in the denial of even a "gratuitous benefit." 374 U.S. at 405.

31. One commentator has argued that in requiring a showing of significant harm to the state's interest, *Sherbert* has effectively overruled *Prince. See* Giannella, *supra* note 12, at 1389.

been previously required.[32] The Court analogized the state's burden in such free exercise disputes to past free speech decisions in which language such as "the gravest abuses" and "paramount interests" described that which the state had to document to override any first amendment violation.[33] The Court had thus recharacterized its view of the interests involved and the way in which it would strike a balance between them.

Operating in this historical context, *Yoder* would appear to assume increased significance in the evolution of the Supreme Court's first amendment doctrine as the first instance since *Sherbert* in which the Court has explicitly applied its restructured balancing test to the free exercise area.[34] The Court was thus faced with the important problem of clarifying what state interests would overcome the burden which *Sherbert* imposed.[35]

Mr. Chief Justice Burger, writing for the majority,[36] began his analysis of the issues by documenting the claims of the respondents and concluding that they did in fact merit free exercise protection.[37] The Court stressed that a way of life based solely on secular grounds and personal philisophical preference "does not rise to the demands of the Religion Clauses."[38] The Court thus turned to the record in order to establish that the Amish lifestyle "is not merely a matter of personal

32. *See* Clark, *supra* note 13, at 329. *See also* Galanter, *supra* note 18, at 244; Kauper, *The Warren Court: Religious Liberty and Church-State Relations*, 67 MICH. L. REV. 269, 276 (1968).

33. 374 U.S. at 406, *quoting* Thomas v. Collins, 323 U.S. 516 (1944).

34. On facts substantially similar to those in *Yoder*, the Supreme Court denied certiorari in State v. Garber, 197 Kan. 567, 419 P.2d 896 (1966), *cert. denied*, 389 U.S. 51 (1967), "thus passing up the opportunity to deal with the important issues of religious liberty raised therein." Kauper, *supra* note 32, at 276.

35. In characterizing that burden the Court stated that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." 406 U.S. at 215.

36. Mr. Justice Brennan joined Mr. Justice Stewart in his concurring opinion. Mr. Justice Brennan and Mr. Justice Stewart joined Mr. Justice White in his concurring opinion. Mr. Justice Douglas dissented in part. Mr. Justice Powell and Mr. Justice Rehnquist took no part in the consideration or decision of the case.

37. 406 U.S. at 214.

38. 406 U.S. at 216. The Court also stated:

> 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.

Id. at 215. In so holding, the Court defined "religion" for the purposes of free exercise protection as excluding beliefs rooted in philosophical, as opposed to religious bases. The Court analogized Thoreau's rejection of "the social values of his time" when he removed himself to Walden Pond, and stated that "Thoreau's choice was philosophical and personal rather than religious," thus showing that even the strongest of personal commitments could not qualify for religious protection if based solely on individual value preferences. *Id.* at 216.

These statements can be read as a step back from the more liberal interpretation of "religion" in Welsh v. United States, 398 U.S. 333 (1970). Mr. Justice Black, defining the term for the purposes of § 6(j) of the Uniform Military Training and Service Act, 50 U.S.C. APP. § 456(j) (1970) stated that:

> [W]e certainly do not think that § 6(j)'s exclusion of those persons with "essentially political, sociological, or philosophical views or a merely personal moral code" should be read to exclude those who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection to participation in all wars is founded to a substantial extent upon *consideration of publc policy*.

