YODER'S LEGACY

*Mark Strasser**

I. INTRODUCTION

In *Wisconsin v. Yoder*,[1] the United States Supreme Court held that a Wisconsin compulsory school attendance law was unconstitutional as applied to Amish parents who refused for religious reasons to allow their children to attend high school. That decision has been subject to differing interpretations, at least in part, because of its mixed messaging. In the very same opinion, the Court offers language suggesting that the Constitution provides robust protection of the implicated constitutional rights but also suggests that the burden imposed on the state to justify overriding those rights is not very great.[2] Regrettably, *Yoder*'s mixed messaging continues to be represented in the caselaw. The rights implicated in *Yoder* are given robust protection at certain times but not others without any accompanying (plausible) explanation or justification. The Court thereby only bolsters the impression that its decisions are unprincipled and its holdings irreconcilable.

Part II of this Article discusses *Yoder* and some of the ways in which the Court sent mixed messages with respect to the degree of protection afforded to the implicated rights.[3] Part III discusses the Court's subsequent treatment of *Yoder*, where the Court sometimes takes *Yoder* to stand for robust protections and at other times for deference to the state.[4] This Article concludes that unless the Court takes its own avowed principles and approaches more seriously, it will only continue to confuse lower courts and undermine its own credibility.

---

* Trustees Professor of Law, Capital University Law School, Columbus, Ohio.

1. 406 U.S. 205 (1972).
2. *See id.* at 234-35.
3. *See infra* Part II.
4. *See infra* Part III.

II. *YODER*

Wisconsin v. Yoder[5] has been subject to differing interpretations, at least in part, because of mixed messages about a variety of matters within the opinion itself. The *Yoder* Court both affirmed and undercut the strength of the implicated rights, which is regrettable because the Court thereby reduced clarity both about which test was applicable when the implicated rights were burdened by the state and about how the relevant test should be applied. To make matters even more confusing, the Court did not seem to appreciate that it was sending mixed messages, thereby contributing to the incoherence of the underlying jurisprudence.

Yoder involved a Wisconsin law requiring children under sixteen years of age to attend school unless certain exceptions applied.[6] Some Amish parents[7] living in the state refused to send their children to high school even though those children had not yet reached sixteen years of age[8] and the statutory exceptions were inapplicable.[9] At issue was whether federal constitutional guarantees precluded the state from forcing these

---

5. 406 U.S. 205 (1972).

6. Here is a portion of the underlying statute at issue:

> 118.15 *Compulsory school attendance*
>
> (1)(a) Unless the child has a legal excuse or has graduated from high school, any person having under his control a child who is between the ages of 7 and 16 years shall cause such child to attend school regularly during the full period and hours, religious holidays excepted, that the public or private school in which such child should be enrolled is in session until the end of the school term, quarter or semester of the school year in which he becomes 16 years of age.
>
> (3) This section does not apply to any child who is not in proper physical or mental condition to attend school, to any child exempted for good cause by the school board of the district in which the child resides or to any child who has completed the full 4-year high school course. The certificate of a reputable physician in general practice shall be sufficient proof that a child is unable to attend school.
>
> (4) Instruction during the required period elsewhere than at school may be substituted for school attendance. Such instruction must be approved by the state superintendent as substantially equivalent to instruction given to children of like ages in the public or private schools where such children reside.

Id. at 207 n.2 (providing the pertinent text of the applicable statute (citing Wis. Stat. § 118.15 (1969))).

7. *Id.* at 207 ("Respondents Jonas Yoder and Wallace Miller . . . and respondent Adin Yutzy . . . . declined to send their children, ages 14 and 15, to public school after they completed the eighth grade.").

8. *Id.* ("Wisconsin's compulsory school-attendance law required them to cause their children to attend public or private school until reaching age 16 but the respondents declined to send their children, ages 14 and 15, to public school after they completed the eighth grade.").

9. *Id.* ("The children were not enrolled in any private school, or within any recognized exception to the compulsory-attendance law . . . .").

parents to send their children to school when the parents' doing so would have violated their sincere religious convictions.[10]

The *Yoder* Court recognized that two important individual interests were at stake—the parents' right[11] to direct their children's education established in *Meyer v. Nebraska*[12] and *Pierce v. Society of Sisters*[13] and the parents' right[14] to engage in the free exercise of religion established in *Sherbert v. Verner*.[15] The Court failed to make clear how much significance to attach to the fact that *two* different rights were implicated.[16] Much of the Court's analysis focused on the religious conflict posed by the requirement, and the small part of the opinion discussing parental rights seemed to undercut the strength of the protections afforded thereto.[17]

The *Yoder* plaintiffs did not want their children to attend public high school because such high schools tend to promote values that are not compatible with the Amish way of life. "The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students."[18] In contrast, "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."[19]

---

10. *See id.* at 208-09.

11. *Id.* at 232-33 ("If not the first, perhaps the most significant statements of the Court in this area are found in *Pierce v. Society of Sisters*, in which the Court observed: 'Under the doctrine of *Meyer v. Nebraska*, 262 U.S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.'") (citations omitted).

12. 262 U.S. 390 (1923).

13. 268 U.S. 510 (1925).

14. *See Yoder*, 406 U.S. at 209 ("[R]espondents believed, in accordance with the tenets of Old Order Amish communities generally, that their children's attendance at high school, public or private, was contrary to the Amish religion and way of life. They believed that by sending their children to high school, they would not only expose themselves to the danger of the censure of the church community, but, as found by the county court, also endanger their own salvation and that of their children. The State stipulated that respondents' religious beliefs were sincere.").

15. 374 U.S. 398 (1963).

16. *Cf. Yoder*, 406 U.S. at 233 ("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.").

17. *See id.* at 213-19; *infra* notes 86-94 and accompanying text.

18. *Yoder*, 406 U.S. at 211.

19. *Id.*

An additional concern was that children of the relevant age (the children were fourteen and fifteen)[20] who were at school would thereby be "take[n] . . . away from their community, physically and emotionally, during the crucial and formative adolescent period of life [d]uring [which] . . . the children must acquire Amish attitudes favoring manual work and self-reliance and the specific skills needed to perform the adult role of an Amish farmer or housewife."[21] Perhaps because the children would not develop the requisite attitudes, testimony suggested that requiring Amish children to attend high school might "ultimately result in the destruction of the Old Order Amish church community as it exists in the United States today."[22] The Court held that the state could not force the parents to send their children to high school[23] because "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[24]

By suggesting that only interests of the highest order that could not otherwise be promoted would justify overriding the free exercise of religion, the Court implied that the Constitution's free exercise guarantees alone sufficed to prevent the state from forcing these parents to contravene their religious beliefs and send their children to high school.[25] In addition, the Court implied that free exercise guarantees are rather robust. The Court stated that "[w]here fundamental claims of religious freedom are at stake . . . we must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption."[26] The Court then set out to apply the announced standard to the case before it.

