ARTICLE

The Right to Exit Religion

ZALMAN ROTHSCHILD*

This Article argues that just over fifty years ago, in Wisconsin v. Yoder, *the Supreme Court recognized what might be called a right to exit religion. In this decision, the Court expressed appreciation for preserving insular religious communities, while simultaneously articulating the principle that accommodations for such communities must not unduly restrict community members' ability to exit should they wish to do so. Yet courts and scholars have largely overlooked* Yoder*'s recognition of a right to exit religion. To make this "right" more concrete, the Article examines impediments to it through a case study of one large insular religious community—the Hasidic community in New York—and shows how the ability to exit can, in practice, be illusory. By examining the Hasidic education system and custody disputes, the Article demonstrates that impediments to exit arise not only from internal communal practices but also, at times, from the state and courts themselves.*

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* Assistant Professor of Law and Horn Family Distinguished Research Scholar in Law and Religion, Benjamin N. Cardozo School of Law; J.D., magna cum laude, Harvard Law School; Ph.D., New York University; M.A., Yeshiva University. For helpful conversation or comments, I am immensely grateful to Douglas Baird, Netta Barak-Corren, Will Baude Brian Bix, Derek Black, Paul Billingham, Emily Buss, Nathan Chapman, Mary Anne Case, Chiara Cordelli, Rosalind Dixon, Dick Fallon, Noah Feldman, Fred Gedicks, Tom Ginsburg, Jonathan Green, Martin Guggenheim, Michael Helfand, Clare Huntington, Mike Klarman, Laura Lane-Steele, Daryl Levinson, Sandy Levinson, Chip Lupu, Stephen Macedo, Jonathan Masur, Jared Mayer, Martha Minow, Doug NeJaime, Alan Patten, Michael Pollack, David Pozen, John Sexton, Kate Silbaugh, Ed Stein, Stew Sterk, Nomi Stolzenberg, Mark Storslee, Julie Suk, Jeannie Suk Gersen, Mark Tushnet, and participants at the Stanford Constitutional Law Center workshop, Cardozo School of Law Faculty Workshop, University of Queensland Law School Faculty Workshop, University of Melbourne Law School Comparative Constitutional Studies Workshop, University of Sydney Law School Julius Stone Institute for Jurisprudence Workshop, University of Chicago Law School Regulation of Family, Sex & Gender Workshop, and the BYU Law School Faculty Workshop, as well as to Tanya Bansal, Anthony Cataldo, Abby Halperin, Kira Kilstein, and Josh Moriarty for excellent research assistance.

INTRODUCTION

The right to exit religion has generally not been recognized in legal scholarship. Free exercise is typically understood as the right to practice one's faith and to be free from government discrimination on the basis of religion.[1] At times, free exercise has been cast as a right of "exit," but that right runs in only one direction: as a right to exit society through exemptions from laws binding on the rest of society.[2] This Article surfaces the opposite right: a right to exit religion and *join*

1. *See, e.g.*, Kane v. De Blasio, 19 F.4th 152, 163–64 (2d Cir. 2021) ("The Free Exercise Clause thus protects an individual's private right to religious belief, as well as 'the performance of (or abstention from) physical acts that constitute the free exercise of religion.'" (quoting Cent. Rabbinical Cong. of U.S. & Can. v. N.Y.C. Dep't of Health & Mental Hygiene, 763 F.3d 183, 193 (2d Cir. 2014))); Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 532 (1993) ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.").

2. *See, e.g.*, Garrett Epps, *What We Talk About When We Talk About Free Exercise*, 30 ARIZ. ST. L.J. 563, 583 (1998) (characterizing certain free exercise claims as "separationist," whereby "claimants seek state protection for the creation of a social sphere separate from the larger society in which they may observe their religiously ordered way of life"); Robin West, *A Tale of Two Rights*, 94 B.U. L. REV. 893, 894–96 (2014) (distinguishing between two kinds of rights: first, the "right to exit," which is the right to "opt-out" of "some central public or civic project," and second, the "rights to enter," which are rights to

society. While the right to exit religion can take various forms, this Article focuses in particular on the right to exit insular religious communities.[3] This right encompasses the ability both to extract oneself from a religious community and to enter a new community of one's choosing—thereby forming a new identity.

The right to exit religion was recognized in *Wisconsin v. Yoder*, a landmark 1972 Supreme Court free exercise decision.[4] But it was not until 2022 that a court squarely held that "individuals have a First Amendment right to leave a religion."[5] That declaration was made in *Bixler v. Superior Court*, in which the California Court of Appeals refused to enforce an agreement by a former Scientologist to submit future disputes to Scientology arbitration, reasoning that enforcement "would bind members irrevocably to a faith they have the constitutional right to leave."[6]

In *Bixler*'s wake, several scholars critical of the decision observed that "exit rights . . . are underdeveloped and not well analyzed, and this is the first opinion . . . to rule that contracts may be breached in order to facilitate exit from a faith."[7] Meanwhile, a different cadre of scholars argued that the right to exit one's religion

participate fully in civic society). West lists the Court's decisions in *Hobby Lobby* and *Hosanna-Tabor* as examples of "exit rights" for institutions seeking exemptions from the obligations imposed on employers by the Affordable Care Act or Civil Rights Acts. *See id.* at 902; *see also* Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1274 (2011) ("[T]he new multiculturalism encapsulates attempts by minority groups to exit the public sphere."). *See generally* Abner S. Greene, *Kiryas Joel and Two Mistakes About Equality*, 96 COLUM. L. REV. 1 (1996) (discussing *Kiryas Joel v. Grumet* and the Hasidic community through the lens of "exit" from society).

3. To be sure, a "right of exit" is not unique to religion. Many other kinds of exit intersect with law, including—among others—exit from marriages, contracts, partnerships, a state, a country, and false imprisonment. Exit, as a general legal concept, is worthy of its own full-length study—or several. For a non-legal classic on exit, see ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 21–29 (1970). Just as the right to exit religion is a subset of rights of exit more generally, it is also a specification of a broader free exercise category (what might be termed "freedom *from* religion"), or so this Article contends. *See infra* note 105 and accompanying text.

4. 406 U.S. 205 (1972).

5. Bixler v. Superior Ct., No. B310559, 2022 WL 167792, at *11 (Cal. Ct. App. Jan. 19, 2022), *review denied* (Apr. 20, 2022), *cert. denied sub nom.* Church of Scientology Int'l v. Bixler, 143 S. Ct. 280 (2022). In *Bixler*, former members of the Church of Scientology sued the Church for harassment after they reported alleged rapes to the police. The Church sought to enforce arbitration agreements the plaintiffs had signed. *Id.* at *1. The question was not whether plaintiffs could be compelled to participate in a "religious ritual," a question the court deemed "immaterial." *Id.* at *11. Rather, the question was whether, "after petitioners have left the faith," they could be required to submit "to Scientology tribunals" composed of "Scientology members" and "governed by Scientology law," regardless of whether the arbitration itself was in any sense ritualistic. *Id.* According to the Church, "a condition for participation in the religion" was that members enter into an "'*irrevocable*' agreement to '*forever*' waive civil proceedings and submit to Scientology Ethics and Justice Codes in 'any dispute' with Churches of Scientology." *Id.* at *15. In other words, "one of the prices of joining its religion (or obtaining a single religious service) is eternal submission to a religious forum" and, effectively, a "waiver of petitioners' constitutional right to extricate themselves from the faith." *Id.* at *15. The court held that the "Constitution forbids a price that high." *Id.*

6. *Id.* at *11.

7. Brief for Professors Michael J. Broyde & Ronald J. Colombo as Amici Curiae Supporting Petitioner, *Bixler*, 143 S. Ct. 280 (No. 22-60) (footnote omitted).

is implicit in American constitutional law and should (finally) be formally recognized as a First Amendment right.[8]

Not surprisingly, the truth lies somewhere in between. This Article argues that the right to exit religion was central to the Supreme Court's reasoning in *Yoder*, in which the Court exempted Amish parents from a state compulsory education law.[9] *Yoder* stands out among the Court's religious freedom decisions: it is the only decision outside of the employment context in which the Court sided with religious plaintiffs before *Employment Division v. Smith*.[10] As such, *Yoder* is increasingly invoked in hot-button "parental rights" cases, including challenges to LGBTQ-inclusive education[11] and to bathroom policies that segregate students based on their sex assigned at birth.[12]

But for all its centrality, *Yoder* remains one of the most misunderstood and underutilized free exercise decisions.[13] This Article argues that *Yoder* has consistently been

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8. *See* Brief for Law & Religion Professors as Amici Curiae Supporting Plaintiffs at 15–16, *Bixler*, 143 S. Ct. 280 (No. B310559) ("An important free exercise right is the right to exit a religion." (quoting Marianne Grano, *Divine Disputes: Why and How Michigan Courts Should Revisit Church Property Law*, 64 WAYNE L. REV. 269, 284 (2018))); *id.* at 17–18 ("All courts should be unequivocal that the right to exit a church is constitutionally protected, as it must be for the Plaintiffs here.").

9. 406 U.S. 205 (1972).

10. 494 U.S. 872 (1990). *See* Zalman Rothschild, *The Impossibility of Religious Equality*, 125 COLUM. L. REV. 453, 461, 461 n.43 (2025) (discussing how, as of 1963, the Supreme Court "effectively sid[ed] with religious plaintiffs in only two cases over the ensuing twenty-seven years[:]" in *Sherbert v. Verner*, "three progeny cases that emerged from *Sherbert*, [that,] like *Sherbert*, dealt with unemployment benefits and served only to tweak *Sherbert*'s holding[,]" and *Yoder*).

11. *See, e.g.*, Mahmoud v. McKnight, 688 F. Supp. 3d 265, 293 (D. Md. 2023), *aff'd*, 102 F.4th 191 (4th Cir. 2024), *cert. granted sub nom.* Mahmoud v. Taylor, 145 S. Ct. 1123 (2025), *and rev'd and remanded sub nom.* Mahmoud v. Taylor, 145 S.Ct. 2332 (2025) (in a case involving LGBTQ-inclusive public school instruction, pointing to various "cases [that] relied on *Yoder*, a seminal Supreme Court case that reaffirmed the 'right of parents to direct the religious upbringing of their children'").

12. *See, e.g.*, Parents for Priv. v. Barr, 949 F.3d 1210, 1231 (9th Cir. 2020) (addressing plaintiffs' argument that *Yoder*'s parental right "extend[s] to a right to require a particular bathroom access policy for transgender students"). *See generally* Clare Huntington, *Parental Rights: Rhetoric Versus Doctrine*, 91 U. CHI. L. REV. 503, 507 (2024) (discussing parent-child relationships, noting that "[p]arental rights are in the news" right now); Latoya Baldwin Clark, *The Critical Racialization of Parents' Rights*, 132 YALE L.J. 2139 (2023) (canvassing challenges to prohibitions on teaching Critical Race Theory in public schools).

13. *See* MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF Law 131 ("My vote for the worst Religion Clause case in the United States goes to *Wisconsin v. Yoder*."); Mark Strasser, Yoder*'s Legacy*, 47 HOFSTRA L. REV. 1335, 1335 (2019) (discussing "*Yoder*'s mixed messaging"); Epps, *supra* note 2, at 582 (noting that "[t]he opinion in *Yoder* is somewhat confused in tone"). *But see* Steven D. Smith, Wisconsin v. Yoder *and the Unprincipled Approach to Religious Freedom,* 25 CAP. U. L. REV. 805, 818 (1996) ("*Yoder* in particular ... contain[s] something worthy of study.") [hereinafter *Religious Freedom*]; Steven D. Smith, *Free Exercise Doctrine and the Discourse of Disrespect*, 65 U. COLO. L. REV. 519, 531 (1994) ("*Yoder* [is] arguably the most important free exercise case between *Sherbert* and *Smith*.").

Courts have been reluctant to apply *Yoder* to non-Amish religious groups, often confining it to its unique facts. *See, e.g.*, Mahmoud v. McKnight, 102 F.4th 191, 211 (4th Cir. 2024) ("In the decades since *Yoder* was decided, other circuit courts of appeals have expressed a similar understanding of its limited holding, connecting its discussion to the unique record established concerning the Amish faith[.]"); Parker v. Hurley, 514 F.3d 87, 100 (1st Cir. 2008) ("Tellingly, *Yoder* emphasized that its holding was essentially sui generis, as few sects could make a similar showing of a unique and demanding religious way of life that is fundamentally incompatible with *any* schooling system."); Mozert v. Hawkins Cnty. Bd. of Educ.,

misread by both its supporters and its critics. It reconstructs *Yoder* by foregrounding the right to exit religion as a constitutional principle at the decision's core. Although this dimension has been largely neglected, a close reading reveals that the right to exit religion was not only recognized by the Court in *Yoder* but central to its holding. This Article illustrates how the Court in *Yoder* both expressed appreciation for preserving insular religious communities and established a rule that accommodations for such communities must not come at the cost of limiting community members' ability to exit should and when they wish.[14]

To draw attention to the right of exit's enduring importance and raise questions about its precise meaning, the Article offers two contemporary examples involving the Hasidic community in New York. As the Article shows, the state's longstanding accommodation of Hasidic schools denies Hasidic children (especially boys)[15] a basic secular education, making it exceedingly difficult for members of the community to exit should they wish to do so. Meanwhile, state courts impede exit by granting custody to Hasidic parents over ex-Hasidic ones, ordering Hasidic children of divorced parents remaining in Hasidic schools, and instructing the ex-Hasidic parent to abide by those schools' comprehensive religious rules governing the home.[16]

These case studies illustrate how, fifty years after *Yoder*, its right to exit religion not only remains unrealized but is, at times, actively undermined by the legal system. The case studies also highlight critical conceptual challenges the Court glossed over in *Yoder*.

Specifically, there will inevitably be costs associated with leaving one's religion and community; a right to exit religion cannot be a cost-free right. Instead, the right to exit religion is a right to not be forced to incur prohibitive costs—a relative standard. But which costs are too high? This Article begins to formulate an answer by way of examples that could be characterized as extreme: instances

827 F.2d 1058, 1067 (6th Cir. 1987) ("*Yoder* rested on such a singular set of facts that we do not believe it can be held to announce a general rule that exposure without compulsion to act, believe, affirm or deny creates an unconstitutional burden."); Fellowship Baptist Church v. Benton, 815 F.2d 485, 496–97 (8th Cir. 1987) (holding that *Yoder* does not apply to non-Amish parents); Steven D. Smith, *Wisconsin v. Yoder and the Unprincipled Approach to Religious Freedom*, 25 CAP. U. L. REV. 805, 808 (1996) ("*Yoder* was repeatedly brushed aside.").

I disagree with the view that *Yoder* is *sui generis* and confined to its Amish context. As this Article went to press, the Supreme Court, in a majority opinion penned by Justice Alito, reclaimed *Yoder*'s importance and broader applicability. *See* Mahmoud v. Taylor, No. 24-297, 2025 WL 1773627, at *19 (U.S. June 27, 2025) ("*Yoder* is an important precedent of this Court, and it cannot be breezily dismissed as a special exception granted to one particular religious minority. It . . . embodies a principle of general applicability. . . ."). However, the Court selectively reclaimed only part of *Yoder*, and even that part incompletely and perhaps incorrectly. It reclaimed *Yoder*'s "robust protection for religious liberty" against those government actions that undermine "the religious beliefs and practices that the parents wish to instill in their children" while ignoring the central roles that communalism and "positive pluralism" played in the decision's reasoning. *Id.* at 30, 36; *see infra* notes 34–51 and accompanying text. More importantly, the Court failed to recognize and reaffirm *Yoder*'s concern for children's free exercise right to exit religion, which can stand in *tension* with their parents' religious liberty. *See infra* note 111.

14. *Yoder*, 406 U.S. at 205.

15. *See infra* notes 150–52 and accompanying text.

16. *See infra* Sections III.B–D.

where exiting religion comes with exceptionally high costs. These examples support further exploration by providing "fixed points" to anchor the discussion.[17]

In addition to serving as fixed points, the case studies illustrate the limitations of a common justification for granting constitutional accommodations to religious communities: consent. While legal scholarship has largely overlooked the right to exit religion,[18] political theorists—most notably in debates about accommodations for insular religious communities whose norms diverge from those of mainstream society—have given it sustained attention.[19] These theorists often defend accommodations for illiberal groups on the ground that members of these groups consent to membership and, with it, the group's internal norms and rules, including those that conflict with state law.[20] If they wished to exit, the logic goes, they would.[21] Indeed, according to some scholars, consent—premised on the right of

17. I mean "fixed points" in the Rawlsian sense, which are moral intuitions that are so compelling and widely accepted that they can serve as foundational starting points for discussion. *See* Paul Weithman, *Fixed Points and Well-Ordered Societies*, 22 POL. PHIL. & ECON. 197, 201 (2023).

18. For notable exceptions, see Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 960 (2013) ("[E]xit from one's traditions and culture is quite difficult, and norms of behavior are often coercive."); Helfand, *supra* note 2, at 1282–87 (engaging with Ayelet Shachar's MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS 40–41 (2001)); Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144, 165 (2003) ("Neither American constitutional traditions nor the abstractions deployed by consent theory . . . resolve controversies about the permissibility of . . . tactics to retain members."); Mark D. Rosen, *The Outer Limits of Community Self-Governance in Residential Associations, Municipalities, and Indian Country: A Liberal Theory*, 84 VA. L. REV. 1053, 1097–99 (1998) (discussing the importance of "opt-outs" from self-governing communities).

19. Scholars have long debated the virtues and pitfalls of accommodating multicultural communities whose norms diverge from those of mainstream society. For some, granting multicultural communities autonomy is ill-advised because it risks further entrenching illiberal practices, harming vulnerable members within those communities. *See, e.g.,* SEYLA BENHABIB, THE CLAIMS OF CULTURE 82–104 (2002); Ayelet Shachar, *Two Critiques of Multiculturalism*, 23 CARDOZO L. REV. 253, 257–58 (2001); AYELET SACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS 40–41 (2001); Susan Moller Okin, *Feminism and Multiculturalism: Some Tensions*, 108 ETHICS 661 (1998); *see also* Will Kymlicka, *Two Models of Pluralism and Tolerance*, in TOLERATION 81, 96 (David Heyd ed., 1996); Nancy Fraser, *From Redistribution to Recognition? Dilemmas of Justice in a 'Post Socialist' Age*, 212 NEW LEFT REV. 68 (1995). Meanwhile, for others, multicultural communities are deserving of robust autonomy because states have no special standing over communities that govern themselves through their own rules and norms. *See, e.g.*, Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 28–29 (1983) (arguing that since judicial interpretation cannot be based on purely objective, universally valid principles, the state must take seriously self-governing communities' constitutional interpretations as applied to themselves); RAINER FORST, CONTEXTS OF JUSTICE: POLITICAL PHILOSOPHY BEYOND LIBERALISM AND COMMUNITARIANISM (John M.M. Farrell trans., Univ. of Cal. 1994) (detailing communitarian critiques of liberalism).

