Mast v. Fillmore: A Perfect 50th Birthday Present for *Yoder*

Chris E. Wittstruck
Attorney at Law
New Hyde Park, New York
WittstruckC@aol.com

Abstract: The 1972 decision in *Wisconsin v. Yoder* is among the significant U.S. Supreme Court rulings adjudicating and establishing precedents around conflicts between religious beliefs and state interest. That *Yoder* has endured a half century is a testament not to its reasoning, but rather to a continuation of the sociological jurisprudential underpinnings that provided the defendants with the justice that others sought for them. This essay argues that the 2021 ruling in *Mast v. Fillmore County, Minnesota*, which vacated and remanded for further consideration a Minnesota state court ruling, could not have come at a better time for the fifty-year-old *Yoder* decision because *Mast* situates questions of Amish religious liberty squarely in the arena of strict scrutiny (in this case, of the Religious Land Use and Institutionalized Persons Act of 2000) rather than by invoking any sociological exceptionalism.

Submitted July 20, 2022; accepted June 5, 2023; published December 7, 2023
https://doi.org/10.18061/jpac.v4i1.9176

Keywords: Amish schooling, free exercise of religion, *Mast v. Fillmore*, religious liberty, strict scrutiny, *Wisconsin v. Yoder*

Introduction

Timeworn clashes between actions based upon fervent religious beliefs and legitimate state interests serve as defining moments in the history of the United States. Polygamy,[1] animal sacrifice,[2] peyote use,[3] yarmulke wearing,[4] military conscription:[5] the circumstances under which First Amendment free exercise of religion claims have arisen are extensive. Within this grouping, with the possible exceptions of a 1955 Broadway comedy[6] and the 2006 Nickel Mines

[1] *Reynolds v. United States*, 98 U.S. 145 (1879); *Davis v. Beason*, 133 U.S. 333 (1890).
[2] *Church of the Lukumi Babalu Aye, Inc. and Ernesto Pichardo v. City of Hialeah*, 508 U.S. 520 (1993).
[3] *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872 (1990).
[4] *Goldman v. Weinberger*, 475 U.S. 503 (1986).
[5] *Welsh v. United States*, 398 U.S. 333 (1970); *Gillette v. United States*, 401 U.S. 437 (1971).
[6] *Plain and Fancy*, a Broadway musical comedy (1955–56) set in and around Bird-in-Hand, Pennsylvania ("Amish Country"). See "Plain and Fancy," Internet Broadway Database, https://www.ibdb.com/broadway-show/plain-and-fancy-7120; see also Stein and Glickman, *Plain and Fancy*.

tragedy,[7] nothing introduced the word "Amish" into the mainstream American lexicon more than $5.00 criminal fines issued to three men for failing to allow their children to attend the ninth grade.[8]

That the 1972 United States Supreme Court decision in *Wisconsin v. Yoder*[9] has endured this long is a testament not to its reasoning, but rather to a continuation of the sociological jurisprudential underpinnings that provided the conscientious criminal defendants the justice that others sought for them at the time.[10] Yet for decades the changing societal mindset regarding matters involving religious exemptions in various realms, coupled with observable changes among the Amish faithful, have rendered the landmark case ripe to be "revisited." Thus, the promulgation of shielding federal statutes and two recent high court rulings strictly interpreting them could not have come at a better time for the fifty-year-old *Yoder* decision.

The Promise that Preceded the Law

The United States Constitution not only prohibits the establishment of religion by government, but also guarantees the free exercise of religious beliefs.[11] Over 100 years before these protections were promulgated through ratification of the First Amendment to the United States Constitution in the 1790s,[12] the Englishman William Penn received the North American land that would become his "holy experiment," establishing Pennsylvania as "a colony where religious toleration would be the order of the day."[13] At Penn's invitation, hundreds of Amish and their Mennonite[14] cousins teemed into pre-Revolutionary War America.[15]

These migrants from Europe did not have the luxury to wait for Cornwallis's surrender at Yorktown, the Constitutional Convention of 1787, or the consequent Bill of Rights. From Anabaptism's inception on January 21, 1525, its followers suffered mercilessly at the hands of the established state church, as well as from some of those ostensibly less radical in their reformist beliefs.[16] Moreover, even after persecution and martyrdom among the Swiss Brethren

---

[7] On October 2, 2006, ten girls were shot (five deceased) at the West Nickel Mines School, an Amish one-room schoolhouse in Lancaster County, Pennsylvania. Kraybill, Nolt, and Weaver-Zercher, *Amish Grace*.
[8] See *State v. Yoder*, 49 Wis.2d 430 (1971); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).
[9] 406 U.S. 205 (1972).
[10] The three Amish defendants were recruited by the National Committee for Amish Religious Freedom which funded their defense. "Intro," *The National Committee for Amish Religious Freedom*, July 6, 2020, https://amishreligiousfreedom.com/intro.htm.
[11] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…" U.S. Const. amend. I. The court in *Everson v. Board of Education*, 330 U.S. 1 (1947) ruled that the Establishment Clause constituted a fundamental liberty such that the Due Process Clause of the Fourteenth Amendment applied its prohibitive direction to state governments. Seven years earlier, the Free Exercise Clause was selectively incorporated to apply to the several states, in *Cantwell v. Connecticut*, 310 U.S. 296 (1940). See also *Engel v. Vitale*, 370 U.S. 421 (1962).
[12] December 15, 1791.
[13] Nolt, *History of the Amish*, 63.
[14] For influential leader Menno Simons (1496–1561).
[15] Nolt, *History of the Amish*, 56–75.
[16] Braght, *The Bloody Theatre or Martyrs' Mirror*.

somewhat subsided, those who adhered to Mennonite principles fared little better. At the conclusion of the Thirty Years War in the 1640s, nobles and barons sought out the expert farming skills of the Anabaptists in order to restore battle-ravaged European lands. In addition to protection from military conscription for these pacifists, the offer also came with the bestowment of purported "free exercise" of faith—so long as that faith was freely exercised bereft of proselytizing, meeting in large groups, or building churches.[17] This situation afforded the silenced believers with about as much religious liberty as the first Christians experienced in the catacombs.

In sum, many members of the Amish,[18] Mennonites, and other religious groups abandoned everything and risked their lives for months on the high seas in death traps like the *Charming Nancy*[19] for the chance to arrive in a distant land based solely on the promise of Penn—a member of the same landed gentry class from which they sought to escape. America, whatever the word meant, was a more palatable alternative than toiling soundlessly in the Palatinate. Whether accepting Penn's promise, only later promulgated into law, was worth it is measured by the depth to which free exercise of religion has been and continues to be safeguarded by government.

Free Exercise of Religion Before *Yoder*

The guaranty of free exercise of one's faith, like all other government assurances, is a proclamation not without limitations. The perimeter for protection from infringement has always been clearly established, but only in the theoretical. Between the years leading up to the *Yoder* decision and at least 1990,[20] government could not infringe on liberties so long as one's exercise of a liberty did not unduly infringe upon the common good, traditionally characterized as a compelling state interest. A renowned example of this balancing analysis, free speech is absolutely guaranteed by government, unless that speech could, for instance, lead to a deadly stampede.[21]

The most prominent of the initial judicial forays into the free exercise thickets occurred many decades after its formation. The 1879 decision of the United States Supreme Court in *Reynolds v. United States*[22] fashioned a somewhat disappointing dichotomy. *Reynolds* dealt with a Mormon's[23] conviction in the then federal territory of Utah for bigamy,[24] the result of a

[17] Nolt, *History of the Amish*, 19–20.
[18] Those Mennonites whose ancestors chose in 1693 to follow the Swiss elder Jakob Ammann's stricter interpretation of the Anabaptist faith
[19] Nolt, *History of the Amish*, 46–47.
[20] The Supreme Court abandoned the compelling interest test in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).
[21] *Schenck v. United States*, 249 U.S. 47 (1919). Justice Oliver Wendell Holmes, writing for a unanimous court, ruled that the distribution of leaflets opposing selective service in World War I constituted a clear and present danger, analogizing, "The most stringent protection of free speech would not protect a man falsely shouting fire in a theatre and causing a panic." *Id*. at 52.
[22] 98 U.S. 145 (1878).
[23] A member of The Church of Jesus Christ of Latter-day Saints.

polygamist lifestyle that at the time was a firmly indisputable tenet of the convict's faith.[25] In upholding the conviction, a unanimous Supreme Court first outlined how polygamous practices were widely outlawed both domestically and internationally,[26] and then reasoned that while Reynolds could believe in polygamy as a religious precept, he could not act upon that precept.[27] In explaining the balance through analogy to repugnant practices such as human sacrifice and bride burning,[28] Chief Justice Morrison Waite wrote:

> To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.[29]

At first scent, the opinion gives off the aroma of sensibility. At close quarters, however, the decision reeks of the stench of overbearing restriction. If religion be relegated to privately held fervent principles that serve as no defense to the believers' outward actions, it would appear that faithful nonconformists could have saved themselves the trouble and remained in Europe.