---

20. *Id.* at 207.
21. *Id.* at 211.
22. *Id.* at 212.
23. *Id.* at 234 ("[W]e hold, with the Supreme Court of Wisconsin, that the First and Fourteenth Amendments prevent the State from compelling respondents to cause their children to attend formal high school to age 16.").
24. *Id.* at 215.
25. *See id.*
26. *Id.* at 221.

The Court accepted[27] the State's claims "that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence"[28] and that "education prepares individuals to be self-reliant and self-sufficient participants in society."[29] But the Court rejected the State's contention that no exception could be made for Amish children, especially if those children were going to be living in the Amish community:

> It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live, but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith.[30]

Thus, because many of the Amish children would be living in their own isolated community and because their attending high school would undermine rather than promote their ability to thrive in that community, the Court reasoned that these youths should be exempted from the state requirement that they attend school until age sixteen.

What of the Amish children who might choose to live outside of the separated agrarian community?[31] There was no "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 shortcomings."[32] Indeed, the Court noted "that the Amish have an excellent record as law-abiding and generally self-sufficient members of society."[33] Thus, the Court implied that Amish children would not be harmed by forgoing that extra year or two of schooling, even if those children were not planning on living in the Amish community.

Yet, if that is so, one might wonder whether non-Amish children would be significantly benefited by the extra year or two of schooling.[34] The Court did not seem persuaded that the extra schooling was beneficial

---

27. *Id.* ("We accept these propositions.").

28. *Id.*

29. *Id.*

30. *Id.* at 222 (citation omitted).

31. *See id.* at 245 n.2 (Douglas, J., dissenting in part) ("A significant number of Amish children do leave the Old Order.").

32. *Id.* at 224.

33. *Id.* at 212-13.

34. *Cf. id.* at 225 n.13 ("[T]he defense introduced a study by Dr. Hostetler indicating that Amish children in the eighth grade achieved comparably to non-Amish children in the basic skills.").

as a general matter,[35] although the Court's focus was on the lack of harm that would be caused to Amish children in particular if those children were exempted from the State's compulsory attendance requirement stating:

> This case . . . is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred. The record is to the contrary, and any reliance on that theory would find no support in the evidence.[36]

Indeed, the Court reaffirmed the power of the state to prevent harm to children, stating: "To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens."[37]

Here, the *Yoder* Court implied that *Prince v. Massachusetts* controlled, which suggests that *Yoder* is best understood as applying *Prince*[38] rather than as ignoring,[39] limiting[40] or contradicting[41] *Prince*.

---

35. *Cf. id.* at 226 n.15 ("Even today, an eighth grade education fully satisfies the educational requirements of at least six States.").

36. *Id.* at 230.

37. *Id.* at 233-34.

38. *See* Jonathan F. Will, *My God My Choice: The Mature Minor Doctrine and Adolescent Refusal of Life-Saving or Sustaining Medical Treatment Based Upon Religious Beliefs*, 22 J. CONTEMP. HEALTH L. & POL'Y 233, 249 n.92 (2006) ("The reasoning in both *Prince* and *Yoder* was consistent, but the results varied due in large part to the different evidentiary records presented.").

39. *See* Nancy B. Shernow, Comment, *Recognizing Constitutional Rights of Custodial Parents: The Primacy of the Post-Divorce Family in Child Custody Modification Proceedings*, 35 UCLA L. REV. 677, 688-89 (1988) ("In *Wisconsin v. Yoder*, the Court refused to apply its *Prince* holding to a claim by Amish parents that their religious beliefs forbade them from sending their children to public high school.").

40. *See* Lisa Biedrzycki, Comment, *"Conformed to This World": A Challenge to the Continued Justification of the* Wisconsin v. Yoder *Education Exception in a Changed Old Order Amish Society*, 79 TEMP. L. REV. 249, 260 (2006) ("[T]he *Yoder* Court distinguished its decision from *Prince v. Massachusetts*, an earlier Supreme Court case, by removing the issue of child labor law."); Daniel N. Price, Note, *The Constitutional Standard for Zoning Cases Under the Texas Religious Freedom Restoration Act*, 6 TEX. F. ON C.L. & C.R. 365, 378 (2002) ("The *Yoder* Court confined *Prince* to the evils associated with child labor . . . ."); Benjamin L. Weiss, Note, *Single Mothers' Equal Right to Parent: A Fourteenth Amendment Defense Against Forced-Labor Welfare "Reform"*, 15 LAW & INEQ. 215, 233 (1997) ("The Court, however, narrowed the apparent breadth of *Prince* in *Wisconsin v. Yoder* . . . .").

41. *See* Susan H. Bitensky, *Spare the Rod, Embrace Our Humanity: Toward a New Legal Regime Prohibiting Corporal Punishment of Children*, 31 U. MICH. J.L. REFORM 353, 468 (1998) ("[A]lthough in *Wisconsin v. Yoder* the Court upheld Amish parents' Free Exercise Clause challenge, the Court took an entirely different view of the Free Exercise Clause claim of a child's custodian in *Prince v. Massachusetts*."); Avigael N. Cymrot, *Reading, Writing, and Radicalism: The Limits on Government Control over Private Schooling in an Age of Terrorism*, 37 ST. MARY'S L.J. 607, 659-60 (2006) ("[W]hile *Yoder* perhaps represents a high mark of the Court's deference to the asserted free exercise rights of parents to provide their children with a religious education . . . . in

Yet, *Prince* is not viewed as particularly protective of free exercise rights as a general matter,[42] or even of hybrid rights in particular.[43] Understanding *Yoder* as applying *Prince* suggests that the common understanding of those cases may be inaccurate—either *Prince* is more protective of free exercise than is commonly thought,[44] or *Yoder* may be less protective than is commonly thought.[45]

Prince, the Court held that free exercise rights did not outweigh a state's interest in enforcing child labor laws."); B. Jessie Hill, *Whose Body? Whose Soul? Medical Decision-Making on Behalf of Children and the Free Exercise Clause Before and After* Employment Division v. Smith, 32 CARDOZO L. REV. 1857, 1863 (2011) ("[C]ourts often refer to *Yoder*'s broad grant of parental rights in the same breath that they note *Prince*'s equally sweeping limitations on that right."); Jeffrey Shulman, *What* Yoder *Wrought: Religious Disparagement, Parental Alienation and the Best Interests of the Child*, 53 VILL. L. REV. 173, 186 (2008) ("In upholding a labor law that effectively prohibited children from selling religious literature in public places, the *Prince* Court rejected the core principles that would form *Yoder's* doctrinal foundation.").

