NOTE

YODER REVISITED: WHY THE LANDMARK AMISH SCHOOLING CASE COULD—AND SHOULD—BE OVERTURNED

Gage Raley[*]

IN 1972, the Supreme Court handed down its decision in *Wisconsin v. Yoder*, which held that the state could not compel Amish and conservative Mennonite children to attend school past the eighth grade under compulsory education laws.[1] This ruling has had a profound and continuing impact on the lives of Amish-raised individuals. Over the past four decades, tens of thousands of individuals raised in Plain communities[2] have been denied a high school education due to the *Yoder* decision.[3]

[*] LL.M. candidate, 2012, Kyushu University Faculty of Law; J.D. candidate, 2011, University of Virginia School of Law; A.B., 2008, Georgetown University. First of all, I would like to thank April Russo. If it were not for the fact that she paid closer attention in Constiutional Law than I did and reminded me about the Casey case, this Note would never have gotten off the ground. I would also like to thank Joel Hibbard and Professors James Ryan, Micah Schwartzman, and Karen Moran for their encouragement and insightful feedback. Finally, I am indebted to the members of the Virginia Law Review and thank them for their careful editing and excellent suggestions. I want to extend a special thank you to Notes Editor Joe Fore, whose tireless efforts turned this into a readable piece. All errors are my own.

[1] 406 U.S. 205, 234 (1972).

[2] The term "Plain People" refers to the Amish and conservative Mennonites. "Amish" and "Plain People" are often used as catch-all phrases when referring to the various conservative Anabaptist sects as a whole. The Amish, conservative Mennonites, and Hutterites all claim exemption to compulsory education laws under *Yoder*, and the terms "Amish" and "Plain People" are used interchangeably in this Note and refer to all Anabaptist churches that claim the *Yoder* exemption. See Donald B. Kraybill, Concise Encyclopedia of Amish, Brethren, Hutterites, and Mennonites 73 (2010) (stating that "Old Order Mennonites and the Amish, as well as many Hutterite colonies, terminate formal education at the eighth grade" under the auspices of *Yoder*).

[3] Amish sociologist Professor Donald Kraybill estimates there are just under 250,000 Amish individuals in the United States, and approximately half are under the age of eighteen. See Mark Scolforo, Study Says Amish Expanding Westward, ABC News (July 28, 2010) http://abcnews.go.com/US/wireStory?id=11269787.

Much has changed in the four decades since *Yoder* was decided. Many in the legal world know that Free Exercise jurisprudence has experienced significant upheaval since the Court handed down *Yoder*, but far fewer are aware that Plain communities have also gone through major transformations during that same period. The evolution of both Amish society and Free Exercise jurisprudence since the Court decided *Yoder* call for a reevaluation of the decision.

Though it is relatively unusual for a Supreme Court decision to be overturned outright, the Court has established a general procedure for determining whether to abandon prior precedent. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court laid out a "series of prudential and pragmatic considerations" that guide the Court when it reexamines a prior holding—considerations that are "designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case."[4] These four considerations are: (1) "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification,"[5] (2) "whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation,"[6] (3) "whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine,"[7] and (4) "whether the rule has proven to be intolerable simply in defying practical workability."[8] Applying these four stare decisis factors to *Yoder*, this Note argues that the decision is no longer justifiable. *Yoder* is based on facts that no longer exist in Amish communities. It is also based on First Amendment law that has changed substantially in the intervening

[4] 505 U.S. 833, 854 (1992).
[5] Id. at 855.
[6] Id. at 854.
[7] Id. at 855.
[8] Id. at 854. In the most recent case to address stare decisis principles, the Court again applied the workability and reliance tests. See Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 912 (2010). While the Court did not consider whether the facts or law had changed in *Citizens United* as it did in *Casey*, there is nothing in *Citizens United* to indicate that the Court would not continue to take those factors into consideration when relevant.

decades, and *Yoder*'s continued viability creates tension with broader Free Exercise jurisprudence. *Yoder*'s continued impact also extends far beyond the circles of academic debate; its holding—that the Amish may cease their children's education after they complete the eighth grade—has significant real-world consequences. Many Plain communities invoke the ruling to hinder the economic and religious mobility of Amish-raised individuals. In light of these realities, this Note argues that the ruling should be overturned.

Part I of this Note will examine contemporary Amish society and will contend that the factual assumptions that underpin the Court's decision in *Yoder* are no longer accurate. The Court handed down *Yoder* nearly forty years ago, and in the intervening decades, much has changed. This Part will conclude that recent changes "have robbed the old rule of significant application or justification."[9] Part II will argue that the *Yoder* rule is not "subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation,"[10] as compulsory education laws no longer pose the kind of "burdens" on Amish religious practices that the Court found they did in *Yoder*. Furthermore, the contemporary interests the Amish have in the *Yoder* exemption run contrary to core constitutional values. Part III will examine the Court's subsequent ruling in *Employment Division v. Smith*[11] and will argue that *Smith* left *Yoder* a "remnant of abandoned doctrine."[12] Part IV will argue that the "hybrid-rights" theory on which *Yoder*'s continued applicability rests after *Smith* "has proven to be intolerable simply in defying practical workability."[13] Part V will conclude by examining the real-world consequences of the continued application of *Yoder*.

[9] *Casey*, 505 U.S. at 855.
[10] Id. at 854.
[11] 494 U.S. 872 (1990).
[12] *Casey*, 505 U.S. at 855.
[13] Id. at 854.

I. CHANGES TO THE "PREMISES OF FACT" UNDERLYING *YODER*

One factor that the Supreme Court takes into consideration when reevaluating a prior decision is "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[14] If the Court were to reexamine its decision in *Yoder* today, it would inquire whether "premises of fact have so far changed in the ensuing . . . decades as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed."[15] This Part demonstrates that the factual assumptions on which the Court relied in *Yoder* no longer reflect reality and that developments in Amish society have undermined the decision's continued justifiability.

To settle the dispute between the State of Wisconsin and the Amish parents, the *Yoder* Court applied the *Sherbert* test, under which "governmental actions that substantially burden a religious practice must be justified by a 'compelling governmental interest.'"[16] If the government cannot show that it has a compelling interest in enforcing a law that burdens an individual with sincere religious objections to that law, that person must be exempted from complying with the law.

The Court's *Sherbert* analysis in *Yoder* rested on four factual assumptions. The first two assumptions concerned the burden on religion imposed by the compulsory education laws, while the other two assumptions concerned the state's interest in enforcing the compulsory education laws.

In determining that compulsory education laws imposed a substantial burden upon the Amish's sincerely held religious beliefs and practices, the Court found two facts salient. First, the Amish would be forced to attend "worldly" consolidated high schools if they had to observe compulsory education laws, where their children would be exposed to non-Amish teachings.[17] Second, the Court noted that after finishing their formal education in elementary school, Amish teens went to work on "family farms" in

[14] Id. at 855.
[15] Id.
[16] *Smith*, 494 U.S. at 883 (summarizing the *Sherbert* test).
[17] *Yoder*, 406 U.S. at 211.

order to receive the training necessary to fulfill "Amish beliefs [that] require members of the community to make their living by farming or closely related activities."[18] Formal high school attendance, the Court determined, would interfere with this religio-agricultural training.

After establishing that compulsory high school attendance would substantially burden the Amish's free exercise interests, the Court then identified two key state interests in enforcing compulsory education laws: (1) to provide children with the "opportunity to prepare for a livelihood of a higher order than that which children could pursue without education" and (2) to "keep children of certain ages off the labor market" and "protect[] their health in adolescence."[19]

The last two of *Yoder*'s four factual assumptions led the Court to conclude that the State lacked a compelling interest in keeping the Amish youth in school in order to "prepare [them] for a livelihood of a higher order" and prevent them from engaging in child labor.[20] The Court found that the agricultural training Amish teens received on family farms after quitting school adequately prepared them to support themselves both inside the Amish community and—if they were to leave—in the broader society. The Court also determined that "employment of children under parental guidance and on the family farm from age 14 to age 16 is an ancient tradition that lies at the periphery of the objectives of [child labor] laws,"[21] and thus there was no need to keep Amish teens in school and monopolize their time with education in order to prevent them from engaging in this type of labor. On the basis of these last two factual findings, the Court concluded that the Amish "carried the . . . difficult burden" of demonstrating that their "informal vocational education" was satisfactory when weighed against the state interests that underlie compulsory education laws.[22]

Application of the *Sherbert* test requires the Court to delve deeply into the specific facts and circumstances of a case, and as a result *Yoder* is a very narrow, fact-based decision. By the Court's

[18] Id. at 210.
[19] Id. at 228.
[20] Id.
[21] Id. at 229.
[22] Id. at 235.

own description, weighing a state's interests against claims for religious exemption from generally applicable laws under *Sherbert* is a "sensitive and delicate task" requiring "great circumspection."[23] It was only "in view of the unique facts and circumstances associated with the Amish community" that the Court held that Wisconsin's interests were not so compelling as to override the Amish's interests.[24] Since this was a case that turned on factual findings about Amish practices and their ramifications, and since "[i]n the circumstances of [the] case . . . the question [was] close,"[25] this first stare decisis consideration is a crucial one. Because the Amish barely satisfied the *Sherbert* balancing test in *Yoder*, even slight changes to the premises of fact could warrant an overturning of the decision.

As this Part will demonstrate, however, the changes to the premises of fact are anything but slight, and they all cut against the findings made by the Court nearly four decades ago. In the following sections, this Note will examine each of *Yoder*'s four factual assumptions and consider the recent developments that render those assumptions obsolete. Part I will conclude that these changed factual circumstances strongly suggest that the Amish would not prevail under the *Sherbert* test today.

