SMU | Dedman School of Law

SMU Law Review

Volume 26 | Issue 5 Article 7

January 1972

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on filing fees and greatest reliance on a petition system which would require candidates to prove that they indeed have a reasonable amount of support.

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The Amish Prevail Over Compulsory Education Laws: *Wisconsin v. Yoder*

Defendants, members of the Old Order Amish Religion, refused to send their children, ages fourteen and fifteen, to school after completion of the eighth grade. The parents were convicted of violating Wisconsin's compulsory school attendance law.[1] On appeal, they complained that the law interfered with their religious beliefs and was, therefore, invalid as an infringement upon the free exercise of their religion, guaranteed by the first and fourteenth amendments of the United States Constitution.[2] The Wisconsin Supreme Court determined that the state's interest in requiring education until the age of sixteen did not override the defendants' right to the free exercise of their religion, and reversed the convictions.[3] The United States Supreme Court granted certiorari.[4] *Held, affirmed*: The state's interest in requiring a minimum degree of education of its children is a valid state interest, but in the special circumstances presented by the Amish sect, the first and fourteenth amendments prevent the State of Wisconsin from compelling the defendants' children to attend formal high school to age sixteen. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

I. The State's Interest Versus the Individual's Rights of Religious Freedom

The first amendment guarantee of freedom of religion has traditionally been considered one of the most valued of the substantive liberties guaranteed by the Constitution.[5] This protection has been extended by the due process clause of the fourteenth amendment to prevent the states from depriving individuals of their religious freedoms.[6] This first amendment right does not go unfettered, however, as it is subject to the reasonable exercise of a state's police power, especially in areas where the public health and safety are involved.[7] The method of determining which of these interests, the state's or the indi-

[1] Wis. Stat. § 118.15 (Spec. Pamphlet 1972).

[2] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I. The due process clause of the fourteenth amendment extends this prohibition and makes it applicable to the states. Cantwell v. Connecticut, 310 U.S. 296 (1940).

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

[4] 402 U.S. 994 (1971).

[5] *See* Braunfeld v. Brown, 366 U.S. 599, 612 (1961) (Brennan, J., dissenting): "[R]eligious freedom—the freedom to believe and practice strange and, it may be, foreign creeds—has classically been one of the highest values of our society."

[6] Cantwell v. Connecticut, 310 U.S. 296 (1940).

[7] *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963).

vidual's, overrides the other, is a balancing procedure.[8] The line which has been traditionally drawn in this balancing process is that between beliefs and actions.[9] The freedom to believe is absolute; actions, though, are generally thought subject to state regulation, even when sincerely supported by religious beliefs.[10]

In affirming the conviction of a Mormon polygamist, the Supreme Court of the United States held in *Reynolds v. United States* that although "[l]aws cannot . . . interfere with mere religious beliefs and opinions, they may with practices."[11] For decades thereafter, the assertion of the free exercise of religion defense failed in state prosecutions ranging from disturbance of the peace violations[12] to palm reading.[13] In 1925, however, in *Pierce v. Society of Sisters*[14] the Supreme Court found that an Oregon statute requiring parents and guardians to send their children only to public schools was an extreme interference with the right of parents to direct the course of their children's education and religious training. Likewise, the "flag-salute" case of the 1940's held that a student's right to refuse to salute the United States flag because of his religious beliefs far outweighed the state's interest in fostering patriotism.[15] Still, in 1944, the Court refused to reverse the conviction of a Jehovah's Witness who had violated a Massachusetts statute by directing her minor ward to distribute religious material on the streets.[16] The Court held that the defendant's free exercise defense must yield to Massachusetts' power as *parens patriae* to provide for the welfare of the child.