398 U.S. at 342 (emphasis added).

preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living."[39] The Court was impressed by the fact that the Amish base their entire existence on a religiously mandated rejection of worldly influences and outside contact[40] and noted that they have demonstrated their conviction by maintaining a virtually unchanged agrarian community structure for centuries.[41] The Court then was able to gauge the extent of any free exercise burden by comparing the conduct which the statute required to that which the Amish belief required. Respondents' expert testimony led the Court to conclude that compulsory attendance in modern secondary schools would force exposure to outside values while producing psychological conflicts and barriers to the Amish child's cohesive integration into the religiously required community existence.[42] Based on these factors, the Court determined that enforcement of the statute "would gravely endanger if not destroy the free exercise of respondents' religious beliefs."[43]

Having established the existence of a genuine free exercise violation of significant proportions, the Court then turned to the analysis of the state's contention that notwithstanding the religious beliefs of the Amish, its interest in compelling secondary education was sufficiently significant to require enforcement of the statute.[44] The state's arguments may be grouped into three categories for purposes of analysis.

The state first contended that compulsory secondary education is required "to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence."[45] In short, an informed electorate is vital to a democratic society.[46] The Court disposed of this contention by noting that preparation for the mainstream of society is not the only legitimate function of education,[47] nor the only means of fulfilling political and social responsibilities.[48] The Court felt that the long history of the Amish as a successful, self-sufficient unit demonstrated their ability to function in a democratic process which purports to respect the diversity which imposes no social burdens.[49]

The state's second argument proceeded on the supposition that should the Amishman choose to leave the confines of the insulated community, he

39. 406 U.S. at 206.

40. *Id.* at 216–17.

41. *Id.*

42. *Id.* at 212, 218.

43. *Id.* at 219.

44. The Court quickly disposed of two preliminary arguments offered by the state. The state first stressed the belief-action distinction to support the need to enforce the statute, but the Court's historical analysis refuted their contention. The state secondly based an argument on the nondiscriminatory nature of their statute, but the Court noted that this in itself did not remove the threat of a free exercise burden. *Id.* at 219–21.

45. *Id.* at 221.

46. *See* Brief for Petitioner at 10–14, Wisconsin v. Yoder, 406 U.S. 205 (1972).

47. 406 U.S. at 222, 223–24.

48. *Id.* at 225–26.

49. *Id.* at 222, 225-26.

would be without the intellectual prerequisites for survival.[50] The Court found this proposition to be an unfounded one. Not only did the state fail to document that the loss of adherents by attrition was presently demonstrating such a lack of preparation,[51] but the state also failed to recognize that the Amish society does in fact inculcate skills which would find ready markets in the modern world.[52]

The state argued finally that an exception to the statute "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."[53] The state contended that the denial of such education removed from the Amish child the capability to choose an alternative way of life, since the failure to expose Amish children to alternatives was an effective denial of the capability to make an intelligent choice.[54] The Court did not deny that such might be the case,[55] but relied on *Pierce v. Society of Sisters*[56] in finding a "charter of the rights of parents to direct the religious upbringing of their children."[57] The Court indicated that enforcement of the statute in this instance would interfere with parental rights by significantly influencing the "religious future of the child"[58] and found no counterbalancing interest grounded either in the need to protect the health or safety of the child or in the concerns of society.[59]

Stressing the burden which enforcement of the statute would hold for the Amish and the successful child preparation evidenced by the self-sufficient nature of the Amish sect, the Court concluded that "it was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish."[60]

The *Yoder* Court may have been justified in finding that the free exercise burdens in issue were more worthy of protection than the interests which Wisconsin asserted. Nevertheless, it is submitted that the analysis of this ultimate conclusion is not nearly as important for the resolution of future conflicts of this nature as is the analysis of the process by which the Court reached its eventual result. It is further submitted that

50. *Id.* at 224. *See* Brief for Petitioner at 17.
51. 406 U.S. at 224.
52. *Id.* at 224–25.
The testimony of Dr. Donald A. Erickson, an expert witness on education, also showed that the Amish succeed in preparing their high school age children to be productive members of the Amish community. He described their system of learning-through-doing the skills directly relevant to their adult roles in the Amish community as "ideal" and perhaps superior to ordinary high school education.
Id. at 212.
53. *Id.* at 229.
54. *Id.* at 232.
55. *See* note 78 and accompanying text *infra.*
56. 268 U.S. 510 (1925).
57. 406 U.S. at 233.
58. *Id.* at 232.
59. *Id.* at 234.
60. *Id.* at 236, *citing* Sherbert v. Verner, 374 U.S. 398 (1963).

the opinion, when scrutinized with this in mind, provides only minimal guidance with respect to the future adjustment between free exercise interests and the pursuit of legitimate state ends.