42. *See* Donald L. Beschle, *No More Tiers? Proportionality as an Alternative to Multiple Levels of Scrutiny in Individual Rights Cases*, 38 PACE L. REV. 384, 422 (2018) ("[I]n *Prince v. Massachusetts*, the Court rejected a free exercise challenge to a statute prohibiting the use of children in religious solicitations."); Megan Joy Rials, Comment, *By the Pricking of My Thumbs, State Restriction This Way Comes: Immunizing Vaccination Laws from Constitutional Review*, 77 LA. L. REV. 209, 232 (2016) ("Dicta from another Supreme Court case, *Prince v. Massachusetts*, suggests that religious exemptions might not be required under the Free Exercise Clause."); Rebecca Williams, Note, *Faith Healing Exceptions Versus* Parens Patriae*: Something's Gotta Give*, 10 FIRST AMEND. L. REV. 692, 710-11 (2012) ("The Supreme Court opinion in *Prince v. Massachusetts* is viewed as the seminal case in limiting the rights of parents to act upon their religion in ways that are harmful to their children . . . .").

43. *See* David Gan-wing Cheng, Wisconsin v. Yoder*: Respecting Children's Rights and Why* Yoder *Should Be Overturned*, 4 CHARLOTTE L. REV. 45, 62 (2013) ("[I]n *Prince*, the Court rejected a Free Exercise and parental right challenge by a Jehovah's Witness to a state labor statute prohibiting the furnishing of merchandise to a minor knowing he or she intends to sell it in a public place."); Josh Gupta-Kagan, Stanley v. Illinois*'s Untold Story*, 24 WM. & MARY BILL RTS. J. 773, 788-89 (2016) ("In 1944, the *Prince v. Massachusetts* Court had recognized some constitutional protections for families—at least when those rights were bolstered by the First Amendment's Free Exercise Clause—but still upheld state intervention to protect children while applying fairly deferential review."); William J. Haun, Comment, *A Standard for Salvation: Evaluating "Hybrid-Rights" Free-Exercise Claims*, 61 CATH. U. L. REV. 265, 275 (2011) ("The *Prince* case, like *Yoder*, presented a hybrid claim involving free exercise combined with the parental rights associated with raising children. Massachusetts labor laws prevented a mother from directing her children to distribute religious literature in the streets. [T]he Court concluded that legitimate concerns regarding child health and public safety could justify a state's constraints on that parental right."); Kelly R. Schwab, Note, *Lost Children: The Abuse and Neglect of Minors in Polygamous Communities of North America*, 16 CARDOZO J.L. & GENDER 315, 326-27 (2010) ("The controlling case on Free Exercise and parenting during this period was *Prince v. Massachusetts*, a case that upheld a law prohibiting children from distributing religious literature in the public sphere, despite parental freedom to raise their children as they wish.").

44. *But cf.* Henry J. Abraham, *Abraham, Isaac and the State: Faith-Healing and Legal Intervention*, 27 U. RICH. L. REV. 951, 974 (1993) ("[I]n light of *Prince v. Massachusetts*, the argument that, in the faith-healing context, free exercise is linked to fundamental parental rights, and therefore, deserves the court's protection, is also apparently unpersuasive.").

45. *See infra* notes 63-75, 106-09 and accompanying text.

Prince v. Massachusetts[46] involved a Massachusetts law prohibiting child labor.[47] That law specified that any parent permitting a child to work in violation of the law was subject to criminal penalty.[48] Sarah Prince, who was the "custodian of Betty M. Simmons, a girl nine years of age,"[49] permitted Betty to distribute the religious magazines *Watchtower* and *Consolation*[50] in exchange for donations.[51] This practice was construed by the Massachusetts Supreme Judicial Court to be sales falling within the prohibition,[52] and the question before the United State Supreme Court was whether federal guarantees precluded applying the Massachusetts statute to Prince's conduct.[53]

Prince argued that her free exercise rights, coupled with her rights as a parent, precluded the state from punishing her.[54] After all, it was not as if Prince left Simmons alone at night to distribute these religious tracts; rather, the two were only about twenty feet apart[55] when doing their "preaching work."[56] Further, Prince was viewed by the Court as having constitutionally protected rights by virtue of her relationship with Simmons: "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor

---

46. 321 U.S. 158 (1944).

47. *Id.* at 160-61 ("No boy under twelve and no girl under eighteen shall sell, expose or offer for sale any newspapers, magazines, periodicals or any other articles of merchandise of any description, or exercise the trade of bootblack or scavenger, or any other trade, in any street or public place.").

48. *Id.* at 161 ("Any parent, guardian or custodian having a minor under his control who compels or permits such minor to work in violation of any provision of sections sixty to seventy-four, inclusive . . . shall for a first offence be punished by a fine of not less than two nor more than ten dollars or by imprisonment for not more than five days, or both.").

49. *Id.* at 159.

50. *See id.* at 162.

51. *Id.* at 161 n.4 ("[S]pecified small sums are generally asked and received but the publications may be had without the payment if so desired.").

52. *See id.* at 163 ("[T]he questions are no longer open whether what the child did was a 'sale' or an 'offer to sell' within § 69 or was 'work' within § 81. The state court's decision has foreclosed them adversely to appellant as a matter of state law." (citing *Commonwealth v. Prince*, 46 N.E.2d 755, 758 (Mass. 1943), *aff'd sub nom. Prince v. Massachusetts*, 321 U.S. 158 (1944))).

53. *See id.* at 160 (framing the issue as to "whether §§ 80 and 81, as applied, contravene the Fourteenth Amendment by denying or abridging appellant's freedom of religion and by denying to her the equal protection of the laws").

54. *Id.* at 164 ("Appellant . . . . rests squarely on freedom of religion under the First Amendment, applied by the Fourteenth to the states. She buttresses this foundation, however, with a claim of parental right as secured by the due process clause of the latter Amendment.").

55. *Id.* at 162 ("[S]he and Mrs. Prince took positions about twenty feet apart near a street intersection.").