20. *See, e.g.*, CHANDRAN KUKATHAS, THE LIBERAL ARCHIPELAGO 5, 8 (2003) (defending a strong view of autonomy for illiberal groups premised on an assumed right of exit, even when the possessor of the right is unaware of any other kind of life).

21. *See id.* John Rawls considered "ecclesiastical power" legitimate because "those who are no longer able to recognize a church's authority may cease being members." JOHN RAWLS, POLITICAL LIBERALISM 221 (1993). Indeed, the doctrine of church autonomy is often defended on the basis of this assumption that by virtue of joining a church, members impliedly consent to its authority. *See* Schragger & Schwartzman, *supra* note 18, at 956–62 (discussing the relationship between voluntarism and church autonomy); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1505 (1981) ("Voluntary affiliation with the group is the premise on which group autonomy depends.").

exit—is the silver bullet that solves the puzzle of how liberal societies should treat *il*liberal communities.[22]

The problem with this defense is that it is largely divorced from the realities of insular religious communities.[23] Scholars often presume that the right of exit is genuine and attainable, and this assumption permits consent to be inferred from the mere absence of exit.[24] Yet, as the Hasidic education and custody case studies explored in this Article demonstrate, the right of exit from such communities is often little more than a phantom. These examples highlight the paradox that the very accommodations liberal society extends to illiberal communities can undermine the right of exit that ostensibly justifies their provision.

Before proceeding, a brief clarification is in order. Although the Article adopts the term "right," I am not wedded to it. Rights function primarily as negatives—constraints on government action.[25] On this conception, constitutional rights are individual rights to not be regulated in certain domains, such as religion or speech, or to not be regulated in particular ways, such as arbitrarily or invidiously.[26]

When this Article speaks of the "right to exit religion," it refers not to this narrow sense of protection from government infringement—though, as I will show, it can function that way under certain conditions[27]—but to a broader constitutional principle or value. In this respect, the Article draws on Lawrence Sager's "distinction between the scope of the Constitution itself, on the one hand, and the distinctly narrower scope of the judicially enforced Constitution, on the other."[28] This view maintains that the Constitution and its interpretation offer not only a set of negative rights enforced by the judiciary, but also a set of "[a]ffirmative social rights" that "come wrapped with questions of judgment, strategy, and responsibility that seem well beyond the reach of courts in a democracy."[29] These affirmative commitments are left primarily to

22. *See* KUKATHAS, *supra* note 20; Michael A. Helfand, *Implied Consent to Religious Institutions: A Primer and A Defense*, 50 CONN. L. REV. 877, 897–902 (2018). For an alternative view that acknowledges the insolubility of this puzzle, see VICTOR M. MUNIZ-FRATICELLI, THE STRUCTURE OF PLURALISM: ON THE AUTHORITY OF ASSOCIATIONS 11 (2014) (referring to the puzzle as a "tragic conflict"); Nomi M. Stolzenberg, *The Return of the Repressed: Illiberal Groups in a Liberal State*, 12 J. CONTEMP. L. ISSUES 897, 900 (2002) (discussing the paradox of the puzzle).

23. Much of the debate over the pros and cons of accommodating multiculturalism is conducted in the abstract. *See, e.g.*, Larry Alexander, *Illiberalism All the Way Down: Illiberal Groups and Two Conceptions of Liberalism*, 12 J. CONTEMP. LEGAL ISSUES 625, 627–28 (2002).

24. To be sure, this does not apply to all scholars. Some have critiqued the defense of "exit" as naïve at best, emphasizing, for example, that women and children often lack opportunities to leave. *See, e.g.*, SHACHAR, *supra* note 19, at 40–41; Leslie Green, *Rights of Exit*, 4 LEGAL THEORY 165, 172 (1998) ("It is as difficult to leave many social groups as it is to leave the state, and in some cases it is even impossible."); *see also* Jeff Spinner-Halev, *Autonomy, Association and Pluralism*, *in* MINORITIES WITHIN MINORITIES 157, 159–67 (Avigail Eisenberg & Jeff Spinner-Halev eds., 2005) (proposing "a meaningful right to exit" in balancing pluralism and autonomy). This Article aims to make this critique more concrete, with vivid case studies that draw on interviews with actual stakeholders.

25. *See infra* notes 115–16.

26. *Id.*

27. *See infra* notes 119, 124 and accompanying text.

28. Lawrence Sager, *Thin Constitutions and the Good Society*, 69 FORDHAM L. REV. 1989, 1989 (2001).

29. *Id.* at 1989–90.

legislatures and executives to pursue,[30] though courts can and should safeguard them when they surface as more conventional negative rights in litigation. As this Article will show, the right to exit religion can operate in this way when courts adjudicate child-custody disputes or claims for exemptions from compulsory education laws.[31]

This Article does not purport to provide a comprehensive framework for operationalizing the right to exit religion, though it does suggest some possibilities.[32] Its more modest aim is to introduce the right as a constitutional principle, to ground it in Supreme Court precedent, to sketch some of its possible meanings, and to examine some contemporary examples that help illustrate its contours and continuing importance. The Conclusion outlines several specific questions for further study, with the hope that this Article will serve as a gateway to deeper inquiry into the theoretical contours, normative foundations, and doctrinal implications of the right to exit religion.

I. *YODER* ON PLURALISM AND ITS LIMITS

Yoder is often dismissed as a fact-bound anomaly.[33] This Part challenges that narrow reading, arguing instead that *Yoder* articulated a robust theory of pluralism while also imposing a crucial limiting principle.

A. POSITIVE PLURALISM

In *Yoder*, members of the Old Order Amish were convicted under Wisconsin's compulsory education statute for not enrolling their children in high school.[34] The Amish maintained that their religion called for children to leave school after eighth grade, at which point they would receive only agricultural and homemaking instruction.[35] The Court employed its "incidental burdens doctrine," which it

30. *Id.*

31. *See infra* notes 124, 246–59 and accompanying text.

32. *See infra* notes 118–26 and accompanying text.

33. *See supra* note 13.

34. 406 U.S. 205, 207–08 (1972). Some have characterized the issue in *Yoder* as Amish parents refusing to enroll their children in *public* high school. *See, e.g.,* Brief for Constitutional Scholars as Amici Curiae Supporting Respondents at 4, Mahmoud v. Taylor, 145 S. Ct. 2332 (2025) (No. 24-297), 2025 WL 1105497, at *4 ("[In *Yoder*] this Court held that parents whose families were members of the Old Order Amish faith could not—consistent with the Free Exercise Clause—be forced under threat of criminal sanction to send their children to public school after the eighth grade."); Gage Raley, Yoder *Revisited: Why the Landmark Amish Schooling Case Could—and Should—Be Overturned*, 97 VA. L. REV. 681, 707 (2011) 686–90 (arguing that because the Amish today have their own private schools and homeschooling is available, some of *Yoder*'s factual premises are no longer tenable and the decision should be overturned). That characterization is understandable given that the Court on one occasion gave the impression that one of the Amish parents' concerns centered on the environment in high schools, which would suggest the Court had specific schools in mind, like public schools. *See Wisconsin v. Yoder*, 406 U.S. 205, 211 (1972) ("[H]igh school attendance with teachers who are not of the Amish faith—and may even be hostile to it—interposes a serious barrier to the integration of the Amish child."). Moreover, the Wisconsin Amish community did not operate its own high school, so, realistically, Amish parents would have sent their children to the local public school if compelled to enroll their children in a high school. *See id.* at 207 ("[T]he respondents declined to send their children, ages 14 and 15, to public school after they completed the eighth grade."). But it is important to remember that *Yoder* was in fact about avoiding *any* formal high school, not public high school in particular. *Id.* ("Wisconsin's compulsory school-attendance law required them to cause their children to attend public or private school until reaching age 16."). *Pierce v. Society of Sisters* was still good law. 268 U.S. 510 (1925).

35. *Yoder*, 406 U.S. 205 at 215–29.

had (re)adopted nearly a decade earlier in *Sherbert v. Verner* but had yet to apply.[36] That doctrine required balancing the state's interest in applying its general law against burdens on religion imposed by the law.[37]

Applying the *Sherbert* test, the Court concluded that the benefits of compulsory high school, in the Amish context, did not justify interfering with the community's and parents' religious beliefs.[38] On the burden side, the Court emphasized that enforcing the law would directly conflict with the parents'[39] religious convictions.[40] As the parents explained, formal education beyond eighth grade would expose their children to the ways of mainstream society and the value it places on more advanced study (that is, study beyond the basics children learn through eighth grade). Meanwhile, Amish faith requires "life in a church community separate and apart from the world and worldly influence."[41] In addition to the burdens on individual beliefs and practices, the Court emphasized that requiring members of the Amish community to comply with the state's general compulsory education law would threaten the survival of Amish religious culture writ large.

Yoder is an ode to pluralism.[42] The Court recounted Amish religious culture at length to illustrate vividly what would be lost if Wisconsin were permitted to

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36. I say "(re)adopted" because in fact the Court first adopted this doctrine in the 1940s, though it swiftly and stealthily abandoned it. *See* Rothschild, *supra* note 10, at 461 n.38 ("Justice Alito's concurrence [in *Fulton*] is problematic for a host of reasons, but, somewhat ironically, it also missed an opportunity to tack on an additional twenty years to the religious liberty era it claimed was cut short by the Court in *Smith*.").

37. *See Yoder*, 406 U.S. at 215 ("The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. [H]owever strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests.").

38. *Id.* at 218.

39. And, on the Court's telling, their children's beliefs too. *Id.* at 215 ("We come then to the quality of the claims of the respondents concerning the alleged encroachment of Wisconsin's compulsory school-attendance statute on their rights and the rights of their children to the free exercise of the[ir] religious beliefs. . . .").

40. *Id.* at 215–19.

41. *Id.* at 210.

42. This gloss can be contrasted with a reading of *Yoder* that emphasizes the individual religious freedom of the Amish parents, though the two are not mutually exclusive. *See, e.g.*, Herrick v. Wain, 838 A.2d 1263, 1271 (Md. Ct. Spec. App. 2003) (describing *Yoder* as balancing individual religious freedom against the state's interests); Jeffrey Shulman, *What* Yoder *Wrought: Religious Disparagement, Parental Alienation and the Best Interests of the Child*, 53 VILL. L. REV. 173, 174 (2008) ("[In *Yoder*,] the government's ability to enforce generally applicable law [was] subject to an individual's religious beliefs."). In *Yoder*'s wake, several federal courts of appeals—correctly, in my view—recognized that communalism animated the decision. *See, e.g.*, Parker v. Hurley, 514 F.3d 87, 99–100 (1st Cir. 2008) (describing the law at issue in *Yoder* as "effectively overr[iding] [the Amish's] ability to pass their religion on to their children, as their faith required" and identifying *Yoder* as "embod[ying] judicial protection for social and religious 'sub-groups from the public cultivation of liberal tolerance[,]'" pointing out that *Yoder* was concerned with the "'way of life' . . . [of] a distinct community and life style" specifically); Leebaert v. Harrington, 332 F.3d 134, 144 (2d Cir. 2003) (describing *Yoder* as a response to a "threat to the Amish community's way of life" and differentiating the case at hand from *Yoder* in that the plaintiff had not alleged that "his community's entire way of life [was] threatened"); New Life Baptist Church Acad. v. Town of East Longmeadow, 885 F.2d 940, 951 (1st Cir. 1989) (differentiating the case at hand from *Yoder* in that the record did "not suggest that enforcement of the [state procedures] would destroy a religious community's way of life"); *see also* Mark L. Movsesian,

force Amish parents to enroll their fourteen- and fifteen-year-olds in high school.[43] Amish tradition, the Court explained, is defined by its "devotion to a life in harmony with nature and the soil,"[44] its "separation from, rather than integration with, contemporary worldly society,"[45] and its "aloof[ness] from the world and its values."[46] Unlike mainstream American society, the Amish live a "simple, Christian life deemphasizing material success, rejecting the competitive spirit, and seeking to insulate themselves from the modern world."[47] "Separate and apart from the world," theirs is a life of communalism rather than individualism.[48]

Yoder's pluralism is premised on the positive value of preserving distinctive communities. While it is true that communities are composed of individuals and, in many respects, exist to serve them, they are more than the sum of their parts. They possess inherent value derived from their distinctiveness, which contributes to society's diversity. From this perspective, it can be said that communities do not serve individuals so much as individuals serve communities.[49]

The New Thoreaus, 54 LOY. U. CHI. L.J. 539, 543 (2023) ("[T]he existence of a community of believers [in *Yoder* was] relevant to the definition of religion. . . ."); B. Jessie Hill, *Discrimination*, Wisconsin v. Yoder, *and the Freedom of Association*, 60 ST. LOUIS U. L.J. 695, 702 (2016) (highlighting *Yoder*'s focus on "the communal . . . aspects of the Amish religion").

43. Chief Justice Burger may also have emphasized the uniqueness of Amish culture and its infusion with religiosity to differentiate it from nonreligious communities, given his position that *Yoder*'s holding applied exclusively to *religious* communities. *Yoder*, 406 U.S. at 233–34. *See* Christopher C. Lund, *Religion Is Special Enough*, 103 VA. L. REV. 481, 508 (2017) ("Undoubtedly *Frazee/Thomas*/*Yoder* [which are limited to religion] and *Seeger/Welsh* [which are protective of deeply held secular commitments] sit in tension with each other. . . ."). Separately, but relatedly, one might argue that the Court expounded on Amish culture to underscore the sincerity of the parents' objection to secular high school. That objection was neither novel nor idiosyncratic: it could be traced historically and corroborated sociologically across the community. Nonetheless, even if *Yoder*'s communalism served multiple purposes, on my reading, an appreciation for cultural pluralism was a central feature of the decision—albeit confined to religious cultural pluralism.

44. *Yoder*, 406 U.S. at 210.

45. *Id.* at 211.

46. *Id.* at 210.

47. *Id.*

48. *Id.*

49. At its core, *Yoder* should be understood as a decision championing pluralism. The pluralism at stake in *Yoder* differs from the utilitarian version of pluralism often invoked in Religion Clauses scholarship—one grounded in fear of an overpowerful government. *See* Richard W. Garnett, *Religious Freedom, Church Autonomy, and Constitutionalism*, 57 DRAKE L. REV. 901, 903 (2009) (arguing that regarding churches as distinct sovereigns contributes to democracy's health by ensuring a multiplicity of powers). On my reading, *Yoder*'s pluralism is concerned with safeguarding disparate perspectives on the good life. This brand of pluralism goes beyond mere toleration, and it is not assimilative. It respects, invites, and nurtures difference. It accords with Horace Kallen's likening American society to an orchestra, in which—unlike the competing metaphor of a melting pot—nothing is "fused or melted." *See* HORACE M. KALLEN, *Democracy versus the Melting-Pot, in* CULTURE AND DEMOCRACY IN THE UNITED STATES 116–17 (1924) ("[I]n an orchestra every type of instrument has its special timbre and tonality, founded in its substance and form . . . so in society, each ethnic group may be the natural instrument, its temper and culture may be its theme and melody and the harmony and dissonances and discords of them all may make the symphony of civilization."); *see also* JOHN INAZU, CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE 31 (2016) (describing confident pluralism as allowing "citizens and the groups that they form" to live by their own norms, even if they "may be illiberal or inegalitarian").

In the Court's telling, Amish culture's distinctiveness was matched only by its vulnerability. Without judicial intervention, there was a "very real threat of [Wisconsin] undermining the Amish community and religious practice as they exist today."[50] Unless they could relocate to a more sympathetic state, Wisconsin's Amish community would be forced to "abandon belief and be assimilated into society at large."[51] The Court ultimately held that the Constitution shields the Amish from the state's compulsory education law—a holding grounded in part on the value of the distinctive contributions that religious subcultures make to a pluralistic society.

B. CONTEXTUALIZING EDUCATION

The line between pluralism and relativism is perilously thin. If diversity in education yields diversity in culture, and cultural diversity is to be celebrated—not just tolerated—it is hard to see why *any* compulsory education law should be enforced. So long as "difference" is valued for its own sake, it would seem that the more difference, the better. The pressing question, then, is where (if anywhere) law and society could and should draw the line between "good" and "bad," desirable and undesirable, forms of difference.

One answer might be the "best interests of the child," a touchstone in family law.[52] On this view, so long as an education system does not undermine children's best interests, it should be exempted from state education laws; to the extent it does, the law should govern. The difficulty, however, is that the "best interests" standard is infinitely malleable: the state can *always* assert that its laws serve the child's best interests, that is, the "interests" the state deems "best."

Indeed, in *Yoder* the state advanced precisely this argument, defending its compulsory education law as serving the best interests of Amish children.[53] Wisconsin stressed the costs to Amish children if the law were not enforced,[54] which, in its

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Perhaps somewhat ironically, *appreciation* for pluralism is sometimes promoted at the expense of pluralism itself. For example, according to Amy Gutmann, democracy is impossible without multiculturally-attuned citizens, which requires "conscious social reproduction." AMY GUTMANN, DEMOCRACY EDUCATION 39 (1999). On this view, legislatures should not exempt religious schools from comprehensive civics instruction even—perhaps especially—when the civic values conflict with the communities' beliefs and way of life. *Id.* at 120. For a similar view, see STEPHEN MACEDO, DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY 202 (2003); Stephen Macedo, *Transformative Constitutionalism and the Case of Religion: Defending the Moderate Hegemony of Liberalism*, 26 POL. THEORY 56, 72–73 (1998).

50. *Id.* at 218.

51. *Id.*

52. *See infra* note 230. The best-interests-of-the-child legal standard—common in family law—is often applied in the context of religion and child custody. *See, e.g.*, Sanborn v. Sanborn, 465 A.2d 888, 892 (N.H. 1983) (altering the father's visitation schedule to include Saturdays in light of the child's best interests); Osier v. Osier, 410 A.2d 1027, 1030–31 (Me. 1980) (noting that a court may consider a mother's religion so long as it poses a substantial threat to the child's well-being).

53. *Yoder*, 406 U.S. at 232.