The balancing test applied in *Yoder* must be distinguished from a test which weighs the degree to which different courses of conduct serve a particular policy end. In the latter, the factors being weighed are measured against a common denominator — the extent to which they promote the same policy. However, as the Court operated the balance in *Yoder,* what was being measured was not the extent to which two different courses of conduct promoted a discernible policy, but rather the extent to which two different courses of conduct promoted two or more *different* policies. At that point, it was the relative desirability of the respective *policies* which were balanced. In short, the common denominator between the factors being weighed was not present in *Yoder.* The Court could not seize on a standard by which to measure the worth of that being compared.[61]

Since the conflicting interests had to be resolved *only* as they balanced against one another, the Court's conclusion itself merely expressed that the prevention of a significant free exercise burden is more important than that which the state would gain by requiring secondary school attendance of Amish children. The ability of this decision to shed light on whether or not free exercise protection is more important than *other* state policies would depend on the degree to which those policies conform to the social importance of the state's goals as determined by the *Yoder* Court. It follows that the predictability which *Yoder* lends to the determination of such future conflicts hinges on the ability of future courts to analogize the state interests they have to deal with to the valuations arrived at in *Yoder.* This ability turns on the clarity, completeness, and objectivity with which the *Yoder* Court assessed the state policies in question. The contention here is that the failure of the Court to engage in such an analysis leaves future courts faced with similar situations obliged to engage in a largely ad hoc decision-making process.[62]

In the state's first argument, the Court was confronted with the need to determine whether the protection of free exercise interests counterbalanced the assurance of an electorate familiar with the issues which confront a modern democracy.[63] The Court responded, however, by asserting that the state's political interest in education was served not-

61. As one writer states: "[T]here is neither a set of principles which allocate rules of decision to particular types of fact situations nor objective criteria for assigning weights to religious and governmental interests in various contexts." Dodge, *The Free Exercise of Religion: A Sociological Approach,* 67 MICH. L. REV. 679, 687 (1967).

62. One commentator specifies the consequences of such a methodology to include the removal of an advance notion of rights and powers from individuals and prosecutors, the lack of guidance to lower courts, and the diminution of the legitimacy usually accorded a Supreme Court decision. *See* Clark, *supra* note 13, at 330. As a result, there exists the danger of merely "affirming prevailing morality over the religious liberty of radical dissenters." Giannella, *supra* note 12, at 1385.

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

withstanding the separatist existence of the Amish.[64] In this manner, the Court avoided the full consideration of that which the state contended would result from a failure to enforce the statute. It is submitted that the Court's dismissal of the state's position in this fashion was not predicated upon a sufficient basis.

In documenting its position, the Court turned to *Meyer v. Nebraska*[65] in stating that:

> It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live, but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith.[66]

In addition, the Court stressed that when Thomas Jefferson emphasized the state's need to educate the people, he had in mind merely a "sturdy yeoman" schooled in educational basics similar to those which the Amish already successfully impart.[67]

Initially, it must be noted that the *Meyer* Court did not endorse the promotion of separated communities. Rather, *Meyer* held that allowing children to receive foreign language education did not impede amalgamation into the larger society as the state claimed.[68] The *Meyer* Court thus implied the existence of a bona fide state concern in *fostering* the integration of the child into the social mainstream,[69] and the case thus provides no justification for the endorsement of Amish separatism.

Additionally, it must be remembered that when Jefferson idealized the "sturdy yeoman" as the existence which would sufficiently meet the needs of the state, he wrote of a state which was primarily agrarian, and advocated such a pattern for the masses rather than for an insulated group.[70] The Court's Jeffersonian analysis would seem to falter when applied to a small group within the highly developed society which exists today.