56. *Id.*

hinder."[57] However, the *Prince* Court explained, "neither rights of religion nor rights of parenthood are beyond limitation."[58]

The *Prince* Court was fearful that those who engaged in unpopular proselytizing, whether religious or otherwise, might be subject to physical or verbal abuse. "The zealous though lawful exercise of the right to engage in propagandizing the community, whether in religious, political or other matters, may and at times does create situations difficult enough for adults to cope with and wholly inappropriate for children, especially of tender years, to face."[59] For example, there might be "emotional excitement and psychological or physical injury."[60] Adults are permitted to risk such injuries—"[p]arents may be free to become martyrs themselves."[61] However, parents are not permitted to subject their children to such risks contrary to law—"it does not follow they [parents] are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."[62]

If indeed there was evidence in the record that children had been subject to great harm when distributing religious literature, then the differing holdings in *Prince* and *Yoder* would be unsurprising. Yet, the showing of likely harm to Simmons was not particularly persuasive. The Court cited to works describing the general dangers that are posed by child labor.[63] But this case was different from the standard case involving child labor if only because the child's guardian was present, which the Court admitted would likely reduce the dangers posed.[64] Nonetheless, the guardian's presence would not prevent individuals from being mean to Betty Simmons,[65] and the Court mentioned "harmful

57. *Id.* at 166.
58. *Id.*
59. *Id.* at 169-70.
60. *Id.* at 170.
61. *Id.*
62. *Id.*
63. *Id.* at 168 nn.15-16. *But cf. id.* at 174-75 (Murphy, J., dissenting) ("Reference is made in the majority opinion to 'the crippling effects of child employment, more especially in public places, and the possible harms arising from other activities subject to all the diverse influences of the street.' To the extent that they flow from participation in ordinary commercial activities, these harms are irrelevant to this case.").
64. *See id.* at 169 ("The case reduces itself therefore to the question whether the presence of the child's guardian puts a limit to the state's power. That fact may lessen the likelihood that some evils the legislation seeks to avert will occur.").
65. *Cf. id.* at 169-70 ("The zealous though lawful exercise of the right to engage in propagandizing the community, whether in religious, political or other matters, may and at times does create situations difficult enough for adults to cope with and wholly inappropriate for children, especially of tender years, to face.").

possibilities . . . [such as] emotional excitement and psychological or physical injury."[66]

Yet, the Court's point that there was a possibility of harm, while true, proves too much. Mentioning such a possibility does not establish that there was any evidence in the record indicating that harm was likely to occur.[67] If the mere possibility of harm suffices to justify state intervention, then state intervention would seem relatively easy to justify. In his concurring and dissenting opinion,[68] Justice Jackson articulated his fear that the state could now justify a whole host of interventions with respect to children's religious education and practice as long as the state claimed to be doing so to promote health and welfare.[69]

Prince is helpful to consider when examining the *Yoder* Court's repeated assertion that the Amish children would not be harmed by forgoing that additional year or two of schooling.[70] *Prince* suggests that the mere *possibility* of harm should have sufficed,[71] whereas the *Yoder* Court's focus was on whether forgoing a year or two of schooling would, in fact, have resulted in harm.[72] But these differing emphases illustrate just how malleable the suggested standard is. Given the lack of showing of actual harm in *Prince*,[73] the actual harm standard suggested in *Yoder* would seem to have yielded a favorable result for Prince, and the possible harm standard suggested in *Prince*[74] would presumably have yielded a

66. *Id.* at 170.

67. *See id.* at 174 (Murphy, J., dissenting) ("The state, in my opinion, has completely failed to sustain its burden of proving the existence of any grave or immediate danger to any interest which it may lawfully protect."); *see also* Brief for Appellant at 12, Prince v. Massachusetts, 321 U.S. 158 (1944) (No. 98) ("There is nothing in the record to indicate that any of the evils the statute was designed to prevent existed in this case. The record *refutes* any such contention.").

68. *See Prince*, 321 U.S. at 178 (Jackson, J., concurring and dissenting) ("I have no alternative but to dissent from the grounds of affirmance of a judgment which I think was rightly decided.").

69. *Id.* at 177 ("[A] foundation is laid for any state intervention in the indoctrination and participation of children in religion, provided it is done in the name of their health or welfare.").

70. Erwin Chemerinsky & Michele Goodwin, *Religion Is Not A Basis for Harming Others: Review Essay of Paul A. Offit's* Bad Faith: When Religious Belief Undermines Modern Medicine, 104 GEO. L.J. 1111, 1119 (2016) ("[I]t is crucial to note that *Yoder* is based on the Court's conclusion that exempting these children from the schooling requirement was unlikely to harm them.") (book review).

71. *See* Wisconsin v. Yoder, 406 U.S. 205, 233-34 (1972) ("To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* if it *appears* that parental decisions will jeopardize the health or safety of the child, or have a *potential* for significant social burdens.") (emphasis added).

72. *See id.* at 234 ("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 . . . .").

73. *See supra* note 67 and accompanying text.

74. *See supra* note 71 and accompanying text. *But see* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 911 (1990) (Blackmun, J., dissenting) ("Similarly, this Court's prior decisions have not allowed a government to rely on mere speculation about potential harms, but have demanded

result favorable for the state in *Yoder*, assuming that missing one to two years of school would at least potentially be harmful.[75]

At least one other issue is raised by the *Yoder* analysis. Suppose that several fourteen- and fifteen-year-olds do not wish to attend high school because they have a strong (nonreligious) attachment to the land.[76] They (and their parents) believe that these teenagers would learn much more by working on farms rather than by going to high school for one or two additional years. Suppose further that these nonreligious parents and children challenge the state's compulsory education requirement. In such a case, the Court would have to decide whether these nonreligious children would have to be afforded an exemption.

An important difference between *Yoder* and the hypothesized case is that in the latter, the parents' free exercise interests would not be implicated—the parents would (merely) be asserting their (fundamental) right to direct their children's education. The challenge by these nonreligious parents would likely not be successful. As the Court in *Yoder* states, "A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations . . . ."[77]

---

evidentiary support for a refusal to allow a religious exception." (citing Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 719 (1981)); *Yoder*, 406 U.S. at 224-29; Sherbert v. Verner, 374 U.S. 398, 407 (1963))). However, Justice Blackmun did not consider whether *Prince* is best understood as considering potential harms.

75. *See* Troxel v. Granville, 530 U.S. 57, 97 (2000) (Kennedy, J., dissenting) ("[T]his Court has acknowledged that States have the authority to intervene to prevent harm to children . . . ." (citing *Yoder*, 406 U.S. at 233-34; Prince v. Massachusetts, 321 U.S. 158, 168-69 (1944))); *Yoder*, 406 U.S. at 230, 245 ("This case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred."); *See also id.* (Douglas, J., dissenting in part) ("It is the future of the student, not the future of the parents, that is imperiled by today's decision."); Nicholas J. Nelson, Note, *A Textual Approach to Harmonizing* Sherbert *and* Smith *on Free Exercise Accommodations*, 83 NOTRE DAME L. REV. 801, 825 (2008) ("Parents also often make religiously motivated choices on behalf of their children––such as not sending them to high school, as in *Yoder*—that could be said to 'harm' them."); *cf.* Emily A. Bishop, Note, *A Child's Expertise: Establishing Statutory Protection for Intersexed Children Who Reject Their Gender of Assignment*, 82 N.Y.U. L. REV. 531, 561 (2007) ("*Prince* essentially establishes harm as a limiting principle on the broad language of *Meyer*, *Pierce*, and *Yoder*: To the extent that parental choices cause harm to a child, they do not receive constitutional protection.").