54. *Id.* at 225–28. Put differently, the state viewed these benefits as sufficient to outweigh the attendant costs to Amish parents' and their community's religiosity. *See* Rothschild, *supra* note 10, at 516 ("Under the religious liberty model, courts were required to balance a law's burdens on religious practices against its intended benefits . . . [because] the government [was] constitutionally mandated to

view, required at least one or two years of high school for every child. The case, the state argued, implicated not only the generic constitutional question of how far its discretionary "power of the state" extended[55] but also the children's "substantive right" to an education[56]—arguably the strongest kind of interest—recognized in *Brown v. Board of Education*,[57] and which Wisconsin claimed it had a *duty* to enforce on their behalf.[58] When parents failed in that duty, as the Amish parents had, "the child must be protected" from the parental preference for "fostering ignorance."[59]

But "ignorance" is hardly self-defining.[60] The Amish might appear ignorant when measured by conventional standards of education and knowledge. But why should the majority's standards govern? According to the Court, they shouldn't. Wisconsin was "neither fair nor correct" to characterize the Amish as perpetrators of ignorance.[61] Indeed, by describing Amish education as fostering ignorance, the state revealed its own ignorance.[62] The majoritarian state not only failed to value a form of education different from its own; it failed even to recognize it as education at all. Yet, as the Court observed, the Amish did not oppose education beyond the eighth grade as such, but only "conventional formal education of the type provided by a certified high school."[63] It is true that Amish education did not cultivate "learned people," but neither did it purport to.[64]

As the Court suggested, education is a means to an end, and its ends are contextual: they depend on the community in which the child is expected to become an adult. Thus, "the value of all education must be assessed in terms of its capacity to prepare the child for life."[65] Yet there is no single, one-size-fits-all "life." Life is not a homogeneous, universal abstraction but a concrete, contextual reality,

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'value' religion sufficiently to refrain from imposing even unintended, incidental burdens on religious practice."); *see also* Sherif Girgis, *Unfinished Liberties, Inevitable Balancing*, 125 COLUM. L. REV. 531, 545 (2025).

55. *Yoder*, 406 U.S. at 220.

56. *Id.*

57. 347 U.S. 483 (1954).

58. *See* Brief for Petitioner, Wisconsin v. Yoder, 406 U.S. 205 (1972) (No. 70-110), 1971 WL 133705, at *18 (discussing "the substantive right of a child to an elementary and secondary education" and how "[i]n *Brown v. Board of Education of Topeka*, the court based its holding on the importance of the right of a child to a basic education and held that the denial by the state of that right constituted denial of equal protection of the laws. Similarly, the Amish child is being denied this right by the theocratic society into which he was born." (quotations and citations omitted)).

59. *Id.* at 222. That is, the state provides free education for those parents who wish to take advantage of it. Parents who opt out of public school education have the right to fulfill their obligation by providing their children with a private education. *See generally* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925). If they do not, the state must become the children's parents, as it were, in their role as *parens patriae*, and intervene. *See* Daniel L. Hatcher, *Purpose vs. Power:* Parens Patriae *and Agency Self-Interest*, 42 N.M. L. REV. 159, 159–62 (2012) (providing an overview of the *parens patriae* doctrine).

60. "Ignorance" is an empty category, defined only in relation to its opposite—"knowledge" or "education" terms that themselves are not self-defining.

61. *Wisconsin v. Yoder*, 406 U.S. 205, 223 (1972).

62. *Id.*

63. *Id.*

64. *Id*

65. *Id.* at 222.

lived in specific settings, shared among particular people, and shaped by local values. Insofar as "life in modern society as the majority live" is the "goal," requiring formal high school is sensible.[66] But the Amish do not live that life. Theirs is a "life in [a] separated agrarian community," and for *that* life a different form of education is not only appropriate but ideal.[67]

In light of this contextual approach to education, the Court found that the Amish community's "system of learning"—which included developing "the skills directly relevant to their adult roles in the Amish community"—was "ideal" "in terms of preparing Amish children for life as adults in the Amish community."[68] Amish children grow into Amish adults who live in an Amish community, and, as the Court concluded, the "Amish succeed in preparing their high school age children to be productive members of [that] community."[69]

The government's interest in a universal education was thus not only uncompelling, but it was misguided. It rested on the false notion of a single child archetype and a single ideal education to prepare her for a single ideal life. Yet while many children come of age in a predominantly secular world, others are raised in societies that are anything but.[70] It was therefore poor policy for the government to prescribe a uniform curriculum for all children,[71] and such a policy could not be

66. *Id.*

67. *Id.*

68. *Id.* at 212, 223.

69. *Id.* at 212.

70. This discussion raises deeper questions about the relationship between education and indoctrination and whether the state can *ever* avoid "indoctrinating" children so long as it is involved in their education, either by providing (and shaping the) free education that most Americans avail themselves of or by prescribing a minimum education for all children. Both forms of involvements are value-laden. *See infra* notes 87, 114. At oral argument in *Mahmoud v. Taylor*, Justice Barrett suggested a distinction between "exposure" and "indoctrination," as did Justice Jackson in *Barnette* more than eighty years earlier. Oral Argument at 39:29, Mahmoud v. Taylor, No. 24-297 (2025), https://www.oyez.org/cases/2024/24-297 [https://perma.cc/N4TA-GQGN] ("[T]here's actually in the book—you know, it—it presents a world view, right? . . . [A]nd many of the books, it's not just pictures; it's actually the text is—you know, it's talking about there are not just two genders, embracing, you know, nonbinary and—and pronouns, et cetera . . . to clarify, what are your clients objecting to? Are they objecting only to exposure, or are they objecting to what they're calling indoctrination?"); West Virginia State Board of Education v. Barnette, 319 U.S. 624, 631 (1943) ("[T]he State may require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty, which tend to inspire patriotism and love of country. Here, however, we are dealing with a compulsion of students to declare a belief."). But in the context of education, the distinction is mostly without a difference.

71. Of course, Amish parents had considerable choice with respect to *how* they educate their children. They could have sent their children to any number of private schools, for example. *See generally* Ira C. Lupu, *The Centennial of* Meyer *and* Pierce: *Parents' Rights, Gender-Affirming Care, and Issues in Education*, 26 J. CONTEMP. LEGAL ISSUES 147, 231 (2025) ("The Trilogy of the 1920's protected parents' rights to choose various educational options. . . .") What I mean by "one-size-fits-all" is that they did not have a choice about *whether* and with *what* (for the most part) to educate them, since compulsory education laws, including Wisconsin's, dictate the content of mandatory education. On that note, it is worth observing that the distinction drawn in *Pierce v. Society of Sisters* between the "how" (in *Pierce*, enrolling children in public school versus nonpublic school) and the "what" (the content of compulsory education), though meaningful to some degree, is hardly the difference between "standardizing" and not "standardizing" children that *Pierce* claims it is. *See* 268 U.S. 510, 534–36

justified in light of the First Amendment's promise of religious liberty and the Court's appreciation for pluralism.

C. THE RIGHT TO EXIT RELIGION

At this point, it would seem difficult for Wisconsin to justify imposing *any* compulsory education law on an unwilling religious community that has its own education system tailored to its distinctive way of life. Nonetheless, the Court "accept[ed]" one of the state's interests in universal compulsory high school education.[72] Though the state had no legitimate interest in preparing all children for its particular version of a good life, some children might wish to pursue such a life—or some other life besides the one they were born into. Here, the Court recognized that the state had not only a valid but a compelling interest in preserving every child's ability to choose for themself what kind of life to lead.[73] The constitutional calculus changed once the state interest was framed as ensuring the possibility of exit *from* the Amish community. While the state lacks even a legitimate—let alone compelling—interest in imposing a universal educational standard on all children so as to prepare them to live the same life, the Court suggested that it does have a compelling interest in safeguarding every child's ability to choose for herself what kind of life to lead.

The Court described this interest in terms of a right of Amish children to exit their religion. It noted Wisconsin's argument that high school education is necessary "because of the possibility that some such children will choose to leave the Amish community, and that if this occurs [and they are bereft of such an

(1925) (holding that the state may not "standardize its children by forcing them to accept instruction from public teachers only"). If the state may "regulate all schools . . . inspect, supervise and examine them, their teachers and pupils, require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare," only the state may not demand that children receive that education at a *public* school, the state is still very much—and I would argue even more meaningfully—"standardiz[ing] its children." *See id.* at 534–35.

72. Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

73. *See id.* at 221 (accepting that the state's "interest in its system of compulsory education is . . . compelling"). Meaning, on my reading of *Yoder*, the contextual-relativist approach to education—according to which Amish education must be accepted as adequate because it prepares children for an *Amish* life—holds only insofar as Amish children remain in the Amish community. The state's interest extended to Amish children who might one day wish to *leave* it. Chief Justice Burger's opinion—along with the other opinions—took this "interest" of the state seriously, namely, its interest in safeguarding children's right to exit religion. The Court agreed that the "right" to leave one's insular religious community serves as a limit on any free exercise protection it might grant. The Court disagreed with the state only with respect to the application of that limitation—which is what the Court meant by its disregard of any "sweeping claim[s,]" insisting on "searchingly examin[ing]" how the state's interests would apply to the specific facts at hand. *See id*; *see also* Smith, *Religious Freedom*, *supra* note 13, at 814 ("[t]he [*Yoder*] Court stresse[d] that the state's educational objectives [were] entirely legitimate and important . . . Notice that the Court is not really balancing here; it is not in the end asserting that some real loss in terms of the state's interests is outweighed by the gain to Amish religion or religious freedom. Rather, in the Court's presentation, the state's interests are not in fact impaired . . . .").

education] they will be ill-equipped for life."[74] It was important for the state that "if Amish children leave their church[,] they should not be in the position of making their way in the world without [a more robust] education."[75] That is, the state sought to ensure that Amish children could live outside of their inherited community—in other words, it aimed to secure the possibility of *exit*.[76]

The Court endorsed this state interest; it simply held that modern high school education was not required to vindicate it. At issue in *Yoder* were merely two years of education: ninth and tenth grades.[77] Crucial to the Court's analysis was the fact that "the Amish accept the necessity of formal schooling through the eighth grade level."[78] In addition to their "agricultural training" and soft skills of "industry and self-reliance," the Court explained, Amish children "learn basic reading, writing, and elementary mathematics" and thus attain the "basic skills in the 'three R's'" (Reading, Rriting, and Rithmetic).[79] Satisfying itself with a study "indicating that Amish children in the eighth grade achieved comparably to non-Amish children in the basic skills[,]"[80] the Court was content that "upon leaving the Amish community," those who disaffect will be in a position to find their way and not "become burdens on society because of educational shortcomings."[81] As an empirical matter, the Court was convinced that if an Amish person wished to integrate into society, the lack of a high school education would not "result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship."[82] In light

74. *Yoder*, 406 U.S. at 224.
75. *Id.*
76. *Id.* at 221–24.
77. *Id.* at 222.
78. *Id.* at 224.
79. *Id.* at 211–12, 224.
80. *Id.* at 225 n.13.
81. *Id.* at 224. One could interpret this state interest differently— as an attempt to reduce the number of individuals dependent on the government for financial support (in the event that some Amish people leave the Amish community)—rather than as an effort to secure a right of exit for children. But this articulation of Chief Justice Burger's about potential burdens on society comes immediately after his rather elaborate description of the state's (actual) articulated interest: enabling exit for the *child*. Also, as I explain shortly, Justices White's and Douglas's opinions clearly describe the state's interest as facilitating a right of exit. To the extent there is tension between their opinions and Chief Justice Burger's opinion, theirs constitute the rationale of the Court's plurality. *See infra* notes 88–109 and accompanying text.
82. *Id.* at 234. Though it is a separate question, one might wonder whether the Court was correct in its empirical assessment—namely, whether Amish children in fact received sufficient secular education to enable them to make a meaningful choice about remaining in the Amish community. *But see infra* notes 218–29 and accompanying text (suggesting a constitutional bare-minimum threshold of secular education, one that Amish children likely received). Relatedly, while it is true that, as a formal matter, Amish children upon turning sixteen can take advantage of "rumspringa"—a period in which they may "run around," after which they are given the choice of baptism into the church—some question whether this "choice" is truly a choice. *See* DONALD B. KRAYBILL, THE RIDDLE OF AMISH CULTURE 186 (rev. ed. 2001) ("Amish youth 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% of them do, in fact, embrace Amish ways.").

of these findings, the Court held that Wisconsin failed to demonstrate a compelling interest in enforcing its compulsory education law in this context.[83]

To be sure, Chief Justice Burger's opinion on behalf of the Court is confusing, if not contradictory. On one hand, Chief Justice Burger accepted Wisconsin's interest in preparing children to "mak[e] their way in the world" should any "Amish children [one day decide to] leave their church."[84] On the other, he warned against substituting Amish indoctrination with *secular* indoctrination, cautioning that "if the State is empowered, as parens patriae, to 'save' a child from himself or his Amish parents by requiring an additional two years of compulsory formal high school education, the State will in large measure influence, if not determine, the religious future of the child."[85] It is not clear how to distinguish between education that equips children to "mak[e] their way in the world" and education that impermissibly "influence[s], if not determine[s]" children's "religious future."[86] Taken to its logical conclusion, Chief Justice Burger's warning could be read to suggest that *all* compulsory secular education, insofar as it prepares children for a particular (secular) conception of the good life, amounts to (unconstitutional) indoctrination.[87]

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83. Smith, *Religious Freedom*, *supra* note 13, at 814 n.83.

84. *Yoder*, 406 U.S. at 232.

85. *Id.* at 224, 232.

86. *Id.*

87. Here, Chief Justice Burger is responding to Justice Douglas's position that high-school-aged children must be consulted before a court can exempt their parents from enrolling them in a modern, secular high school. Chief Justice Burger first disclaimed that his opinion takes a position on Justice Douglas's "hypothetical" of the Amish child who has "expressed desires to the contrary" of her parents—though in effect it did, considering that so long as the Court did not insist on hearing from Amish high-school-aged children, as Justice Douglas proposed, the Court implicitly took the position that (even actual) conflicts between the children and parents did not matter. He then suggested that to side with the state in such a situation, would, if anything, itself constitute "an intrusion by a State into family decisions in the area of religious training [and] would give rise to grave questions of religious freedom . . . ." *Id.* at 231. That is because "if the State is empowered, as parens patriae, to 'save' a child from himself or his Amish parents by requiring an additional two years of compulsory formal high school education, the State will in large measure influence, if not determine, the religious future of the child." *Id.* at 232.

This is a valid point. It is my contention that in the context of education, "indoctrination" is impossible to avoid. *See also infra* note 114. An implication of this is that the right to exit religion is not a "neutral" right in which the state abstains from taking a position on the good life. Underwriting the right of exit is the value of autonomy, and, like all values, autonomy is hardly neutral (though it is often portrayed as such). *See* Stephen Macedo, *Liberal Civic Education and Religious Fundamentalism: The Case of God v. John Rawls*, 105 ETHICS 468, 488 (1995) ("[T]he state has no business promoting broad ideals like personal autonomy."); Nomi M. Stolzenberg, "*He Drew a Circle That Shut Me Out*": *Assimilation, Indoctrination, and the Para dox of a Liberal Education*, 106 HARV. L. REV. 581, 586 (1993) (discussing the argument that "liberalism condemns indoctrination but refuses to acknowledge its own reliance upon it"); Moshe Halbertal, *Autonomy, Toleration, and Group Rights*, in TOLERATION (David Heyd ed., 1996) ("[B]asing individual freedom on the notion of autonomy could lead to imposing a particular conception of the good life on individuals who do not perceive autonomy as valuable."). *See also* JOHN RAWLS, POLITICAL LIBERALISM 200 (1993) (acknowledging that his version of liberalism would include "educat[ing] [children] to a comprehensive liberal conception"); BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 162 (1980) ("[A] liberal education . . . question[s] the seeming certainties of [children's] early moral environment [so] that the child can begin to glimpse the larger world of value . . . .").

But to the extent Chief Justice Burger's opinion is conflicted about the value of equipping children with the ability to exit their religious community, on this point he spoke only for himself and two other Justices. Often overlooked is that *Yoder* was a seven-Justice decision.[88] Four concurring Justices expressly conditioned their votes on the preservation of a right to exit the Amish community.[89] To the extent their position diverged from Chief Justice Berger's on this issue, it represents the controlling plurality view of the *Yoder* court.[90]

In a concurrence on behalf of himself and Justices Brennan and Stewart, Justice White stressed that he joined the majority opinion only because he was satisfied that the Amish children had received a basic education by the end of eighth grade. It would have been a "very different case," he explained, "if respondents' claim were that their religion forbade their children from attending any school at any time and from complying in any way with the educational standards set by the State."[91]

The concurrence emphasized that the Amish children had "acquir[ed] the basic tools of literacy to survive in modern society by attending grades one through eight,"[92] and the state had not shown that they "[would] be intellectually stultified or unable to acquire new academic skills later"[93] without further schooling. For Justice White and his colleagues, a basic education mattered because some Amish children might wish to "desert the Amish faith when they come of age."[94] Some "may wish to become nuclear physicists, ballet dancers, computer programmers, or historians," and states are justified "in seeking to prepare [children]

88. *Yoder* was decided by seven justices, as only seven were on the bench when the case was heard. *Id.* at 206. *Yoder* was heard on December 8, 1971 (and decided on May 15, 1972). *Id.* at 205. Justice Hugo Black had stepped down on September 17, 1971, two days before suffering a stroke (he died six days later). United Press Int'l, *Justice Black Dies at 85; Served on Court 34 Years*, N.Y. TIMES (Sept. 25, 1971), https://www.nytimes.com/1971/09/25/archives/justice-black-dies-at-85-served-on-court-34-years-civil-liberties-a.html. Justice Powell replaced him on January 7, 1972. *Justice Lewis Powell*, JUSTIA: U.S. SUP. CT. CTR., https://supreme.justia.com/justices/lewis-powell [https://perma.cc/U8LA-X8S2] (last visited May 10, 2025). Meanwhile, Justice John Marshall Harlan II stepped down on September 23, 1971 (and died three months later). *Justice John Marshall Harlan II*, JUSTIA: U.S. SUP. CT. CTR., https://supreme.justia.com/justices/john-marshall-harlan-ii [https://perma.cc/48U4-GPJF] (last visited May 10, 2025).

89. For Justices White, Brennan, and Stewart, their concurring votes rested on their view that the children received a sufficient foundational secular education. For Justice Douglas, it rested on Freida Yoder's testimony that she agreed with her parents that she should not attend a secular high school. These are different bases, but they share in common the assumption that the children's—in Justice Douglas's case, the single child's—right of exit was preserved.

90. By this, I am proposing that in addition to tallying Justices' votes on outcomes or even "issues," the Justices' respective rationales could—and I would argue should—also be counted. A majority rationale is at least as important, and arguably more important, than a majority holding. *See generally* Lewis Kornhauser & Lawrence Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1, 11 (1993) (discussing the possibility of "'issue-by-issue' voting [which] reflects the view of each judge on the constitutive issues").

91. *Yoder*, 406 U.S. at 238 (White, J., concurring).

92. *Id.* at 238.

93. *Id.* at 240.

94. *Id.*

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."[95]

Meanwhile, in a partial concurrence and partial dissent—concurring with respect to one child, Frieda Yoder, who testified at trial regarding her religious beliefs,[96] and dissenting with respect to the other two children who were not consulted—Justice Douglas stressed that an Amish child "may want to be a pianist or an astronaut or an oceanographer [and to] do so he will have to break from the Amish tradition."[97] Yet, "[i]f a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today."[98] Such a result, Justice Douglas warned, would "harness" the child "to the Amish way of life"—denying "the right of students to be masters of their own destiny."[99] This view plainly presupposes that children themselves hold a right to exit the religion of their birth. To safeguard that right, Justice Douglas argued, the Court must regard "the student's judgment, not his parents'," as "essential."[100] Unless children of insular religious communities affirmatively disclaim a desire for a secular high school education, as Frieda Yoder did, the full panoply of compulsory education laws must be enforced to ensure that those children retain the option of a different future.