In 1963, the Court in *Sherbert v. Verner*[17] formulated a two-fold test to

[8] In Braunfeld v. Brown, 366 U.S. 599, 605 (1961), the Court indicated that "to make accommodation between religious action and an exercise of state authority is a particularly difficult task . . . ." *See also* People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

[9] Thomas Jefferson, as early as 1786, had noted the possibility that some actions, based upon religious beliefs, would disrupt the "peace and good order," and when that occurred, a government could lawfully interfere. T. JEFFERSON, *An Act for Establishing Religious Freedom*, in 2 WRITINGS OF THOMAS JEFFERSON 300, 302 (A. Lipscomb & A. Bergh eds. 1903). *See also* Braunfeld v. Brown, 366 U.S. 599, 604 (1961); Reynolds v. United States, 98 U.S. 145 (1878).

[10] Cantwell v. Connecticut, 310 U.S. 296 (1940). Courts, in determining rights under the free exercise clause, must take care not to run afoul of the establishment clause. Thomas Jefferson stated that the establishment of religion clause of the first amendment was responsible for "building a wall of separation between Church and State." Letter from Thomas Jefferson to a committee of the Danbury Baptist Association, Jan. 1, 1802, in 16 WRITINGS OF THOMAS JEFFERSON, *supra* note 9, at 281-82. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971); Everson v. Board of Educ., 330 U.S. 1 (1947). *See generally* Harding, *Religious Liberty: The Source of Freedom?*, 11 SW. L.J. 169 (1957). The courts are forced to recognize this wall of separation when examining a law challenged upon infringement of free exercise grounds and look at the possibility of aiding the establishment of the religion. In addition, courts must consider other incidental rights and powers found in the subject matter of the litigation; for example, the parent's interest in the religious upbringing of his child was a consideration in Prince v. Massachusetts, 321 U.S. 158 (1944).

[11] 98 U.S. 145, 166 (1878). *See also* Davis v. Beason, 133 U.S. 333 (1890).

[12] State v. White, 64 N.H. 48, 5 A. 828 (1886).

[13] McMasters v. State, 21 Okla. Crim. 318, 207 P. 566 (1922).

[14] 268 U.S. 510 (1925). An earlier, equally important case decided by the Supreme Court during this period was Meyer v. Nebraska, 262 U.S. 390 (1923), in which the conviction of a schoolteacher for violating a Nebraska statute forbidding the teaching of a language other than English was reversed on the grounds that the statute was arbitrary and interfered with individual fundamental rights.

[15] West Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[16] Prince v. Massachusetts, 321 U.S. 158 (1944).

[17] 374 U.S. 398 (1963). This decision was termed by one author to be the "dawn of a new day for religious freedom claims." Galanter, *Religious Freedoms in the United States: A Turning Point?*, 1966 WIS. L. REV. 217, 241.

determine whether a state's secular interest predominated over an individual's religious liberty. It was first necessary to determine whether the law in question imposed a burden on the free exercise of religion, and, if so, whether some compelling state interest justified the substantial infringement of the first amendment rights. The state's interest, said the Court, should triumph only when the "gravest abuses, endangering paramount interests, give occasion for permissible limitation" of religious liberties.[18]

Historically speaking, courts have generally concentrated on three facets of this state interest—religious freedoms conflict. First, they have investigated the nature and purpose of the law in question. Where the religion-oriented conduct constituted a threat to the public safety, peace, or order, and the purpose of the law was to safeguard these public interests, the religious liberty claims generally yielded to the state's interest.[19] A second area of focus was the degree of the burden that the law exerted upon the free exercise of the religion. Where the religious practice itself was not made unlawful by the state law, then only an "indirect" burden was said to exist, and the law was upheld.[20] Finally, courts have increasingly probed beyond the religious conduct itself to determine the validity of the religious claims. Both the sincerity of the claimants in their beliefs and practices,[21] and the centrality, or importance, of the activities sought to be regulated have received attention from the courts.[22]

II. THE COMPELLING INTEREST OF STATES' COMPULSORY EDUCATION LAWS

Since 1647, when Massachusetts passed an act establishing the first public schools in America,[23] the importance of the state's interest in education has not

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[18] 374 U.S. at 406.