76. *Cf. supra* notes 34-35 and accompanying text.

77. *Yoder*, 406 U.S. at 215.

The Court illustrated what it would have considered a merely secular consideration:

> [I]f the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis [but would be] . . . . philosophical . . . rather than religious.[78]

The Court's point should not be misunderstood. The fact that the values at issue were religious rather than merely "philosophical and personal"[79] did not end the analysis, because "activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare."[80] That said, however, the Amish parents' decision not to send their child to high school had to be respected because free exercise interests were implicated, whereas parents who could show that their children would not be harmed by doing something other than attending high school for one or two years would nonetheless not be able to have their children exempted absent some free exercise claim.[81]

The *Yoder* Court's position with respect to the degree to which parenting rights are protected is somewhat difficult to understand. Citing both *Meyer* and *Pierce*,[82] the *Yoder* Court acknowledged that the parent's right to educate his or her child has a long pedigree. The Court discussed the "traditional concepts of parental control over the religious upbringing and education of their minor children recognized in this Court's past decisions."[83] Not only does "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children[,]"[84] but the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."[85]

---

78. *Id.* at 216.
79. *Id.*
80. *Id.* at 220.
81. *See id.* at 236 ("Nothing we hold is intended to undermine the general applicability of the State's compulsory school-attendance statutes or to limit the power of the State to promulgate reasonable standards . . . .").
82. *See id.* at 232-33.
83. *Id.* at 231.
84. *Id.* at 232.
85. *Id.*

After implying that this long-recognized parental right had robust protection, the Court undercut the strength of that very protection. First, the Court quoted the following passage from *Pierce*:

> Under the doctrine of *Meyer v. Nebraska*, 262 U.S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . [The] rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State.[86]

Here, the Court suggests that the parents' liberty to direct their children's education cannot be overridden by legislation that is not reasonably related to legitimate state purposes.[87] Such a point, while true, does not establish that the implicated parental right is particularly robust because *all* legislation must be rationally related to a legitimate state objective to pass constitutional muster.[88]

If *Meyer* and *Pierce* really involve the fundamental interest in parenting,[89] then one might assume that the *Yoder* Court was understating the relevant state burden and that the state had to do more than merely establish that its legislation was rationally related to a legitimate state interest in order to override parental rights.[90] But the *Yoder* Court implicitly rejected that it was understating the relevant state burden when describing *Pierce*'s requirement that legislation (merely) have some reasonable relation to a legitimate state purpose.[91]

The *Yoder* Court distinguished what was at issue before it from what had been at issue in *Pierce* by noting that "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

---

86. *Id.* at 232-33 (citing Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925)).

87. *See id.* at 233.

88. *See* U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 183 (1980) (Brandeis, J., dissenting) ("A legislative classification may be upheld only if it bears a rational relationship to a legitimate state purpose.").

89. *See* Washington v. Glucksberg, 521 U.S. 702, 719-20 (1997) ("The [Due Process] Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests . . . . [which] . . . includes the right[] . . . to direct the education and upbringing of one's children.") (citing, inter alia, *Pierce*, 268 U.S. 510; Meyer v. Nebraska, 262 U.S. 390 (1923)).

90. *See* Reno v. Flores, 507 U.S. 292, 301-02 (1993) (discussing the "line of cases which interprets the Fifth and Fourteenth Amendments' guarantee of 'due process of law' to include a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.").

91. *See Yoder*, 406 U.S. at 232-33.

the State's requirement . . . ."[92] Such a comment suggests that when free exercise interests are not also at issue, then the interests of parenthood are *permissibly* overridden as long as there is a reasonable relationship between the state regulation and a legitimate purpose. The parenting right standing alone must give way to the state's compulsory education requirement—"A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations . . . ."[93]

Yet, this is surprising. Suppose that nonreligious children would suffer no harm by forgoing the extra year or two of schooling (perhaps the same arguments supplied by the Amish[94] could analogously be offered here). Then, it is not clear what compelling state interest would justify overriding the parents' fundamental right to determine the education of their children (by having the children forgo the extra year or two of school, which *ex hypothesi* would not be harmful). But if the parents' decisions regarding their children's education can be overridden, absence of harm notwithstanding, then *Yoder* suggests that the parents' right to direct their children's education is not particularly robust.

Yoder is rather confusing. It mentions that two important rights are implicated, but suggests that the parent's right to direct his or her child's education is not very robust. In addition, the Court sends mixed messages about the degree to which free exercise rights are robust. The Court suggests both that free exercise rights alone are afforded significant constitutional protection and that free exercise rights—*only when coupled with other important rights*—are afforded significant constitutional protection. As if that were not confusing enough, the Court also suggests that free exercise rights, when coupled with other important rights, can nonetheless be overridden upon some showing of probable (possible?) harm.

III. *YODER* IN THE CASELAW

The *Yoder* Court's confusing messages are reflected in the subsequent caselaw. Sometimes, parental rights are characterized as robust, but at other times are characterized as readily overridden. Sometimes, free exercise rights are characterized as strongly protected, whereas at other times they are characterized as strongly protected only when coupled with other important rights, and still, at other times, they are characterized as relatively weak. The Court's shifting standards

92. *Id.* at 233 (emphasis added).
93. *Id.* at 215.
94. *See supra* notes 34-35, 71, 74.

coupled with its reaching very different results when allegedly applying the same standard in apparently relatively similar circumstances have undermined confidence in the consistency of the jurisprudence[95] and the integrity of the Court.[96]

A. Education Rights

The *Yoder* Court's ambiguous messaging about the robustness of parenting rights is reflected in the later caselaw. For example, citing *Yoder*, the Court in *Lassiter v. Department of Social Services*[97] said that it "has accorded a high degree of constitutional respect to a natural parent's interest . . . in controlling the details of the child's upbringing,"[98] and elsewhere claimed that parent-child relationships are shielded from state interference.[99]

---

95. *Cf.* Bowen v. Roy, 476 U.S. 693, 731 (1986) (O'Connor, J., concurring in part and dissenting in part) ("The Court simply cannot, consistent with its precedents, distinguish this case from the wide variety of factual situations in which the Free Exercise Clause indisputably imposes significant constraints upon government."); John W. Whitehead, *The Conservative Supreme Court and the Demise of the Free Exercise of Religion*, 7 TEMP. POL. & C.R.L. REV. 1, 1 (1997) ("A survey of the United States Supreme Court's Free Exercise Clause decisions reveals that the Court has not maintained a consistent free exercise jurisprudence."); Ernest P. Fronzuto, III, Comment, *An Endorsement for the Test of General Applicability:* Smith II*, Justice Scalia, and the Conflict Between Neutral Laws and the Free Exercise of Religion*, 6 SETON HALL CONST. L.J. 713, 717 (1996) (discussing "the contradictory approaches to free exercise review presented by the Court and Congress, and their inconsistent application").