Because the Court ultimately exempted Amish parents from the compulsory education law at issue, this dimension of *Yoder*'s reasoning has been overlooked. The decision is often remembered as a *failure* to consider the possibility that the interests of Amish children are distinct from those of their parents and community.[101] Yet, properly understood, *Yoder* can be read as supporting, rather than subverting, a constitutional right to exit insular religious communities—a possibility scholars of children's rights and of law and religion have largely failed to appreciate.[102]

To be sure, some might question whether *Yoder* recognized a right belonging to children or, rather, whether *Yoder* should be read more narrowly as merely marking the outer limit of free exercise protection for Amish parents and the

95. *Id.*

96. Justice Douglas noted that "Frieda Yoder ha[d] in fact testified that her own religious views are opposed to high-school education." *Id.* at 243 (Douglas J., dissenting in part). But, as Emily Buss has argued, considering that "Frieda was called to testify in open court in front of the entire assemblage of lawyers, judges, and interested onlookers, including her family's minister," and "was asked a series of leading questions," "[a]sking for her viewpoint was, in all likelihood, a meaningless display." *What Does Frieda Yoder Believe?*, 2 U. PA. J. CONST. L. 53, 67–68 (1999).

97. *Yoder*, 406 U.S. at 244–45 (Douglas, J., dissenting in part).

98. *Id.* at 245.

99. *Id.*

100. *Id.*

101. *See, e.g.*, Hamilton, *supra* note 13 (arguing that *Yoder* was wrongly decided because it neglected the children's interests); Debra McVicker, *The Interest of the Child in the Home Education Question:* Wisconsin v. Yoder *Re-examined*, 18 IND. L. REV. 711, 718 (1985) ("The Court, for example, failed to consider the 'marginal' Amish child, the one who would choose to leave the Amish community if given a real opportunity.").

102. To the extent scholars read *Yoder* as a case about exit, they typically confine that reading to Justice Douglas's opinion alone—a limitation this Article seeks to unsettle. *See, e.g.*, Rosen, *supra* note 18, at 1102 (describing only the opinion by Justice Douglas as concerned with "opt-outs").

Amish community. Most of the *Yoder* opinions couched the right to exit religion in terms of the government's interest, weighing the third-party harms to Amish children in the constitutional calculus.[103]

But in the context of education laws enacted for the benefit of children, the line between "governmental interests" and a "right" is not particularly bright. When the government seeks to equip children with the knowledge and skills necessary to leave their insular communities if they choose, its interest can fairly be described as advancing what it regards as the *right* of every child.

In recognizing the government's interest in preserving children's right to exit religion, the opinions offered a key insight into an often-missed dimension of free exercise: when granting free exercise protection to one group, courts must be mindful of the ways in which that protection may impede the free exercise of other groups. This includes the risk of undermining children's ability to decide for themselves whether to remain in insular religious communities.[104] Although free exercise is not typically conceived as including freedom *from* religion,[105] *Yoder* suggests that such freedom is as important as freedom *of* religion.

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103. In addition to unearthing a constitutional right to exit religion, this reading of *Yoder* helps to clarify the decision's place in the Court's free exercise jurisprudence in another respect. Douglas NeJaime and Reva Siegel have observed that, before *Smith*, the Court sided with religious plaintiffs in free exercise cases only when doing so did not impose harms on identified third parties. *See Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L. J. 2516, 2526 (2015). While *Yoder* might seem to contradict this observation, NeJaime and Siegel assimilate it to their account by arguing that, in *Yoder*, "the Court conceptualized the interests of the Amish children as aligned with their parents, such that the accommodation benefitted, rather than potentially harmed, the children themselves." *Id*. Consequently, "accommodating the religious liberty claim [in *Yoder*] would not have harmed specifically identified third parties." *Id*. The interpretation of *Yoder* I advance here offers a different account: the Court *did* consider the Amish children's interests—one could say as third parties—and treated the protection of those interests as a condition of upholding the free exercise claims of their parents and community.

104. Several Supreme Court decisions have addressed the problem of upholding one group's rights at the expense of another group's interests or rights. *See* Estate of Thornton v. Caldor, Inc. 472 U.S. 703, 708–11 (1985) (finding it unconstitutional for a state to require employers to relieve employees on their Sabbath, whichever day it might be, "no matter what burden or inconvenience this imposes on the employer or fellow workers"); United States v. Lee, 455 U.S. 252, 261 (1982) (emphasizing that "[g]ranting an exemption from social security taxes to a [religious] employer operates to impose the employer's religious faith on the employees"); Prince v. Massachusetts, 321 U.S. 158, 177 (1944) (Jackson, J., dissenting) ("My own view may be shortly put: I think the limits begin to operate whenever activities begin to affect or collide with liberties of others or of the public."). What I am describing here is the phenomenon not merely of granting a free exercise right to one group at the expense of some general interest or right of a different group, but at the expense of a different group's own right to free exercise specifically—what might be called "free exercise contra free exercise." *See generally* Frederick M. Gedicks, *Coase and Accommodation: A Reply*, 71 EMORY L.J. 1457 (2022) (analyzing third-party harms in economic terms); Stephanie H. Barclay, *First Amendment "Harms*," 95 IND. L.J. 331 (2020) (assessing the role third-party harms should play); James M. Oleske, Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 HARV. C.R.-C.L. L. REV. 99, 135 (2015) (discussing the importance of weighing third-party harms when considering religious exemptions from antidiscrimination laws).

105. Relatively little scholarship has treated freedom from religion as a right grounded in the Free Exercise Clause, rather than in the Establishment Clause. *See generally* Nelson Tebbe, *Nonbelievers*, 97 VA. L. REV. 1111 (2011) (discussing the status of nonbelievers under the Religion Clauses); 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 149 (2006); Douglas

Indeed, it is no coincidence that Justice White cast *Yoder* in terms of a duty owed to children: the state's "interest" was in effectuating all parents' duty to "prepare [their children] for the life style that they may later choose."[106] Meanwhile, for Justice Douglas, the interest at stake was "the *right* of students to be masters of their own destiny," a right that only children themselves could waive.[107] When courts consider exemptions from compulsory education, "[i]t is the future of the student, not the future of the parents, that [stands to be] imperiled by [the] decision."[108] In such cases, children's "rights" are "squarely before" the court and "should be considered" by it, for "children have no effective alternate means to vindicate their rights."[109]

Thus, while Chief Justice Burger underscored the value of preserving the distinctiveness of insular communities and stressed the inherently contextual nature of education, his opinion—and still more clearly those of Justices White and Douglas—also emphasized the importance of ensuring that the children of such communities are not rendered incapable of exiting them.[110] In this way, *Yoder* affirmed respect for difference, but not unqualified deference to it.

The line between appropriate and inappropriate deference is hard to draw. It is obscured by the inverse relationship between two values: the right to exit religion and the pluralism fostered by communal autonomy. The more insular religious communities deprive their children of the tools to survive outside, the more they ensure continuity within. And the more radical their educational philosophy and curriculum, the more they contribute to pluralism—while simultaneously entrenching their children in a world wholly apart from society.[111]

But according to *Yoder*, at least one identifiable and defensible line is safeguarding the "right of exit" of the very children who make the community's continuity possible, which includes ensuring that all children receive at least a basic elementary secular education.[112] Children transmit culture, but they are not merely

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Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 326–28 (1996). *See also* James Nelson, *Corporate Disestablishment*, 105 VA L. REV. 595 (2019) (discussing Title VII cases involving employers who impose religion on employees).

106. Wisconsin v. Yoder, 406 U.S. 205, 240 (1972).

107. *Id.* at 245 (Douglas, J., dissenting in part) (emphasis added).

108. *Id.*

109. *Id.* at 242 n.1, 245.

110. The Court's compromise echoes John Stuart Mill's position on education, which aimed to balance communal integrity with individual autonomy. On the one hand, consistent with his commitment to liberty and diversity, Mill opposed state regulation of education. "A general State education," Mill wrote, "is a mere contrivance for moulding people to be exactly like one another." JOHN STUART MILL, ON LIBERTY AND OTHER WRITINGS 190 (4th ed. 1869). Too much state intervention in education, he warned, produces uniformity, and thereby stifles diversity. On the other hand, Mill also declared that it is "a self-evident axiom that the State should require and compel the education, up to a certain standard, of every human being who is born its citizen." *Id.* at 188–89.

111. Put differently, there is an ineluctable tension between protecting children's right to exit religion and respecting the pluralist values of dissenting communities. A choice must be made between the children's (future) autonomy and the community's and parents' (current) autonomy. It is a zero-sum game; ultimately, a tradeoff must be made. Neutrality is not an option. *See infra* note 114.

112. Toward the end of Part II, I offer a (somewhat) more complete account of what such a basic education might consist of. *See infra* notes 218–29 and accompanying text.

instruments for its preservation. *Yoder* makes clear that communal distinctiveness cannot be maintained at the expense of a child's freedom to one day leave the community.

This dimension of *Yoder* reaches beyond its particular facts. It suggests that if a court or state agency wishes to exempt religious objectors from compulsory education laws, it may do so only on the condition that the children in question are equipped with the tools they will need to forge their own destinies if they should one day wish to part ways with the community of their birth. On *Yoder*'s telling, parents in insular religious communities have extensive rights, but they do not have the right to withhold from their children the language of broader society and the skills necessary to carve out a meaningful place for themselves in that society should they one day wish to join it.[113] In this sense, the "right of exit" from one's religious community can also be framed as the "right to enter" mainstream society.[114]

D. STATE ACTION

As previously mentioned, *Yoder*'s right to exit religion may be better understood as a constitutional principle than a right in the classical sense. In American constitutional law, negative rights are the norm: with few exceptions, constitutional rights operate as prohibitions on certain state actions—for example, the state may not intentionally discriminate on the basis of race or restrict the content of speech.[115] As a general matter, governmental *in*actions are not constitutionally prohibited.[116]

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113. *See* Prince v. Massachusetts, 321 U.S. 158, 170 (1944) ("Parents may be free to become martyrs themselves [but not] to make martyrs of their children.").

114. One cannot exit into nothingness. The relationship between exit and entrance is especially apparent in the context of secular education, as the knowledge and skills that enable children to exit an insular religious community are precisely the knowledge and skills that enable them to navigate—that is, enter—the secular world. This has implications for whether a "right of exit" can be understood as neutral. If exit is synonymous with entrance, and entrance is necessarily into a particular society (since every society is particular), with its own worldviews and values, then facilitating "exit" inevitably privileges one world (mainstream secular society) over another (one's inherited, religious world). Which is to say, at least in the context of education, neutrality is impossible. One might respond that the secular world represents "autonomy," which is about choosing for *oneself* which values and lifestyle one wishes to pursue, such that "entering" the secular world does not involve entering a specific "world" at all and rather is like entering a train station where one receives a ticket and can choose any train among many options heading to a wide variety of destinations ("worlds"). But that response would require assuming that autonomy does not represent a "world" of its own. It does. *See supra* note 87. This is, of course, an enormous topic.

115. *See* Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2273 (1990) ("Traditionally, the protections of the Constitution have been viewed largely as prohibitory constraints on the power of government, rather than affirmative duties with which government must comply."); *see also* Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1295 (1984); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1392 (1984). While the Sixth Amendment—which requires the government to provide the accused with a speedy and public trial and various other protections—and the right to be informed of one's right to remain silent might seem like exceptions to this rule, even these "positive" rights are not so positive—they apply only in the context of and (merely) as conditions for (negative) governmental deprivations. *See* U.S. CONST. amend. VI; Miranda v. Arizona, 384 U.S. 436 (1966).

116. *See* DeShaney v. Winnebago Cty. Dep't Soc. Servs., 489 U.S. 189 (1989) (distinguishing between governmental actions and inactions).

Because a "right" to exit religion would typically be violated by government inaction—a failure to promote conditions that enable individuals to leave their insular religious communities—this right would largely lie outside the purview of the judiciary, depending instead on legislative and executive action for its actualization.[117]

Yet it is worth asking whether *Yoder*'s promised right to exit religion could also function as a judicially enforceable negative right. What kinds of state actions might deprive individuals of that right and thereby invite judicial intervention?[118]

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117. The right to exit religion overlaps somewhat with the right to education, which also tends to raise the state action question. The right to education as a federal constitutional right has mostly been a nonstarter, not only because it is not enumerated but also—perhaps especially—because it is inconsistent with the constitution's general "negative rights" framework. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (rejecting access to education as a fundamental right); Hernandez v. Grisham, 508 F. Supp. 3d 893, 985 (D.N.M. 2020) ("[T]he Supreme Court has stated that no general right to education exists."). While some have attempted to deduce a right to education from various provisions of the federal constitution, these arguments have been rejected by the Supreme Court. *See, e.g.*, Derek Black, *Freedom, Democracy, and the Right to Education*, 116 N.W. UNIV. L. REV. 1031, 1096 (2022) ("[T]he right to education . . . reach[es] across multiple aspects of the Constitution."); *Rodriguez*, 411 U.S. at 35–36 (rejecting the argument "that education is itself a fundamental personal right, because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote").

It is true that state constitutions provide "positive" rights to education—a point sometimes stressed by scholars. *See, e.g.*, Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1135–36 (1999) ("[E]very state constitution . . . provides the basis for a variety of positive claims against the government[, including] the right of children to receive free public schooling."). But these are phrased specifically and merely as directives to the state to provide some form of education system. *See infra* note 160 (New York constitution's education clause); Scott R. Bauries, *The Education Duty*, 47 WAKE FOREST L. REV. 705, 722 (2012). It is perhaps for this reason that courts and scholars typically frame the "right to education" as a right to adequate finances for existing public education rather than as a broader right compelling the state to establish and enforce compulsory education laws. *See, e.g.*, Gary B. v. Whitmer, 957 F.3d 616, 620–21 (6th Cir. 2020), reh'g en banc granted, opinion vacated, 958 F.3d 1216 (6th Cir.); Scott R. Bauries, *A Common Law Constitutionalism for the Right to Education*, 48 GA. L. REV. 949, 1004–05 (2014); *infra* note 160. *But see infra* note 150.

This Section's discussion could help broaden what an (aspirational) positive right to education might entail. It suggests that, to the extent a right to education exists or will exist, it should include an affirmative duty on the part of the government to enact and enforce compulsory education laws in instances where parents do not want secular education for their children. To be sure, it is unclear how such a positive right to compulsory education would be operationalized if the state neglected to enact or enforce it. The children would be the holders of the right. Assuming they are of the age at which they might actually be positioned to bring a lawsuit—yet not past the age at which compulsory education would no longer apply such that they would lack standing—whom would they sue? Their parents, to whom compulsory education laws are directed? Perhaps they could sue the state for not enacting or not enforcing an education law, but such a legal action would be conceptually and doctrinally challenging. *See* Martha Minow, *Children's Rights Debates, Revisited*, 75 FLA. L. REV. 195, 213 (2023) ("[C]hildren and youth lack [the] means to enforce . . . legal protections."). While this Article's case study of courts and agencies exempting religious parents from education laws offers an example of state action that could implicate the right to education as a negative, rather than positive, right, the more practical problem of operationalization remains.

118. Charles L. Black once famously described state action as a "'doctrine' without shape or line . . . . [as having] the flavor of a torchless search for a way out of a damp echoing cave . . . . [and as] a conceptual disaster area." *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's* Proposition 14, 81 HARV. L. REV. 69, 95 (1967). What was true in 1967 remains true today. It should be noted, however, that some would have no difficulty finding a state action in inadequate government regulation of private religious schools, even if the state lacked compulsory

In some contexts, state action is clear. When a family court orders a parent to abide by religious rules—a phenomenon I will discuss shortly—the state has plainly acted.[119] The same can be said, though some disagree, when a court enforces a religious contract.[120]

State action is less straightforward in the realm of education. If a state does not require school attendance, the right of exit is undermined through inaction alone, leaving no affirmative state action to challenge.[121] But because every state has had compulsory education laws in place for over a century,[122] the relevant question is not whether states must require school attendance but whether courts or agencies may carve out special exemptions from those laws for religious objectors.[123] In granting such exemptions, state action is arguably present: it is the affirmative act of relieving religious parents of an otherwise binding legislative obligation.[124]

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education legislation altogether. *See* Mary Anne Case, *Feminist Fundamentalism on the Frontier Between Government and Family Responsibility for Children*, 2009 UTAH L. REV. 381, 391 (2009) ("[T]he state is under a constitutional obligation to protect children from receiving a discriminatorily inferior education on grounds of sex, whether or not that education is in a private or home school."); JAMES G. DWYER, RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS 85–86 (1998); Kimberly A. Yuracko, *Education off the Grid: Constitutional Constraints on Homeschooling*, 96 CAL. L. REV. 123, 156 (2008). *Cf.* Cass Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 887 (1987) (courts "rel[y] upon common law notions about the role of government" when "search[ing] for state 'action'").

119. By this, I do not mean merely that the government has "acted" in some general sense, but that it has acted in a way that has shifted the status quo. *See* Sunstein, *supra* note 118, at 903. *See infra* notes 271–74 and accompanying text.

120. As was requested in *Bixler*, for example. *See supra* note 5; Shelley v. Kraemer, 334 U.S. 1 (1948).

121. On my analysis, legislatures should take account of the "right to exit religion" as a constitutional principle. But if a legislature has not enacted a compulsory education law, there is no state action that would justify a court's intervention to secure the right of exit.

122. *See* Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education,* 81 GEO. WASH. L. REV. 92, 127 (2013) ("By 1918, education was compulsory in every state."). *See, e.g.*, Billy Gage Raley, *Safe at Home: Establishing a Fundamental Right to Homeschooling*, 2017 B.Y.U. EDUC. & L.J. 59, 65–67 (discussing advocacy for exemptions from compulsory school attendance laws). Of course, it is also possible a state will repeal or—as in the recent case of New York—scale back its existing compulsory education law, thereby removing the baseline of the preexisting law, making it appear that state action is lacking. If the legislature has no affirmative duty to enact compulsory education laws in the first place, perhaps it also has full license to scale them back. *See infra* note 124 and accompanying text. But even in such a case, an interesting question remains: does the "action" of instituting *in*action constitute state action for constitutional law purposes? *See infra* note 124. In 1967, the Court held that a state constitutional amendment prohibiting the state from interfering with individuals' freedom to choose to whom to sell property involved state action and was unconstitutional. Reitman v. Mulkey, 387 U.S. 369. The Court distinguished between "expressly authoriz[ing] and constitutionaliz[ing] the private right to discriminate" and the "mere repeal" of a statute, suggesting—but not holding—that the latter might not constitute state action. *Id.* at 376. For recent scholarship assuming that repeals do constitute state action, see Ronald J. Colombo, *The Repeal of Religious Accommodations: A Constitutional Analysis*, 73 AM. U. L. REV. 729, 747 (2024) and Nelson Tebbe, *Repeals of Religious Accommodations*, 74 AM. U. L. REV. F. 1, 27 (2024).