A. Assumption No. 1: Compulsory Education Would Force Amish into "Worldly" Public High Schools

Until the middle of the twentieth century, most Amish children attended one-room public elementary schools.[26] These schools were, practically speaking, "Amish" schools. As Amish students made up a large portion of the student body, there was little reason to fear these rural "Amish" schools would expose children to the worldly influences rejected by the Old Order Amish.[27] The Court

[23] Id.

[24] Duro v. Dist. Attorney, 712 F.2d 96, 98 (4th Cir. 1983).

[25] *Yoder*, 406 U.S. at 240.

[26] Thomas J. Meyers, Education and Schooling, *in* The Amish and the State 87, 87 (Donald B. Kraybill ed., 1993).

[27] *Yoder*, 406 U.S. at 217 ("[In these] nearby rural schoolhouse[s], with a large proportion of students of the Amish faith, the Old Order Amish had little basis to fear that school attendance would expose their children to the worldly influence they reject.").

found that the Amish objected to both public and private high schools, however, because "secondary education in rural areas is . . . largely carried on in a consolidated school, often remote from the student's home and alien to his daily home life," and because "the values and programs of the modern secondary school are in sharp conflict with the fundamental mode of life mandated by the Amish religion."[28] In particular, these worldly, consolidated high schools

> emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students[, whereas] 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.[29]

Applying compulsory education laws to the Amish, the Court determined, would place Amish children in an "environment hostile to Amish beliefs."[30] Attendance at traditional public high schools, the Court noted, places a "serious barrier" to a child's integration into the Amish religious community.[31]

Because Amish communities believe that salvation is contingent on a person's decision to live in a separate church community shielded from worldly influences,[32] the Court found that compulsory attendance at these consolidated schools would result in "an impermissible exposure of their children to a 'worldly' influence in conflict with their beliefs."[33] Thus, the Court concluded that "Amish objection to formal education beyond the eighth grade is firmly grounded in . . . central religious concepts."[34]

Even as the Court was deciding *Yoder*, however, the structure of Amish education was beginning to change, and those changes accelerated in subsequent years. In the mid-1950s, states began to

[28] Id.
[29] Id. at 211.
[30] Id.
[31] Id. at 211–12.
[32] Id. at 210.
[33] Id. at 211.
[34] Id. at 210.

consolidate their rural elementary schools.[35] The Amish did not mind their children attending one-room, rural, predominately Amish public elementary schools, but they began establishing their own schools when the state began consolidating rural public elementary schools.[36] The Amish purchased one-room schoolhouses discarded by public townships or, when necessary, built their own schools; the latter approach has become more common recently.[37] The transition to private Amish schools is largely complete today.[38]

The privatization of Amish schooling undermines the Court's finding in *Yoder* that "modern compulsory secondary education in rural areas is . . . largely carried on in a consolidated school . . . ."[39] Modern compulsory elementary education in rural areas is now largely carried on in consolidated schools, yet the Amish have proven themselves capable of observing compulsory education laws through elementary school despite this development. The Amish could observe compulsory education laws through high school, as well, by keeping their children in the private Amish schools for a few more years; this would in no way result in "an impermissible exposure of their children to a 'worldly' influence in conflict with their beliefs."[40]

Apart from the possibility of developing Amish-only private schools, the emergence of homeschooling since *Yoder* was decided gives the Amish yet another alternative to "worldly" public high schools. The Amish already have the private educational infrastructure in place to accommodate Amish students through high school. Rod and Staff Books, a leading textbook publisher for Amish and conservative Mennonite schools, already carries high school curricula for the Mennonite schools that allow students to

[35] Donald B. Kraybill, The Riddle of Amish Culture 172 (rev. ed. 2001).
[36] Meyers, supra note 26, at 87.
[37] Kraybill, supra note 35, at 177–78.
[38] In 1950, for example, there were only three Amish schools in Lancaster County, Pennsylvania, home to one of America's largest Amish populations, but by 1975 there were sixty-two, and "[t]oday, with few exceptions, children in the Lancaster settlement attend one-room private schools staffed by Amish teachers." Id at 177.
[39] *Yoder*, 406 U.S. at 217.
[40] Id. at 211.

continue their education through the tenth grade.[41] It also carries a homeschool curriculum that continues through the twelfth grade for Amish and Mennonite families who want their children to receive a diploma.[42] While the publisher warns against sending children to college because of "the large number of children from Christian homes that lose their way spiritually in college settings," it notes that the diploma and transcript of credits offered through the homeschool curriculum "ha[ve] been widely accepted by colleges and universities."[43]

This Amish private school solution, in fact, was proposed by a Wisconsin Supreme Court judge in his dissent from that court's *Yoder* ruling:

> The points of view [of the Amish and school officials] are clearly reconcilable. The law requires that all children attend school until they are sixteen. The Amish object to the worldliness of the usual high school. The writer of this dissent believes that both objections can be met by an Amish vocational school which will teach reading, agriculture, and husbandry, and whatever religious precepts the Amish community desires.
>
> In addition, such basic skills as English and mathematics should be taught—"unpretentious" knowledge that will be useful not only in the Amish community, but would better enable those who fall away from the community to adjust to the outside world and to continue their education if they so desire.[44]

The Wisconsin Supreme Court judge's solution is a sensible one. With this option readily available—now that the Amish have a private school system in place that could accommodate high-school-age students—the Amish can no longer claim that their forced compliance with compulsory education laws would necessarily expose them to impermissible worldly beliefs. A modern public high school might not be "equipped, in curriculum

[41] See Rod and Staff Books, Bible-Based Curriculum, http://www.rodandstaffbooks.com/list/Rod_and_Staff_Curriculum/ (last visited Mar. 10, 2011).

[42] See Rod and Staff Books, High School Program, http://www.rodandstaffbooks.com/list/High_School/ (last visited Mar. 10, 2011).

[43] Id.

[44] State v. Yoder, 182 N.W.2d 539, 550 (Wis. 1971) (Heffernan, J., dissenting).

or social environment, to impart the values promoted by Amish society,"[45] but an Amish high school could be.

B. Assumption No. 2: Compulsory Education Would Interfere with Agricultural Training

In addition to the Amish's objection to sending their children to consolidated, public high schools, the Court found that the Amish also believed they had an affirmative religious duty to train their teenaged children to make a living from the land.

The Court began its examination of this belief by giving a brief overview of Amish teachings on separation and farming:

> Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence. . . .
>
> A related feature of Old Order Amish communities is their devotion to a life in harmony with nature and the soil. . . . Amish beliefs require members of the community to make their living by farming or closely related activities.[46]

After exploring the connection between the Amish's religious beliefs and farming, the Court found that the Amish did not object to elementary education up through the eighth grade because farming requires the basic skills taught in the early grades but did object to compulsory education after the eighth grade because it interfered with practical preparation for a life of farming.[47] The Court concluded that compulsory education is deleterious and violates Amish belief by removing children from their community during a period in which Amish adolescents "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

[45] *Yoder*, 406 U.S. at 212.

[46] Id. at 210; see also id. at 217 (recognizing that the Amish "assert as an article of faith" their "way of life in a church-oriented community, separated from the outside world and 'worldly' influences, [and] their attachment to nature and the soil").

[47] Id. at 212 (noting that the Amish "do not object to elementary education through the first eight grades as a general proposition because they agree that their children must have basic skills in the 'three R's' in order to . . . be good farmers").

housewife."[48] The Amish successfully persuaded the Court that the "traits, skills, and attitudes" necessary for an Amish life are "best learned through example and 'doing' rather than in a classroom."[49]

On the basis of these findings, the Court concluded that secondary schooling would "substantially interfer[e] with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contraven[ing] the basic religious tenets and practice of the Amish faith."[50]

Today, in contrast, most Amish youth no longer work on family farms. The past forty years have shown a "steady decline" in Amish youth who farm or grow up on farms,[51] with land prices being the most frequently cited reason for the move away from farming in Amish communities.[52] This bleak economic situation has led many Amish to abandon their reliance on agricultural work.[53] Today, approximately two-thirds of Amish breadwinners have left the fields.[54]

This trend away from agriculture has proved troublesome for Amish people whose formal education was cut short. With their limited education, professional jobs are not an option; the Amish are limited to manual work,[55] often in shops, warehouses, and

[48] Id. at 211.

[49] Id.

[50] Id. at 218.

[51] Tom Shachtman, Rumspringa: To Be or Not To Be Amish 176 (2006); see also Gerald Mayer, Cong. Research Serv., Child Labor in America: History, Policy, and Legislative Issues, RL 31501, at 25 (2008) ("In recent years, the opportunity for the Amish to farm has diminished . . . ."); Kraybill, supra note 35, at 238 (noting that shortly after the *Yoder* litigation, the Amish began to "hedge on their commitment to farming").

[52] See, e.g., Mayer, supra note 51, at 25 (citing "increased land values and property taxes" as key contributors to decreases in Amish farming); Shachtman, supra note 51, at 178 (quoting an Amishman who observed that "most of our young people aren't interested in investing their time and money, and struggling every day to make ends meet on a farm").

[53] Kraybill, supra note 35, at 238.

[54] Id.; see also Shachtman, supra note 51, at 192 ("Statistics . . . are hard to come by, but the latest figures on Amish households show that 53 percent of household heads younger than age sixty-five work in factories; their number includes 71 percent of all the male Amish heads of households under the age of thirty-five.").

[55] Kraybill, supra note 35, at 241.

factories.[56] Amish entrepreneurs created "mini-factories—small shops and cottage industries."[57]

With the movement away from agricultural work, the Amish lifestyle—which the *Yoder* Court said had "not altered in fundamentals for centuries"[58]—changed in a fundamental way. Professor Donald Kraybill writes that "[t]he occupational transformation underway . . . is the most profound and consequential change since the arrival of the Amish in North America. Its long-term consequences will fundamentally alter a way of life that for more than two and a half centuries has been anchored in a rural, separatist culture."[59] Simply put, the Amish way of life is drastically different now than it was in 1972 when *Yoder* was decided.