[19] *See, e.g.*, Jacobson v. Massachusetts, 197 U.S. 11 (1905); Winters v. Miller, 446 F.2d 65 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971); Wright v. DeWitt School Dist. No. 1, 238 Ark. 906, 385 S.W.2d 644 (1965) (regulations requiring vaccinations of citizens or public school children); Powers v. State Dep't of Social Welfare, 208 Kan. 605, 493 P.2d 590 (1972) (medical examinations required as a condition for receiving welfare benefits); Application of President and Directors of Georgetown College, 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964) (court orders demanding that blood transfusions be administered to an unwilling Jehovah's Witness patient); Cleveland v. United States, 329 U.S. 14 (1946) (violations of the Mann Act); Leary v. United States, 383 F.2d 851 (5th Cir. 1967), *rev'd on other grounds*, 392 U.S. 903 (1969); State v. Bullard, 267 N.C. 599, 148 S.E.2d 565 (1966) (narcotics convictions). However, where the public goals were found to be less compelling and there was no threat to public safety or order, the state's law would not be enforced. *See, e.g., In re* Jenison, 265 Minn. 96, 120 N.W.2d 515, *remanded*, 375 U.S. 14, *rev'd on rehearing*, 267 Minn. 136, 125 N.W.2d 588 (1963) (juror could refuse to serve because of religious beliefs); Torcaso v. Watkins, 367 U.S. 488 (1961) (test for office of notary public could not require applicant to declare his belief in God); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (city tax could not be levied on Jehovah's Witnesses distributing religious material).

[20] Three states' Sunday closing laws were held to be only indirect burdens on the free exercise of religion. *See* Braunfeld v. Brown, 366 U.S. 599 (1961); McGowan v. Maryland, 366 U.S. 420 (1961); Gallagher v. Crown Kosher Super Mkt., 366 U.S. 617 (1961).

[21] United States v. Ballard, 322 U.S. 78 (1944) (holding that under the particular circumstances involved it was not error to refuse to submit to the jury the question of the sincerity of the defendants' beliefs).

[22] *See* Welsh v. United States, 398 U.S. 333 (1970). *See also* Casad, *Compulsory High School Attendance and the Old Order Amish: A Commentary on State v. Garber*, 16 KAN. L. REV. 423 (1968).

[23] *See generally* Comment, *The Right Not To Be Modern Men: The Amish and Compulsory Education*, 53 VA. L. REV. 925, 930 (1967).

diminished.[24] The state, as *parens patriae*, uses these compulsory education laws to protect children from unwise decisions made by themselves or their parents, until they are old enough to decide for themselves.[25] The majority of states have compulsory education statutes requiring a child to attend school until a certain age or to a certain grade.[26] If a non-public school is attended, the alternate mode of education must meet minimal standards equivalent to those of that state's public instruction.[27] The importance of the state's interest in promoting compulsory education has been reflected in the many judicial decisions which have upheld the validity of these laws in the face of a variety of attacks.[28]

The compulsory education statutes have frequently been attacked by various religious groups as violations of the free exercise clause of the first amendment.[29] The refusal by members of the Amish sect to send their children to school past the eighth grade has resulted in many state prosecutions.[30] The particular value system of the Amish, involving their ideas of self-sufficiency[31] and separation from the worldliness of contemporary society, has been argued as reason enough for an exception to the laws.[32] Although the Amish are not against all secular education, believing in the need for learning the basic skills (reading, writing, etc.) necessary in their community, they do oppose a high school education because of the exposure their children receive to contemporary societal values opposed to their own.[33] This exposure will, the Amish contend, lead to the disintegration of their religious communities.[34]

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[24] *See* Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

[25] Casad, *Compulsory Education and Individual Rights*, in 5 RELIGIONS AND THE PUBLIC ORDER 51, 79-83 (D. Gianella ed. 1969).

[26] The statutes of Colorado and the District of Columbia permit children, upon reaching a certain age or grade limit, to be excused from school upon the condition that they engage in lawful employment. COLO. REV. STAT. ANN. §§ 123-20-5, 80-6-1 to 80-6-2 (1963); D.C. CODE ANN. §§ 31-202, 36-201 to 36-228 (1967).