In the years leading up to *Yoder*, however, the belief-action dichotomy presented by the Court in *Reynolds* was somewhat meliorated.

In *Cantwell v. Connecticut*,[30] the Supreme Court vacated the convictions of Jehovah's Witnesses who went door-to-door with palpably anti-Catholic literature and audio recordings in a predominantly Roman Catholic neighborhood of New Haven, Connecticut, and solicited money without a required permit.[31] In vacating the convictions, the court not only addressed the

---

[24] Morrill Anti-Bigamy Act, 12 Stat. 501(1862) (making bigamy in federal territories a criminal offense).
[25] In 1990, the Mormon Church formally outlawed polygamy. See *The Church of Jesus Christ of Latter Day Saints, Official Declaration 1, Manifesto, Doctrine and Covenants Student Manual* (2002), https://www.churchofjesuschrist.org/manual/doctrine-and-covenants-student-manual/official-declaration-1-manifesto?lang=eng.
[26] "Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people." *Reynolds v. United States*, 98 U.S. 145, 164 (1879).
[27] "Every act necessary to constitute the crime was knowingly done, and the crime was therefore knowingly committed. Ignorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of the law. The only defense of the accused in this case is his belief that the law ought not to have been enacted. It matters not that his belief was a part of his professed religion; it was still belief, and belief only." *Id.* at 167.
[28] "Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?" *Id.* at 166.
[29] *Id.* at 167.
[30] 310 U.S. 296 (1940).
[31] *Id.* at 301.

distinction between establishment and free exercise, but also expounded upon the belief-action dichotomy:

> The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. No one would contest the proposition that a State may not, by statute, wholly deny the right to preach or to disseminate religious views. Plainly such a previous and absolute restraint would violate the terms of the guarantee. It is equally clear that a State may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment. The appellants are right in their insistence that the Act in question is not such a regulation. If a certificate is procured, solicitation is permitted without restraint but, in the absence of a certificate, solicitation is altogether prohibited.[32]

In a similar vein, though in the free speech realm, the court found that the state was limited in its ability not only to prohibit action, but to compel action. In *West Virginia State Board of Education v. Barnette*,[33] a decision made against the backdrop of World War II, the court ruled compulsory flag saluting in school as unconstitutional. Under the applicable statute, noncompliance was treated as an act of insubordination resulting not only in expulsion, but also concomitant criminal prosecution for the child's family, based upon truancy. The appellees were Jehovah's Witnesses.[34] Justice Robert H. Jackson saw the broad danger in mandating symbolic acts of patriotism and where it leads, though irrespective of the issue of religious freedom:

> Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public

[32] *Id.* at 303.
[33] 319 U.S. 624 (1943).
[34] *Id.* at 629.

> educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.[35]

A First Amendment establishment case of like import, the Supreme Court in *Engle v. Vitale*[36] ruled that compulsory school prayer was unconstitutional, even if the prayer was nondenominational,[37] and even if students were permitted to absent themselves during the prayer with no repercussions.[38] The court found that by using the public school system to encourage recitation of the Regents' prayer, the State of New York had adopted a practice wholly inconsistent with the Establishment Clause.[39] The court also offered an important window into its view of the establishment prohibition and how it is only somewhat distinguishable from the free exercise guarantee:

> Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause, of the First Amendment, both of which are operative against the States by virtue of the Fourteenth Amendment. Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that. Its first and most

---

[35] *Id.* at 641.
[36] 370 U.S. 421 (1962).
[37] The somewhat benign prayer was all of twenty-two words: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Id.* at 422.
[38] *Id.* at 423.
[39] *Id.* at 424.

> immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs.[40]

In *Sherbert v. Verner*,[41] decided less than a decade before *Yoder*, the high court dealt with South Carolina's refusal to award unemployment benefits to a Seventh-Day Adventist Church member who refused to accede to her employer's demands to work on Saturday, her Sabbath. While initially recognizing the belief-action dichotomy,[42] the court addressed not simply the appellant's action, but whether it is the type of action government has any business in regulating in the first place:

> Plainly enough, appellant's conscientious objection to Saturday work constitutes no conduct prompted by religious principles of a kind within the reach of state legislation. If, therefore, the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a compelling state interest in the regulation of a subject within the State's constitutional power to regulate…[43]

As to infringement, the court framed the Hobson's choice that the appellant faced:

> 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.[44]

As to any justification based upon compelling state interest, it was not lost on the court that the same statutory scheme that served as the basis for denial of the appellant's benefits actually exempted compulsory Sunday work when such was permitted by the Commissioner of Labor

---

[40] *Id.* at 430.
[41] 374 U.S. 398 (1963).
[42] *Id.* at 402–03.
[43] *Id.* at 403.
[44] *Id.* at 404.

based upon national emergency.[45] Moreover, the state's claim that the ruling would lead to "the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday" was for several reasons found to be less than compelling.[46]

Whether based upon the Free Exercise Clause or the Establishment Clause, if compulsory school flag saluting, compulsory school prayer, and compulsory work on the Sabbath is unconstitutional, why isn't compulsory education attendance at a mandated minimum level just as abhorrent, provided a deep-seeded religious belief underpins the objection? It is against this backdrop that *Yoder* was decided.

Yoder at the State Court Level

What is plainly apparent from the state court travails in *Yoder* is that the state botched the trial court record big time.

On April 2, 1969, Jonas Yoder, Wallace Miller, and Adin Yutzy were each tried non-jury in a Monroe, Wisconsin, courtroom and later convicted for the misdemeanor of violating the state's compulsory education law[47] for failing to have their under-sixteen-year-old children attend school. The state called only two witnesses: the cash-strapped school district superintendent who convinced the district attorney to bring the case and who identified the defendants' children as truants and an Amish teacher who admitted not seeing the over-thirteen-year-old students in school. Astonishingly, the prosecution then rested.[48]

An overall reading of the Wisconsin Supreme Court ruling in *Yoder*[49] shows that the defendants' attorney, William B. Ball, did a masterful job in creating a trial court record that firmly and overwhelmingly established not only the ardently held faith precept of the trio that prohibited the attendance of their children beyond the eighth grade, but the clear lack of a justifiable compelling state interest:

> At the trial the appellants put in evidence by expert testimony the full range of the Amish religious beliefs and the tenets of the Old Order Amish religion. Dr. John A. Hostetler[50] testified the Amish religion requires as a part of the individual's way of salvation a church community separate from the world. The Amish separateness is dictated by their religious belief of what God's will is for them and

[45] "[N]o employee shall be required to work on Sunday…who is conscientiously opposed to Sunday work; and if any employee should refuse to work on Sunday on account of conscientious…objections he or she shall not jeopardize his or her seniority by such refusal or be discriminated against in any other manner." *Id.* at 406 (quoting and citing S.C. Code, § 64-4).
[46] *Id.* at 406–07.
[47] Wisc. Stat. §118.15 (1969).
[48] "*Wisconsin v Yoder*: The Amish Challenge Compulsory Education Laws," *University of Missouri-Kansas City School of Law*, accessed March 8, 2022, http://law2.umkc.edu/Faculty/projects/ftrials/conlaw/YoderStory.html.
[49] *State v. Yoder*, 49 Wis.2d 430 (1971).
[50] Professor at Temple University; author of *Amish Life* (1968) and *Amish Society* (rev. ed., 1968).

> thus all the means by which they maintain this unique separateness have religious meaning.[51]
>
> Defense witness Wilbur E. Deininger, sheriff of Green county from 1963 to 1967, undersheriff in 1967 and 1968, and a present member of the city of Monroe department of police, testified that, to his knowledge, no teenage member of the Old Order Amish group dwelling in Green county had ever been apprehended or arrested for crime or engaged in acts of violence. Defense witness Ray F. Kaskey, for the past nine years director of the department of social services for Green county, testified he knew of no Amish in the county who had been recipients of public assistance, had been unemployed or received unemployment compensation, had illegitimate births, been residents of publicly supported homes for the aged, the indigent, the physically or mentally ill, or alcoholics. He further stated the Amish people did not add to the social burdens which the taxpayers of Green county must bear, and that the fact the Amish children do not attend high school has no effect in adding to the social burdens carried by these taxpayers.[52]

Conversely, the state's "record" constituted of nothing more than taking potshots at the defendants' religious beliefs.