123. *See supra* note 119.

124. In such a case, a government entity—a court or agency—is actively deciding to exempt parents from an otherwise applicable law. The law's existence provides a baseline; deviations from that baseline can be understood as state action. Conversely, if the legislature had not enacted a compulsory education law in the first place, it would be hard to see how such inaction would constitute state action. *See supra* note 121.

Once state action is established, however, an arguably even harder question emerges: how should courts balance competing rights? As *Yoder* instructs, when protecting the free exercise of some, courts must take care not to undermine the free exercise of others. In *Yoder*, the "others" were the Amish children; their free exercise right was their eventual freedom to choose whether to remain within their religious community.[125] *Yoder* thus belongs to a broader set of cases that

When a court is weighing granting an exception to parents in light of their claimed right to free exercise, the "baseline" question intersects with one's theory of constitutional rights. If rights are understood as demarcations of spheres in which the government lacks authority to act, the baseline would be "no education law as applied to religious objectors," provided a court has concluded that the law is unconstitutional as applied to them. If rights are instead conceived as calls for balancing at the back end, the preexisting law is the baseline. *Compare* District of Columbia v. Heller, 554 U.S. 570, 643 (2008) (Scalia, J.) ("The very enumeration of the right takes out of the hands of government.") *with id.* at 689 (Breyer, J., dissenting) (balancing "whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests"). These views need not be mutually exclusive—one could take the position that the government has no authority to act *when* the benefits do not (significantly) outweigh the costs. Generally, though, on the former view the government lacks power in certain spheres altogether, whereas the latter is less about *authority*.

In some ways, the claim that preexisting laws set the baseline resembles an interesting argument in favor of a positive right to education. Some contend that because states are already active in the realm of education and provide free schooling on which parents rely, states have created a baseline of state-provided adequate education to which parents now hold a right. On this view, the state "acts" if it deprives parents of that baseline. *See* Friedman & Solow, *supra* note 122, at 127 ("[T]he compulsory nature of the state's command [of education has] encouraged reliance on the state and the creation of limited alternatives, in a manner not so terribly different from cases in which the Court has found a positive right."). *But see* John C. P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 595 (2005) (making the case for "a right to a law" where there is a "government[] monopoly," which can be "contrast[ed]" with education). Even if correct, this argument exemplifies the nearly exclusive (and thus limited) focus on the right to education as a right to sufficiently funded public schools, rather than as a right to enforced compulsory education laws. Parents who wish to educate their children may rely on free public education; parents who wish to withhold a secular education from their children do not. A positive right to compulsory education, thus, cannot be rooted in a reliance interest. This Article contributes to this conversation by identifying a form of state action that can be said to implicate a *negative* right: the right to not be deprived of a compulsory education.

125. The Court recently reaffirmed *Yoder* as a case of "general applicability," notwithstanding *Smith*. *See* Mahmoud v. Taylor, No. 24-297 (2025), at *19. But it is still worth reflecting on the "right to exit religion" under the *Smith* Court's holding that free exercise is a prohibition against governmental intentional discrimination on the basis of religion. *See* Rothschild, *supra* note 10 at 460 (on a "natural interpretation" of *Smith*, it "construed the Free Exercise Clause as prohibiting intentional discrimination against religion"). *See id.* at 487, 528–29. While a general compulsory education law is presumptively not motivated by religion—that is, unless one adopts an expansive definition of "religion" that includes "secularism" in its ambit, such that the law can be said to favor one "religion" over all others—an exemption from it well might be. The interesting question is whether it does. By this I do not mean to pose the rather tired question whether religious exemptions are, as a general matter, acts of favoritism toward religion such that they violate the Establishment Clause. *See, e.g.*, Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 335 (1987) ("[I]t is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious mission."). Rather, if a religious community seeks an exemption precisely to entrench its children in its religious culture by denying them a meaningful opportunity to leave, and a state entity grants that exemption in support of the community, the exemption can be understood as "on the basis of religion"—that is, on the basis of denying children choice with respect to religion. To be sure, "on the basis of" does not lend itself to easy interpretations. *See* Zalman Rothschild, *Antizionism, Antisemitism, Antidiscrimination*, 101 IND. L.J. (forthcoming 2026) (on file with author).

pose a question that invites no easy answers: how should conflicting negative rights be balanced? What should a court do when the negative rights of one group can be secured only at the expense of another's?[126]

These dilemmas underscore the limits of judicial resolution. While *Yoder*'s right to exit religion can and should be considered by the judiciary in certain contexts, its protection rests primarily with legislatures and administrative agencies. This raises the question: to what extent do these institutions, and, where relevant, the judiciary, in fact protect that right today? Two contemporary case studies—education and custody disputes in New York's Hasidic community—offer at least a partial answer.[127]

II. HASIDIC EDUCATION

Roughly 100,000 Hasidic children are enrolled in over 200 Hasidic schools in New York.[128] These schools often provide little to no instruction in mathematics, science, history, or English.[129] Their graduates typically do not receive high

126. *See supra* note 104; *see also supra* note 103.

127. Another example worth mentioning is the homeschooling movement in America. As Robin West has argued, "[t]he majority of homeschoolers today, and by quite a margin, are devout, fundamentalist Protestants" who "do not approve of the public schools' secularity, their liberalism, their humanism, their feminist modes of socialization, and in some cases, of the schools' very existence." Given the "little or no oversight from public school officials" in some states, some homeschooling parents "have virtually unfettered authority to decide what subjects to teach, what curriculum materials to use, and how much, or how little, of each day will be devoted to education[,]" such that if they "want to teach . . . from nothing but the Bible, [they] can." Robin West, *The Harms of Homeschooling*, 29 PHIL. & PUB. POL. Q. 7, 7 (2009); *see also* Robert Reich, *Testing the Boundaries of Parental Authority over Education: The Case of Homeschooling*, in MORAL AND POLITICAL EDUCATION, (S. Macedo and Y. Tamir, eds. (2002)); James Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, CAL. L. REV. 82 (1994). This Article's analysis carries implications for such homeschoolers.

128. *See* Ray Domanico, *New York State vs. Hasidic Schools: Placing the "Substantially Equivalent" Curriculum Debate in Context*, MANHATTAN INST. (Mar. 23, 2023), https://manhattan.institute/article/new-york-state-vs-hasidic-schools-placing-the-substantially-equivalent-curriculum-debate-in-context#notes [https://perma.cc/UW7V-HACT] (reporting that from 2018 to 2019, the number of Hasidic children enrolled in Hasidic schools was 55,485 in New York City and 35,122 in New York suburban county schools); YOUNG ADVOCATES FOR FAIR EDUC., NON ≠ EQUIVALENT: THE STATE OF EDUCATION IN NEW YORK CITY'S HASIDIC YESHIVAS 45 (2017), https://d3n8a8pro7vhmx.cloudfront.net/yaffed/pages/116/attachments/original/1523680597/Yaffed_Report_online_version.pdf?1523680597 [https://perma.cc/FCJ4-9G4H] [hereinafter YAFFED: THE STATE OF EDUCATION] (calculating enrollment at about 115,000 in 2013). This number reflects the estimated total of Hasidic students, both boys and girls. As I address later in this Article, the education Hasidic students receive differs by gender. *See infra* notes 150–51, and accompanying text. For a previous engagement with the facts surrounding Hasidic education, see generally Zalman Rothschild, *Free Exercise's Outer Boundary: The Case of Hasidic Education*, 119 COLUM. L. REV. F. 200 (2019) [hereinafter *Outer Boundary*], from which I draw in this Part. I am myself a graduate of the Hasidic school system. For a discussion of my own Hasidic education, see Zalman Rothschild, *My Religious Education was Unparalleled—and That's the Problem*, WASH. POST (March 13, 2025), https://www.washingtonpost.com/opinions/2025/03/13/yeshivas-closing-hasidic-jews-state-funding-education/.

129. *See* YAFFED: THE STATE OF EDUCATION, *supra* note 128, at 31–35.

school diplomas; many lack basic math abilities, can barely read or write English, and have negligible or no training in science, literature, and history.[130]

While those concerned with the quality of education in America tend to focus on urban public schools, such schools often provide a better secular education than Hasidic schools.[131] This fact has for a long time remained relatively unknown because the Hasidic community is rarely glimpsed and, until recently, seldom subjected to critical scrutiny. The opacity of the Hasidic community and its reluctance to be scrutinized help explain why there is little scholarship on Hasidic schools and virtually no scholarly engagement with the legality of the Hasidic curriculum.[132]

This Part aims to help fill that gap. First, it contextualizes Hasidic schools, exploring the ideology that shapes their curriculum and the regulatory role the schools play within the Hasidic community. It then examines the legality of this curriculum, highlighting how Hasidic schools frequently fall short of New York's minimum educational standards and how the state has consistently failed to enforce these requirements against them. Finally, it draws on interviews with current and former members of the Hasidic community to show how New York's non-enforcement has rendered exit prohibitively costly for many who seek to leave.

A. BACKGROUND

Hasidism is a revolutionary Jewish movement that originated in eighteenth-century Poland and soon spread across much of Eastern Europe.[133] It took root in the United States after World War II.[134] Today, American Hasidim are clustered in close-knit, insular communities in and around New York

130. *See id.* at 40 (explaining that many yeshiva graduates lack a high school diploma and face extreme difficulty passing the GED high school equivalency test); Eliza Shapiro & Brian M. Rosenthal, *18 Hasidic Schools Failed to Provide Basic Education, New York City Finds*, N.Y. TIMES (June 30, 2023), https://www.nytimes.com/2023/06/30/nyc-hasidic-yeshivas-education.html (noting that the City concluded that eighteen Hasidic yeshivas "have been breaking the law by not providing their students with an adequate secular education" and that five schools "were complying with the law only because of their affiliations with state-approved high school programs").

131. *See* Stacy Childress, Richard Elmore & Allen Grossman, *How to Manage Urban School Districts*, HARV. BUS. REV., Nov. 2006, 55, 55–57; Naftuli Moster, *Here Is Why YOU Should Care About Hasidic Children's Education*, MEDIUM (Nov. 27, 2016), https://medium.com/@Yaffedorg/here-is-why-you-should-care-about-hasidic-childrens-education-b08bee4d0f35 [https://perma.cc/Q57G-NTGS]; Jack Schneider, *The Urban-School Stigma*, ATLANTIC (Aug. 25, 2017), https://www.theatlantic.com/education/archive/2017/08/the-urban-school-stigma/537966.

132. A few exceptions include Stephen Rutman, *Civics in Yiddish: State Regulation of Language of Instruction in New York's Private Schools*, 48 FORDHAM URB. L.J. 1245, 1251 (2021); RELIGIOUS LIBERTY AND EDUCATION: A CASE STUDY OF YESHIVAS VS. NEW YORK (Jason Bedrick, Jay P. Greene & Matthew H. Lee eds.) (2020); Rothschild, *Outer Boundary*, *supra* note 128; *see also* Lotem Perry-Hazan, Netta Barak-Corren, and Gil Nachmani, *Noncompliance with the Law as Institutional Maintenance at Ultra-Religious Schools*, 18 REG. & GOV. 612 (2023) (exploring how ultra-religious schools in Israel respond to state regulations).

133. *See* Rachel Elior, THE MYSTICAL ORIGINS OF HASIDISM 1 (2006).

134. *See* JONATHAN D. SARNA, AMERICAN JUDAISM: A HISTORY 296–97 (2d ed. 2019).

City.[135] Anchored in Jewish mystical teachings, Hasidim are often referred to as *haredi*, meaning "trembling," as in "trembling before God."[136] While Hasidism consists of many distinct branches, typically led by different charismatic Hasidic masters, or *rebbes*,[137] nearly all Hasidim adhere to shared principles of pietism and communal insularity.[138]

Hasidim vigorously resist acculturation and assimilation.[139] Indeed, one of Hasidism's central values is its rejection of secularism.[140] In the wake of the Holocaust, when many Jews—mistakenly, according to Hasidic *rebbes*—placed their hopes in establishing a secular homeland in Israel,[141] the Hasidim instead recommitted themselves to their pietistic, insulated way of life.[142] If broader society would not impose segregation upon them, as it once had, Hasidic sects would choose to segregate themselves by erecting a parallel system of rules and institutions to shield themselves from outside influences.[143] To facilitate this self-imposed separation, Hasidic communities—or more precisely, leadership in these communities—prohibit televisions, the internet, and secular books and newspapers.[144]

Hasidic schools stand at the center of Hasidic life, serving both as the primary means of maintaining communal seclusion and as an instrument for enforcing anti-secularism. They instill the community's philosophy of anti-secularism in the community's children and enforce extensive rules that reach into the home.[145]

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135. Including and especially in the Brooklyn neighborhoods of Williamsburg, Borough Park, and Crown Heights, as well as in the New York towns and villages of Monroe, Monsey, New Square, and Kiryas Joel. *See id.* at 296–98; *A Day in Monsey: A Hasidic Paradise*, THE HASIDIC WORLD (July 25, 2023), https://hasidicworld.wordpress.com/2023/07/25/a-day-in-monsey-a-hasidic-paradise [https://perma.cc/HM3S-2VGT].

136. As a result of their "trembling," they are highly scrupulous in following traditional Jewish law. SAMUEL HEILMAN, DEFENDERS OF THE FAITH: INSIDE ULTRA-ORTHODOX JEWRY 12–13 (1992).

137. *See* SAMUEL C. HEILMAN, WHO WILL LEAD US? THE STORY OF FIVE HASIDIC DYNASTIES IN AMERICA 1–7 (2017) ("[Rebbes] were endowed with what their Hasidim considered remarkable personalities and righteous character that they could and would use for the good of others.").

138. *See* William Shaffir, *Boundaries and Self-Presentation Among the Hasidim: A Study in Identity Maintenance*, *in* NEW WORLD HASIDIM: ETHNOGRAPHIC STUDIES OF HASIDIC JEWS IN AMERICA 31, 40 (Janet S. Belcove-Shalin ed., 1995).

139. *See* SARNA, *supra* note 134, at 296–98; HEILMAN, *supra* note 136, at 156 (describing the avoidance of "any sort of modernization or acculturation").

140. *See* SARNA, *supra* note 134, at 296–98; HEILMAN, *supra* note 136, at 171–76 (describing Hasidic communal actions intended to isolate Hasidic individuals from the secular world).

141. *See* Zara Steiner, *The Promising Land: Early Zionism*, 69 HISTORY 238, 238–50 (1984).

142. *See* HARRY M. RABINOWICZ, HASIDIM: THE MOVEMENT AND ITS MASTERS 397 (1988); HEILMAN, *supra* note 136, at 29–33.

143. *See* SARNA, *supra* note 134, at 296–98. To be sure, this reaction to modernity and secularism was not pioneered by American Hasidim; it predated them. For more on Hasidism's position on secularism, see Rothschild, *Outer Boundary*, *supra* note 128, at 227.

144. *See* Josh Hack, Taming Technology: Ultra-Orthodox Jewish Families and Their Domestication of the Internet (Sept. 2007) (MSc dissertation, London School of Economics and Political Science) (MEDIA@LSE Electronic MSc Dissertation Series), https://www.lse.ac.uk/media-and-communications/assets/documents/research/msc-dissertations/2007/Hack-final.pdf [https://perma.cc/7NHT-ZMV3] ("Nearly all Haredi Jews insist on avoiding mass media such as films, television, and even secular newspapers.").

145. *See* Lauren Hakim, *What It Takes to Attend a Haredi School: 11 Rules Families Must Follow in the New School Year*, SHTETL (Oct. 5, 2023, 11:45 AM), https://www.shtetl.org/article/what-it-takes-to-attend-haredi-school-11-rules-families-must-follow-new-school-year [https://perma.cc/X8W2-ELED].

Because nearly all Hasidic adults are parents and are expected to send their children to these schools, school rules empower the community's leaders to regulate Hasidic behavior. These rules typically ban computers, televisions, and secular books; require strict observance of Kosher, modesty, and Sabbath laws; and prohibit a wide range of practices associated with the outside world, including keeping pets.[146] Children's enrollment is conditioned on full compliance,[147] and expulsion carries with it the ostracization of the child's parents from the community.[148]

B. SECULAR EDUCATION IN HASIDIC SCHOOLS

In keeping with the community's belief system, Hasidic schools provide little to no secular education.[149] The education offered, however, differs significantly for boys and girls: girls receive more secular instruction than boys.[150] This is because Hasidic girls are forbidden from studying most Jewish religious texts, which make up the core (if not the entirety) of Hasidic education for boys.[151] Although in both cases the secular education falls short of New York's legal requirements, this Article focuses primarily on Hasidic boys' schools when outlining the education system in these communities.[152]

The limitations of a typical New York Hasidic school's secular education were laid bare in extensive interviews that I conducted with former Hasidim for

146. *See infra* note 252.

147. *See* Hakim, *supra* note 145 ("If a parent violates the rule, the child can be expelled.").

148. *See infra* notes 237–38 and accompanying text; *see also* SAMUEL C. HEILMAN & MENACHEM FRIEDMAN, THE HAREDIM IN ISRAEL: WHO ARE THEY AND WHAT DO THEY WANT? 15 (1991).

149. Indeed, as I have explained in earlier work, secular education is regarded as "ontologically evil according to Hasidic ideology," such that "the sheer absorption of secular ideas in one's mind is in itself sinful." Rothschild, *Outer Boundary*, *supra* note 128, at 227.

150. *See* Brief for Footsteps Inc., as Amicus Curiae Supporting Plaintiff's Motion for a Preliminary Injunction at 5, Young Advocs. for Fair Educ. v. Cuomo, 359 F. Supp. 3d 215 (E.D.N.Y. 2019) (No. 18-CV-4167), 2018 WL 8805266. Some would find this unconstitutional in its own right (despite the lack of state action). *See* Dwyer, *supra* note 127. Indeed, this is the inverse gender-based asymmetry that Mary Anne Case argues would have been unconstitutional had "the Amish [in *Yoder*] insisted on pulling only their daughters out of school without a high school diploma." Case, *supra* note 118, at 394.

151. *See* AYALA FADER, MITZVAH GIRLS: BRINGING UP THE NEXT GENERATION OF HASIDIC JEWS IN BROOKLYN 22–25 (2009) [hereinafter FADER, MITZVAH GIRLS] ("[Boys] receive limited secular education. [Girls] are not allowed to study Torah or, in some Hasidic schools such as Satmar, even to read the . . . ."). *See also* AYALA FADER, HIDDEN HERETICS JEWISH DOUBT IN THE DIGITAL AGE 230 (2020) [hereinafter FADER, HIDDEN HERETICS] ("Some Hasidic schools offer boys very little secular education, and boys may not speak or write much English through adulthood. In contrast, private Jewish schools for girls are divided into religious and secular studies Hasidic girls learn to read *loshn koydesh*, too, but [the girls'] religious study is much less extensive than for boys."); GEORGE KRANZLER, HASIDIC WILLIAMSBURG: A CONTEMPORARY AMERICAN HASIDIC COMMUNITY 176–78 (1995). For theological sources, see Rothschild, *Outer Boundary*, *supra* note 128, at 207 n.38.