[27] *See* State v. Garber, 197 Kan. 567, 419 P.2d 896 (1966), *cert. denied*, 389 U.S. 51 (1967); State v. Superior Court, 55 Wash. 2d 177, 346 P.2d 999 (1959), *cert. denied*, 363 U.S. 814 (1960).

[28] *See, e.g.*, People v. Turner, 121 Cal. App. 2d 861, 263 P.2d 685 (App. Dep't Super. Ct. 1953), *appeal dismissed*, 347 U.S. 972 (1954); Meyerworth v. State, 173 Neb. 889, 115 N.W.2d 585 (1962). Religion was not at issue in these cases.

[29] *E.g.*, State v. Bailey, 157 Ind. 324, 61 N.E. 730 (1901); Commonwealth v. Smoker, 177 Pa. Super. 435, 110 A.2d 740 (1955); Commonwealth v. Bey, 166 Pa. Super. 136, 70 A.2d 693 (1950).

[30] *See* Comment, *The Amish and Compulsory School Attendance: Recent Developments*, 1971 WIS. L. REV. 832, 835.

[31] The Amish have been exempted from payment of social security taxes as a tribute to their self-sufficiency. Treas. Reg. § 1.1402(h)-1 (1970).

[32] *See* Comment, *supra* note 30, at 832. The Amish regard this forbearance and separation from contemporary society as essential for their spiritual salvation.

[33] The contemporary social values of worldliness and competitiveness are at direct odds with Amish values of humility and obedience to the will of God. *See* Comment, *supra* note 30, at 834.

[34] It has been asserted that the large consolidated schools, speech, customs, and comforts of contemporary society threaten the Amish in particular to a greater extent than other religious groups. *See* Comment, *supra* note 23, at 948. It is interesting to note that special statutory relief for the Amish has been granted in several states. For example, in Pennsylvania broad exceptions to the compulsory education statute allow school administrators wide discretion in granting exemptions or devising alternative plans, such as a work-study program, for Amish children fourteen years or older. PA. STAT. ANN. tit. 24, § 13-1330 (Supp. 1972). Other states have modified their compulsory education laws by providing for exemptions or at least less rigid treatment of the Amish. Iowa provides that exemptions may be granted by the state superintendent of public education and are renewable each year,

However, until 1971, state supreme courts generally upheld these compulsory education laws in spite of the Amish free exercise claims, basing their decisions on the belief-action distinction.[35] One case in particular, *State v. Garber*,[36] is especially noteworthy, being the first instance in which Amish claims were asserted against a state's attendance law following the Supreme Court's holding in *Sherbert v. Verner*.[37] The Kansas Supreme Court, however, overlooked the *Sherbert* test, basing its decision on the strict rationale that because the law presented no infringement on the right of the Amish petitioners to "believe or worship" in the religion of their choice, there was no denial of religious freedom. The decision received criticism for the Kansas court's complete disregard of the *Sherbert* test,[38] but the United States Supreme Court denied certiorari.[39]

III. WISCONSIN V. YODER

In *Wisconsin v. Yoder* the Amish respondents convinced the Court through the use of sociological data and the testimony of expert witnesses that "the Old Order Amish religion pervades and determines virtually their entire way of life. . . ."[40] By equating their way of life to their religion, the Amish demonstrated that the Wisconsin attendance law, which required school attendance until the age of sixteen, presented not only an infringement upon their religious liberty, but a real threat to the very existence of their society and faith, in subjecting their children to the secular values attendant with secondary education. The sincerity of their beliefs and the importance of the "role that belief and daily conduct play in the continued survival of the Old Order Amish communities and their religious organization," were cited as further reasons for sustaining the claims of the Amish.[41]

The Court initially rejected Wisconsin's contention that the belief-action distinction be strictly applied, stating that actions were not always outside the protection of the free exercise clause.[42] The implication of the Court's language was that the distinction had best be laid to rest, at least as an all-purpose talisman for determining these conflicts.[43] The Court agreed that a certain amount of education was necessary for a citizen to participate effectively in America's political system, and that it enabled a child to become a self-reliant,

conditioned upon proof that the child has sustained a basic level of achievement in the "basic skills." IOWA CODE § 299.24 (Supp. 1972). Kansas requires that upon completion of the eighth grade, exempted children must participate in parent-supervised work-study programs. KAN. STAT. ANN. § 72-1111 (Supp. 1970).