The Amish community's move from an agricultural to an industrial economy undermines the *Yoder* Court's findings that "Amish beliefs require members of the community to make their living by farming or closely related activities"[60] and that high school attendance would interfere with Amish teens' acquisition of "the specific skills needed to perform the adult role of an Amish farmer."[61] Because high school no longer poses as significant a conflict with Amish youths' agricultural training, compulsory education laws no longer "interpose[] a serious barrier to the integration of the Amish child into the Amish religious community."[62] And because "life in the separated agrarian community" is no longer "the keystone of the Amish faith," compulsory high school attendance laws no longer impose the same burden on Amish religious beliefs and practices that they did at the time of *Yoder*.[63]

[56] Id.
[57] Id. at 245.
[58] *Yoder*, 406 U.S. at 217.
[59] Kraybill, supra note 35, at 259.
[60] *Yoder*, 406 U.S. at 210.
[61] Id. at 211.
[62] Id. at 211–12.
[63] Id. at 222.

C. Assumption No. 3: Amish Children Are Prepared to Be Self-Sufficient Adults Even Without a High School Education

The State argued to the *Yoder* Court that it had a strong interest in enforcing its compulsory education laws because "education prepares individuals to be self-reliant and self-sufficient participants in society."[64] While the Court accepted this proposition as legitimate, it qualified its recognition of the State's interest as applied to the Amish by asserting:

> 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.[65]

The Court cited an expert witness for the Amish who stated that "their system of 'learning-by-doing'" was ideal for "preparing Amish children for life as adults in the Amish community."[66] After recognizing how successfully the Amish have thrived as a distinct unit in American society for over 200 years,[67] the Court concluded that "an additional one or two years of formal high school for Amish children in place of their long-established program of informal vocational education would do little to serve [the State's] interests."[68]

The Court also addressed the State's claim that it had an interest in enforcing high school attendance because those who leave the Amish community may be left "ill-equipped for life."[69] The Court dismissed this argument out of hand as "highly speculative."[70] Noting the lack of "specific evidence" that the Amish community

[64] Id. at 221.
[65] Id. at 222.
[66] Id. at 223.
[67] Id. at 225 ("The Amish alternative to formal secondary school education has enabled them to function effectively in their day-to-day life under self-imposed limitations on relations with the world, and to survive and prosper in contemporary society as a separate, sharply identifiable and highly self-sufficient community for more than 200 years in this country.").
[68] Id. at 222.
[69] Id. at 224.
[70] Id.

loses members to the world, the Court also found no basis for the argument that Amish-raised individuals who leave the community, with "their practical agricultural training and habits of industry and self-reliance, would become burdens on society because of educational shortcomings."[71] The Court found that the "informal vocational education" that Amish teens receive on family farms in lieu of formal high school would adequately equip defectors to support themselves in the outside world: "There is nothing in this record to suggest that the Amish qualities of reliability, self-reliance, and dedication to work would fail to find ready markets in today's society."[72]

The Court also put heavy emphasis on the fact that the litigation was over "one, or at most two, additional years" of high school, which the Court found would add little marginal benefit for Amish students. In fact, the majority opinion emphasized no fewer than eight times that Wisconsin required only one or two more years of formal schooling than the Amish already accepted.[73] In a concurring opinion joined by Justices Brennan and Stewart, Justice White noted that he joined the majority because he could not "say that the State's interest in requiring *two more years of compulsory education* in the ninth and tenth grades outweighs the importance of the concededly sincere Amish religious practice to the survival of that sect."[74] Because the deviation from the State's requirements was "relatively slight," Justice White concluded that the Amish's claim prevailed.[75] While conceding the State's legitimate interest in "prepar[ing children] for the life style that they may later choose, or at least to provide them with an option other than the life they have led in the past,"[76] the relatively minor amount of schooling at stake led Justice White to join the majority. He found himself unable to conclude "that Amish children who leave school in the eighth grade will be intellectually stultified or unable to acquire

[71] Id.
[72] Id.
[73] Id. at 222 (noting that the difference was only "an additional one or two years of formal high school"); id. (same); id. at 224 (same); id. (same); id. at 225 (same); id. at 227 (same); id. at 232 (same); id. at 234 (same).
[74] Id. at 237–38 (White, J., concurring) (emphasis added).
[75] Id. at 238 (White, J., concurring).
[76] Id. at 240 (White, J., concurring).

new academic skills later. The statutory minimum school attendance age set by the State is, after all, only 16."[77]

Two additional years of formal education may not have been essential for young Amish to be self-sufficient in the early 1970s. In today's world, however, Amish children are not prepared to be economically productive adults without a high school education. As Justice Breyer has recognized, "In recent years the link between secondary education and business has strengthened, becoming both more direct and more important. Scholars on the subject report that technological changes and innovations in management techniques have altered the nature of the workplace so that more jobs now demand greater educational skills."[78] Increasing global competition in particular, Justice Breyer noted, "has made primary and secondary education economically more important."[79]

But it is not only global competition that has made increased education crucial for improving one's job prospects. Americans must also compete for jobs against a domestic workforce that is far more educated today than it was when *Yoder* was handed down. In 1970—just two years before *Yoder* was decided—only 52 percent of Americans twenty-five and older had completed at least four years of high school, and a mere 11 percent had completed four or more years of college.[80] By 2007, the percentage of Americans twenty-five and older with a high school diploma or its equivalent

[77] Id. (White, J., concurring).

[78] United States v. Lopez, 514 U.S. 549, 620 (1995) (Breyer, J., dissenting).

[79] Id. at 621. Members of the Executive Branch, including the current President, have also emphasized the essential nature of secondary education in a globalized economy. See, e.g., Barack H. Obama, Address to Joint Session of Congress, H.R. Doc. No. 111-1, at 7–8 (2009) ("In a global economy where the most valuable skill you can sell is your knowledge, a good education is no longer just a pathway to opportunity—it is a prerequisite . . . . [E]very American will need to get more than a high school diploma. And dropping out of high school is no longer an option.").

[80] U.S. Bureau of the Census, U.S. Dep't of Commerce, Supplementary Report: Educational Characteristics of the Population of the United States: 1970, Pub. L. No. PC-S1-20, at 1 (1972), available at http://www.census.gov/population/socdemo/education/cp70pcs1-20/cp70pcs1-20.pdf.

had climbed to 84 percent, and the number of Americans with at least a bachelor's degree had more than doubled, to 27 percent.[81]

States have also recognized this educational arms race, with many raising the age requirement for their compulsory education laws to age seventeen or eighteen.[82] Today, nearly half of the states require students to attend school through age seventeen or eighteen.[83] Wisconsin is among the states that have increased their age requirement to eighteen.[84]

The Amish are becoming more vulnerable to the economic cycles that affect the outside world now that they rely primarily on manufacturing jobs to make a living. Recent news reports have revealed that some Amish households have turned to public assistance after their breadwinners lost factory jobs, something practically unheard of before the Amish began moving off the farms. In Elkhart, Indiana, for example, "economic necessity has forced an increasing number [of Amish individuals] to make their living by working for the RV makers and suppliers that dominate the landscape and economy."[85] Like the rest of the workforce in the RV industry, Amish workers have suffered the effects of factory closures and layoffs.[86] Professor Kraybill, reflecting on the situation in Elkhart, stated that the effects of the recession demonstrate that the Amish are not "insulated or isolated from the larger economy . . . . They are not self-sufficient. They're buying and selling in the larger marketplace."[87] Some Amish members who have lost their jobs, after gaining permission from their bishops to

[81] U.S. Bureau of the Census, U.S. Dep't of Commerce, Educational Attainment in the United States: 2007, Pub. L. No. P20-560, at 1 (2009), available at http://www.census.gov/ prod/2009pubs/p20-560.pdf.

[82] National Conference of State Legislatures, Compulsory Education: Overview, http://www.ncsl.org/IssuesResearch/Education/CompulsoryEducationOverview/tabid/12943/Default.aspx (last visited Apr. 10, 2011).

[83] Id.

[84] Wis. Stat. § 118.15 (Supp. 2009). The statute has several narrow exceptions for students attending vocational colleges, students in correctional facilities, and students in certain high-school-equivalency programs. See, e.g., id. § 118.15(b), (d).

[85] Allison Linn, Amish See the Recession as a Challenge and a Blessing, MSNBC.com (Aug. 19, 2009), http://www.msnbc.msn.com/id/32390961/ns/us_news-the_elkhart_project/.

[86] Marilyn Odendahl, Amish Are Entering Jobless Rolls, eTruth.com (Apr. 18, 2009), http://www.etruth.com/know/news/story.aspx?ID=480834.

[87] Linn, supra note 85.

receive state assistance, have filed unemployment claims;[88] this marks "a big step for a sect that traditionally has shunned public benefit programs such as Social Security and Medicare."[89] The move from farm to factory means that the state has a greater interest in assuring that Amish heads of households have the ability to support their families and do not end up as "burdens on society because of educational shortcomings."[90]

As Justice Breyer noted in *United States v. Lopez*, the purpose of secondary education is to give individuals the skills they need to survive in a modern economy.[91] Secondary education has become vastly more important in the nearly four decades since *Yoder* was handed down. Individuals with only an eighth-grade education are at a severe disadvantage in today's job market—a much greater disadvantage than they would have faced in 1972. Amish workers today are not the "sturdy yeomen" that the *Yoder* Court described but rather are interdependent Americans who need education to thrive in the contemporary economy. It is unlikely that any expert would characterize the "vocational education" that Amish teens receive in factories and sawmills today as "'ideal,' and superior to an ordinary high school education."[92] Furthermore, the trend of states raising their age requirements in regard to compulsory education means that, in nearly half the states, including Wisconsin, there is no longer only a "minimal difference between what the State would require and what the Amish already accept."[93] The increased importance of formal education undermines the *Yoder* Court's finding that an eighth-grade education adequately prepares Amish individuals to support themselves in today's economy.