Thus the *Yoder* Court's failure to insert into the balance that which the state asserted would not appear to be amply justified. Further, it seems arguable that the real basis for the Court's position here is simply that the state's interest in maintaining an informed electorate is not sig-

64. *See* notes 47 & 48 and accompanying text *supra*.
65. 262 U.S. 390 (1923).
66. 406 U.S. at 222.
67. *Id.* at 225–26.
68. 262 U.S. at 402–03.
69. *Id.* at 402.
70. The Court itself seemed to recognize this when it stated: "And it is clear that *so far as the mass of the people were concerned* he envisaged that a basic education in the 'three R's' would sufficiently meet the interests of the State." 406 U.S. at 226 n.14 (emphasis added). *See also* Mr. Justice Marshall's dissenting opinion in San Antonio School Dist. v. Rodriguez, 93 S. Ct. 1278 (1973) wherein he states that "[e]ducation serves the essential function of instilling in our young an understanding of and appreciation for the principles and operation of our governmental process . . . . Indeed, it has frequently been suggested that education is the dominant factor affecting political consciousness and participation." *Id.* at 1338.

nificantly compromised when only a small group of citizens are the subject of dispute. If that is the case, not only is there no hint at how large the group must be before the state interest assumes noticeable proportions, but the Court is then determining the ability to assert constitutional rights by reference to the number of people claiming the rights.[71]

In its second argument, the state noted a policy interest in providing the Amish with the capability of functioning in modern society should they choose to leave the Amish sect.[72] The Court characterized the state as contending that if the Amish leave their community, they will become "burdens on society,"[73] since the state mistakenly assumed that the Amish allow their young to "grow in ignorance."[74] It should be noted, however, that the state did not challenge the respondents' expert testimony concerning the nature of Amish existence,[75] and thus at no time denied that the Amish competently prepared their young in the skills required for an agrarian life. This becomes more clear upon recognizing that the policy which the state was advocating sought not only to provide a basis for Amish who left the community to make a living, but also to provide the intellectual means to pursue a *non-agrarian* career should that be the Amishman's choice. That this was in fact part of the state's contention is demonstrated by that portion of the dissenting opinion in the Wisconsin Supreme Court which the state quoted in its brief:

> The traditional Amish life has its attractions, but ought this court, by depriving Amish children of all but a bare eighth grade education, block for all time all other avenues for them.[76]

Thus, the significance of the state's interest in pursuing that policy — providing the Amishman a means to exist through non-Amish ways of his choice — and its relation to the significance of free exercise protection was not properly treated by the Court.

Finally, in its third argument, the state asserted that the need to provide Amish children with the capability to choose alternative lifestyles outweighs the protection of the free exercise of their parents' religion.[77] The Court was directly confronted with the difficult question of determining the point at which the state has a right to interfere with the religious choices traditionally made by parents for their children. In essence, the state was asking whether the nearly total lack of exposure to the outside world, allegedly resulting in a denial of the capability to opt for a lifestyle

71. "It would be unseemly if an exception lost its constitutional status when the religious group or groups that utilized it became too numerous." Galanter, *supra* note 18, at 296. *See also* Clark, *supra* note 13, at 332–33; Kurland, *Expanding Concepts of Religious Freedom,* 1966 WIS. L. REV. 215 (1966).

72. *See* note 50 and accompanying text *supra.*

73. 406 U.S. at 224.

74. *Id.*

75. *Id.* at 219.

76. *See* Brief for Petitioner at 17, *quoting* State v. Yoder, 49 Wis. 2d 430, 452, 182 N.W.2d 539, 549 (1971).

77. *See* notes 53 & 54 and accompanying text *supra.*

apart from traditional modes of Amish life, would be sufficient justification for state interference. The Court attacked the problem in three ways.