> The state's argument that the appellants' refusal to obey the compulsory school law is no part of their worship but merely a practice or a way of life cannot be accepted. The free exercise clause is not restricted in its protection to formal ritualistic acts of worship common in theistic religions but also includes the practice or the exercise of religion which is binding in conscience. (citations omitted) There is no question that, as found by the trial court, the compulsory education law infringes upon the free exercise of religion by the appellants within the scope of the protection of the first amendment.[53]
>
> Under the facts of this case, there has been an inadequate showing that the state's interest in establishing and maintaining an educational system overrides the defendants' right to the free exercise of their religion. Consequently, I would hold that unless and until further experience indicates that so invoking the first amendment poses a serious threat to the effective functioning of an educational system within the state, children of members of the religious order involved in this case should not be required to attend school beyond the eighth grade.[54]

---

[51] *Yoder*, 49 Wis.2d at 435.
[52] *Id.* at 438.
[53] *Id*. at 435.
[54] *Id.* at 447 (Hansen, J., concurring).

While the trial court judge was clearly reticent to find the state misdemeanor statute unconstitutional, the Wisconsin Supreme Court, surely influenced by the dearth of the record made by the state, ruled 6-1 that the statute as applied to the Amish was an unreasonable exercise of governmental power.[55]

From the Hostetler trial testimony, the court first recognized that Amish children cannot attend high school since any high school, public or private, constitutes a deterrent to their salvation and that "to the Amish, how long a child should attend a formal school is a religious question."[56] Accordingly, the court found that the compulsory education law infringes upon the free exercise of religion by the Amish within the scope of the protection of the first amendment.[57]

Next, the court recognized that the burden of compulsory education is a heavy one, as the law commands the Amish to perform affirmative acts that are repugnant to their religion. The justices then balanced this burden against compulsory education as a compelling state interest. Here, the court pronounced that a "compelling interest is not just a general interest in the subject matter but the need to apply the regulation without exception to attain the purposes and objectives of the legislation."[58] The court found the scale tipped clearly in favor of the Amish:

> In the important matter of freedom of religion, the natural parents should have the right to rear their children in their religion, especially as here, where the parents are in agreement and the tenets of their religion require them to render such upbringing. When a child reaches the age of judgment, he can choose for himself his religion, but prior to that time the state in its capacity of *parens patriae* ought not to enforce educational requirements which will directly influence or destroy that choice. Nor is this harm to the Amish justified because on speculation some Amish children may after reaching adulthood leave their religion. To force a worldly education on all Amish children, the majority of whom do not want or need it, in order to confer a dubious benefit on the few who might later reject their religion is not a compelling interest.[59]
>
> We think it is even less possible to assert a spurious claim for exemption under this case than under *Sherbert*.[60] Claims for such an exemption can easily be detected because of the uniqueness of the Amish people. Nor is there merit in the state's argument that its administrative expense and inconvenience of an exemption should be avoided. Here, the state is put to no expense by the exemption. True, Green county may lose a few dollars in state aid but this amount can hardly be the basis of a compelling state interest. Granting an exception from

[55] *Yoder*.
[56] *Id.* at 436.
[57] *Id.* at 437.
[58] *Id.* at 438.
[59] *Id.* at 440.
[60] *Sherbert v. Verner*, 374 U.S. 398 (1963).

> compulsory education to the Amish will do no more to the ultimate goal of education than to dent the symmetry of the design of enforcement.[61]
>
> We conclude that although education is a subject within the constitutional power of the state to regulate, there is not such a compelling state interest in two years' high school compulsory education as will justify the burden it places upon the appellants' free exercise of their religion.[62]

The court also gave short shrift to the state's argument that to recognize an exemption for the Amish would violate the Establishment Clause.[63]

Justice Nathan Heffernan, the lone dissenter,[64] citing the landmark *Brown v. Board of Education*,[65] viewed education as perhaps the most important function of state and local governments. In finding a clear compelling state interest flowing from compulsory school attendance laws, the dissenter saw the balance to be in favor of the state based upon two perceptions. First, that the statute in question did not require attendance at levels higher than the eighth grade in a public school, and that vocational schools for the Amish at the time existed in several states. Second, and foreshadowing the dissent in the dispute at the U.S. Supreme Court, the justice viewed the majority as ignoring critical rights of those not before the court:

> The reasoning is faulty, for it conceives the problem as one of religious liberty alone. It completely ignores the personal liberty of the Amish children to avail themselves of educational opportunities beyond eighth grade. In addition, the freedom of these young people to make a religious choice is completely ignored.[66]

For his part, the dissenter would have affirmed the convictions but stayed the execution of the sentences to give the Amish time to establish vocational schools.[67]

Yoder at the United States Supreme Court

While the state's lack of a record was problematic at the Wisconsin Supreme Court, it was virtually determinative when the case reached the United States Supreme Court.[68] In his majority opinion affirming the state high court decision, Chief Justice Warren Burger was clearly persuaded not by what the state presented, but by what it failed to adequately present in the trial proceeding. This failure served as escort to the decision-writer's overtly enamored view of the Amish.

---

[61] *Yoder*, 49 Wis.2d at 443.
[62] *Id.* at 447.
[63] *Id.* at 443–45.
[64] *Id.* at 448–55 (Heffernan, J., dissenting).
[65] 347 U.S. 483 (1954).
[66] *Yoder*, 49 Wis.2d at 448.
[67] *Id.* at 455.
[68] *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

The majority opinion spends several paragraphs over several pages[69] paraphrasing the testimony and references to expert witness scholars on Amish religious and education,[70] pointing out that their testimony was "uncontradicted."[71] After briefly describing Amish history, the court recognized that a fundamental belief is that "salvation requires life in a church community separate and apart from the world and worldly influence."[72] It also found that "Amish beliefs require members of the community to make their living by farming or closely related activities."[73] The objection to formal education beyond the eighth grade is rooted in these principles, since exposure would lead to "worldly influence" being imposed on their children:

> The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. 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 from, rather than integration with, contemporary worldly society.[74]

The court also recognized that formal high school attendance would take the children away from their communities, physically and emotionally, during a critical and formative period of adolescence, where learning through "doing" is more important than the ill-equipped and contrary high school classroom.[75]

The court recognized that the extensive uncontroverted record established by respondents not only indicated that significant psychological harm could befall Amish children compelled to attend high school, but that the Amish succeed in rearing their high school age children to be productive members of the community without forcing high school upon them, postulating that the Amish mode of learning through doing is "ideal" and perhaps superior to a high school education.[76] The majority then added: "The evidence also showed that the Amish have an excellent record as law-abiding and generally self-sufficient members of society."[77]

In turning away the state's argument that repulsion to higher education is a function of Amish societal rather than religious beliefs, the court again turned to the uncontested experts:

> the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep

[69] *Id.* at 209–13 and at various points throughout the opinion.
[70] John A. Hostetler and Donald A. Erickson.
[71] *Yoder,* 406 U.S. at 209.
[72] *Id.* at 210.
[73] *Id.*
[74] *Id.* at 210–11.
[75] *Id.* at 211.
[76] *Id.* at 212.
[77] *Id.* at 212–13.