[88] See Odendahl, supra note 86 (noting that some jobless Amish "have gotten permission from some of the bishops to get state assistance").
[89] Linn, supra note 85.
[90] *Yoder*, 406 U.S. at 224.
[91] 514 U.S. 549, 620 (1995) (Breyer, J., dissenting).
[92] *Yoder*, 406 U.S. at 212.
[93] Id. at 236.

D. Assumption No. 4: Employment of Amish Teens on "Family Farms" Is Not Harmful Child Labor

In examining the State's interest in requiring high school attendance, the *Yoder* Court also discussed the relationship between compulsory education laws and child labor laws.[94] The Court noted that the selection of the age of sixteen for compulsory education laws arose, in part, as a result of "the movement to prohibit most child labor under age 16 that culminated in the provisions of the Federal Fair Labor Standards Act of 1938."[95] The Court went on to explain that "[t]he requirement of compulsory schooling to age 16 must therefore be viewed as aimed not merely at providing educational opportunities for children, but as an alternative to the equally undesirable consequence of unhealthful child labor . . . or, on the other hand, forced idleness."[96]

The Court found that, with regard to the need to mandate schooling as an alternative to child labor, "Wisconsin's interest in compelling the school attendance of Amish children to age 16 emerges as somewhat less substantial than requiring such attendance for children generally."[97] The Court came to this conclusion on the assumption that Amish youths would be put to work on family farms after quitting school.[98] The Court did not view the Amish employment of their children as problematic, because it found nothing in the record to suggest that such labor was "in any way deleterious to their health or that Amish parents exploit children at tender years."[99] The Court concluded that "[i]n the context of this case, such [child labor] considerations, if anything, support rather than detract from [the Amish parents'] position."[100]

---

[94] Id. at 227 ("[C]ompulsory education and child labor laws find their historical origin in common humanitarian instincts, and . . . the age limits of both laws have been coordinated to achieve their related objectives.").

[95] Id. at 228.

[96] Id.

[97] Id. at 228–29.

[98] Id. at 229 ("[W]hile agricultural employment is not totally outside the legitimate concerns of the child labor laws, employment of children under parental guidance and on the family farm from age 14 to age 16 is an ancient tradition that lies at the periphery of the objectives of such laws.").

[99] Id.

[100] Id. at 227–28.

Today, however, many of those children are not going to work on a traditional family farm but rather in industries and situations that bring to bear the concerns underlying child labor laws. As Amish fathers have moved away from farming, their sons have followed them to the sawmills and woodworking plants.[101] As one might imagine, child labor laws forbid underage teens from working in such dangerous occupations as woodworking shops and sawmills. Amish boys who seek employment in such occupations upon completion of eighth grade "run smack into restrictions on the employment of children that date back to the Progressive era, when rules were imposed to prevent exploitation of children in factories and sweatshops."[102] The Fair Labor Standards Act ("FLSA"), as the *Yoder* Court noted,[103] excludes from its definition of "oppressive child labor" the employment of a child under age sixteen "by his parent or by a person standing in the place of his parent on a farm owned or operated by such parent or person."[104] Regulations promulgated under the FLSA also, however, "expressly prohibited children under fourteen from work in any manufacturing business (except farming), those under sixteen from operating heavy machinery, and those under eighteen from toiling in particularly dangerous workplaces, such as sawmills"[105]—precisely the types of industries that the Amish are likely to work in today. After *Yoder*, the Department of Labor relaxed labor restrictions on fourteen- to fifteen-year-old Amish, allowing them to perform more farm work during what would otherwise be school hours. The Department would not make the same concessions with regard to sawmills and woodworking shops that it made for farm work, concluding that "the Amish would be in violation of federal child labor laws if they allowed their teens to work in such plants."[106]

The FLSA restrictions created a predicament for Amish parents looking to occupy their teens' time after they completed the eighth

[101] Mayer, supra note 51, at 25.
[102] Shachtman, supra note 51, at 197.
[103] *Yoder*, 406 U.S. at 229 n.19.
[104] 29 U.S.C. § 213(c)(2) (2006).
[105] Shachtman, supra note 51, at 197; see 29 C.F.R. § 570.55 (2011) (prohibiting workers younger than eighteen years old from operating "power-driven woodworking machines").
[106] Mayer, supra note 51, at 25.

grade. In an attempt to solve this dilemma, the Amish "pressed [Congress] for an amendment to the child labor provisions of the FLSA in order to accommodate their practices."[107] Starting with the 105th Congress (1998–99), congressmen representing districts with Amish constituents repeatedly introduced legislation to amend federal child labor law on behalf of the Amish in both the House and Senate.[108] A proposal offered by Senator Arlen Specter, for example, would have permitted a teen over the age of fourteen who "by statute or judicial order is exempt from compulsory school attendance beyond the eighth grade" to work in sawmills and woodworking shops.[109]

The attempts in Congress to exempt the Amish from child labor regulations were controversial. Union leaders argued against these proposals, pointing to the extremely dangerous working conditions that exist in sawmilling and woodworking.[110] The Department of Labor also expressed similar concerns about exempting the Amish from child labor laws.[111] Pointing to a high accident and fatality rate for the industry nationwide, the Department emphasized that such work is "even more dangerous for children" than for adults.[112]

Congressmen from Amish districts, however, argued that the concerns about the safety of Amish children were overblown. Representative Mark Souder of Indiana, urging that the FLSA be amended to permit Amish teens to work in sawmills and woodworking shops, argued that "the Amish children would be 'supervised by adults who know and care about them' and that the proposed amendment 'would protect a truly endangered religion

[107] Id.

[108] Id.

[109] 147 Cong. Rec. 10,589 (2001) (reading of amendment offered by Sen. Arlen Specter into the record by the House clerk).

[110] See, e.g., Mayer, supra note 51, at 28 ("[S]awmilling and woodworking are among the most hazardous occupations for adults, with a death rate that is *five times* the national average for all industries . . . ." (internal quotation marks omitted) (quoting H.R. 1943, Legislation Amending the Fair Labor Standards Act to Permit Certain Youth to Perform Certain Specified Work: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Education and the Workforce, 108th Cong. 16, 20 (2003))) (statement of Nicholas Clark, Asst. General Counsel, United Food and Commercial Workers, AFL-CIO) (emphasis added), available at http://ftp.resource.org/gpo.gov/hearings/108h/90142.pdf.

[111] Id. at 27.

[112] Id. (quoting Thomas M. Markey, U.S. Dep't of Labor).

and culture.'"[113] Senator Specter of Pennsylvania commented that Amish workplaces are no more dangerous than the family salvage yard in which he worked in his youth.[114] Though several attempts to pass an exemption failed between 2001 and 2003, Amish allies in Congress eventually managed to insert the provision in a consolidated appropriations bill,[115] and President Bush signed it into law in January 2004, thereby giving the Amish the exemption from child labor laws they had long sought.[116]

States have a stronger interest today than they had in 1972 in compelling Amish children to attend school as a way to keep them out of dangerous work situations. The *Yoder* Court found that "[i]n . . . terms [of preventing child labor], Wisconsin's interest in compelling the school attendance of Amish children to age 16 emerges as somewhat less substantial than requiring such attendance for children generally."[117] Today, however, the States' interest in mandating school attendance of Amish children is *more* substantial than their interest in requiring such attendance for children generally. Amish teens are not employed in the types of jobs the typical American teen has. They do not work at retail stores or restaurants; they work in sawmills and factories—dangerous occupations that "[y]oung workers' inexperience, smaller size, immaturity, and lack of training make . . . even more dangerous."[118] While the employment of underage children on family farms may have been "an ancient tradition that [lay] at the periphery of the objectives of [child labor] laws,"[119] the factory jobs that Amish teens hold today are at the very heart of the objectives of child labor laws.

Congress's grant of the FLSA exemption does not mean that the federal government condones Amish child labor in sawmills and woodworking factories. Rather, the fact that Congress limited its

[113] Id. at 26–27.

[114] Shachtman, supra note 51, at 204.

[115] See Mayer, supra note 51, at 27–29 (citing the FY2004 Consolidated Appropriations Act, H.R. 2673, 108th Cong. (2003)).

[116] Shachtman, supra note 51, at 205.

[117] 406 U.S. at 228–29.

[118] Employment Needs of Amish Youth: Hearing Before a Subcomm. of the S. Comm. on Appropriations, 107th Cong. 14 (2001) (statement of Thomas M. Markey, U.S. Dep't of Labor).

[119] *Yoder*, 406 U.S. at 229.

FLSA exemption to only those underage workers who are "by statute or judicial order exempt from compulsory school attendance beyond the eighth grade"[120] indicates that the concession was made only in light of the unique situation created by *Yoder*. In fact, if *Yoder* were overturned, this narrow FLSA exemption would have no effect.

E. Conclusion to Part I

With the emergence of Amish private schools and the disappearance of Amish farms, compulsory high school attendance would not infringe upon Amish beliefs in the ways the *Yoder* Court found it would. In addition, the increased importance of secondary education gives states a stronger interest in compulsory education laws today than they had in 1972. When *Yoder* was handed down, most Amish people lived in self-contained agricultural communities. Now that they must interact with the larger economic system to survive, states have a stronger interest in ensuring that Amish individuals are equipped with the intellectual tools to support themselves in today's economy. The move of Amish teens from farms to factories also gives states a greater interest than they had in 1972 in mandating high school attendance as a method of preventing them from engaging in child labor. Accordingly, it is highly doubtful that the Amish could pass the *Sherbert* test today. "[T]he question [was] close" when *Yoder* was before the Court,[121] and the trends that have taken place since then have drastically tipped the scales in favor of compulsory high school attendance laws.