First, the Court responded by asserting that:

> The same argument could, of course, be made with respect to all church schools short of college. There is nothing in the record or in the ordinary course of human experience to suggest that non-Amish parents generally consult with children up to ages 14–16 if they are placed in a church school of the parents' faith.[78]

This response would appear to avoid the problem. Not only does this observation fail to deny the existence of the harm to the child as the state conceived it, but it also fails to recognize that the state's argument centers on the cultural isolation inherent in the Amish community. In comparing that community to a church school, the Court fails to note that attendance in such schools is neither characterized by total isolation apart from the school nor lack of those secular subjects omitted in Amish training. The differences which exist between the situations cannot justify the failure to fully consider the effects of a lack of secondary education.

Second, the Court noted by way of *Pierce* that traditionally, parental responsibility in determining the religion of the child is accorded a highly respected position.[79] However, *Pierce* only allowed parents to place their children in a religious school which also met the state's curiculum requirements.[80] Using *Pierce* to allow a total isolation not only from the usual coursework but also from contact with the outside world is a tenuous extrapolation.[81] The Court attempted to justify that result with reference to *Prince v. Massachusetts*[82] in support of the proposition that parental responsibility may be subject to state regulation only "if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens."[83] Although the Court did not specify those factors which would bear on health or safety, mental health considerations were placed within the ambit of the factors considered.[84]

If by reference to *Prince* the Court meant to connote that denial of the capability to choose a lifestyle is not to be considered, it would appear that the foundation for the Court's contention is somewhat wanting. *Prince* found an impingement on the child's health and safety which was sufficient to override a free exercise violation merely in the distribution of religious

78. 406 U.S. at 232.

79. *See* notes 57 & 58 and accompanying text *supra*.

80. 268 U.S. at 531–35.

81. One commentator made the following query:

> Are "closed" subgroups to be permitted to perpetuate their self-contained isolation by the inculcation and isolation of their young? Or must they compete for the ideological loyalty of their young in the wider social arena? . . . At what point are the enrichments of diversity outweighed by the virtues of enlightenment?

Galanter, *supra* note 18, at 287–88.

82. 321 U.S. 158 (1944).

83. 406 U.S. at 324.

84. *Id.*

literature by the child after nightfall in the presence of an adult.[85] This would seem to be a less significant detriment to the child's welfare than that asserted within the state's argument, but the *Yoder* Court concluded that "[t]his case, of course, is not one in which any harm to the physical or mental health of the child . . . has been demonstrated or may be properly inferred."[86]

Finally, the Court treated the state's third argument by asserting that an additional one or two years of secondary education would not result in significant beneficial consequences for the child.[87] It is difficult to align this proposition with the Court's earlier determination that the additional one or two years of education could result in the formation of a barrier to the child's integration into the Amish community.[88] The Court seemed to be saying that the values and lifestyles to which the adolescent child is exposed will be of great significance in the determination of his own lifestyle.[89] It follows from this reasoning that if this period is so crucial, and that if during this period the child is exposed only to the Amish way of life, his capability to choose another lifestyle at a later stage in his development would be seriously limited. One is significantly curtailed from choosing that to which one has not been exposed. It would also follow that compulsory education, in providing such outside exposure, provides at least some of the prerequisites of the capability to *not* be Amish. Although the Court did stress additional negative consequences of the two years — referring to the possibilties of engendering psychological conflicts[90] — it is submitted that the Court did not at the same time fairly accord secondary education the positive significance which it deserved.[91]

85. *See* Mr. Justice Murphy's dissent in *Prince*, 321 U.S. at 175.

86. The Court apparently recognized this dilemma in stating that *Sherbert* "took great care to confine *Prince* to a narrow scope." 406 U.S. at 230. In actuality, *Sherbert* merely cited *Prince* for the proposition that the state must prove "some substantial threat to public safety, peace, or order." 374 U.S. at 403. It is thus not clear whether *Sherbert* was in fact limiting *Prince* or whether *Sherbert* was endorsing the harm found to exist in *Prince* as sufficient to counterbalance a free exercise violation.