> religious conviction, shared by an organized group, and intimately related to daily living. That the Old Order Amish daily life and religious practice stem from their faith is shown by the fact that it is in response to their literal interpretation of the Biblical injunction from the Epistle of Paul to the Romans, "be not conformed to this world." This command is fundamental to the Amish faith. Moreover, for the Old Order Amish, religion is not simply a matter of theocratic belief. As the expert witnesses explained, the Old Order Amish religion pervades and determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community.[78]

The court conclusively established that compulsory high school education infringes upon Amish religious freedom:

> In sum, the unchallenged testimony of acknowledged experts in education and religious history, almost 300 years of consistent practice, and strong evidence of a sustained faith pervading and regulating respondents' entire mode of life support the claim that enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs.[79]

For its part, the State of Wisconsin did little more in the United States Supreme Court by way of argument than it did in the lower court in making a record:

> Neither the findings of the trial court nor the Amish claims as to the nature of their faith are challenged in this Court by the State of Wisconsin. Its position is that the State's interest in universal compulsory formal secondary education to age 16 is so great that it is paramount to the undisputed claims of respondents that their mode of preparing their youth for Amish life, after the traditional elementary education, is an essential part of their religious belief and practice. Nor does the State undertake to meet the claim that the Amish mode of life and education is inseparable from and a part of the basic tenets of their religion—indeed, as much a part of their religious belief and practices as baptism, the confessional, or a sabbath may be for others.[80]

In the summary of its presentation, the state attempted to obtain a reversal by establishing the belief-action dichotomy that by 1972 had been fairly eroded by the high court.[81] The state also

---

[78] *Id.* at 216.
[79] *Id.* at 219.
[80] *Id.* at 219.
[81] *Id.* at 220.

argued "neutrality": that the compulsory high school attendance statute does not discriminate against any one particular religion. Citing *Sherbet,*[82] the court pointed out that statutes neutral on their face can violate basic freedoms in their application.[83] Nor did it view the "Amish exception" as violating the Establishment Clause for favoring a religious group.[84]

The state additionally argued that its interest in the fostering of education is so compelling as to trump religious belief, asserting that the Amish position, no matter how rooted in religion, fostered "ignorance."[85] As a corollary, the state indicated its concern over the possibility that some yet-baptized Amish children may choose to eventually resist the faith, thus rendering their agriculture-based "education by doing" worthless in general society.[86] Here, again, the state's arguments were annihilated by the feeble record it made at the trial level:

> The State argues that if Amish children leave their church they should not be in the position of making their way in the world without the education available in the one or two additional years the State requires. However, on this record, that argument is highly speculative. There is no specific evidence of the loss of Amish adherents by attrition, nor is there any showing that upon leaving the Amish community Amish children, with their practical agricultural training and habits of industry and self-reliance, would become burdens on society because of educational short-comings. Indeed, this argument of the State appears to rest primarily on the State's mistaken assumption, already noted, that the Amish do not provide any education for their children beyond the eighth grade, but allow them to grow in "ignorance." To the contrary, not only do the Amish accept the necessity for formal schooling through the eighth grade level, but continue to provide what has been characterized by the undisputed testimony of expert educators as an "ideal" vocational education for their children in the adolescent years. There is nothing in this record to suggest that the Amish qualities of reliability, self-reliance, and dedication to work would fail to find ready markets in today's society. Absent some contrary evidence supporting the State's position, we are unwilling to assume that persons possessing such valuable vocational skills and habits are doomed to become burdens on society should they determine to leave the Amish faith, nor is there any basis in the record to warrant a finding that an additional one or two years of formal school education beyond the eighth grade would serve to eliminate any such problem that might exist.[87]

[82] *Sherbert v. Verner*, 374 U.S. 398 (1963).
[83] *Yoder*, 406 U.S. at 220–21.
[84] *Id.* at 221.
[85] *Id.* at 222.
[86] *Id.* at 224.
[87] *Id.* at 224–25.

It was also not lost on the majority of the Supreme Court justices that the permissive curtailment for education at sixteen years of age was less than arbitrary, as it dovetailed with child labor laws.[88] Here, and again based upon the record, the court determined that no "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."[89] This pronouncement was in the face of a clear record of the children performing family farm work at a young age.

Finally, addressing the dissenting opinion by Justice William O. Douglas,[90] the majority made clear that the state chose to prosecute only the recalcitrant parents of the Amish children and not the children themselves. Thus, the perceived "right" of the children would have to wait for the proper case:

> However read, the Court's holding in *Pierce*[91] stands as a charter of the rights of parents to direct the religious up-bringing of their children. And, when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a "reasonable relation to some purpose within the competency of the State" is required to sustain the validity of the State's requirement under the First Amendment. To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince*[92] if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens. But in this case, the Amish have introduced persuasive evidence undermining the arguments the State has advanced to support its claims in terms of the welfare of the child and society as a whole. The record strongly indicates that accommodating the religious objections of the Amish by forgoing one, or at most two, additional years of compulsory education will not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society.

The concurring opinion of Justices Potter Stewart and William Brennan expressed equal certitude that the case before the court involved only the State of Wisconsin attempting to brand Amish parents as criminals, and in no way involved questions of Amish children's attendance at school.[93]

In partial dissent, Justice William O. Douglas opined that the case before the court was squarely about the children of the appellees. He based this primarily upon the fact that the

---

[88] *Id.* at 227–28.
[89] *Id.* at 230.
[90] *Id.* at 241–49 (Douglas, J., dissenting in part).
[91] *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).
[92] *Prince v. Massachusetts*, 321 U.S. 158 (1944).
[93] *Yoder*, 406 U.S. at 237.

motion to dismiss the prosecution made at the trial level specifically referenced the religious rights of the children.[94] The dissenter stated that no analysis of religious-liberty claims can take place in a vacuum.[95] He then went on to cite numerous precedents where the rights of minors in a variety of settings were afforded constitutional protection.[96]

Moreover, Justice Douglas appeared to adhere to the belief-action dichotomy established in *Reynolds*[97] and feared that the majority had opened the door to an overturning of that precedent.[98]

Interestingly, the dissent emphasizes that the majority's emphasis on the "law and order" record of this Amish group of people is quite irrelevant:

> A religion is a religion irrespective of what the misdemeanor or felony records of its members might be…and the Amish, whether with a high or low criminal record, certainly qualify by all historic standards as a religion within the meaning of the First Amendment.[99]

The point made by Justice Douglas is not readily apparent by the text of his pronouncement. Rather, one must read the imbedded footnote. Here, the dissenter references selected quotes by Professor John Hostetler in his landmark book *Amish Society*:

> "[d]rinking among the youth is common in all the large Amish settlements." Amish Society 283. Moreover, "[i]t would appear that among the Amish the rate of suicide is just as high, if not higher, than for the nation." *Id.* at 300. He also notes an unfortunate Amish "preoccupation with filthy stories," *id.* at 282, as well as significant "rowdyism and stress." *Id.* at 281. These are not traits peculiar to the Amish, of course. The point is that the Amish are not people set apart and different.[100]

The Petri Dish and the Pedestal

While it is clear that three Amish men won reversal of their convictions in the United States Supreme Court, the broader question is whether the import of the decision can stand the test of time. In this regard, the axiom "two wrongs don't make a right" takes on quite literal meaning.

Similar to what occurs in the public realm, in so many cases the state's reaction to that which appears out of the conventional or grossly unpopular is to completely misinterpret and overreact.

---

[94] *Id.* at 241–42.
[95] *Id.* at 242.
[96] *Id.* at 243–46.
[97] *Reynolds v. United States*, 98 U.S. 145 (1879).
[98] *Yoder*, 406 U.S. at 247.
[99] *Yoder*, 406 U.S. at 246–47.
[100] *Id*. at 247 n.5 (Douglas, J., dissenting in part).

Like the door-to-door proselytizers in *Cantwell*[101] or the parents of the flag salute objectors in *Barnette*,[102] the state in *Yoder* threatened and then carried out criminal prosecution. Rather than legitimate inquiry regarding beliefs, the beliefs were discounted and subjected to inquisition. To the state's mind, the nonconformity had to be punished to preserve order and the greater good (the "compelling interest" argument). The religious values of the Amish were treated as a bacterium: an annoyance that disrupted what the mainstream had already decided was necessarily for the best.

In *Yoder*, the Amish were accused of rendering their children ignorant. Further, the State of Wisconsin absurdly raised the specter that in granting an exemption the court might be unconstitutionally *establishing* the Amish faith. Though the state stipulated that Amish beliefs were "sincere,"[103] it attacked the beliefs as being societal rather than religious, and thus unworthy of First Amendment protection.

Religious belief cannot be subjected to a scientific analysis. Transubstantiation, the core Roman Catholic belief that consecration of bread and wine renders the substances the actual physical body and blood of Christ, cannot be proven by growing the substances in a petri dish. So, too, the Amish belief that high school education is so sophisticated as to violate the tenet of worldly separation cannot be determined through empirical debate. In Europe, the nonconformist debaters always lost and, as the history of Anabaptists and other religious dissenters attest, with ensuing horrific results.

Yet, while the believers should not have been subjected to persecution, and their beliefs should not have been subjected to hounding scrutiny, *Yoder* arguably leaves much to be desired. Read the majority decision in *Yoder* and appreciate the antithetical. Bound by a record that was demonstrably one-sided in favor of the appellees' position, the chief justice places the Amish, whose faith is constructed upon humility and strict resistance to all that is haughty and proud, on a high societal pedestal. It is this pedestal that Justice Douglas discounts in his dissent.[104] The Amish are sinners, as each member will readily admit, because as Christians they believe only one man free from sin ever walked the earth.