96. *See* Donald Falk, Note, Lyng v. Northwest Indian Cemetery Protective Association*: Bulldozing First Amendment Protection of Indian Sacred Lands*, 16 ECOLOGY L.Q. 515, 553 (1989) ("*Northwest Indian* injured more than the protections of the free exercise clause. The opinion compromised the integrity of the Court's judicial method of reviewing and representing facts."); Michelle L. Stuart, Note, *The Religious Freedom Restoration Act of 1993: Restoring Religious Freedom After the Destruction of the Free Exercise Clause*, 20 U. DAYTON L. REV. 383, 408 (1994) ("The new majority position destroys the Free Exercise Clause by distorting prior case law, an approach that can be fatal to other constitutional guarantees and to the integrity of the Court.").

97. 452 U.S. 18 (1981).

98. *Id.* at 38-39 (Blackmun, J., dissenting) (citing *Yoder*, 406 U.S. at 232-34; Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925)).

99. Hodgson v. Minnesota, 497 U.S. 417, 446 (1990) ("[T]he family has a privacy interest in the upbringing and education of children and the intimacies of the marital relationship which is protected by the Constitution against undue state interference." (citing *Yoder*, 406 U.S. at 233-34)); Block v. Rutherford, 468 U.S. 576, 599 (1984) ("Among the relationships that we have expressly shielded from state interference are bonds . . . between parents and their children." (citing *Yoder*, 406 U.S. 205 (1972))).

Yet, the Court has also cited *Yoder* when attempting to undermine the robustness of the parenting claim at issue. For example, in *Runyon v. McCrary*,[100] the Court wrote:

> In *Wisconsin v. Yoder*, 406 U.S. 205, the Court stressed the limited scope of *Pierce*, pointing out that it lent "no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society" but rather "held simply that while a State may posit [educational] standards, it may not pre-empt the educational process by requiring children to attend public schools."[101]

The *Runyon* Court suggests that *Yoder* undercuts the strength of parental rights. The difficulty is not that the Court is cautioning that parental rights are not absolute. That goes without saying,[102] because no rights are absolute.[103] But if *Pierce* and *Yoder* are merely understood as precluding the state from prohibiting attendance at private schools[104] that are subject to reasonable regulation,[105] then *Pierce* and *Yoder* are not offering particularly strong protection and seem to belie that there is a fundamental interest in directing one's children's education.

B. Free Exercise

Some of the language in *Yoder* suggests that free exercise rights are afforded robust protection while other language in the opinion suggests that free exercise rights will be afforded robust protection only when another right is also *implicated*.[106] While commentators agree that *Yoder* stands for the proposition that, *once triggered*, free exercise rights must be afforded robust protection,[107] the caselaw is less supportive of that

---

100. 427 U.S. 160 (1976).

101. *Id.* at 177 (White, J., concurring) (citing *Yoder*, 406 U.S. at 239); *see also* Norwood v. Harrison, 413 U.S. 455, 461 (1973) (discussing the limitations of the protections recognized in *Pierce* and *Yoder*).

102. *Cf.* Troxel v. Granville, 530 U.S. 57, 92-93 (2000) (Scalia, J., dissenting) ("[N]o one believes [that] . . . parental rights are to be absolute.").

103. McDonald v. City of Chicago, 561 U.S. 742, 802 (2010) (Scalia, J., concurring) ("No fundamental right . . . is absolute."); Kovacs v. Cooper, 336 U.S. 77, 85 (1949) ("[E]ven the fundamental rights of the Bill of Rights are not absolute.").

104. *See Runyon*, 427 U.S. at 177.

105. *Id.* at 178-79 ("The Court has repeatedly stressed that while parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation.").

106. Wisconsin v. Yoder, 406 U.S. 205, 214 (1972).

107. *See* Michael A. Helfand, *Religious Institutionalism, Implied Consent, and the Value of Voluntarism*, 88 S. CAL. L. REV. 539, 557-58 (2015) ("[B]oth the *Sherbert* and *Yoder* courts afforded broad protection to religiously motivated conduct against the substantial burdens imposed by

conclusion than is commonly thought. Thus, language from *Yoder* supports the proposition that the Constitution offers strong protection for free exercise rights. The Court stated, "[w]here fundamental claims of religious freedom are at stake . . . [the Court] must searchingly examine the interests that the State seeks to promote."[108] The Court also supported the proposition that free exercise rights, when coupled with other rights, will be offered robust protection—"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."[109] But the Court also offers language to support the proposition that the state has the power to override free exercise rights when the failure to do so might cause harm—"the power of the parent, even when linked to a free exercise claim, may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens."[110] Yet, a case that provides support for such differing approaches to free exercise cannot plausibly be thought to represent the epitome of free exercise protection[111] unless one believes that free exercise protections are not very strong.

The difficulty pointed to here is not merely that the Court's meaning is ambiguous. Decisions that are written in a confusing way can be clarified in the subsequent jurisprudence. For example, both *Stanley v.*

---

otherwise valid laws—insisting that such religiously motivated conduct was guaranteed free exercise protections save in the most extreme of circumstances."); Douglas Laycock, *Church Autonomy Revisited*, 7 GEO. J.L. & PUB. POL'Y 253, 256 (2009) ("The law of conscientious objection was also at a high point in 1981. *Sherbert v. Verner* and *Wisconsin v. Yoder* required compelling justification for governmentally imposed burdens on the free exercise of religion . . . ."); Richard S. Myers, *The Right to Conscience and the First Amendment*, 9 AVE MARIA L. REV. 123, 127 (2010) (acknowledging that "Y*oder* is viewed as the high watermark of free exercise protection" but then in the same breath asserting "the ruling [*Yoder*] was in reality quite narrow."); Elizabeth Harmer-Dionne, Note, *Once A Peculiar People: Cognitive Dissonance and the Suppression of Mormon Polygamy As A Case Study Negating the Belief-Action Distinction*, 50 STAN. L. REV. 1295, 1304 (1998) ("The decision in *Wisconsin v. Yoder* marked the pinnacle of judicial recognition of free exercise exemptions."); Marie Killmond, Note, *Why Is Vaccination Different? A Comparative Analysis of Religious Exemptions*, 117 COLUM. L. REV. 913, 921 (2017) ("Two midcentury cases, *Wisconsin v. Yoder* and *Sherbert v. Verner*, are often viewed jointly as the high-water mark of free exercise protection . . . ."); Cynthia Koploy, Note, *Free Exorcise Clause? Whether Exorcism Can Survive the Supreme Court's "*Smith *Neutrality"*, 104 NW. U. L. REV. 363, 375 (2010) ("[C]ases like *Sherbert* and *Yoder* under the Warren and Burger Courts marked the height of free exercise protection for religious actors . . . .").