[35] *See, e.g.*, State v. Hershberger, 103 Ohio App. 188, 144 N.E.2d 693 (1955); Commonwealth v. Smoker, 177 Pa. Super. 435, 110 A.2d 740 (1955); Commonwealth v. Beiler, 168 Pa. Super. 462, 79 A.2d 134 (1951); *In re* Marsh, 140 Pa. Super. 472, 14 A.2d 368 (1940); Rice v. Commonwealth, 188 Va. 224, 49 S.E.2d 342 (1948); *see* text accompanying notes 9, 10 *supra*.

[36] 197 Kan. 567, 419 P.2d 896 (1966), *cert. denied*, 389 U.S. 51 (1967).

[37] 374 U.S. 398 (1963); *see* notes 17-18 *supra*, and accompanying text.

[38] *See* Casad, *supra* note 22.

[39] 389 U.S. 51 (1967).

[40] 406 U.S. at 216.

[41] *Id.* at 235.

[42] *Id.* at 219-20. *See* Sherbert v. Verner, 374 U.S. 398 (1963); Murdock v. Pennsylvania, 319 U.S. 105 (1943).

[43] "[I]n this context belief and action cannot be neatly confined in logic-tight compartments." 406 U.S. at 220.

self-sufficient contributing member of society. However, these assertions were only true when applied to the bulk of society; when applied to the unique Amish situation, the state's interest appeared less substantial. The Court reasoned that an additional one or two years' instruction did relatively little to accomplish the goals of the state, and that the skills attained through an eighth grade education were all that were necessary for a contributing life in Amish society. Furthermore, the Court pointed out that the Amish trait of self-sufficiency had received federal governmental notice before.[44] Although Wisconsin noted the potential plight of an Amish child who might leave the Amish community for contemporary society with only an eighth-grade education, the Court answered that the Amish qualities of "reliability, self-reliance, and dedication to work," would surely find ready acceptance by potential employers.[45]

Wisconsin relied on *Prince v. Massachusetts*[46] as authority for the state's power to provide for the welfare of its youths, even over their parents' wishes. *Sherbert v. Verner*,[47] the Court noted, had restricted *Prince* and the state's position as *parens patriae* to situations in which the physical or mental health of the child, or the peace, safety, or welfare of the public, were endangered.[48] Instead, the decision in *Pierce v. Society of Sisters*[49] was found to be controlling. The decision in *Pierce* stated that when the interests of the parent in guiding the religious and educational training of the child were coupled with the individual's rights of religious liberty, the state's interest in the conduct must be more compelling than merely having a "reasonable relation to some purpose within the competency of the state."[50] In *Yoder*, Wisconsin's interest was determined not to be compelling in the light of the respondents' evidence which effectively undermined the state's arguments.

The Court, ruling for the respondents, qualified the scope of their decision by advancing two caveats. The first was a warning to courts in the future to tread gently in this area, stressing the uniqueness of the Amish situation,[51] perhaps fearing that the decision would open the floodgates to numerous free exercise claims for exemptions from attendance laws. Secondly, the Court stated that *Yoder* should not be construed as a judicial undermining of the states' compulsory education laws; rather, the Court suggested that the state devise reasonable standards to provide for informal continuing education for Amish children past the eighth grade, without impairing their free exercise of religion.[52]

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[44] *See* note 31 *supra.*

[45] 406 U.S. at 224.

[46] 321 U.S. 158 (1944); *see* note 16 *supra*, and accompanying text.