With due apologies to the former sheriff and social services director of Green County, Wisconsin, the Amish communities are not without crime, suicide, or mental illness. By way of just a few examples, consider instances of murder and solicitation to murder spouses;[105] the multiple hate crime assaults committed in 2011 by sixteen Amish members in Bergholtz, Ohio

---

[101] *Cantwell v. Connecticut*, 310 U.S. 296 (1940).
[102] *West Virginia State Board of Education v. Barnette,* 319 U.S. 624 (1943).
[103] *Yoder*, 406 U.S. at 209.
[104] *Id.* at 247 n.5 (Douglas, J., dissenting in part).
[105] See Nikki Young, "The First Amish Man Convicted of Murder: Edward Gingerich," NewsBreak.com, December 20, 2022, https://original.newsbreak.com/@nik-1590556/2864349071553-the-first-amish-man-convicted-of-murder-edward-gingerich; David Lohr, "Amish Minister Confesses To Killing Wife 9 Years Ago: Cops," *HuffPost*, January 14, 2016, https://www.huffpost.com/entry/amish-minister-confesses-to-killing-wife-9-years-ago-cops_n_5697cf0de4b0b4eb759d6db3; Rebecca Morris, "The Sex-Crazed Amish Man who 'Plotted' to Murder his Wife," *New York Post*, July 9, 2016, https://nypost.com/2016/07/09/the-sex-crazed-amish-man-who-plotted-to-murder-his-wife/.

(popularly known as the "Bergholtz Beard-Cutting Case");[106] the 1999 federal conviction of two Amish members for buying cocaine from the Pagans motorcycle gang and reselling it in the Plain community;[107] a 2012 $17 million securities fraud conviction;[108] 2019 charges of alleged confessed sex abuse by a member of the Amish and the criminal cover-up of same by an Amish bishop in Lancaster County, Pennsylvania;[109] animal cruelty convictions stemming from deplorable and rampant puppy mill operations;[110] frequent instances of driving (team) while

[106] See "Amish Beard-Cutting Case," Federal Bureau of Investigation, February 8, 2013, https://www.fbi.gov/news/stories/16-sentenced-in-amish-beard-cutting-case; see also Kraybill, *Renegade Amish*.

[107] Associated Press, "2 Amish Men are Sent to Jail for Buying, Distributing Coke," *Deseret News*, July 1, 1999, https://www.deseret.com/1999/7/1/19453493/2-amish-men-are-sent-to-jail-for-buying-distributing-coke; see also Associated Press, "2 Amish Arrested for Drug Deal," CBS News, June 24, 1998, https://www.cbsnews.com/news/2-amish-arrested-for-drug-deal/.

[108] Peter H. Milliken, "Amish Man Sentenced in $16.8M Fraud Case," *The Vindicator Printing Company*, June 14, 2012, https://vindyarchives.com/news/2012/jun/14/amish-man-sentenced-in-m-fraud-case/.

[109] Dan Nephin, "Amish Bishop Enters Probation Program to Resolve Failure to Report Sexual Abuse Claims," *Lancaster (PA) Online*, October 27, 2020, https://lancasteronline.com/news/local/amish-bishop-enters-probation-program-to-resolve-failure-to-report-sexual-abuse-claims/article_fd6b6042-187b-11eb-a039-9f21cc4d819c.html.

[110] Susan Miers Smith, "Lancaster Puppy Breeder Pleads Guilty to 13 Counts of Animal Cruelty," *Reading (PA) Eagle*, September 24, 2021, https://www.readingeagle.com/2021/09/24/lancaster-puppy-mill-breeder-pleads-guilty-13-counts-animal-cruelty/; see also Natasha Catherine, "The Amish and Animal Cruelty: An Unexpected Mix" (blog post), Animal Advocates of South Central Pennsylvania, February 3, 2018, https://www.animaladvocatesscpa.com/blog/post/amish-animal-cruelty-unexpected-mix/.

intoxicated;[111] seemingly just as frequent instances of child sex abuse,[112] and repeated violations of food safety laws by a Bird-in-Hand, Pennsylvania, Amish organic farmer.[113]

Similarly, the eighth-grade education of some people either raised Amish but unbaptized or formerly Amish did not instill purity, as they instilled trust while preying on other Plain people. Consider a notorious land fraud euphemistically referred to as "the Florida thing"[114] and the $3.9 million "5 Star" securities fraud civil prosecution and bankruptcy[115] as glaring examples.

The premise that people who are members of Plain communities are free of mental illness and suicide is clearly farcical, given the waiting list at just the facilities dedicated exclusively to mental health assistance for Amish members.[116]

---

[111] "Pennsylvania Officer Pulls Over Horse and Buggy Driver for DUI," Erie News Now, March 1, 2022, https://www.erienewsnow.com/story/45980008/pennsylvania-officer-pulls-over-horse-and-buggy-driver-for-dui; see also Adam Schrader, "Amish Buggy Driver Spotted Rocking Out to Stereo, Pounding Beers," *New York Post*, September 17, 2019, https://nypost.com/2019/09/17/amish-buggy-driver-spotted-rocking-out-to-stereo-pounding-beers/; Will Payne, "Horsing Around: Four 'Drunk' Underage Amish Men Riding a Horse and Buggy Arrested for DUI after They're 'Spotted Throwing Beer Cans,'" *The Sun*, January 1, 2020, https://www.thesun.co.uk/news/10650508/drunk-amish-horse-buggy-arrested-dui/; "Amish Teen Charged with DUI After Accident," *New Castle (PA) News*, April 17, 2018, https://www.ncnewsonline.com/news/local_news/amish-teen-charged-with-dui-after-accident/article_5fb4ae07-3960-5fd6-a2e8-46099f50f2f2.html; Erik Wesner, "Amishman Arrested for Driving Buggy While Intoxicated," *Amish America*, June 17, 2019, https://amishamerica.com/amishman-arrested-for-driving-buggy-while-intoxicated/.

[112] Peter Smith, "Pennsylvania Amish Man Sentenced to 38–76 Years for Sexually Abusing 4 Pre-Teen Girls," *The Morning Call* (Allentown, PA), January 24, 2020, https://www.mcall.com/news/pennsylvania/mc-nws-pa-amish-child-sex-abuse-sentencing-20200124-kigotwyewzgtxk5ek4d3mvh4a4-story.html; see also Danielle Wallace, "Missouri Amish Brothers Break 5-Year Probation Agreement on Child Molestation Charges," *Fox News*, September 29, 2020, https://www.foxnews.com/us/missouri-amish-brothers-child-molestation-5-years-probation; Peggy Gallek, "74-Year-old Ohio Amish Man Charged with Rape, *Fox 8*, February 25, 2022, https://fox8.com/news/i-team/ohio-amish-man-charged-with-rape/.

[113] Erik Wesner, "Lancaster Amish Organic Farmer Must Pay $250,000, Faces Possible Jail Time for Food Violations," *Amish America*, August 4, 2021, https://amishamerica.com/lancaster-amish-organic-farmer-must-pay-250k-possible-jail-time-food-violations/.

[114] Jen Banbury, "What Happens When the Amish Get Rich," *Bloomberg*, June 26, 2014, https://www.bloomberg.com/news/articles/2014-06-26/rich-amish-lured-into-florida-land-investment-scheme.

[115] Sherry Van Arsdall, "Lawsuit: U.S. SEC says Goshen's Earl Miller Defrauded 'Novice Investors' of $3.9 Million," *Goshen (IN) News*, November 10, 2015, https://www.goshennews.com/news/lawsuit-u-s-sec-says-goshen-s-earl-miller-defrauded/article_1abfa2ff-340d-5f18-8827-59ec57ec40f0.html; see also Mike Grant, "Amish Scam Victims Look for Payback at Dinky's Meeting," *Washington (IN) Times Herald*, February 14, 2019, https://www.washtimesherald.com/news/local_news/amish-scam-victims-look-for-payback-at-dinkys-meeting/article_b737af66-0475-5d85-a9f5-e5c09692e3fd.html.