108. *See Yoder*, 406 U.S. at 221.

109. *See id.* at 233 (internal citation omitted).

110. *See id.* at 233-34.

111. *See supra* note 107 and accompanying text.

Illinois[112] and *Zablocki v. Redhail*[113] were decided on equal protection grounds[114] but have subsequently been understood to protect fundamental interests under substantive due process.[115] The difficulty is that subsequent caselaw has cited *Yoder* to support very different approaches to free exercise jurisprudence.[116]

In several cases, the Court has quoted with approval the language in *Yoder* suggesting that free exercise rights have robust protection.[117] However, writing for the majority, Justice Scalia in *Employment Division, Department of Human Resources of Oregon v. Smith*[118] suggested:

> 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 . . . the right of parents, acknowledged in *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), to direct the education of their children.[119]

A number of points might be made about the *Smith* Court's characterization of *Yoder*. First, the *Yoder* Court itself noted that two rights were implicated,[120] so it was not as if the *Smith* Court had

---

112. 405 U.S. 645 (1972).

113. 434 U.S. 374 (1978).

114. *See id*. at 382 ("[T]he statute violates the Equal Protection Clause."); *Stanley*, 405 U.S. at 658 ("[D]enying such a hearing to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause.").

115. *See* Troxel v. Granville, 530 U.S. 57, 66 (2000) ("[W]e have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children." (citing *Stanley*, 405 U.S. at 651)); Turner v. Safley, 482 U.S. 78, 95 (1987) ("[T]he decision to marry is a fundamental right under *Zablocki v. Redhail*, 434 U.S. 374 (1978) . . . .").

116. The claim here is not that this is the only case to have this chimerical quality. *See generally* Mark P. Strasser, Rust *in the First Amendment Scaffolding*, 19 U. PA. J. CONST. L. 861, 861-87 (2017) (discussing the recurring, differing interpretations of *Rust v. Sullivan* in the caselaw).

117. *See* McDaniel v. Paty, 435 U.S. 618, 627-28 (1978) ("The Court recently declared in *Wisconsin v. Yoder* . . . '[t]he essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.'"); *see also* Wallace v. Jaffree, 472 U.S. 38, 81 (1985) ("Our cases have interpreted the Free Exercise Clause to compel the government to exempt persons from some generally applicable government requirements so as to permit those persons to freely exercise their religion." (citing, inter alia, *Wisconsin v. Yoder*, 406 U.S. 205 (1972))); Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest. However, it is still true that '[t]he essence of all that has been said and written on the subject is that only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion.'" (citing *Yoder*, 406 U.S. at 215)) (omission in original).

118. 494 U.S. 872 (1990).

119. *Id.* at 881 (citing, inter alia, *Yoder*, 406 U.S. 205) (internal citations omitted).

120. *See Yoder*, 406 U.S. at 233 (noting that "the interests of parenthood are combined with a free exercise claim").

discovered something altogether new.[121] That said, however, *Smith* likely neither accurately reflects *Yoder* nor the traditional jurisprudence.

Yoder suggests that free exercise rights alone provide a bulwark against state intervention—"only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[122] Unless one believes that the *Yoder* Court was simply confused, it seems unlikely that the Court would say in one part of the opinion that free exercise rights alone impose an additional burden on the government,[123] but in a different part of the opinion that free exercise imposes an additional burden on the government only when other rights are also implicated. Instead, the more plausible interpretation of the *Yoder* Court's having discussed the robustness of free exercise rights and also having noted elsewhere that parenting rights were at issue is that the Court was suggesting that the parenting right alone would not have justified granting the exemption but that the parenting right combined with a free exercise right would.[124] The Court thereby undercuts the strength of the parenting right,[125] but need not be suggesting that free exercise rights are only protected when another right is also implicated.

As Justice O'Connor pointed out in her *Smith* concurrence in the judgment, one issue involves whether a statute's burdening free exercise rights will trigger strict scrutiny, and a different issue is whether the statute will ultimately be upheld.[126] Even when strict scrutiny is triggered, the state law will be upheld if there is a sufficiently compelling interest and sufficiently narrow tailoring.[127] Justice O'Connor claimed that in each of the free exercise cases in which the Court upheld the classification at issue, the Court "rejected the particular constitutional claims . . . only after carefully weighing the competing interests."[128]

Precisely because a law's triggering strict scrutiny will not guarantee that the law will be struck down, one cannot merely look at the success of

---

121. Some commentators seem not to appreciate this. *See*, *e.g.*, Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 430 (1994) ("Exactly what is this new invention of Justice Scalia and the majority in *Smith*?").

122. *Yoder*, 406 U.S. at 215.

123. *See also id*. at 220 ("A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." (citing, inter alia, *Sherbert v. Verner*, 374 U.S. 398 (1963))).

124. *See id.* at 215 ("A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations . . . .").

125. *Cf. supra* notes 100-05 and accompanying text.

126. *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 903-07 (1990) (O'Connor, J., concurring in judgment).

127. *See id.* at 896.

128. *Id.*

the underlying claim to determine whether the free exercise right, standing alone, had triggered a higher level of scrutiny.[129] The *Smith* Court inaccurately characterized the free exercise jurisprudence existing at that time in that free exercise rights had never before required the presence of an additional right in order to trigger closer review.[130]

That said, however, *Smith* captures something important that Justice O'Connor's comments miss.[131] While Justice O'Connor was correct that there is no necessary connection between the level of scrutiny employed and the ultimate holding, it is nonetheless true that few laws will pass muster under strict scrutiny,[132] because "such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."[133] In several of the cases implicating free exercise, the Court upheld the classification even though the ends did not seem compelling or the means did not seem narrowly tailored to promote the state's implicated interest.[134] For example, Justice Brennan described the state interest implicated in *Braunfeld v. Brown*[135] that allegedly justified overriding the free exercise interests of those observing Sabbath on a day other than Sunday as "the mere convenience of having everyone rest on the same day."[136] Justice Stevens described the state interest allegedly justifying overriding the free exercise interests of the Amish who wished not to participate in the Social Security system as insufficiently strong in *United States v. Lee*.[137] He noted that "it would be

129. *See id.* at 897 ("[I]t is surely unusual to judge the vitality of a constitutional doctrine by looking to the win-loss record of the plaintiffs who happen to come before us.").