152. *See* Ginia Bellafante, *In Brooklyn, Stifling Higher Learning Among Hasidic Women*, N.Y. TIMES (Sept. 2, 2016), https://www.nytimes.com/2016/09/04/nyregion/in-brooklyn-stifling-higher-learning-among-hasidic-women.html (discussing the differences between the quality of schooling).

an amicus brief on behalf of Footsteps, an organization that assists people leaving ultra-Orthodox communities.[153] These interviews revealed that:

> [T]he only education in secular subjects that boys in the [Hasidic] yeshiva system receive occurs while they are in *cheder* (elementary school), and between the ages of 7 and 13. "English" instruction (as the time devoted to secular studies is called) takes place for only 45 to 90 minutes at the end of a long school day (up to 10 hours), four days per week. It is typically limited to rudimentary English reading[,] writing[,] and arithmetic. And, it is often taught by teachers who barely know English themselves.[154]

The lack of secular education in Hasidic schools has since been confirmed by various media outlets, including *The New York Times*, which conducted an in-depth investigation, and has even drawn attention from Justice Kagan during a recent Supreme Court oral argument.[155]

C. NEW YORK EDUCATION LAW

Compulsory education laws are primarily determined at the state level.[156] The Supreme Court has recognized that states bear the "paramount responsibility" for establishing and administering educational standards—a responsibility that includes the authority to impose "reasonable regulations for the control and duration of basic education."[157] All states have compulsory education laws, and every state constitution affords some kind of "right" to education.[158] New York is no exception.[159]

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153. The brief was filed in support of the plaintiff, Young Advocates for Fair Education (YAFFED)—a nonprofit organization that advocates for educational reform of yeshivas—in its challenge to the Felder Amendment. *See infra* notes 173–75 and accompanying text. *See* Brief for Footsteps Inc., as Amicus Curiae Supporting Plaintiffs Motion for a Preliminary Injunction at 1–4, *Cuomo*, 359 F. Supp. 3d 215 (No. 19-CV-4167) ("This brief gives voice to more than twenty Footsteps members and volunteers who were interviewed and described their own experiences with how Hasidic yeshivas in New York State are systematically failing the young people they are supposed to serve.").

154. *See id.* at 5. At most Hasidic schools, this limited secular education—like the religious education—is taught in Yiddish. *See* YAFFED: THE STATE OF EDUCATION, *supra* note 128, at 4, 31–32.

155. *See* Shapiro & Rosenthal, *supra* note 130; Eliza Shapiro & Brian M. Rosenthal, *In Hasidic Enclaves, Failing Private Schools Flush with Public Money*, N.Y. TIMES (Sept. 12, 2022), https://www.nytimes.com/2022/09/11/nyregion/hasidic-yeshivas-schools-new-york.html (noting that a *Times* review of thousands of pages of public records, dozens of Yiddish-language documents, and interviews with over 275 people showed Hasidic schools "keeping some 50,000 boys from learning a broad array of secular subjects"); Transcript of Oral Argument at 54, Okla Charter Sch. Bd. v. Drummond, 605 U.S. 165 (2025) (No. 24-394) ("Let's say we're up in New York, and there's a Hasidic community that has a Yeshiva, and it's a very serious Yeshiva, and what that means is that almost all the instruction has to do with studying Talmud and other religious texts. Very little of it has to do with secular subjects. Almost none of the instruction is in English. Almost all of it is in Yiddish or in various, like, ancient Hebrew/Aramaic kind of languages.").

156. *See* SAMUEL M. DAVIS, CHILDREN'S RIGHTS UNDER THE LAW 129 (2011).

157. Wisconsin v. Yoder, 406 U.S. 205, 213 (1972).

158. *See* DAVIS, *supra* note 156, at 129; Allen W. Hubsch, *Education and Self Government: The Right to Education Under State Constitutional Law*, 18 J.L. & EDU. 93, 96–97 (1989); Hershkoff, *supra* note 117.

159. *See* DAVIS, *supra* note 156, at 129 ("Compulsory school attendance laws . . . are universal in all states.").

Its constitution requires the legislature to "provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."[160]

Under New York State law, "each minor from six to sixteen years of age shall attend upon full time instruction,"[161] with English as the required language of instruction.[162] During the first eight years of schooling, public schools must cover twelve subjects: arithmetic, reading, spelling, writing, English, geography, U.S. history, civics, hygiene, physical training, New York history, and science.[163] In high school, five subjects are mandated: English language and its use, civics, hygiene, physical training, and American history.[164] If parents opt to send their child to a private school, the school must offer "substantially equivalent" instruction to that provided by public schools in the same district[165]—meaning approximately the same number of instructional hours in roughly the same subjects.[166] In addition, private schools must provide students over the age of eight with instruction in patriotism, citizenship, and human rights, with special emphasis on genocide, slavery, and the Holocaust.[167] All schools in the state must also include instruction on the dangers of alcohol, drugs, and tobacco.[168]

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160. N.Y. CONST. art. XI, § 1. The constitution does not describe the level of education that must be provided. *See id.* The New York Court of Appeals, the state's highest court, outlined the minimum requirements for a constitutionally adequate education in *Campaign for Fiscal Equity v. State*, 55 N.E.2d 661 (N.Y. 1995). It held that the state must give children the opportunity to obtain the literacy, calculation, and verbal skills necessary to function as civic participants capable of voting and serving on a jury. *See id.* at 666. Justice Marshall's words in his *Rodriguez* dissent—that education adequacy standards are "unintelligible and without directing principle"—ring true for New York's right to an education, despite *Campaign for Fiscal Equity*'s "clarification." San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 90 (1973) (Marshall, J., dissenting). Nonetheless, graduates of Hasidic schools—who typically receive no civics education and often struggle to communicate in English—might well be considered to lack these essential skills. Importantly, however, *Campaign for Fiscal Equity* is strictly about *financing* for public schools, as are most "right to education" cases.

On that note, and, as mentioned earlier, *supra* note 117, this Article advances the argument that a "right to education" is deficient if it does not include an affirmative obligation on the part of the state not only to enact, but also to enforce, compulsory education laws. Such a right could truly be said to belong to *children*. It is not merely a right to adequate secular education made freely available to parents who wish to avail themselves of it, but a right belonging even to those children whose parents are not aligned with the state's educational aims and who would deny their children a secular education.

161. N.Y. EDUC. LAW § 3205(1)(a).

162. *Id.* § 3204(2). The only exception is a transitional period (three to six years) for students with limited English proficiency. Textbooks must also be written in English. *Id.*

163. *Id.* § 3204(3)(a)(1).

164. *Id.* § 3204(3)(a)(2).

165. *Id.* To determine substantial equivalency, courts have looked to: (1) the competency of the instructor(s); (2) "the extent[] . . . to which the lack of social intercourse with other children," if applicable, "deprives [the child] of an equivalent education"; and (3) if (1) and (2) are satisfied, "whether the child is, in fact, receiving an equivalent education by means of the materials, curriculum, and methodology provided" by the alternative educational institution. *In re* Franz, 378 N.Y.S.2d 317, 320 (N.Y. Fam. Ct. 1976); *see also In re* Thomas H., 357 N.Y.S.2d 384, 390–91 (N.Y. Fam. Ct. 1974).

166. *See* N.Y. EDUC. LAW § 3205(1)(a). An education outside the public school system is deemed substantially equivalent "[i]f the child is receiving adequate instruction in all the subject areas required under the law for the periods of time required." *In re Franz*, 378 N.Y.S.2d at 325.

167. N.Y. EDUC. LAW § 801(1).

168. *Id.* § 804.

D. NEW YORK'S (NON)RESPONSE

The typical Hasidic school curriculum has for decades failed to meet these statutory requirements.[169] Although reports consistently corroborate this fact,[170] New York has long turned a blind eye to Hasidic education, presumably to accommodate the community's distinctive educational priorities—whether out of multicultural sensitivities, pressure from the Hasidic community's bloc vote,[171] or both.[172]

In 2018, amidst rumors that the New York State Education Department (NYSED) was facing pressure to investigate Hasidic schools, the New York legislature codified a looser standard specifically for these schools.[173] To shield Hasidic schools from New York's compulsory education requirements, the legislature enacted the "Felder Amendment," named after Simcha Felder, the state senator representing the predominantly Hasidic neighborhood of Borough

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169. To be sure, the requirement falls on parents and not the schools. What I mean by this is that the schools do not meet the standards that would satisfy the parents' obligations.

170. *See* Shapiro & Rosenthal, *supra* note 155 (mentioning the thousands of pages that were reviewed); Shapiro & Rosenthal, *supra* note 130 (discussing an eight-year New York City investigation that concluded that more than a dozen Hasidic schools were failing to provide their students with "adequate" basic education). *Cf.* Young Advocs. for Fair Educ. v. Cuomo, 359 F. Supp. 3d 215, 222 (E.D.N.Y. 2019) (noting the limited secular education that Hasidic yeshiva students receive).

171. *See, e.g.*, Shapiro & Rosenthal, *supra* note 130 (noting that during a June 2023 visit with Hasidic leaders, New York City Mayor Eric Adams defended the Hasidic yeshivas and, while accepting a plaque "thanking him for protecting yeshivas," stated, "I'm not a new friend, I'm an old friend, and old friends respect each other"); *id.* (discussing how "city government . . . has shied away from criticizing the politically influential Hasidic community" and how a "long-stalled investigation . . . spanned eight years and two mayoral administrations and was often hobbled by political interference and bureaucratic inertia"); Reuven Blau & Greg B. Smith, *Brooklyn Yeshivas Blow NYC-Set Deadlines on Bolstering Secular Studies*, THE CITY (Sept. 20, 2020, 9:35 PM), https://www.thecity.nyc/education/2020/9/20/21448158/brooklyn-yeshivas-schools-nyc-secular-classes-deblasio [https://perma.cc/2FF7-YM2Y] ("In December 2019, [the New York City Department of Investigation] released a report stating that de Blasio had been aware that the investigation had been slowed down, in part to help him gain support in Albany for an extension of mayoral control of the schools."); *infra* note 172.

172. It should be noted that while Hasidim oppose engagement with secular society, they strategically engage in politics when doing so allows them to secure forms of assistance from secular authorities that, in turn, enable them to remain secluded *from* secular society. In a book review of a detailed and illuminating account of Satmar Hasidim's successes along these lines, I wrote:

> At every turn, the Hasidim of Kiryas Joel succeeded—one might say wildly—in achieving their political goals. Although they are a numerical minority whose way of life is at odds with mainstream American culture, the Hasidim have not proven themselves to be politically impoverished and vulnerable to the whim of majoritarian will. To claim otherwise is to confuse modest dress with modest tactics, financial poverty with political poverty, lack of fluency in English with a lack of fluency in political machinations, and self-isolation from mainstream society with a lack of interest in and ability to enter the public sphere when doing so would be advantageous.

Zalman Rothschild, *Religious Minority Status Upended: The Tale of a Hasidic Town*, L.A. REV. BOOKS, https://lareviewofbooks.org/article/religious-minority-status-upended-the-tale-of-a-hasidic-town/ [https://perma.cc/WDK7-7ZMM] (reviewing Nomi M. Stolzenberg and David N. Myers, AMERICAN SHTETL: THE MAKING OF KIRYAS JOEL, A HASIDIC VILLAGE IN UPSTATE NEW YORK (2022)).

173. *See* Steve Lipman, *'Felder Amendment' Challenged in Federal Suit*, JEWISH TELEGRAPHIC AGENCY: N.Y. JEWISH WK. (July 25, 2018, 9:29 AM), https://www.jta.org/2018/07/25/ny/felder-amendment-challenged-in-federal-suit [https://perma.cc/3XL6-9TYN].

Park in Brooklyn, who conditioned his pivotal budget vote on the amendment's passage.[174] The amendment allows NYSED to take into account a range of factors when assessing whether Hasidic schools offer a "substantially equivalent" education—including whether the curriculum fosters critical thinking skills—provided that these schools deliver instruction in core subjects such as mathematics, science, English, and history.[175]

But Hasidic schools did not satisfy even this relaxed version of New York's compulsory education laws. Their continued noncompliance was demonstrated when, after much pressure from advocacy groups and heightened media attention on Hasidic schools, NYSED issued revised guidelines for complying with the state's compulsory education law.[176] According to these guidelines, all private elementary and middle schools must teach mathematics, science, English, social studies, art, and health[177] for multiple hours per day,[178] a far cry from what Hasidic boys' schools were actually providing.

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174. *See id.*

175. *See* N.Y. EDUC. LAW § 3204(2)(ii)–(v). The Felder Amendment also allows for a holistic approach to teaching these subjects. For example, English may be taught "for information and to use that information to construct written essays that state a point of view or support an argument"; mathematics may be taught to "solve real world problems using both number sense and fluency with mathematical functions and operations"; history may involve learning to "interpret and analyze primary text to identify and explore important events in history, to construct written arguments using the supporting information they get from primary source material, demonstrate an understanding of the role of geography and economics in the actions of world civilizations, and an understanding of civics and the responsibilities of citizens in world communities"; and science may involve learning "how to gather, analyze and interpret observable data to make informed decisions and solve problems mathematically, using deductive and inductive reasoning to support a hypothesis, and how to differentiate between correlational and causal relationships." *Id.*

176. The 2018 Revised Guidelines were available on the NYSED's website but were later updated in 2019 to reflect the more recent Guidelines. *Compare Substantial Equivalency*, N.Y. STATE EDUC. DEP'T (Nov. 20, 2018), https://web.archive.org/web/20181128223937/http://www.nysed.gov/nonpublic-schools/substantial-equivalency (2018 Guidelines), *with Substantial Equivalency*, N.Y. STATE EDUC. DEP'T (July 3, 2019), https://web.archive.org/web/20191003074245/http://www.nysed.gov/nonpublic-schools/substantial-equivalency [https://perma.cc/KX5E-H9ZS] (notice of revision of Guidelines), *and Substantial Equivalency*, N.Y. STATE EDUC. DEP'T, https://www.nysed.gov/nonpublic-schools/substantial-equivalency [https://perma.cc/392J-8PLD] (last visited May 10, 2025) (updated Guidelines); *see also* Lindsey Christ, *NY Outlines New Guidelines for What Private Schools Must Teach*, SPECTRUM NEWS N.Y. 1 (Nov. 20, 2018, 7:53 PM), https://www.ny1.com/nyc/all-boroughs/politics/2018/11/21/ny-outlines-new-regulations-for-what-private-schools-must-teach [https://perma.cc/CL93-SK64] (describing the political and administrative controversy surrounding the 2018 guidelines).

177. *See* N.Y. STATE EDUC. DEP'T, COMMISSIONER'S DETERMINATION OF SUBSTANTIAL EQUIVALENCE 24 (2018), https://web.archive.org/web/20181128223937/http://www.nysed.gov/common/nysed/files/programs/nonpublic-schools/cd-elementary-middle-tools.docx. [https://perma.cc/PZK3-ZMHQ]. This nonbinding guidance was intended to interpret the "substantial equivalence" and instructional requirements of section 3204(3)(a).

178. *Teach NYS Confirms 3.5 Hour Daily Core Subject Requirement (Grades 7 and 8) in NYSED Enforcement Guidance*, TEACH NYS: ACT FOR JEWISH EDUC., https://teachcoalition.org/blog/teach-nys-confirms-3-5-hour-daily-core-subject-requirement-grades-7-and-8-in-nysed-enforcement-guidance [https://perma.cc/N7KU-DWE6] (last visited May 11, 2025). While NYSED appeared to clarify that nonpublic schools must provide 3.5 hours of secular education, its guidance also stated that nonpublic schools "should provide instruction for approximately the same time required of public schools," meaning "Grades 1-6 = 5 hours daily" and "Grades 7-12 = 5 1/2 hours daily." *See* Guidelines for Determining Equivalency of

In response to these new guidelines, ultra-Orthodox Jewish leaders sued NYSED.[179] They argued that the state had failed to comply with the New York State Administrative Procedure Act, claiming that the so-called "guidelines" were in fact binding regulations—meaning they should have been subject to public notice and comment before implementation.[180] A New York state court agreed and struck down the guidelines.[181]

In 2022, NYSED issued new proposed regulations that largely mirrored the previously invalidated guidelines.[182] Ultra-Orthodox Jewish leadership immediately denounced them. Agudath Israel of America, which represents Hasidic interests, declared in a public statement that it rejected the new proposed regulations because they neglected the "educational value of religious studies."[183] According to Agudath Israel, "By ignoring this essential component of yeshiva education, the proposed new regulations may result in yeshivas having to make major changes to their school day schedules to be deemed substantially equivalent. This is entirely unacceptable."[184] In an open letter to NYSED, Rabbi Aaron Teitelbaum (the Satmar *rebbe* of Kiryas Joel, New York) explained that he had "reviewed the proposed guidelines with great interest" and could not "agree to them because we will no longer be able to provide the education that our parent body is expecting from our education institutions."[185] Invoking the Holocaust, he stated: "[T]he Jewish world suffered colossal losses. Entire Jewish communities, men, women and children were completely wiped out. We are the children of the few survivors. It is our duty to rebuild what was destroyed."[186]

This vocal response testifies to the likely impact of the regulations, which—if enforced—would have required meaningful changes to Hasidic education.[187]

Instruction in Nonpublic Schools, N.Y. State Educ. Dep't, http://www.p12.nysed.gov/nonpub/guidelinesequivofinstruction.html [https://perma.cc/6MDL-UBMX] (last visited May 10, 2025). A four-year high school course of study must include at least the following units of work or their equivalent: four units of English and four of social studies (including a year of American history), two units each of math and science, one unit of art and/or music, and a half unit of health. *Id.*

179. Verified Pet. at 31–34, Parents for Educ. & Religious Liberty in Schs. v. Rosa, No. 901354-19 (N.Y. Sup. Ct. Apr. 29, 2019).

180. *Id.*

181. Decision/Judgment at 6–7, *Rosa*, No. 901354-19 (N.Y. Sup. Ct. Apr. 29, 2019).

182. *See* Brian M. Rosenthal & Eliza Shapiro, *New State Rules Offer Road Map for Regulating Private Hasidic Schools*, N.Y. TIMES (Sept. 13, 2022), https://www.nytimes.com/2022/09/13/nyregion/new-york-rules-yeshivas.html.