II. THE RELIANCE INTEREST: WHY THE *YODER* EXEMPTION STILL MATTERS TO THE AMISH

As the previous Part of this Note demonstrated, changes in Amish society over the past four decades have undermined the rationales for cutting short the formal education of Amish children. Due to the rise of Amish private schools, compulsory education laws no longer pose the threat of "an impermissible exposure of

[120] 29 U.S.C. § 213(c)(7)(A)(ii)(II) (2006).
[121] *Yoder*, 406 U.S. at 240 (White, J., concurring).

[Amish] children to a 'worldly' influence."[122] High school attendance would no longer interfere with the religio-agricultural training of Amish youth, as most Amish families no longer make their living through farming. Not only is a high school education increasingly important in today's economy, but the new workplaces for Amish youth—factories and sawmills—are too dangerous for teens. So, we might ask, why do Amish parents still take their children out of school after the eighth grade? These questions dovetail neatly with the topic of this Part: the reliance inquiry.

In considering whether to overrule an earlier decision, the Court's reliance inquiry "counts the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application."[123] Though the change in factual circumstances might support overturning the *Yoder* ruling, the Court would be hesitant to do so if the reliance interests of the Amish were so high as to "lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation."[124] The Court has cited reliance on an earlier decision as a "significant reason" not to depart from precedent.[125] This Part explores whether *Yoder* is subject to reliance interests that might give the Court pause when considering whether to overturn it.[126]

---

[122] Id. at 211.

[123] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992).

[124] Id. at 854.

[125] Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 551 U.S. 877, 906 (2007).

[126] It should be noted at the outset that this Part will focus solely on the possible reliance interests that the Amish have in *Yoder*, since it is highly unlikely that the Court would find that the decision affects any other group in any significant way. In the present legal context, *Yoder* stands for little more than the fact that the Amish, in 1972, were able to pass a *Sherbert* balancing test. The Supreme Court stated that the "convincing showing" that the Amish made was "one that probably few other religious groups or sects could make." *Yoder*, 406 U.S. at 235–36. The U.S. Court of Appeals for the Fourth Circuit has recognized that it was only "in view of the unique facts and circumstances associated with the Amish community" that "the Court held that Wisconsin's interest in education was not so compelling as to override the sincere religious beliefs of the Amish." Duro v. Dist. Attorney, 712 F.2d 96, 98 (4th Cir. 1983). When non-Amish parents—most commonly homeschooling parents—have cited *Yoder*, attempting to claim an exemption from compulsory education laws, lower courts have been quick to distinguish their cases from *Yoder* by noting that its holding applies only to the Amish. See id. (refusing to apply *Yoder* to parents of the Pentecostal faith); see also In re Lippitt, No. 38421, 1978 WL 218341, at *7–8 (Ohio Ct. App. Mar. 9, 1978) (finding *Yoder* inapplicable because the homeschooled children in question, "[u]nlike the Amish, . . . are not being trained to live in an

To determine the possible reliance interests that the Amish have in *Yoder*, it is essential to examine how the Court handled the issue of reliance in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[127] There, the Court stated that the reliance interests women have in the continued availability of abortion would make the Court very hesitant to overturn *Roe v. Wade*:

> [F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.[128]

Applying the *Casey* reliance analysis, several questions arise in the *Yoder* context:

- Do the Amish "order their lives around the right" to take Amish children out of school after the eighth grade?
- Do they "ma[k]e choices that define their views of themselves and their places in society, in reliance on the availability of" the *Yoder* exemption?
- Does the exemption "facilitate" (or hinder) the ability of members of Amish communities to "participate equally in the economic and social life of the Nation"?
- Does the *Yoder* exemption serve "human values" contained in the Constitution?

The answers to these questions will help determine whether the *Yoder* exception is "subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add

agrarian community made up entirely of members sharing a religious creed and life style"); State v. Riddle, 285 S.E.2d 359, 361–62 (W. Va. 1981) (declining to apply *Yoder* to homeschooled children of "Biblical Christian" sect of Methodism). The remainder of this section, therefore, will focus exclusively on the possible reliance interests that the Amish have in the *Yoder* decision.

[127] 505 U.S. at 855–56.

[128] Id. at 856.

inequity to the cost of repudiation."[129] This analysis suggests that, while the Amish church has a continuing interest in the *Yoder* exemption as a tool for retaining their members, this reliance interest is diminished by the interests of Amish young people whose economic and religious autonomy is threatened by *Yoder*'s continued viability.

A. Do the Amish "Order Their Lives Around the Right" to Curtail Their Children's Education?

Amish communities are extremely strict, authoritarian, and traditional. They would seem to be exactly the type of social order against which young people would rebel. The vast majority of Amish-raised youth, however, end up staying in the community—over ninety percent, according to Kraybill.[130] This is an astoundingly high percentage, especially when one considers that forty-four percent of adult Americans have left the religious denomination of their childhoods.[131]

The *Yoder* decision is one of the chief reasons why Amish retention rates are so high. Justice Douglas argued that granting the Amish an exemption from compulsory education laws would result in Amish children being "forever barred from entry into the new and amazing world of diversity that we have today," and that when an Amish child is removed from school after the eighth grade, he is being "harnessed to the Amish way of life by those in authority over him."[132] Though the *Yoder* majority dismissed them, Justice Douglas's warnings have proven to be prophetic.

"The mere thought that their child might aspire to 'higher' education," notes one scholar, "would be a threat to any Amish parents."[133] It may seem disturbing to think that Amish parents consciously sabotage their children's ability to leave the community by limiting their education. In fairness to the parents,

[129] Id. at 854.

[130] Kraybill, supra note 35, at 186.

[131] The Pew Forum on Religion & Public Life, U.S. Religious Landscape Survey 5 (2008).

[132] *Yoder*, 406 U.S. at 245–46 (Douglas, J., dissenting in part).

[133] Melvin R. Smucker, How Amish Children View Themselves and Their Families: The Effectiveness of Amish Socialization, 33 Brethren Life & Thought 218, 229 (1988).

however, they face tremendous pressure from Amish society to keep their children in the faith.[134] "The parents' respect from the community relates directly to their success in rearing children who become committed, conscientious Amish adults."[135] In some communities, the church prints family directories listing the membership status of each child in every home, and thus "the 'failures' of parents with non-Amish children are published for all to read."[136] "[T]he Amish believe that listing the names of those who defect will function to limit defection."[137] When the outcome of one's parenting is exposed for the whole community to see, a child's apostasy can be devastating: "Even if only one child left the faith and became a successful and respected member of the outside world, most parents would feel a deep sense of failure and loss."[138]

If Justice Douglas was correct and Amish parents' purpose in removing children from school after the eighth grade is to leave them "forever barred from entry into the new and amazing world of diversity that we have today" and to "harness[] [them] to the Amish way of life,"[139] what do we make of the conclusion of the three members of the *Yoder* Court, who stated they were "unable to say that the State has demonstrated that Amish children who leave school in the eighth grade will be intellectually stultified or unable to acquire new academic skills later"?[140]

In theory, Amish-raised individuals could, as *Yoder*'s concurring Justices noted, simply resume their education once they grow old enough to make their own decisions.[141] In practice, however, resuming one's education after an interruption can be extremely

[134] Richard A. Stevick, Growing Up Amish: The Teenage Years 86 (2007).
[135] Id. at 84.
[136] Id.
[137] Denise M. Reiling, The "Simmie" Side of Life: Old Order Amish Youths' Affective Response to Culturally Prescribed Deviance, 34 Youth & Soc'y 146, 151 (2002).
[138] Stevick, supra note 134, at 84. One middle-aged Amish father interviewed by Stevick compared the emotional cost of losing a child to the outside world to losing the child through death: "We have buried five children, but that has not given us as much grief as the one who has strayed." Id.
[139] *Yoder*, 406 U.S. at 245 (Douglas, J., dissenting in part).
[140] Id. at 240 (White, J., concurring).
[141] Id.

difficult.[142] By allowing parents to interrupt their children's schooling, the *Yoder* exemption makes it very unlikely that Amish individuals will acquire new academic skills later in life. By the time an Amish teen reaches the age when he can make his own decisions (traditionally sixteen, in most Amish communities), he is at least one or two years behind academically. The interference with educational continuity is perhaps the single most significant effect of the *Yoder* exemption.

In sum, the Amish do "order their lives around the right" to remove their children from school after the eighth grade because it helps a very strict community prevent defection when it might otherwise have difficulty retaining its young people. It insulates church authorities from pressure to change, since they know the lack of a high school education "obstructs the path" to the outside and will keep unhappy members from leaving. "Amish youth," Kraybill explains, "do not have a real choice because their upbringing and all the social forces around them funnel them toward church membership. This is likely why more than 90 percent of them do, in fact, embrace Amish ways."[143] The high school exemption is one of these crucial social forces, and its role in pushing Amish-raised individuals toward church membership is one of the Amish community's most important reliance interests in *Yoder* today.

B. Does the Withholding of Education "Define Their Views of Themselves and Their Places in Society?"

Even beyond the direct impact the *Yoder* exemption has on the lives of Amish individuals, it has a very strong symbolic meaning as well—one that "define[s] their views of themselves and their places in society."[144] Plain children are taught from early on that they are

[142] For example, one Department of Education study at an urban California high school showed only 31 percent of dropouts eventually re-enrolled during the five years of the study, over half of these re-enrollees returned for only one year and earned few credits, and only 18.4 percent graduated by the time the study ended. And this was at a school that had "a strong commitment to reenrolling dropouts," a characteristic that Amish communities do not share. BethAnn Berliner et al., Reenrollment of High School Dropouts in a Large, Urban School District, U.S. Dep't of Educ., REL 2008–No. 056, at iv (2008).

[143] Kraybill, supra note 35, at 186.