As examples of what *would* constitute sufficient harm the Court cited Jacobsen v. Massachusetts, 197 U.S. 11 (1905); Application of President and Directors of Georgetown College, Inc., 331 F.2d 1000, 1010 (D.C. Cir.) (chambers opinion), *cert. denied*, 377 U.S. 978 (1964); Wright v. DeWitt School Dist., 238 Ark. 906, 385 S.W.2d 644 (1965). Both *Jacobsen* and *Wright* concern the state's interest in compulsory smallpox vaccination, while *Georgetown* concerns the rights of the state to compel necessary medical treatment of a child against his parents' wishes. It is submitted that these cases, bearing only upon the most obvious state priorities of life and death, provide no guide to the adequacy of an interest such as that asserted in *Yoder*.

87. 406 U.S. at 234.

88. *Id.* at 218. *See* notes 42 & 43 and accompanying text *supra*.

89. The Court referred to the "crucial and formative adolescent period of life" during which the groundwork for integration into the Amish community must be laid. *Id.* at 211.

90. *Id.* at 212.

91. It has been stated that "the pivotal position of education to success in American society and its essential role in opening up to the individual the central experiences of our culture lend it an importance that is undeniable." *Developments*

The *Yoder* Court was faced with the need to determine whether the state interests alleged were strong enough to outweigh a demonstrably severe free exercise burden. While the Court's analysis seems to have provided a workable criterion for the assessment of the religious interest in question,[92] it would not appear to aid future courts faced with the need to determine whether the pursuit of other state interests should or should not outweigh such a strong free exercise violation. At times, the Court appeared to avoid the need to engage in any balancing of the precise factors placed before it. When it did balance the policies, the Court seemed to recharacterize the issues so as to be able to weigh that which was more easily resolvable than the problems actually presented. In so doing, the Court did not engage in the full and objective evaluation of closely competing interests to which future courts could turn for guidance by analogy in the determination of the weights of other state policies.[93]

Although such a tack limits the usefulness of precedent in affording predictability to the resolution of similar conflicts, it should not be assumed that such an approach to the free exercise-state interest area is automatically counterproductive. In so restricting the use of the opinion, the Court may be taken as implying that each case must be decided on its particular facts, without reference to previous determinations. Since in this type of balancing the conflicts between the interests involved are measured only as they weigh against one another, it would seem to be dangerous to endorse analogy to the valuation of a state interest in a previous case, when that valuation was determined by reference to a free exercise burden of a magnitude which may not be present in the subsquent situation. The usefulness of comparison is inhibited by this lack of an outside criteria against which the factors are measured.

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in the Law — Equal Protection, 32 HARV. L. REV. 1065, 1129 (1969). It is interesting to note in this regard that the Court has most recently determined that education is not a fundamental right under the constitution for equal protection review of state legislation purposes. The Court did, however, stress its "undisputed importance" notwithstanding that holding. *See* San Antonio School Dist. v. Rodriguez, 93 S. Ct. 1278, 1297 (1973).

93. On the need to objectively characterize the interests in question, it has been noted:

> It would indeed be begging the question to purport to balance some highly generalized and obviously crucial interest, such as the right of the legislature to inform itself of matters bearing on national security, against some rather particular and narrowly conceived claim such as the right of a particular individual to withhold a particular, perhaps trivial, item of information from a committee on this occasion. Any such formulation, of course, seems to require only one answer, but it does so at the expense of ignoring the fact that the claim of the witness may be stated in equally generalized form, and therefore may perhaps take on equally impressive proportions. The Court should never cast the controversy in a form which conceals the conflict to be resolved, as it does whenever it inflates one part of the balance while leaving the other highly particular.

Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755, 763 (1963).

For views on how the balancing test does or should operate in a free exercise-state interest context, *see generally* Clark, *supra* note 13; Galanter, *supra* note 18; Giannella, *supra* note 12.