183. *Agudath Israel Statement on Proposed New York State Equivalency Regulations*, AGUDATH (Mar. 10, 2022), https://agudah.org/agudath-israel-statement-on-proposed-new-york-state-equivalency-regulations [https://perma.cc/A2FK-AW9M].

184. *Id.*

185. Julia Gergely, *NY State Releases New Guidelines for Private Schools — and Yeshivas Push Back*, JEWISH TELEGRAPHIC AGENCY: N.Y. JEWISH WK. (Mar. 11, 2022, 1:40 PM), https://www.jta.org/2022/03/11/ny/ny-state-releases-new-guidelines-for-private-schools-and-yeshivas-push-back [https://perma.cc/UR76-PA9F].

186. *Id.*

187. Though it should be noted that the new regulations did not impose specific amounts of instruction in the various subjects, set a timeline for compliance, or establish penalties for any school in violation so long as state officials determine it is making a "good-faith" effort to improve. *See* Rosenthal & Shapiro, *supra* note 182.

Soon after the new regulations were issued, however, a New York court struck them down once again. The court reasoned that the regulations addressed schools rather than parents, yet under New York's compulsory education law the duty to provide a secular education falls on *parents*, not schools.[188] (Obviously, determinations about schools where children are enrolled are sometimes necessary to assess whether parents have complied with the state's education statute, but the court nonetheless concluded that NYSED lacked the statutory authority to make determinations about schools themselves.)[189] An intermediate appellate court reversed, but only on narrow statutory grounds, declining to reach the more significant constitutional questions implicated by the regulations.[190] New York's highest court affirmed this decision but, significantly and paradoxically, also instructed that NYSED has no authority to shut down Hasidic schools or order Hasidic parents to unenroll their children.[191] If Hasidic schools are dissatisfied with how NYSED interprets and implements the decision and reassert their constitutional claims in further litigation, the strength of current free exercise doctrine makes it likely they would prevail[192]—notwithstanding *Yoder*'s core concern with safeguarding children's right to exit.[193]

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188. *See* Parents for Educ. & Religious Liberty in Schools v. Young, 190 N.Y.S.3d 816, 828–29 (N.Y. Sup. Ct. 2023) ("[T]he Court finds that respondents lack authority to direct parents to completely unenroll their children from nonpublic schools that have been determined to fall short of meeting each and every substantial equivalency criteria, nor do respondents have authority to direct the closure of such schools.").

189. *Id.* at 829–30 ("[T]he Court finds that 8 NYCRR 130.6 [c][2][i] and 8 NYCRR 130.8 [d][7][i]—stating that 'the nonpublic school shall no longer be deemed a school which provides compulsory education fulfilling the requirements of Article 65 of the Education Law'—must be stricken.").

190. *See* Parents for Educ. & Religious Liberty in Schs. v. Young, 215 N.Y.S.3d 552, 558–59 (N.Y. App. Div. 2024).

191. *See* Parents for Educ. & Religious Liberty in Schs. v. Young, No. 2025-056, 2025 WL 1697944, at *1 (N.Y. June 18, 2025). New York's highest court clarified that although NYSED may conclude a school "does not provide substantially equivalent instruction," parents need not unenroll their children and may instead "determine how [they will] ensure their compliance with the Education Law." *Id.* Hasidic schools immediately championed the decision, touting that it "severely limits [NYSED's] authority over yeshivas and yeshiva parents," as the court held that Hasidic "parents and not the State have control over the upbringing and education of their children." Parents for Educ. & Religious Liberty in Schs. (PEARLS) *Statement by PEARLS on Today's Court of Appeals Decision*, BOROPARK24, June 18, 2025, https://www.boropark24.com/news/statement-by-pearls-on-today-s-court-of-appeals-decision [https://perma.cc/896C-JJJB].

192. Hasidic schools initially challenged the new regulations on constitutional grounds as well. *See* Petitioner's Memorandum of Law Supporting of a Preliminary Injunction & Opposing Respondent's Motion to Dismiss at 13–17, Parents for Educ. & Religious Liberty in Schs. v. Young, 190 N.Y.S.3d 816 (N.Y. Sup. Ct. 2023) (No. 907655-22). Hasidic schools argued that because the regulations do not apply to children in certain nonpublic schools—including, for example, schools for children with disabilities and special schools for students who reside in child care institutions (and are placed there by a family court or the Office of Children and Family Services or some other agency)—under recent free exercise doctrine, they must also exempt Hasidic parents who believe secular education is unsuitable for their children. *Id.* at 17; *see* 8 N.Y. COMP. CODES R. & REGS. tit. 8, § 130.3(a) ("A nonpublic school shall be deemed substantially equivalent if it [is a] . . . State-approved private special education school or State-operated or State-supported school established by the State Legislature . . .").

193. In 2019, I wrote that "while many competing interests are implicated in [the] case . . . of Hasidic education, a court would find that securing a basic secular education for all children must ultimately outweigh these competing interests." Rothschild, *Outer Boundary*, *supra* note 128, at 232; *see also*

Yet Hasidic schools may not need to bring such challenges. In April 2025, the New York legislature again scaled back its compulsory education law with a new amendment crafted specifically to accommodate Hasidic schools.[194] Under this amendment, nonpublic schools can demonstrate the "substantial equivalency" of their secular education in any of seven ways, including by securing accreditation from an authorized private accreditation agency[195] or by administering

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Aaron Saiger, *State Regulation of Curriculum in Private Religious School: A Constitutional Analysis*, *in* RELIGIOUS LIBERTY AND EDUCATION, *supra* note 132, at 49 ("[T]he state has the constitutional authority to demand fairly large commitments of time and resources to secular subjects on the part of private schools."). But 2019 was light years ago in free-exercise-of-religion-years. Free exercise doctrine shifted radically in 2020, when Justice Barrett joined the Court and supplied the fifth vote needed for the exceedingly expansive rule of religious equality that now governs free exercise jurisprudence. *See* Rothschild, *supra* note 10 at 454 ("The Supreme Court has recently adopted a new rule of religious equality. Stated simply, whenever the government grants an exemption from a general law for a 'secular' entity, activity, or motivation, it unconstitutionally discriminates against religion if it does not also offer an exemption to all 'comparable' religious entities, activities, and motivations."). Given the "exceptions" built into New York's compulsory education laws, *see supra* note 192, Hasidic schools and parents would have more than a colorable claim that the law unfairly "discriminates" against religion under this new religious equality doctrine. *See* Rothschild, *supra* note 10 at 479–92. In addition, they might argue that New York's retained discretion over what counts as "substantially equivalent" education renders not exempting Hasidic schools from New York's compulsory education law unconstitutional discrimination against religion. *See, e.g.*, N.Y. EDUC. LAW § 3204 (McKinney 2025) ("[U]nless the commissioner approves a lower percentage for such tests"; "assessment approved by the commissioner"; "nothing in this subdivision shall preclude the commissioner from defining by rule or regulation alternative criteria which may also be used to demonstrate that instruction at a nonpublic schools is in compliance with this section . . ."); Zalman Rothschild, *Individualized Exemptions, Vaccine Mandates, and the New Free Exercise Clause*, 131 YALE L.J. FORUM 1106, 1121 (2022) ("By holding that government discretion to offer exemptions from contractual provisions requires the government to grant exemptions to all religious objectors, the Court [in *Fulton*] effectively rendered countless government decisions and actions constitutionally infirm as applied to religious objectors."). Of course, the outcome may ultimately turn on the political leanings of the judge or judges deciding the case. *See* Zalman Rothschild, *Free Exercise Partisanship*, 107 CORNELL L. REV. 1067, 1108 (2022).

194. *See, e.g.*, Bianca Fortis, *Albany's Blueprint for Schools: Cell-Free Halls, Looser Yeshiva Rules, New Aid Math*, N.Y. FOCUS (May 9, 2025), https://nysfocus.com/2025/05/09/new-york-budget-2025-education-cellphone-yeshiva-foundation-aid [https://perma.cc/6QSR-DWQK] ("Thanks to a deal made during state budget negotiations, some members of the Ultra Orthodox community—and their lobbyists—succeeded in their bid to fight requirements that yeshivas and other religious schools provide a 'substantially equivalent' education to public schools."); Rockland Daily, *Major Victory for Yeshivas: New Bill Passes NY Legislature, Easing 'Substantial Equivalency' Burden*, ROCKLAND DAILY (May 8, 2025), https://www.rocklanddaily.com/news/major-victory-for-yeshivas-new-bill-passes-ny-legislature-easing-substantial-equivalency-burden [https://perma.cc/6AM6-9MF8] ("This advancement follows months of hard work by elected officials representing Orthodox Jewish communities."); Benjamin Oreskes, Eliza Shapiro, & Grace Ashford, *Hochul, Looking to 2026, Pushed to Weaken Oversight of Religious Schools*, N.Y. TIMES (May 8, 2025), https://www.nytimes.com/2025/05/08/nyregion/new-york-kathy-hochul-hasidic-schools.html ("Mr. Heastie characterized the measure as an effort to give religious schools various options for complying with state law.").

195. N.Y. EDUC. LAW § 3204 (McKinney 2025). The qualifications for an accrediting agency and the standards it is to use are both vague and low. The amended law states,

> An accreditation body shall have the knowledge and expertise to properly evaluate the entirety of the day's curriculum of those schools that it accredits and shall use a peer review process that includes evaluation by leaders of similar nonpublic schools, appropriately train all staff and peer reviewers who are involved in the accreditation process, accredit based on publicly accessible documented standards, perform a comprehensive onsite visit of any school

"any exam or assessment approved by three or more states"[196] "in substantially the same subject areas and same grade levels as" New York tests[197] "and uses the results to assess the school's educational program and to seek to improve instruction and its students' performance on such tests."[198] Meaning, a Hasidic school is deemed to provide an adequate secular education so long as a private accrediting agency using a vague and low standard says so, or even if its students are failing assessments but the school nominally "uses" the results to "assess" itself and "to seek to improve."[199] These changes to New York's century-old law were immediately celebrated in Hasidic circles.[200]

> seeking accreditation while such school is in session, and periodically conduct a combination of interim and full accreditation reviews of the nonpublic schools which it accredits during at least a ten-year period. Additionally, such accreditation body shall require nonpublic schools seeking accreditation to have curriculum that is informed by research, document individual student progress, and have mechanisms for monitoring, assessing, and providing feedback on student progress.

EDUC. § 3204(6)(a)(iii).

196. These are exams or assessments used "for homeschooling or nonpublic school purposes" or any "assessment approved by the commissioner." EDUC. § 3204(6)(b)(i)(1). The exams' "three-year average participation rate" must equal New York's rate. *Id.*

197. New York's testing program includes statewide exams in math and English for grades 3–8, and in science for grades 5 and 8. *See* New York State Education Department, Parents' Frequently Asked Questions About New York State's Annual Grades 3-8 English Language Arts & Mathematics Tests & Grades 5 & 8 Science Tests (2024), https://www.nysed.gov/sites/default/files/programs/state-assessment/2024-faq-for-parents-3-8-tests.pdf [https://perma.cc/9YN8-YXPN].

198. Another avenue worth mentioning is achieving a "percentage of students who score 'proficient' . . . on a year-end . . . assessment" (using the exams mentioned in n.96) in the "subject areas" New York tests that is equal to "the percentage of similarly situated public school students" in the same city or district, or in New York generally. A score of 33% or lower (if the commissioner so determines) is a proficient score. *See* Kirsten J. Barclay & Jennifer M. Schwartzott, *Substantial Equivalency Law for Nonpublic Schools Amended*, BOND, SCHOENECK & KING ATTORNEYS (May 13, 2024), https://www.bsk.com/news-events-videos/new-york-state-education-law-regarding-substantial-equivalency-is-modified-by-budget-legislation [https://perma.cc/4BHL-LBD4].

199. In such circumstances, a Hasidic school is automatically deemed compliant with New York's compulsory education law. *See* Barclay & Schwartzott, *supra* note 198.

200. *See, e.g.*, Agudath Israel of America, *Gov. Hochul Signs NYS Budget: Agudath Israel Hails Wins for Parents and Yeshiva Autonomy*, AGUDATH ISRAEL OF AMERICA (May 9, 2025), https://agudah.org/gov-hochul-signs-nys-budget-agudath-israel-hails-wins-for-parents-and-yeshiva-autonomy [https://perma.cc/XCP6-9JCY] (touting the decision, "Avrohom Weinstock, Chief of Staff of Agudath Israel" explained that "[t]he autonomy and right for our schools to operate according to our *mesorah* (tradition) is of paramount importance"). By contrast, and interestingly, Senator Liz Krueger argued on the Senate floor that the amendment was "antisemitic" given its projected impact on Hasidic children. Senator Liz Krueger, *Sen. Krueger Speaks on Substantial Equivalency in the FY '25-'26 NYS Budget*, YOUTUBE (May 8, 2025), https://www.youtube.com/watch?v=F68PHuA-nrY. ("This bill is actually antisemitic because it's targeting a sub-universe of young Jewish children from getting their rightful education in New York State.").

Could this amendment constitute a state action that violates the right to exit religion? As I explained earlier, one could argue that the "action" of instituting *in*action—such as repealing a law— constitutes state action. *See supra* note 122. Even if there is no state action, however, the constitutional value recognized in *Yoder* should at least factor into lawmakers' decisionmaking when deliberating about whether to scale back a state's compulsory education laws. *See supra* note 121. For one such example, consider once again Senator Liz Krueger's speech on the Senate floor opposing the amendment. *See Sen. Krueger Speaks on Substantial Equivalency in the FY '25-'26 NYS Budget*, YOUTUBE (May 8, 2025),

E. THE CHALLENGE OF EXIT

The lack of secular education in Hasidic communities risks depriving Hasidic adolescents and adults of the practical ability to leave their community. Many graduates of Hasidic schools emerge unable to communicate effectively in English and without even basic skills or knowledge—barriers that are formidable obstacles to securing employment and to integrating into broader society.[201]

As noted above,[202] I conducted in-depth interviews with graduates of Hasidic schools for an amicus brief.[203] These interviews revealed the "substantial and long-lasting impacts" of Hasidic education, including "difficulty earning a living, securing meaningful employment, pursuing higher education, and fully participating in society."[204]

For example, one interviewee observed that "the only possible thing [he] was qualified to do was unskilled labor, [so he became a] dishwasher."[205] When he tried to find employment, he discovered that, for someone like himself, "[t]here's really nothing out there" since "[e]ven the most rudimentary job requires [English] language skills," which he did not have.[206] Those wishing to earn a GED and enroll in college discovered that preparing for the exam "require[d] a herculean effort."[207] Not knowing "any long division or algebra," or even "what science *was* at that point," it took an interviewee "years" to prepare for and pass the

https://www.youtube.com/watch?v=F68PHuA-nrY ("A sound basic education means the skills students need to function productively as civic participants capable of voting and serving on a jury. Children deprived of a basic education cannot be expected to do that. If adopted, [the bill] disadvantages a specific minority that cannot speak for itself: students at a small number of New York's Heredi and Hasidic yeshivas.").

201. As the interviews I draw on and discuss imminently show, those who exit the Hasidic community often have practically no secular academic or professional skills, and only a limited command of English. Unsurprisingly, poverty is not uncommon among those who exit the community. *See* David Rosenberg, *Haredi Poverty: The Same Threat in Both New York and Israel*, HAARETZ (Dec. 7, 2018), https://www.haaretz.com/israel-news/2018-12-07/ty-article/.premium/haredi-poverty-the-same-threat-in-both-new-york-and-israel/0000017f-f553-d5bd-a17f-f77b8d6f0000; *Religion & Ethics Newsweekly: Leaving Ultra-Orthodox Judaism*, PBS (May 10, 2013), https://www.pbs.org/wnet/religionandethics/2013/05/10/may-10-2013-leaving-ultra-orthodox-judaism/18423/.

202. *See supra* note 153 and accompanying text.

203. *See* Brief for Footsteps, Inc. as Amicus Curiae Supporting Plaintiff's Motion for a Preliminary Injunction, Young Advocs. For Fair Educ. v. Cuomo, 359 F. Supp.3d 215 (E.D.N.Y. 2019) (No. 18-CV-4167), 2018 WL 8805266. This was not intended as a comprehensive study; its limited objective is to uncover the realities of a representative group of individuals who have exited the Hasidic community. *See* Bent Flyvbjerg, *Five Misunderstandings About Case-Study Research*, 12(2) QUALITATIVE INQUIRY 219, 228 (2006) ("One can often generalize on the basis of a single case, and the case study may be central to scientific development via generalization as a supplement or alternative to other methods. But formal generalization is overvalued as a source of scientific development, whereas 'the force of example' is underestimated."); ROBERT STAKE, THE ART OF CASE STUDY RESEARCH 8 (1995) ("The real business of case study is particularization, not generalization.").

204. Brief for Footsteps Inc., as Amicus Curiae Supporting Plaintiffs' Motion for a Preliminary Injunction at 13, *Cuomo*, 359 F. Supp. 3d 215 (No. 19-CV-4167).

205. *Id.* at 14.

206. *Id.*

207. *Id.* at 16.

GED exam.[208] One interviewee—who did manage to receive a GED and enroll in college—described his college experience as "a disaster."[209]

More generally, interviewees explained how upon leaving the community, they found "it hard to relate to people around [them] and to fit in."[210] Because there were "so many things they ha[d not] heard of" and it was "a big challenge to fit in without having [learned] the basic elements of life outside [the Hasidic community]," some "felt like there was an infinite divide between [themselves] and the rest of the world and that it was fundamentally impossible to cross it."[211] Departing the Hasidic community left one, as an interviewee put it, "isolated and really alone[,]" lacking the "social norms and basic things needed to make it out there."[212] "It's like being an immigrant in your own country."[213]

These reports are, of course, anecdotal. But they suggest that many ex-Hasidic individuals struggle immensely with adjusting to the "outside" world when attempting to exit the community of their youth.[214] That should not come as a surprise. Lacking even a rudimentary secular education, it is extraordinarily difficult for anyone in adulthood to reinvent themselves—especially for those who already have children, as most people seeking to leave the Hasidic community do.[215]

Individuals who leave their inherited community without even a basic secular education often cannot "exit" in the true sense of the word. To exit one community, it is helpful—if not necessary—to enter another.[216] For those leaving an insular community, the other "community" they would likely seek to enter is mainstream American society. But it is exceedingly difficult to do so without rudimentary language skills and basic cultural knowledge. Immigrants might lack language skills and cultural references, but rarely are they almost entirely unfamiliar with the workings of modern society.[217]

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How much education must religious schools provide to satisfy *Yoder*'s right of exit? The interviews I conducted point to a line, albeit a tentative one. There was

208. *Id.* (emphasis added).
209. *Id.* at 18.
210. *Id.* at 20.
211. *Id.*
212. *Id.*
213. *Id.*
214. *See generally* Batya Ungar-Sargon, *Why Do So Many Jews Who Leave the Ultra-Orthodox Community Commit Suicide?*, GOTHAMIST (Aug. 12, 2015), https://gothamist.com/news/why-do-so-many-jews-who-leave-the-ultra-orthodox-community-commit-suicide [https://perma.cc/93XF-4L9A] (discussing difficulties associated with exiting the Hasidic community leading some exiters to commit suicide).
215. *See* KRANZLER, *supra* note 151, at 82–83.
216. *See supra* note 114.
217. Not to mention that, unlike many immigrants, those leaving the Hasidic community usually enter this new "world" without any family or friends. I thank Professor Mary Anne Case for encouraging me to stress this point. *See* Ungar-Sargon *supra* note 214 ("Individuals . . . who leave the ultra-Orthodox community to pursue a secular life are frequently shunned and ostracized by their families and loved ones. Their parents might refuse to see or communicate with them, and keep them from their family home.").

a marked difference between the ex-Hasidic female and male interviewees. As discussed earlier, in contrast to boys, and although "still deeply inadequate," girls in Hasidic schools typically do receive a barebones, minimal secular education.[218] While boys receive at most an hour and a half of secular education four times a week—which in practice is often treated as free time—a typical Hasidic girls' elementary school day consists of "prayer and Jewish religious studies" from "8 AM to 12 PM" and "secular subjects" "from 1 PM to 4 PM."[219] Secular studies are "taught at a very low level"—but at least they are taught.[220]

According to one female interviewee, her secular education did not include science until the seventh grade, and even then "hardly any."[221] But, in seventh grade, her class "covered a little biology," including instruction "about the digestive system and sleeping cycles."[222] Another female interviewee described receiving some instruction in "English and grammar."[223] Although she "failed" many of the "Regents exam[s] she took," they were at least administered to her, and she did manage to receive a passing aggregate score.[224] (The Regents exams are New York State standardized exams that, if passed, result in a high school diploma called a "Regents diploma.")