[144] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992).

part of "a peculiar people,"[145] that they are different from mainstream Americans, and that the Lord has called them to "come out from among them, and be ye separate."[146] In order to instill an identity of "separateness" from the outside world, Plain churches mandate that their children wear distinctive clothing,[147] prohibit them from using technologies that facilitate integration into the broader society,[148] and—in the case of Old Order Amish—even require them to speak a different language than mainstream Americans, the "Englishers," speak.[149]

Like all other aspects of their lives, the education of Amish and Mennonite children is designed to reinforce the theme of separation. Rod and Staff Publishers, a leading distributor of Amish and Mennonite curricula in the United States, lists the following as one of its "Goals for Education":

> *To develop in the student a sense of right in relation to the surrounding world.* This involves helping him to be aware of the world and its ways that affect him, without developing a craving for becoming a part of its system. Our aim should be to prepare him to live as a stranger and pilgrim.[150]

[145] Deuteronomy 26:18 (King James).

[146] 2 Corinthians 6:17 (King James); see also The Amish Struggle with Modernity 6 (Donald B. Kraybill & Marc A. Olshan eds., 1994) (giving examples of the Scriptures on which Amish beliefs on separation are based).

[147] See, e.g., Grandview Gospel Fellowship, Statement of Faith and Standard of Practice § 8(d) (2004) ("In order to keep the lines of our separation from the world distinct we will . . . [a]bide by . . . dress standards and clothe ourselves according to the principle[] of separation . . . . Boys and girls shall be clothed by the same principles as the adult members.") (on file with the Virginia Law Review Association).

[148] See id. § 8(f) ("In order to keep the lines of our separation from the world distinct we will . . . [n]ot allow ourselves or our families to be exposed to television, radio, the Internet (WWW), or computer games . . . . We must prayerfully think through the moral and ethical implications of all that electronic media places at our fingertips or we will be absorbed into this world's system and finally condemned with it.").

[149] See Kraybill, supra note 35, at 55–57 (discussing the role that the primary dialect spoken by the Amish—"Pennsylvania Dutch"—plays in the Amish church's implementation of the separation doctrine).

[150] Rod and Staff Publishers Catalog 3 (2011) (on file with the Virginia Law Review Association) (boldface omitted) (emphasis added).

The term "stranger and pilgrim" is very familiar to those in Plain communities.[151] The phrase comes from Hebrews 11:13, which states that the Old Testament patriarchs "confessed that they were strangers and pilgrims on the earth."[152] Contemporary definitions of "stranger" and "pilgrim" include "one who does not belong to or is kept from the activities of a group"[153] and "one who journeys in foreign lands," respectively.[154] When the Amish and Mennonites state that their aim in education is to prepare students to be "strangers" and "pilgrims," what they mean is that they are seeking to instill an attitude in that child that he does not belong in mainstream society.[155] While the Court recognized in *Brown v. Board of Education* that one of the most important objectives of education is to help an individual "adjust normally to his environment,"[156] the Amish church's objective is, as the *Yoder* Court noted, "separation from, rather than integration with, contemporary worldly society."[157] The Amish approach to education furthers the goal of making Amish individuals feel, quite literally, like foreigners in the outside world.

The *Yoder* exemption is one key way in which the Amish use education to emphasize to their children their status as outsiders. Amish teens know that other Americans their age attend high school in order to assure that they are prepared for life in mainstream society. They also know that their parents remove them from school after the eighth grade so that they will *not* be prepared for life in mainstream society.[158] Amish individuals' lack

[151] John A. Hostetler, Amish Society 76 (4th ed. 1993) ("[The Amish] profess to be 'strangers and pilgrims' in the present world.").

[152] Hebrews 11:13 (King James).

[153] Merriam-Webster's Collegiate Dictionary 1158 (10th ed. 2001).

[154] Id. at 879.

[155] One writer in the *Blackboard Bulletin*, an Amish periodical, endorsed limited English instruction in school as a strategy for retention of the young: "My mind goes back almost thirty years to when I taught school," he writes. "On two occasions our senior bishop reminded me not to over-emphasize speaking English in school. The pupils should learn to speak well enough to do business in town but being somewhat hindered in speech could serve as a barrier to their fitting in with worldly associations." Stevick, supra note 134, at 93–94.

[156] 347 U.S. 483, 493 (1954).

[157] 406 U.S. at 211.

[158] Shachtman, supra note 51, at 97 (recounting one Amish youth's conversation with his parents regarding his desire to continue his education).

of a high school education is a mark of separation, as well as a constant reminder to the Amish young people that, should they leave the community, they will be reduced to the margins of an American society where the vast majority of adults have a high school diploma.

The Amish, therefore, do rely on the availability of the *Yoder* exemption to "define their views of themselves and their places in society." The *Yoder* exemption is a key component of the Amish narrative of separation, and the "ritual" of ending school after the eighth grade is as important to the church for its symbolism as it is for its practical effects.

C. Does Limiting Education Help the Amish "Participate Equally in the Economic and Social Life of the Nation"?

In *Casey*, the Court held that women had a reliance interest in abortion because "[t]he ability of women to participate equally in the economic and social life of the Nation [is] facilitated by their ability to control their reproductive lives."[159] The Amish reliance interest in the *Yoder* exemption, however, does precisely the opposite: it *hinders* the ability of Amish individuals to participate equally in the economic and social life of the Nation.

The Amish acknowledge that this is one of the main purposes in avoiding compulsory attendance. Some candid Amish elders admit that "cutting off schooling after the eighth grade limits the children, but that it benefits the continuity of the sect for the kids to have less ability to make it on the outside and hastens their return to the fold."[160]

Even the findings of John A. Hostetler, the key expert witness for the Amish in *Yoder*,[161] reveal how *Yoder* has morphed into a barrier that prevents individuals from leaving Amish communities. Hostetler recognized that "[o]ne of the areas of internal conflict [in Amish society] is the desire of young people to obtain education beyond the elementary grades."[162] A high school education opens

[159] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992).
[160] Shachtman, supra note 51, at 261.
[161] 406 U.S. at 212.
[162] John A. Hostetler, Persistence and Change Patterns in Amish Society, 3 Ethnology 185, 188 (1964).

the door to college and careers outside of the Amish community, a door that Amish parents would rather keep shut. "The increased emphasis on education in American society as a prerequisite for adult living," Hostetler notes, "makes learning very attractive to the Amish boy or girl."[163] By prohibiting high school attendance, however, "such ambitions are blocked."[164]

As Kraybill observes: "The boycott of high school obstructs the path leading to marriage with outsiders, preparation for professional careers, and participation in civic life,"[165] things that a successful life outside the Amish community would include. The Amish community has a reliance interest in *Yoder* because "the lack of [an] advanced education leaves [Amish youth] unprepared academically and technologically for the jobs available [outside the community], and it seriously hampers their chances of leaving the Amish sect should they desire to do so."[166] The Amish, therefore, rely on *Yoder* because it prohibits Amish-raised individuals from "participat[ing] equally in the economic and social life of the Nation."

D. Does the Yoder *Exemption Serve the "Human Values" Enshrined in the Constitution?*

In *Casey*, the Court noted that the Constitution serves "human values" and that this must be taken into account when considering reliance interests.[167] The *Casey* opinion emphasized "personal autonomy" as one of those values that the Constitution promotes.[168] The Court in *Casey* was, of course, speaking of bodily autonomy in particular, but the autonomy fostered by education is also an interest that the Court has recognized as worthy of constitutional protection.[169]

[163] Id.
[164] Id.
[165] Kraybill, supra note 35, at 176.
[166] Shachtman, supra note 51, at 197.
[167] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992).
[168] See, e.g., id. at 851 ("[C]hoices central to personal dignity and autonomy[] are central to the liberty protected by the Fourteenth Amendment.").
[169] See Plyler v. Doe, 457 U.S. 202, 221–22 (1982) (discussing the relationship between personal autonomy and education and how education advances the constitutional goal of "advancement on the basis of individual merit").

The "human values" consideration highlights the opposing tension between the interests of the Amish church and the interests of Amish-raised individuals. Amish-raised young people have an interest in receiving a high school education because it will help them become self-sufficient and autonomous. The Amish church has an interest in denying those same young people a high school education because it will hamper their ability to leave the community.

As discussed in the preceding Part of this Note, highschool-level education is increasingly essential for financial independence, but the denial of education also affects the ability of Amish youth to direct the course of their spiritual lives for themselves. If an Amish-raised individual wishes to leave the Amish faith, his decision to do so is greatly complicated if he does not have a high school education. The Court in *Brown* observed that a major function of education is to help a person "adjust normally to his environment,"[170] and without a high school education to help him adjust, an Amish-raised person will face difficulty in his efforts to integrate into an American society that relegates the under educated to its margins. Amish communities do not tolerate nonconformists in their ranks, so if life in the Amish community is his only realistic option due to his lack of education, the Amish faith will be his only option as well.

There can be no question that the *Yoder* exemption does *not* promote the "human value" of autonomy and independence. The Amish community's reliance interests in *Yoder* are rooted in the fact that denying its young people a high school education will leave them dependent on the Amish community and unable to leave the faith. *Yoder* fosters personal dependency, rather than independence and autonomy, a result completely at odds with the values that the Constitution seeks to promote.