[116] Hurubie Meko, "Here's a Closer Look into Whispering Hope, Other Amish and Plain Mental Health Facilities," *Lancaster (PA) Online*, January 26, 2020, https://lancasteronline.com/news/local/heres-a-closer-look-into-whispering-hope-other-amish-and-plain-mental-health-facilities/article_db461afa-3fa2-11ea-9fa2-e329e664f8a9.html; see also the Amish services section of Oaklawn's Adult Services webpage: https://oaklawn.org/adult-services/. Additionally, the author is well aware of mental illness and suicide

Possibly of greater significance is the steady, decades-long phenomenon of the nationwide Amish population abandoning farm life for other for-profit endeavors.[117] The fact that the agrarian lifestyle highlighted by Chief Justice Warren Burger in *Yoder* is slowly but surely being eroded among the devoted opens the door to questioning whether Amish faith still "pervades and determines the entire mode of life of its adherents":

> A related feature of Old Order Amish communities is their devotion to a life in harmony with nature and the soil, as exemplified by the simple life of the early Christian era that continued in America during much of our early national life. *Amish beliefs require members of the community to make their living by farming or closely related activities*.[118]

The Amish are not all that special; they are twenty-first century Americans living out their lives in a faith community where select members suffer the same physical, mental, and emotional maladies and social deviances as any other group of individuals, whether that group be faithful or faithless. Further, the connotative Amish member image—the simpleton family farmer with roadside produce stand—is belied by numerous genuine examples: the proprietors of the sizable quilt and craft shop, complete with website, email address, and acceptance of orders via telephone,[119] professional construction companies and retail food establishments owned by Amish members, not to mention the countless Amish assembly line workers at several recreational vehicle manufacturers in northern Indiana.[120]

If the *Yoder* defendants were before the trial court today, prosecuted by a Wisconsin district attorney armed with experts and ready to create a strong record, would the result in the appellate courts be different than in the 1970s? Stated another way, did the Amish receive a constitutionally mandated religious exemption from compulsory education laws or simply a pass based upon an absurdly romanticized, though completely undisputed, rendition of Amish society?

Judicial Danger Flags

During the post-*Yoder* years, numerous Supreme Court decisions have served as threats to the continued viability of the "Amish exemption." A few of note are discussed.

---

among members of the Amish community though decades-long personal interactions with several Old Order Amish members in Lancaster County, Pennsylvania.

[117] "Many Amish Leaving Farming Behind," *Washington Post*, November 9, 2000, https://www.washingtonpost.com/archive/politics/2000/11/09/many-amish-leaving-farming-behind/046ae2ff-581e-4b27-ab09-08e817d77846/.

[118] *Wisconsin v. Yoder*, 406 U.S. 205 (1972), emphasis added.

[119] Business is based in Leola, Pennsylvania (identity of proprietors withheld).

[120] Personal observations of the author.

In *Employment Division, Department of Human Resources of Oregon v. Smith*,[121] the high court was asked to determine whether the state could deny unemployment benefits to persons dismissed from their employment due to religiously inspired peyote use.[122] Previously, the case had been remanded to the Oregon Supreme Court to determine if religiously inspired use of the substance was, in fact, a violation of the state's criminal law.[123] As the state high court concluded that such use was in defiance, and that the religious practice could not be permitted under the Free Exercise Clause, the Supreme Court again granted certiorari, which is a review of a lower court decision by a higher court.[124]

The divided Court affirmed the Oregon high court, reasoning that an individual's religious beliefs do not excuse him or her from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate.[125] Citing numerous previous decisions involving child labor, Sunday "blue laws," and draft dodging, the court stated that it had "consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability' on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[126]

In distinguishing *Yoder*, the court seemed to imply that no religious exemption would have been issued in 1972 without the previous establishment of parental rights by the court:

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press…or the right of parents, acknowledged in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) to direct the education of their children, see *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school).[127]

To add to the peril, the court rejected the need to employ the traditional balancing test between religious belief and compelling state interest,[128] especially (as in *Yoder*) in the criminal realm:

---

[121] 494 U.S. 872 (1990).
[122] Peyote is a psychoactive alkaloid that comes from a small cactus that grows wild in the Chihuahua Desert. "Peyote," Hallucinogens.com, accessed May 18, 2022, https://hallucinogens.com/peyote/.
[123] 485 U.S. 660 (1988).
[124] *Smith*, 494 U.S. at 876.
[125] *Id.* at 878–79.
[126] *Id.* at 879, 880.
[127] *Id.* at 881.
[128] See *Sherbert v. Verner*, 374 U.S. 398 (1963).

> We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges. The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." (citation omitted) To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"—permitting him, by virtue of his beliefs, "to become a law unto himself," *Reynolds v. United States*, 98 U.S., at 167—contradicts both constitutional tradition and common sense.[129]

In sum, absent the presence of some other constitutionally protected right, the decision permitted governments to enact laws that would severely restrict the practice of religion so long the law did not intend to apply solely to any one religious group.

Just four years later, in *Board of Education of Kiryas Joel Village School District v. Grumet*,[130] the Supreme Court dealt with a New York State statutory grant that presumptively favored an insular religious group.

The ultra-orthodox Satmar Hasidim arrived in America in the aftermath of the horrors of the Nazi Holocaust. Other than being a Jewish sect, the assemblage shares marked outward religious and societal identifying features with the Amish:

> The residents of Kiryas Joel are vigorously religious people who make few concessions to the modern world and go to great lengths to avoid assimilation into it. They interpret the Torah strictly; segregate the sexes outside the home; speak Yiddish as their primary language; eschew television, radio, and English-language publications; and dress in distinctive ways that include head coverings and special garments for boys and modest dresses for girls. Children are educated in private religious schools…[131]

The private religious schools in the village, however, did not provide mandated services for handicapped children. These children were forced to attend schools in the broader public district outside of the village, the enclave made up exclusively of Satmar Hasidim faithful. Accordingly, several parents withdrew their in-need children from school, citing in strikingly similar fashion as the parents in *Yoder*, "the panic, fear and trauma [the children] suffered in leaving their own community and being with people whose ways were so different."[132] In deciding that the sect did

[129] *Id.* at 885.
[130] 512 U.S. 687, 732.
[131] *Id.* at 691.
[132] *Id.* at 692.

not have the right to a separate in-village public school, the New York State Court of Appeals[133] reasoned that the Satmars' constitutional right to exercise their religion freely did not require a separate school, since the parents had alleged emotional trauma, not inconsistency with religious practice or doctrine, as the reason for seeking separate treatment.[134]

In response, the state legislature and governor promulgated a law creating a union-free school district wholly within the political borders of the village.[135] In striking down the school district statute as unconstitutional, the court stated:

> A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion….favoring neither one religion over others nor religious adherents collectively over nonadherents…. Chapter 748, the statute creating the Kiryas Joel Village School District, departs from this constitutional command by delegating the State's discretionary authority over public schools to a group defined by its character as a religious community, in a legal and historical context that gives no assurance that governmental power has been or will be exercised neutrally. (citations omitted)[136]

The majority opinion was met with a scathing dissent by Justice Antonin Scalia, who ironically penned the majority opinion in *Oregon v. Smith.*[137] The dissent determined in feigned astonishment that the majority had deemed an admirable accommodation to promote religious toleration as an establishment of religion.[138] Further, it pointed out that, unlike most Establishment Clause cases involving education, no public funding was being allocated to a private school.[139] The dissent painstakingly details that the specific grant of governmental authority was delegated not to a religious group, but to a district with political boundaries whose members all happened to be of the same religious belief.[140] In nullifying the state's attempt to have its handicapped children receive proper education, Justice Scalia additionally warned that the majority was developing a novel Establishment Clause principle to the effect that no secular objective may be pursued by a means that might also be used for religious favoritism if some other means is available.[141]

While decided on Establishment Clause principles, the majority's reasoning leaves little doubt as to the difficulties religious-minded parents would face if, sans a village-based school

---

[133] In the State of New York, the Court of Appeals is the highest appellate court.
[134] *Board of Ed. of Monroe-Woodbury Central School Dist. v. Wieder*, 72 N.Y. 2d 174, 189 (1988).
[135] *Grumet*, 512 U.S. at 693.
[136] *Id.* at 696.
[137] 494 U.S. 872 (1990).
[138] *Grumet*, 512 U.S. at 732.
[139] *Id.* at 732–33.
[140] *Id.* at 736.
[141] *Id.* at 741.

district, they sought an exemption from in any way having their school-age handicapped children attend public, out-of-village instruction.