[47] 374 U.S. 398 (1963).

[48] 406 U.S. at 230.

[49] 268 U.S. 510 (1925); *see* note 14 *supra*, and accompanying text. The *Yoder* Court said that *Pierce* "stands as a charter of the rights of parents to direct the religious upbringing of their children." 406 U.S. at 233.

[50] 268 U.S. at 535.

[51] The Court warned that the Amish had presented a "convincing showing, one that probably few other religious groups or sects could make." 406 U.S. at 235-36.

[52] The Court noted the states' past history of "amicable and effective relationships with church-sponsored schools," and suggested "continuing vocational education of Amish children under parental guidance," as a solution. 406 U.S. at 236. *See* note 34 *supra.*

Another argument advanced by Wisconsin was that a decision granting an exemption to the Amish from the compulsory education law would ignore the substantive rights of Amish children by depriving them of any choice if they desired to continue their education past the eighth grade. This was an appealing contention especially in light of the Court's increasing recognition in recent decisions of the constitutional rights of students and minors.[53] The Supreme Court, however, determined that the substantive rights of the children were not at issue in *Yoder*. Only the parents were subject to prosecution in this criminal proceeding; the children were not parties to the litigation.[54] Furthermore, the Court noted that the record in *Yoder* was bare of any inference that the particular parents in the litigation were acting contrary to their children's wishes in keeping them home from school following completion of the eighth grade.[55] The Court insisted that its decision in *Yoder* could not be construed as any resolution of conflicting interests between parents and children; these differences would best be resolved in state courts in the future.

In the final analysis, it is difficult to ascertain whether the Supreme Court implicitly intended for *Yoder* to stand for a broadening of free exercise rights, or whether it intended merely to distinguish its past holdings in the state interest—religious liberty area with the special situation presented by the Amish claims. It is obvious, however, that the Court did attempt to narrow the scope of its holding to prevent a deluge of free exercise claims against school compulsory attendance laws. The Court characterized the Amish as a unique religious group; it vindicated states' compulsory education laws and kept the focus only on the eighth-grade to age-sixteen period; and, rather disappointingly it refused to consider the substantive rights of the children who will be ultimately affected by the *Yoder* decision.

It seems ironic that the Court dealt with the rights of the Amish parents in such a broad manner, yet denied any assertion of the children's rights. The Court should have more realistically appraised the small likelihood of fourteen-year-old Amish children protesting their parents' refusal to allow them to attend school. The result of the holding may be the educational suffocation of many Amish children who realize this fact too late in their lives.[56] Although

[53] *See, e.g.*, Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (the right of students to freedom of speech recognized); *In re* Winship, 397 U.S. 358 (1970) (defendant in a juvenile proceeding can be convicted only upon proof beyond a shadow of a doubt); *In re* Gault, 387 U.S. 1 (1966) (recognition of constitutionally protected due process rights in juvenile proceedings). *See also* Gyory, *Constitutional Rights of Public School Pupils*, 40 FORDHAM L. REV. 201 (1971).

[54] 406 U.S. at 230-31.

[55] *Id.* at 231.

[56] Justice Douglas dissented from the majority holding that the children's rights were not involved in the litigation. The difficulty with the majority's reasoning, he stated, is due to the narrow scope of the holding, which concentrated upon the state on one side and the parents on the other, resulting in the children's free exercise rights being pre-empted by those of their parents. Because "no analysis of religious-liberty claims can take place in a vacuum," Douglas suggested that the children's views be canvassed in the present litigation since the children would have "no other effective forum" to voice their opinions. 406 U.S. at 242. It is noteworthy to mention, however, that Justice Douglas did agree with the majority's disapproval of any strict application of the belief-action distinction, noting that *Yoder* would open the way "to give organized religion a broader base than it has ever enjoyed," and predicting an eventual overthrow of Reynolds v. United States, 98 U.S. 145 (1878) (*see* note 11 *supra*, and accompanying text). 406 U.S. at 247.