E. Conclusion to Part II

The Amish no longer have the same interests in an exemption from compulsory high school attendance that the Court found they had in 1972. They do not need the exemption to protect their children from negative influences at "worldly" high schools, nor do

[170] 347 U.S. at 493.

they need it to avoid interference with the agricultural training of their youth. This is not to say, however, that Amish parents and church leaders have no continuing interests in *Yoder*. They have indeed "ordered their thinking and living around that case,"[171] as it has allowed the church to maintain authority and strictness without having to worry about its young people leaving the flock. The decision also helps "define [young Amish persons'] views of themselves and their places in society"[172] by reinforcing the church's message of separation. Furthermore, the education exemption helps Amish communities prevent defection by hampering the ability of Amish-raised individuals to "participate equally in the economic and social life of the Nation."[173] These reliance interests, however, are at odds with the "human values" that the Constitution serves, particularly the economic and religious autonomy interests possessed by Amish-raised individuals. The interests that the Amish have in *Yoder* today—the restriction of their members' economic and religious freedoms—are simply not as central as the interests of Amish youth whose educations are cut short. If the Court finds that the change in factual situations or Free Exercise law supports the argument to overturn *Yoder*, the reliance interests of the Amish community should not prevent the Court from doing so.

III. THE EVOLUTION OF LEGAL PRINCIPLES: HOW *SMITH* RENDERED *YODER* "A REMNANT OF ABANDONED DOCTRINE"

This Part examines the third inquiry in the Court's stare decisis test: "[W]hether related principles of law have so far developed as to have left the [prior decision] no more than a remnant of abandoned doctrine . . . ."[174] If the Court were to reevaluate *Yoder*, it would consider whether the evolution of legal principles has left *Yoder*'s doctrinal footings weaker than they were in 1972 and whether the development of constitutional law since the case was

[171] *Casey*, 505 U.S. at 855.
[172] Id.
[173] Id.
[174] Id.

decided has left *Yoder* behind "as a mere survivor of obsolete constitutional thinking."[175]

As discussed in Part I, the Court decided *Yoder* under the *Sherbert* test, holding that if the Amish could show that the compulsory education laws substantially burdened the free exercise of their religion, the state would have to show a compelling interest in the law as applied to the Amish to justify its application. In *Employment Division v. Smith*, however, the Court held that a state does not have to meet strict scrutiny to justify a "*generally applicable*" law with an incidental burden on the exercise of a religious practice.[176] The Court used a new theory—"hybrid claims"—to reconcile the *Smith* decision with *Yoder*, a move that many legal experts find incredible.[177] This Part asserts that the *Smith* decision and subsequent decisions have left *Yoder* "a remnant of abandoned doctrine."[178]

In *Yoder*, the Court held that "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."[179] In *Smith*, however, the Court repudiated this notion by ruling that facially neutral laws that incidentally burden the free exercise of religion do *not* violate the First Amendment, so long as they can pass rational basis review.[180] The Court held that the *Sherbert* test, which the *Yoder* decision had employed, is inapplicable to an "across-the-board criminal prohibition on a particular form of conduct"[181]—precisely what Wisconsin's truancy laws were. The *Smith* Court attempted to reconcile its holding with *Yoder* by explaining:

> 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

[175] Id. at 857.
[176] 494 U.S. 872, 878–79 (1990) (emphasis added).
[177] See infra note 187 and accompanying text.
[178] *Casey*, 505 U.S. at 855.
[179] 406 U.S. at 220.
[180] 494 U.S. at 878–81.
[181] Id. at 884.

> conjunction with other constitutional protections, such as . . . the right of parents . . . to direct the education of their children.[182]

Justice O'Connor, however, argued that *Smith* was inconsistent with *Yoder*. "In *Yoder*," O'Connor wrote, "we expressly rejected the interpretation the Court now adopts . . . ."[183] The concurrence maintained that *Yoder* had "expressly relied on the Free Exercise Clause"[184] and accused the majority of trying to "escape" from "*Yoder* by labeling [it a] 'hybrid' decision[]."[185] Justice Souter, who joined the Court shortly after *Smith* was handed down, also believed that *Smith*'s "hybrid rights" distinction was unconvincing. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, he insisted that he was "not persuaded" by the Court's attempt to distinguish *Smith* from *Yoder* and that *Yoder* did not leave "any doubt" that the case turned on "fundamental claims of religious freedom."[186]

Academics have also expressed great skepticism of the hybrid rights theory, with most scholars believing that the hybrid rights argument "was a make-weight to explain *Yoder* that lacks enduring significance."[187]

But judicial and scholarly criticism is not the only indication of *Yoder*'s status as a constitutional outlier. In employing the "evolution of legal principle" test in *Casey*, the Court determined that *Roe v. Wade* was sound and that "courts building upon *Roe* [will not] be likely to hand down erroneous decisions as a consequence," because *Roe* "fits comfortably within the

---

[182] Id. at 881 (citing *Yoder*).

[183] Id. at 895 (O'Connor, J., concurring).

[184] Id. at 896.

[185] Id.

[186] 508 U.S. 520, 566 (1993) (Souter, J., concurring).

[187] Kent Greenawalt, Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses, 1995 Sup. Ct. Rev. 323, 335 (internal quotation marks omitted); see also Ira C. Lupu, *Employment Division v. Smith* and the Decline of Supreme Court-Centrism, 1993 BYU L. Rev. 259, 267 ("[T]he theory was no more than an unprincipled attempt to pretend that *Yoder* survived *Smith*."); William P. Marshall, In Defense of *Smith* and Free Exercise Revisionism, 58 U. Chi. L. Rev. 308, 309 n.3 (1991) ("The Court's claim that *Wisconsin v. Yoder* was decided on the basis of a 'hybrid' constitutional right is particularly illustrative of poetic license.") (citations omitted); Michael W. McConnell, Free Exercise Revisionism and the *Smith* Decision, 57 U. Chi. L. Rev. 1109, 1121 (1990) ("One suspects that the notion of 'hybrid' claims was created for the sole purpose of distinguishing *Yoder* in this case.").

framework of the Court's prior decisions, . . . the holdings of which are 'not a series of isolated points,' but mark a 'rational continuum.'"[188] The same can hardly be said, however, about *Smith*'s compatibility with *Yoder*.

The fact that *Yoder* remains on the books has caused great confusion in lower courts—as will be explored more completely in the next Part. Because the circuits have widely differed in their treatment of hybrid rights, it seems that at least some courts must be "hand[ing] down erroneous decisions" as a result.

If critics are correct in identifying the hybrid rights doctrine as "a make-weight to explain *Yoder*,"[189] then *Yoder* is indeed "a mere survivor of obsolete constitutional thinking."[190]

IV. PRACTICAL WORKABILITY: THE "HYBRID RIGHTS" THEORY CAUSES CONFUSION

By taking *Employment Division v. Smith* at face value and assuming that *Yoder* has, in fact, been preserved by the hybrid rights doctrine, we can turn to the fourth *Casey* test and consider whether the hybrid rights rule "has proven to be intolerable simply in defying practical workability."[191]

In applying the workability test, the *Casey* Court cited *Swift & Co. v. Wickham*, a case in which the Court held that an important procedural rule should not be maintained by stare decisis once it has proved unworkable because of the significant consequences to both litigants and courts.[192] The *Wickham* Court supported finding a procedural rule unworkable by noting that it had "been uniformly criticized by commentators" and lower courts had either "sought to avoid dealing with its application or have interpreted it with uncertainty."[193]

We have already seen in Part III that legal commentators have condemned the hybrid rights explanation of *Yoder*'s compatibility with *Smith* as disingenuous, but they have also widely criticized the

[188] 505 U.S. 833, 858 (1992) (quoting Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).
[189] Greenawalt, supra note 187, at 335.
[190] *Casey*, 505 U.S. at 857.
[191] Id. at 854.
[192] 382 U.S. 111, 116 (1965).
[193] Id. at 124.

hybrid rights theory for being unworkable, citing Justice Souter's concurrence in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*—mentioned in Part III.[194] In that concurrence, Justice Souter argued that there are fundamental flaws in the doctrine:

> [T]he distinction *Smith* draws strikes me as ultimately untenable. If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith* . . . . But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.[195]

In addition to criticism by observers, lower-court attempts to deal with *Smith* and the hybrid rights doctrine have resulted in "doctrinal confusions" and "serious departures."[196] Circuit and trial courts have taken various approaches in dealing with the theory. Some circuit courts have dismissed it outright, either rejecting *Smith*'s "hybrid"

[194] See, e.g., Joanne C. Brant, "Our Shield Belongs to the Lord": Religious Employers and a Constitutional Right to Discriminate, 21 Hastings Const. L.Q. 275, 282 (1994) ("[T]he hybrid-rights approach to free exercise exemptions is not only jurisprudentially unsound, as others have concluded, but unworkable in practical application."); Alan Brownstein, Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality, 18 J.L. & Pol. 119, 188 (2002) ("The conventional criticism of the hybrid rights exception . . . is that it is intellectually incoherent. To use the crude local vernacular, it just makes no sense."); Caroline Mala Corbin, Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law, 75 Fordham L. Rev. 1965, 1982 n.99 (2007) ("[T]he [hybrid rights cases] . . . ha[ve] been widely criticized as unworkable and created merely to account for prior precedent."); Christopher C. Lund, A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence, 26 Harv. J.L. & Pub. Pol'y 627, 630–31 (2003) (recognizing other authors who have criticized the hybrid-rights doctrine as "untenable"); James M. Oleske, Jr., Federalism, Free Exercise, and Title VII: Reconsidering Reasonable Accommodation, 6 U. Pa. J. Const. L. 525, 556 (2004) ("[T]he hybrid-rights rule[] has been roundly criticized as unprincipled and unworkable . . . .").

[195] Church of Lukumi Babalu Aye, Inc., v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring).