Federal Statutes to the Rescue

In the wake of *Oregon v. Smith*, Congress passed the Religious Freedom Restoration Act of 1993 ("RFRA").[142] The law

> Prohibits any agency, department, or official of the United States or any State (the government) from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability, except that the government may burden a person's exercise of religion only if it demonstrates that application of the burden to the person: (1) furthers a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.[143]

At the very least, the statute required reestablishment of the compelling state interest balancing test of *Sherbert v. Verner*[144] abandoned by the majority in *Oregon v. Smith.* Unfortunately, in the 1997 decision *City of Boerne v. Flores*,[145] the U.S. Supreme Court determined that Congress had exceeded its authority by attempting to apply the law to the actions of state and local governments under Section 5 of the Fourteenth Amendment.[146] RFRA still applies to actions taken by the federal government.

Congressional response to *City of Boerne* came in 2000 with the promulgation of the Religious Land Use and Institutionalized Persons Act (RLUIPA).[147] Based upon the Interstate Commerce and Spending Clauses[148] as opposed to the Fourteenth Amendment, in addition to ensuring the religious rights of prisoners, the law

> Prohibits any government from imposing or implementing a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution: (1) is in

[142] Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as 42 U.S.C. §§ 2000bb to 2000bb-4 (Supp. V 1993)).
[143] H.R.1308—Religious Freedom Restoration Act of 1993, Summary: H.R.1308—103rd Congress (1993–1994), https://www.congress.gov/bill/103rd-congress/house-bill/1308.
[144] 374 U.S. 398 (1963).
[145] 521 U.S. 507 (1997).
[146] "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5.
[147] Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274 (codified as 42 U.S.C. §2000 cc et seq).
[148] U.S. Const. Art. I, § 8, .cl 1, 3.

furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.[149]

The Erosion of *Smith*: When Neutral Isn't Neutral

At the very least, the U.S. Supreme Court's unanimous decision in *Fulton v. City of Philadelphia*[150] represents the court's uneasiness with its 5-4 decision in *Smith*[151] and attendant rejection of the compelling state interest requirement.

Catholic Social Service (CSS) had contracted with the City of Philadelphia to provide foster care services for over fifty years. CSS holds the religious belief that marriage is a sacred bond between a man and a woman. Because CSS believes that certification of prospective foster families is an endorsement of their relationships, it will not certify unmarried couples—regardless of their sexual orientation—or same-sex married couples.[152]

Based upon an investigation following a newspaper story recounting the Archdiocese of Philadelphia's position, the city would no longer refer children to the agency or enter a full foster care contract with it in the future, claiming its refusal to certify same-sex couples violated both contractual and municipal nondiscrimination requirements. CSS and affiliated foster parents sued to enjoin the city's referral freeze, claiming that it violated the Free Exercise and Free Speech Clauses of the First Amendment.[153]

Citing *Smith*,[154] both the Federal District Court and Third Circuit denied preliminary relief, reasoning that then nondiscrimination requirements were both neutral and generally applicable.[155]

In a majority opinion coupled with three concurring opinions and no dissents, the high court reversed and remanded, holding that Philadelphia had placed an unconstitutional burden upon CSS's exercise of religious freedom. While recognizing that *Smith* held that laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are both neutral and generally applicable, the court determined that *Smith* was inapplicable because the city had created a mechanism for individualized exemptions by the city's commissioner of social services. Thus, where individual exemptions exist, the government may not refuse to extend that system to cases of religious hardship without a compelling reason.[156]

---

[149] H.R.4862—Religious Land Use and Institutionalized Persons Act of 2000, Summary: H.R.4862—106th Congress (1999-2000), https://www.congress.gov/bill/106th-congress/house-bill/4862?s=1&r=8.
[150] 593 U.S. ____ (2021) (No. 19–123) (hereafter *Fulton*), available at https://www.supremecourt.gov/opinions/20pdf/19-123_g3bi.pdf.
[151] 494 U.S. 872 (1990).
[152] *Fulton*, slip op.
[153] *Fulton*, slip op. (based upon the Supreme Court's finding of violation of the Free Exercise Clause; it did not address the free speech claims raised).
[154] 494 U.S. 872 (1990).
[155] *Fulton*, slip op.
[156] *Id.*

Stated another way, the question is not whether the city had a compelling interest in enforcing its nondiscrimination policies generally, but whether it has such an interest in denying an exception to CSS. The court found that inasmuch as CSS seeks only an accommodation that will allow it to continue serving the children of Philadelphia in a manner consistent with its religious beliefs and does not seek to impose those beliefs on anyone else, the city does not have a compelling interest in refusing to contract with CSS:

> A government policy can survive strict scrutiny only if it advances "interests of the highest order" and is narrowly tailored to achieve those interests. (citation omitted). Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so.[157]

In fact, the court reasoned that by freezing out CSS from the foster care process, it was limiting, rather than expanding, the range of children served.

The concurring opinions in Fulton were forceful, with three of the justices asserting that they would overrule *Smith* and return to the pre-*Smith* strict scrutiny standard,[158] with yet another justice resisting the temptation only because of the fear an alternative might prove equally unworkable.[159] Still, the unanimity achieved through the *Smith* "workaround" is telling as to the otherwise philosophically divided court's outlook regarding religious freedom exemptions and the need to rein in governments that denigrate legitimate concerns over mandates that clash with devoutly held precepts as being nothing more than "discrimination under the guise of religious freedom."[160]

The *Mast* GVR Order

Just two weeks after the high court's pronouncement in *Fulton*, the court ruled on a petition for writ of certiorari in *Mast v. Fillmore County, Minnesota*.[161]

In 2013, the county promulgated an ordinance requiring most homes to have a modern septic system. The Swartzentruber Amish, one of the most conservative of all Plain sects, corresponded with the county and explained that they were forbidden by religious beliefs to install the contemporary technology. Not only did the applicable administrative agency fail to accommodate the grievants, it filed enforcement actions against twenty-three families seeking civil and criminal penalties if the systems were not installed. In response, the Amish filed a declaratory judgment action, alleging that the mandate violated the Religious Land Use and Institutionalized Persons Act (RLUIPA).[162]

---

[157] *Id.*
[158] *Id.* (Alito, J., Thomas, J., and Gorsuch, J., concurring).
[159] Barrett, J.
[160] App. to Pet. for Cert. 147a.
[161] 594 U.S._____ (2021) (No. 20–7028) (hereafter *Mast*), available at https://www.supremecourt.gov/opinions/20pdf/20-7028_o758.pdf.
[162] *Id*. (Gorsuch, J., concurring).

The Amish, however, also offered an alternative: a mulch basin system that would allow gray water to diffuse through wood chips that filter the water as it drains. While primitive, the system was permitted in other jurisdictions.[163]

Persecution of the Amish, even harsher than that experienced by the *Yoder* defendants, continued:

> The County replied by filing a counterclaim seeking an order displacing the Amish from their homes, removing all their possessions, and declaring their homes uninhabitable if the Amish did not install septic systems within six months. MPCA App. 80. The County even unsuccessfully sought a court order authorizing its agents to inspect the inside of Amish homes as part of an investigation into what "types of modern technologies and materials" they might be using. *Id.*, at 81. Apparently, this was part of an effort to amass "evidence" to "attack the sincerity of [the Amish's] religious beliefs."[164]

At the trial level, the county argued that limited use of telephones by the Amish proved that their objection to modern septic systems was contrived, that the Bible requires the Amish to submit to "secular authority," and that since the Amish occasionally use rubber tires and power tools, installing modern septic would pose only a *de minimus* burden on the faithful. While all propositions were rejected by the trial court, it nonetheless sided with the county, finding that the mulch-based system offered "does not provide a less-restrictive means of accomplishing the government's compelling interests of protecting public health and the environment."[165]

In a one-paragraph order, the U.S. Supreme Court granted certiorari, vacated the lower judgment, and remanded the case for further consideration in light of *Fulton* ("GVR"). While not a decision annunciating constitutional interpretation providing precedential value, the opinions in support of the GVR order are highly persuasive, especially in light of the unanimous and virtually simultaneous decision in *Fulton*.

In his concurrence, Justice Samuel Alito stated, "The lower court plainly misinterpreted and misapplied the Religious Land Use and Institutionalized Persons Act."[166] The concurrence of Justice Neil Gorsuch, however, delineated everything that was wrong with the Minnesota Court decision:

> *Fulton* makes clear that the County and courts below misapprehended RLUIPA's demands. That statute requires the application of "strict scrutiny." Under that form of review, the government bears the burden of proving both that its regulations serve a "compelling" governmental interest—and that its regulations

[163] *Id*.
[164] *Id*.
[165] *Mast v. City of Fillmore*, No. A19-1375, 2020 WL 3042114 (Minn. App. June 8, 2020).
[166] *Mast*, slip op. (Alito, J., concurring).