130. *See id.* at 908 (Blackmun, J., dissenting) ("In short, [the Court] effectuates a wholesale overturning of settled law concerning the Religion Clauses of our Constitution."); s*ee also* Holt v. Hobbs, 135 S. Ct. 853, 859 (2015) ("*Smith* largely repudiated the method of analysis used in prior free exercise cases like *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and *Sherbert v. Verner,* 374 U.S. 398 (1963)."); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2760 (2014) ("[T]his Court's decision in *Employment Div., Dept. of Human Resources of Or. v. Smith*, 494 U.S. 872 (1990) [sic], . . . largely repudiated the method of analyzing free-exercise claims that had been used in cases like *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)."); Haun, *supra* note 43, at 282 (discussing "the vast change that Smith brought to free-exercise law").

131. *See infra* notes 143-46 and accompanying text.

132. Cameron Schlagel, Note, *Avoiding the Second Amendment Scrutiny Quagmire: A Pragmatic Test for Second Amendment Challenges Based on International Evidence*, 40 LOY. L.A. INT'L & COMP. L. REV. 223, 251 (2017) ("[L]aws reviewed under strict scrutiny are presumptively unconstitutional and rarely upheld.").

133. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

134. *See generally* Mark Strasser, *The Protection of Conscience: On ACA, RFRA and Free Exercise Guarantees*, 82 TENN. L. REV. 345 (2015) (discussing various cases in which the Court upheld laws adversely affecting free exercise where it was not plausible to believe that the laws passed muster under strict scrutiny).

135. 366 U.S. 599, 614 (1961) (Brennan, J., concurring and dissenting).

136. *Id.*

137. 455 U.S. 252, 262 (1982) (Stevens, J., concurring in the judgment).

a relatively simple matter to extend the exemption to the taxes involved in this case[,]"[138] and admitted that "if we confine the analysis to the Government's interest in rejecting the particular claim to an exemption at stake in this case, the constitutional standard as formulated by the Court has not been met."[139]

To make matters even more confusing, a plurality announced a new standard in *Bowen v. Roy*,[140] arguing that the *Yoder* test "is not appropriate in [a] setting. . . . [involving] the enforcement of a facially neutral and uniformly applicable requirement for the administration of welfare programs reaching many millions of people."[141] There, "the Government is entitled to wide latitude."[142] Instead, "[a]bsent proof of an intent to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest."[143] Then, the Court reversed course, rejecting the *Bowen* standard the very next year.[144]

In *Yoder*, even the free exercise right coupled with the parenting right would not have won the day against the compulsory attendance requirement had there been any evidence that failing to have the additional years of schooling would have harmed the children in some way.[145] But if a mere showing of probable harm is enough to defeat free exercise rights, then those rights are not particularly robust. Suppose that it can be shown that fasting can cause harm[146] or that drinking sacramental wine can be harmful.[147] If this is all that *Yoder* requires in order for free exercise rights to be overridden, then the case does not seem to offer the robust protection that is sometimes claimed.

---

138. *Id.*

139. *Id.*

140. 476 U.S. 693 (1986).

141. *Id.* at 707.

142. *Id.*

143. *Id.* at 707-08.

144. Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 141 (1987).

145. *See* Wisconsin v. Yoder, 406 U.S. 205, 230 (1972) ("This case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred.").

146. *Cf.* Robert K. Vischer, *The Good, the Bad and the Ugly: Rethinking the Value of Associations*, 79 NOTRE DAME L. REV. 949, 1007 n.205 (2004) (noting that fasting can threaten health).

147. *Cf.* Garrett Epps, *What We Talk About When We Talk About Free Exercise*, 30 ARIZ. ST. L.J. 563, 579 (1998) ("The alcohol in the wine does pose a health threat to those who have legitimate access to enough of it to experience ill effects.").

IV. CONCLUSION

Yoder is sometimes characterized as establishing that free exercise and parenting rights receive robust constitutional protection. But an examination of the reasoning and holding of the case suggests that it sends contradictory messages about the strength of those rights. Sometimes, the Court speaks in glowing terms about these very important rights and at other times suggests that the state can override these rights relatively easily.

The Court's contradictory messaging continues to be represented in the caselaw in that *Yoder* is sometimes cited to support the proposition that free exercise or parenting rights are robust while at other times is cited to establish that the burden imposed on the state to justify overriding these rights is not particularly onerous. Certainly, this is not the only case that operates in this way. *Prince* (which the *Yoder* Court suggested was controlling) is also sometimes cited to establish the robustness of parental rights[148] and also cited to establish that parental rights (and free exercise rights as well) must give way to the state's interest in preventing harm.[149]

At least one difficulty posed by *Yoder*'s mixed messaging is that it undercuts that the case really stands for anything. If one wishes to suggest that the state must bear a heavy burden when overriding free exercise rights, one can cite to *Yoder* and its language suggesting the robustness of free exercise. If one wishes to suggest that the state does not have to bear a heavy burden in order to override free exercise rights, one can cite to *Yoder* and its language suggesting that the state can override free exercise rights to prevent harm. But *Yoder* then seems to permit the Court to protect those free exercise rights of which it approves (because the state allegedly must bear a heavy burden before it can justifiably override those rights) and to permit the state to override those free exercise rights of which the Court does not approve (because the state is justified in overriding free exercise right on any showing of probable or, perhaps, possible harm). But the Court's citing *Yoder* to justify these differing approaches to free exercise undercuts the perception that the Court is principled and that the standards announced by the Court are being applied in good faith. Neither the Court nor society can afford to have such perceptions promoted and

148. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 38 (1981) ("[F]reedom of personal choice in matters of family life long has been viewed as a fundamental liberty interest worthy of protection under the Fourteenth Amendment." (citing, inter alia, Prince v. Massachusetts, 321 U.S. 158, 166 (1944))).

149. *See* H. L. v. Matheson, 450 U.S. 398, 449 (1981) (Marshall, J., dissenting) ("Parental authority is never absolute, and has been denied legal protection when its exercise threatens the health or safety of the minor children." (citing *Prince*, 321 U.S. at 169-70)).

the Court must do its utmost to correct its ill-advised haphazard approach to the enforcement of important rights.