[196] See Carol M. Kaplan, Note, The Devil Is in the Details: Neutral, Generally Applicable Laws and Exceptions from *Smith*, 75 N.Y.U. L. Rev. 1045, 1060–64 (2000).

language as dicta[197] or following the U.S. Court of Appeals for the Sixth Circuit, which has rejected the theory outright as "completely illogical."[198] The U.S. Court of Appeals for the Ninth Circuit, similarly, has recognized the criticism the theory has received and has refused to allow "a plaintiff to bootstrap a free exercise claim in this manner."[199] The U.S. Court of Appeals for the Tenth Circuit requires plaintiffs to make out a "colorable claim" that a companion right has been infringed before employing heightened scrutiny under the hybrid rights theory.[200] The U.S. Court of Appeals for the Eleventh Circuit has not recognized hybrid claims, and district courts in the circuit have expressed skepticism towards such claims.[201] Still other appellate courts, including the U.S. Courts of Appeals for the Fourth, Fifth, Seventh, and Eighth Circuits, have yet to squarely address the issue,[202] although these courts and district courts within these circuits have referred to the hybrid rights theory as "seemingly impenetrable"[203] and "a very tricky area

[197] See Brown v. City of Pittsburgh, 586 F.3d 263, 284 n.24 (3d Cir. 2009) ("Relying on dicta in *Smith*, some litigants pressing Free Exercise claims have presented a 'hybrid rights' theory . . . . Like many of our sister courts of appeals, we have not endorsed this theory . . . ."); Knight v. Conn. Dep't of Pub. Health, 275 F.3d 156, 167 (2d Cir. 2001) ("[T]he language relating to hybrid claims is dicta and not binding on this court.").

[198] Kissinger v. Bd. of Trs. of Ohio State Univ., 5 F.3d 177, 180 (6th Cir. 1993).

[199] Jacobs v. Clark County Sch. Dist., 526 F.3d 419, 440 n.45 (9th Cir. 2008).

[200] See Swanson ex rel. Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 700 (10th Cir. 1998) (holding that a plaintiff is required to assert at least a "colorable claim" to an independent constitutional right to survive summary judgment).

[201] Chabad of Nova, Inc. v. City of Cooper City, 575 F. Supp. 2d 1280, 1297 (S.D. Fla. 2008).

[202] Workman v. Mingo County Bd. of Educ., No. 09-2352, 2011 WL 1042330 (4th Cir. Mar. 22, 2011) (recognizing that there is a circuit split over the validity of the hybrid-rights exception and then declining to decide the issue); Combs v. Homer-Ctr. Sch. Dist., 540 F.3d 231, 263 (3d Cir. 2008) (observing that the Eighth Circuit "has not defined the contours of the [hybrid rights] analysis"); Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston, 250 F. Supp. 2d 961, 989 (N.D. Ill. 2003) ("[The] Court of Appeals [for the Seventh Circuit] has yet to address this important issue."); Littlefield v. Forney Indep. Sch. Dist., 108 F. Supp. 2d 681, 705 (N.D. Tex. 2000) ("[T]here is no Fifth Circuit jurisprudence on the subject of hybrid rights.").

[203] Hicks ex rel. Hicks v. Halifax County Bd. of Educ., 93 F. Supp. 2d 649, 660–61 (E.D.N.C. 1999) ("Justice Souter's commentary and the appellate courts' confusion aptly demonstrate the conundrum facing courts attempting to apply *Smith* . . . . Yet the language of *Smith* remains . . . . Consequently, it is the responsibility of this court, until the Supreme Court changes its interpretation, to give meaning to the seemingly impenetrable hybrid-rights exception by applying the law to the facts of cases before it.").

of constitutional law."[204] Given this confusion, perhaps it is little surprise that courts have sought to avoid entering the "fray over the meaning and application of *Smith's* hybrid situations language."[205]

Recent case law suggests that even Justice Scalia, the originator of the hybrid rights theory, has abandoned the doctrine.[206] In *Watchtower Bible & Tract Society of New York v. Village of Stratton*, the Supreme Court held that the village violated the Free Speech Clause by requiring canvassers to obtain a permit before going door-to-door.[207] Justice Scalia concurred in the judgment but did not agree that "one of the causes of the invalidity of Stratton's ordinance is that some people have a religious objection to applying for a permit."[208] Justice Scalia argued that "[i]f a licensing requirement is otherwise lawful, it is in my view not invalidated by the fact that some people will choose, for religious reasons, to forgo speech rather than observe it. That would convert an invalid free-exercise claim . . . into a valid free-speech claim . . . ."[209]

The hybrid rights theory has been widely panned by commentators. Lower courts "have interpreted it with uncertainty,"[210] and the U.S. Courts of Appeals for the Second, Third, and Sixth Circuits have "sought to avoid dealing with its application"[211] by asserting that they will not take it into consideration in their decisions. Accordingly, under the fourth *Casey* test, the hybrid rights theory—upon which *Yoder*'s continued applicability relies—"has proven to be intolerable simply in defying practical workability."[212]

CONCLUSION

Yoder is a rare example of a case that fails each of the stare decisis considerations laid out in *Casey*. Shifting trends in Amish

[204] Ala. & Coushatta Tribes of Tex. v. Trs. of the Big Sandy Indep. Sch. Dist., No. 93-4365, 1994 WL 122255, at *1 (5th Cir. Mar. 31, 1994).
[205] Parker v. Hurley, 514 F.3d 87, 98 (1st Cir. 2008) (internal quotation marks omitted).
[206] Lund, supra note 194, at 631–32.
[207] 536 U.S. 150, 168–69 (2002).
[208] Id. at 171 (Scalia, J., concurring).
[209] Id.
[210] *Swift*, 382 U.S. at 124.
[211] Id.
[212] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992).

culture and American society have left *Yoder*'s holding untenable, as it is highly doubtful that the Amish could pass the *Sherbert* test today with the changes that have taken place since 1972. *Yoder* is not "subject to a kind of reliance that would . . . add inequity to the cost of repudiation,"[213] because the Amish community's reliance interests promote inequity and fly in the face of cherished constitutional values. Additionally, the Court's decision in *Smith* left *Yoder* "no more than a remnant of abandoned doctrine"[214] by repudiating the *Sherbert* balancing test under which *Yoder* was decided. Lastly, the hybrid rights test upon which *Yoder*'s continued applicability relies does not pass *Swift*'s "practical workability" test, as evidenced by the fact that it has been widely panned by commentators, lower courts have "interpreted it with uncertainty," and some courts have expressly admitted that they have "sought to avoid dealing with its application."[215]

While the chances of *Yoder* actually being relitigated before the Court may be remote, the stakes are very high. The argument laid out in this Note is not just about reversing a Free Exercise case with very narrow applicability; it is about removing a Supreme Court precedent that permits Amish children to be stripped of their education and, in many cases, their future. Thus, in concluding, this Note considers a couple of real-life examples of the human costs of *Yoder*'s continued applicability.

DeWayne C. is a nineteen-year-old Amish teen. DeWayne's parents did not let him go to school beyond the eighth grade, because they feared it would enable him to defect from the community. "I begged Mom and Dad [to let me go to high school]," DeWayne said, "but they said the reason you can't is if you go, then you'll more likely leave the Amish church, have a profession—like, you know, 'You're doing something else, then you won't come back at all.'"[216]

Velda B. is a young woman who grew up in an Amish family. When Velda was in elementary school, she was "full of questions" and recognized as a bright student.[217] Velda harbored a secret

[213] Id.
[214] Id. at 855.
[215] *Swift*, 382 U.S. at 124.
[216] Shachtman, supra note 51, at 97.
[217] Id. at 95.

ambition that many might not suspect an Amish girl would have: she wanted a career. "She had no particular career or job in mind, she just wanted a life out of the ordinary Amish channels."[218] She "lost interest" in middle school, however, when it became obvious that her parents would not let her go on to high school. Instead of preparing for a future career by attending high school like most girls her age, at age fifteen Velda was working at a demanding job in a factory that manufactured campers.[219] In her later teen years, when she was on the *rumspringa*,[220] she slipped into alcohol abuse:

> Being "drunk every weekend," she later thought, "kind of dulled some of the pain that I wasn't even aware of, and relieved the confusion for a little bit, but it didn't help solve the problem," which had its seat, she later came to believe, in her desires for a career and more knowledge about life.[221]

Marlin Hostetler, a thirty-six year-old father of two who was raised in an Amish community, lost his job on the production line at an RV factory in 2008. Hostetler did not attend high school, and this made it hard for him to compete for jobs against the hundreds of better-educated laid-off workers in the area. Initially he relied on short-term construction jobs, which took him away from his family for weeks at a time, and he later got a job working in a furniture store that paid less than one-third of what he made at the RV factory. He sold his home at a loss to avoid foreclosure, and he, his wife, and their two sons moved in with his parents. Eventually he got his old job back when the RV industry picked up in mid-2009, but he is now "chipping away at $25,000 in credit card debt."[222]

---

[218] Id. at 95–96.

[219] Id. at 96.

[220] *Rumspringa* (a German term for "running around") refers to a period of time in an Amish person's life that begins at sixteen (the age at which Amish individuals are considered adults) and ends when the person is baptized into the Amish church (typically during their early twenties). During the *rumspringa*, Amish young people are "no longer under the control of their parents, yet still free from the church." Kraybill, supra note 35, at 185. Many Amish young people, like Velda, use this period of relative freedom to experiment with vices such as alcohol. Kraybill, supra note 35, at 145–46.

[221] Shachtman, supra note 51, at 96.

[222] Kari Huus, RV Worker Rebounds, Cautiously, MSNBC.com (Oct. 21, 2009, 9:06 PM), http://www.msnbc.msn.com/id/33405027.

These examples provide a glimpse into the "[u]nmentioned . . . tragic side of Amish life."[223] The *Yoder* decision causes real suffering. It has stifled the dreams of countless young people and caused them to struggle as adults. With each year that passes, another class of Amish children drop out of school without earning a high school diploma. *Yoder* is no longer justifiable given the contemporary life in Plain communities, and those changed circumstances provide school officials with a basis from which to challenge the *Yoder* exemption. *Yoder* should be challenged, and it should be overruled, before yet another generation of Amish children see their educations cut short by an outdated doctrine.

[223] State v. Yoder, 182 N.W.2d 539, 550 (Wis. 1971) (Heffernan, J., dissenting).