> are "narrowly tailored."… Perhaps most notably, the County and courts below erred by treating the County's *general* interest in sanitation regulations as "compelling" without reference to the *specific* application of those rules to *this* community. As *Fulton* explains, strict scrutiny demands "a more precise analysis." Courts cannot "rely on 'broadly formulated'" governmental interests, but must "scrutinize[ ] the asserted harm of granting specific exemptions to particular religious claimants." Accordingly, the question in this case "is not whether the [County] has a compelling interest in enforcing its [septic system requirement] *generally,* but whether it has such an interest in denying an exception" from that requirement to the Swartzentruber Amish *specifically*. (citations omitted)[167]

Where did the state courts go wrong? Just like in *Fulton*, where individual discretionary exceptions were allowed under the statutory rubric, Minnesota ignored the facts that:

> [t]hose who "hand-carry" their gray water are allowed to discharge it onto the land directly.[168] So thousands of campers, hunters, fishermen, and owners and renters of rustic cabins are exempt from the septic system mandate. Under strict scrutiny doctrine, the County must offer a compelling explanation why the same flexibility extended to others cannot be extended to the Amish. As *Fulton* put it, the government must offer a "compelling reason why it has a particular interest in denying an exception to [a religious claimant] while making [exceptions] available to others."[169]
>
> Relatedly, the County and lower courts failed to give sufficient weight to rules in other jurisdictions. Governments in Montana, Wyoming, and other States allow for the disposal of gray water using mulch basins of the sort the Amish have offered to employ.[170] Given that, the County in this case bore the burden of presenting a "compelling reason why" it cannot offer the Amish this same alternative: *Fulton*. To be sure, the County stresses the fact that the "record contains no evidence of a single, properly working mulch basin system in Minnesota."[171] But that is not enough. It is the government's burden to show this alternative won't work; not the Amish's to show it will. "[S]o long as the government can achieve its interests in a manner that does not burden religion, it must do so."[172]

---

[167] *Id*. (Gorsuch, J., concurring).
[168] Minn. Admin. Rule 7080.1500, § 2.
[169] *Mast*, slip op. (Gorsuch, J., concurring).
[170] App. to Pet. for Cert. 73–74.
[171] App. to Pet. for Cert. 74.
[172] *Id*.

Speaking to the lower court's assertion that the offered mulch basins were unworkable, impractical, and/or ineffective, Justice Gorsuch would have none of it, stating:

> But strict scrutiny demands more than supposition. The County must prove with evidence that its rules are narrowly tailored to advance a compelling state interest with respect to the specific persons it seeks to regulate. Here, that means proving that mulch basins will not work on these particular farms with these particular claimants.[173]

Finally, while pointing out the cruelty perpetrated by the county, Justice Gorsuch offered a rather pointed admonition on remand:

> RLUIPA prohibits governments from infringing sincerely held religious beliefs and practices except as a last resort. Despite that clear command, this dispute has staggered on in various forms for over six years. County officials have subjected the Amish to threats of reprisals and inspections of their homes and farms. They have attacked the sincerity of the Amish's faith. And they have displayed precisely the sort of bureaucratic inflexibility RLUIPA was designed to prevent. Now that this Court has vacated the decision below, I hope the lower courts and local authorities will take advantage of this "opportunity for further consideration," and bring this matter to a swift conclusion. In this country, neither the Amish nor anyone else should have to choose between their farms and their faith (citations omitted).[174]

Takeaways from *Mast*

Coupled with the precursor decision in *Fulton,* the significance of *Mast* in relation to free exercise of religion in general, and in preservation of the holding in *Yoder*, cannot be overstated.

Initially, it should be noted that RLUIPA speaks to religious liberties exclusively in the prisoner and land use realm. Yet, while reference to RLUIPA in *Mast* is repeatedly made, the concurring opinion of Justice Gorsuch just as frequently cites violations of the *Fulton* holding, a decision obviously arrived at somewhat simultaneously with the *Mast* GVR order, but to which RLUIPA is wholly inapplicable. Thus, the concurring opinions use *Fulton* in *Mast* as a guidepost for analysis.

In Justice Gorsuch's nonprecedential but persuasive view, government must show a compelling need for application of a law specifically to the community seeking the exemption. Further, government must show compelling reasons why it should be allowed to deny a group of adherents an exemption while affording exemptions to others. Additionally, in considering the exemption, government must look to other jurisdictions to determine if an alternative to a

[173] *Id*.
[174] *Id*.

purportedly compelling interest is viable. Moreover, it is the government, not the exemption seeker, who must affirmatively prove the lack of feasibility of an offered alternative via hard evidence, not conjecture.

Clearly, the burden on the government to effectively deny a religious exemption in any realm where other exemptions are offered is now overwhelming. That speaks well for *Yoder* and others seeking religious exemption guarantees before the current high court.

More importantly, while Justice Gorsuch clearly found the high-handed maltreatment of the Swartzentruber families patently detestable, his opinion is wholly devoid of any deference to the Amish as a group deserving of specialized treatment due to some lofty societal status. While it is possible such favorable references were omitted as they might have proven counterproductive to assist a group suffering the effects of societal change, they are absent nonetheless. So, while Fillmore County's multipronged inquisition into their beliefs and extent of their modernity put the Swartzentruber faith in the figurative petri dish, the Gorsuch opinion resists placing the Amish sect on a *Yoder*-like pedestal; rather, he applied scrutiny that unsympathetically called out the government without exalting the petitioners.

Here, the Amish made their plea, and then kept score as Fillmore County repeatedly fumbled its burden. Whether pious or pagan, the reputation for law abidingness, mental health, or land stewardship among the group's members went unmentioned by Justice Gorsuch. His opinion in *Mast* is absent the repeated reference to the purported communal incorruptibility that served as underpinning of the Burger opinion in *Yoder.* In this regard, neither the Amish nor any other group needs to prove its virtuousness to be deemed worthy of exemption.

Had the prosecution in Green County, Wisconsin, gone to the trouble of making a complete record in *Yoder*, the result might have been different. Nevertheless, it is hard to fathom how any more extensive a record put forth by Fillmore County would have been sufficient to repel the *Mast* petitioners. The Swartzentrubers pled violation of religious tenet, then offered a plausible, if not fully viable, alternative to what was broadly mandated. In 2021, that alone was sufficient to carry the day for petitioners, at least in garnering a remand.

In the unlikely event that the *Yoder* exemption is challenged in the future, the alternative of vocational, albeit limited, education past age fourteen, as detailed by Justice Heffernan in his dissent in the Wisconsin Supreme Court, would likely be determinative as to the clear right to the exemption.[175] Moreover, if state exemptions exist, their analysis might lead to strict scrutiny application to save the day for the Amish.

In sum, Justice Gorsuch's exhaustive and convincing *Mast* GVR order concurrence is a fiftieth birthday gift for *Yoder* that will undoubtedly keep on giving for the Amish and other faith-minded groups, and not exclusively in the land-use sphere. Moreover, as the half-millennium anniversary of the first Swiss Brethren baptisms fast approaches, it is comforting to know that Penn's promise to the faith descendants of Grebel, Blaurock, and Manz has been so abundantly fulfilled.

---

[175] *State v. Yoder*, 49 Wis.2d 430, 453 (1970).

Bibliography

Braught, Thieleman J. van, comp. *The Bloody Theatre or Martyrs' Mirror of the Defenseless Christians Who Baptized Only upon Confession of Faith and Who Suffered and Died for the Testimony of Jesus Their Saviour…to the Year A.D. 1660*. Scottdale, PA: Herald Press, 1951.

Frost, J. William. *A Perfect Freedom: Religious Liberty in Pennsylvania*. Cambridge University Press, 1990. https://doi.org/10.1017/CBO9780511572418.

Kraybill, Donald K. *Renegade Amish: Beard Cutting, Hate Crimes, and the Trial of the Bergholz Barbers*. John Hopkins University Press, 2014. https://doi.org/10.56021/9781421415673.

Kraybill, Donald K., Steven M. Nolt, and David L. Weaver-Zercher. *Amish Grace: How Forgiveness Transcended Tragedy*. San Francisco: Jossey-Bass, 2007.

Nolt, Steven M. *A History of the Amish*. 3rd ed. New York: Good Books, 2015.

Stein, Joseph, and Will Glickman. *Plain and Fancy: A Musical Comedy*. New York: Random House, 1955.