Given the minimal secular education they received, ex-Hasidic women interviewees reported a significantly less harrowing experience when trying to leave the Hasidic community than did ex-Hasidic men. Some found jobs as receptionists, including, for example, "at a security and communications company in Manhattan"; others enrolled in college.[225] Indeed, while it was typical for male interviewees either never to enroll in college (because it felt too culturally alien or they thought themselves too far behind academically) or to enroll only to then drop out (one interviewee "dropped out of four separate semesters midway through"),[226] it was not uncommon for female interviewees to have graduated from college, even if they struggled to do so.[227]

More robust empirical research is needed before firm conclusions can be drawn. Still, the comparatively better outcomes for female interviewees point to what a minimal baseline secular education might entail. Hasidic girls typically receive a very limited secular education in the form of basic English literacy and rudimentary science, which is far more than Hasidic boys receive.[228] This disparity—which is rooted in the belief that girls need not, and indeed may not, study

218. *See* Brief for Footsteps, Inc. as Amicus Curiae Supporting Plaintiff's Motion for a Preliminary Injunction, Young Advocs. For Fair Educ. v. Cuomo, 359 F. Supp. 3d 215 (E.D.N.Y. 2019) (No. 18-CV-4167), 2018 WL 8805266.

219. *Id.* at 11–12.

220. *Id.* at 12.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at 14.

226. *Id.* at 18.

227. *Id.* at 18–19.

228. *See supra* note 151 and accompanying text.

advanced Jewish texts[229]—results in ex-Hasidic women facing significantly less difficulty navigating the modern, secular world than do ex-Hasidic men. Their experiences suggest that receiving even a basic education—for example, attaining approximately a fifth-grade level of literacy and scientific awareness—can mark the difference between securing a child's right to exit religion and failing to do so. Although far more research is needed before this observation can be anything more than suggestive, these accounts point toward a threshold of secular education that could satisfy *Yoder*'s standard for minimal secular education—or at the least provide a starting point for further exploration.

As this discussion of Hasidic education illustrates, New York has failed to uphold even that bare minimum standard for over a century. Its reticence to hold Hasidic schools accountable is best described as a policy of accommodation. Ironically, this accommodation undermines one of the principal defenses of accommodations for multicultural communities: that members of such communities can always leave. The case study of Hasidic education reveals both the naivete of that assumption and the way state accommodations can themselves contribute to rendering it false.

III. HASIDIC CUSTODY BATTLES

For many decades, New York has granted Hasidic communities a *de facto* exemption from state education laws that has significantly curtailed Hasidic children's ability to exit their insular religious community. But the state has also more directly contributed to undermining Hasidic community members' right to exit. This next Part provides a window into custody battles between Hasidic and ex-Hasidic parents to show how the Hasidic school system hinders exit beyond its failure to provide a meaningful secular education. It illustrates how community rules are enforced in Hasidic communities by using the threat of expulsion from school as leverage, and how that same threat is wielded in family court to deny custody or overnight visitation to parents who cease to observe a Hasidic lifestyle. In this way, family courts expand the Hasidic education system's curtailment of the right of exit, as they both restrict parents' ability to build new lives outside the community and order children to remain in the Hasidic school system despite the objections of their ex-Hasidic parent—often by applying the "best interests of the child" standard without accounting for the child's possible future interest in exiting the community.[230]

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229. *See* Rothschild, *Outer Boundary*, *supra* note 128, at 227.

230. Although statutes and caselaw provide factors to consider, the standard is highly discretionary. For good reason, scholars frequently criticize it on the ground that it is hopelessly indeterminate. *See, e.g.*, Elizabeth S. Scott & Robert E. Emery, *Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interests Standard*, 77 LAW & CONTEMP. PROBS. 69, 69 (2014); Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 16 (1987); Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS., 226, 229 (1975). A particular problem with the standard's lack of "objective content," DAVID L. CHAMBERS, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 481–82, 488 (1984), that scholars often point to is that it "largely operates as a cover

A. SCHOOLS AS ENFORCEMENT MECHANISMS

Many Hasidic rules are designed to ensure that the members of Hasidic groups do not become "enticed" by the secular world outside the Hasidic enclave. Access to the internet at home is forbidden, as is reading secular books or periodicals, including the news.[231] And, of course, television is prohibited.[232] Hasidic communities often regulate their constituents with stringent religious norms and enforce these norms with "religious police" who report infractions to Hasidic leadership.[233]

Moreover, Hasidim marry young—often, men by the age of 18 and women by the age of 17—in arranged marriages, and, as mandated, typically begin having children immediately, further entrenching Hasidim in the community.[234] After marriage, exit becomes particularly challenging for Hasidic women, whose marriages "[make] their time and their bodies even less their own," are "expected to be home with children," are "forbidden from driving," and generally have "very little mobility."[235]

As discussed above, the Hasidic school system is a key mechanism for enforcing community rules, as schools require parents to abide by extensive

for the exercise of unprincipled judicial discretion," Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1452 (2018). *See also* Melissa Murray, Loving*'s Legacy: Decriminalization and the Regulation of Sex and Sexuality*, 86 FORDHAM L. REV. 2671, 2692 (2018) (even "where racial concerns appeared to predominate in determining custody, the capacious best-interests standard continued to provide cover for judicial decision-making"). Meanwhile, judges' discretionary choices are shaped by—and thus perpetuate—majoritarian values. *See, e.g.*, Solangel Maldonado, *Bias in the Family: Race, Ethnicity, and Culture in Custody Disputes*, 55 FAM. CT. REV. 213, 214 (2017) (discussing the "risk that judges . . . will assess parenting attitudes and behaviors in accordance with dominant, predominantly White middle-class norms"); Annette R. Appell & Bruce A. Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE J. GENDER L. & POL'Y 63, 66 (1995) ("The lack of a uniform understanding of the term 'best interests' . . . raises significant concerns about social engineering . . . [which] will have the greatest impact on the least visible and respected population of families whose racial and economic status already place them at great risk of destructive state intervention."); Emily J. Stolzenberg, *Tribes, States, and Sovereigns' Interest in Children*, 102 N.C. L. REV. 1093, 1118 (2024) ("The best-interests standard's capaciousness renders it a ready vehicle through which the sovereign . . . may impose majoritarian norms about how to raise children."). Interestingly, the case study of Hasidic custody determinations explored in this Article suggest the opposite: in at least some cases, the best-interests standard is deployed to advantage *minority* interests that *conflict* with majoritarian values and culture. As a general matter, more nuance is needed in parsing the categories of "majoritarian" and "minoritarian" in both the context of judicial decisionmaking and of religion, as is more empirical research. *Cf.* Bruce Ackerman, *Beyond Caroline Products*, 98 HARV. L. REV. 713 (1985) (complicating the meaning of "discrete and insular"). In previous work, I observed in a different context, but also writing about Hasidim, that the story of the Hasidim of Kiryas Joel "offers a different view of powerlessness, suggesting the need for a more nuanced metric to measure minority status of religious communities." *See* Rothschild, *supra* note 172; *see also* Rothschild, *supra* note 10, at n.237

231. FADER, MITZVAH GIRLS, *supra* note 151, at 28, 69, 168–69; FADER, HIDDEN HERETICS, *supra* note 151, at 189–90.

232. FADER, HIDDEN HERETICS, *supra* note 151, at 18.

233. *See id.* at 79–81.

234. *See* KRANZLER, *supra* note 151, at 82–83.

235. FADER, HIDDEN HERETICS, *supra* note 151, at 104.

rules governing the home.[236] To give these rules teeth, Hasidic schools warn parents that any deviation from the rules will result in their children's expulsion.[237] Having one's children expelled carries both economic and social repercussions. It tarnishes the "reputation of entire extended families," which has "serious consequences later when marriages [are] arranged," as tainted members are paired with less socially and economically favorable matches. The threat of such consequences serves to keep Hasidic community members in check.[238]

B. CUSTODY ADJUDICATIONS

As one might expect, it is rare for Hasidim to leave the community. But if, against all odds, a Hasidic parent does leave, the community labors to ensure that the children remain with the parent who stays.[239] The community sees such efforts as necessary to save the souls of the "innocent children," who will otherwise be negatively influenced by the "apostate" parent.[240] Indeed, even relatives

236. *See supra* notes 145–48 and accompanying text. *See, e.g.*, THORSEN LAW OFFICES, EXHIBIT G, APPENDIX UTA SATMAR SCHOOL RULES FOR BOYS (on file with author).

237. *See* FADER, HIDDEN HERETICS, *supra* note 151, at 79–81.

238. *Id.* at 63, 79–81.

239. These communal efforts can be highly effective, often occurring before a Hasidic divorce reaches state court. For instance, early in the lifecycle of an ex-Hasidic parent's divorce, a *beit din* (traditional Jewish court) will often summon the parents to issue and set the terms of a religious divorce. If a parent declines, the court may impose a form of excommunication to apply pressure. A consequence of the excommunication is that the parents' children are expelled from school. One parent I interviewed shared that she initially refused to appear before the *beit din* that summoned her, until it threatened her with excommunication, which she knew carried the penalty of her child being expelled from school mid-year. As I also learned from my interviews, it is typical for the *beit din* to require the parents to sign a sophisticated arbitration agreement (designating the *beit din* as arbitrators) and, in some instances, a settlement agreement—documents courts are likely to find binding. *See, e.g.*, Weisberger v. Weisberger, 60 N.Y.S.3d 265, 268, 271, 275–76 (App. Div. 2017) (partially enforcing a *beit din* custody agreement). While custody is nonarbitrable, family courts can rely on the "best interests of the child" analysis undertaken by the *beit din* and may all but defer to it.

240. *See* Molly Simms, *This Organization Helps People Who've Left the Orthodox Jewish Community*, OPRAH MAG. (Jun. 18, 2019, 7:20 PM), https://www.oprahmag.com/life/a27925298/help-leaving-orthodox-jewish-community-footsteps [https://perma.cc/Q484-6EPH] ("Custody battles are often grueling: Ultra-Orthodox sects can wield serious financial muscle against apostates, and it's common that the spouses who stay behind don't pay a dime in legal fees—the community covers them entirely."); Sharon Otterman, *When Living Your Truth Can Mean Losing Your Children*, N.Y. TIMES, May 25, 2018 https://www.nytimes.com/2018/05/25/nyregion/orthodox-jewish-divorce-custody-ny.html ("[T]he community has become more organized in how it aids the religious parent and ostracizes the parent leaving the fold."); Debra Nussbaum Cohen, *The Harsh Reality Awaiting Hasidic Jews Who Leave Their Community Behind*, HAARETZ (Oct. 24, 2017), https://www.haaretz.com/us-news/.premium-the-harsh-reality-awaiting-hasidic-jews-who-leave-the-fold-1.5459985 ("The community pays for [the Hasidic parent's] excellent private lawyers . . . . When a parent has [left the community] and is trying to regain custody of their children, 'You're not just fighting your spouse and their family. You're literally fighting an entire community . . . . They start rallying the minute somebody leaves. They hire lawyers that first second.'"); Ungar-Sargon, *supra* note 214 (discussing a Hasidic husband who "took out an order of protection against [the ex-Hasidic ex-wife] and sued for custody of her children. He was able to secure over $30,000 in support from the Satmar community to divorce [her] and hire a lawyer in Rockland County who specializes in religious custody issues").

of the "apostate" parent will often join in these efforts.[241] A parent might appear in family court only to discover that their own parents are testifying against them, urging that custody be awarded to the other parent.[242]

Hasidic schools' role in regulating the Hasidic community extends to custody battles. It can take but a single phone call or letter from a Hasidic school to alert a family court that a child will be expelled if he spends unsupervised time with a parent whose home is not strictly compliant with the school's religious rules—and that threat can carry significant repercussions.[243] Operating on the assumption that it is in the child's best interest not to be expelled, family courts sometimes then accede to the school's demand that a parent be denied access to their child.[244] When family courts deny the "apostate" parent custody or unsupervised visitation in response to a school's threat, they effectively put other Hasidic parents on notice: if they deviate from religious norms, they may lose their children.[245]

C. AN EXAMPLE

Consider the example of Reva.[246] Reva was married to a Hasidic man for seven years and lived with him and their three children in a Hasidic community in Monsey, New York. When Reva decided to leave Hasidism and end her marriage, a family court initially awarded her sole custody of her two daughters and joint

241. FADER, HIDDEN HERETICS, *supra* note 151, at 93 ("[E]xtended families on *both* sides often side[] with the still-religious spouse (male or female) if that spouse want[s] the children, offering financial and emotional support with the goal of keeping the children religious at all costs.") (emphasis added)).

242. *Id*. at 93.

243. *See* Brief for Professor Jeannie Suk Gersen as Amicus Curiae Supporting Petitioner Appellant at 3–4, Khan v. Schwartz, 201 A.D.3d 718 (N.Y. App. Div. 2022) (No. 2019-11671).

244. *See* Khan v. Schwartz, 156 N.Y.S.3d 894, 895 (2022). It is also worth asking whether courts are unconstitutionally "delegating" authority to Hasidic schools when they effectively grant them government-backed power to enforce their rules. *See* Zalman Rothschild, *Fulton's Missing Question: Religious Adoption Agencies and the Establishment Clause*, 100 TEX. L. REV. ONLINE 32, 38 (2021) (discussing the "principle stemming [Establishment Clause] doctrine . . . that the government cannot delegate governmental power to religious institutions"). To be sure, though, "religious nondelegation" remains an undeveloped, undertheorized, and understudied doctrine.

245. While these courts are likely operating under good-faith assumptions about what is in the best interest of the child, it bears noting that Hasidic communities' political engagement extends to state judge elections. Such engagement reflects an appreciation of the dynamics and consequences of custody determinations when one parent seeks to exit the Hasidic community. *See, e.g.*, Lauren Hakimi, *Ad Campaign Suggests Judicial Candidate Would Side with Haredi-Practicing Parents over Ex-Spouses*, SHTETL (June 22, 2023, 7:40 PM), https://www.shtetl.org/article/ad-campaign-judicial-candidate-will-side-with-haredi-practicing-parent [https://perma.cc/84Y8-AXXR] (describing a 2023 Yiddish-language Hasidic ad to vote for a Rockland County judicial candidate, which warned that "whoever wins the election will rule on child custody cases in Haredi divorces in which one parent has stopped observing Haredi practices [and] suggest[ed] that, if elected, [the candidate] would decide child custody cases in favor of the parent who is still Haredi-practicing," and that "'[t]he infamous destroyers and wicked Jews want to steal the rights of frum [Orthodox] parents and tear children away from the way that was paved for us from generation to generation. A progressive judge (would be) a direct injury to our values. There is no way we would allow that. The goal is 7000 heimish votes. Rockland residents follow the call of rabbis and school administrators and vote for the endorsed candidates'").

246. This account is drawn from an amicus brief I authored and filed. The names have been anonymized. *See* Brief for Professor Jeannie Suk Gersen as Amicus Curiae Supporting Petitioner Appellant at 2–8, *Khan*, 201 A.D.3d (No. 2019-11671).

custody of her son, Avrum, finding that she was best suited to care for them. However, that changed when the Hasidic school at which her son was enrolled intervened, leading her to be stripped of custody of her children and denied even unsupervised visitation with them.[247]

Rabbi Fogel, the principal of United Talmudical Academy (UTA) Monsey, the Hasidic school in which Avrum was enrolled, wrote a letter to Avrum's school-approved therapist, threatening to expel Avrum unless Avrum's unsupervised visitation with his mother was revoked.[248] Like other Hasidic schools, UTA Monsey requires that students abide by extensive Hasidic religious-communal rules, including how students style their hair and how often they cut their nails.[249] The school forbids children from using radios and Game Boys, reading English-language books of any kind, and playing any "tapes, CD's, etc. not allowed by the Satmar community, such as rock and roll, English speaking folk music, country music, love songs, [and] songs sung by females."[250] As is typical of Hasidic schools, UTA Monsey tightly controls what children are exposed to, requiring that "shopping centers, professional offices, city streets, [and] anywhere women are to be seen . . . be avoided."[251]

In the letter, Rabbi Fogel reported that Avrum shared with other students that during his two weeks of unsupervised visits with his mother, they saw a movie at the local mall and that his mother kept a tablet and a pet cat at home—both forbidden under the Hasidic school's rules.[252] The therapist then sent a letter to Avrum's attorney for submission to the court, echoing almost verbatim Rabbi Fogel's demand.[253] The letter stressed that UTA Monsey is "a Hasidic school with cultural and religious standards" and that "compliance to these religious norms must be met . . ."[254] It also relayed Rabbi Fogel's threat that if the court did not terminate overnight visits and limit visitation to "one hour in Monsey" with supervision, he would have "no choice" but to "expel" Avrum.[255]

The family court proceeded to terminate overnight visitation between Reva and her son. The court's decision rested in part on its conclusion that Reva's secular activities, including taking Avrum to the movies and allowing him to use her tablet, put his enrollment at UTA Monsey in jeopardy.[256] And, the court

247. *See id.*

248. UTA Monsey rules require that any social worker or counsel "first be approved by Satmar rabbis." Brief for Professor Jeannie Suk Gersen as Amicus Curiae Supporting Petitioner Appellant at 3 n.1, *Khan*, 201 A.D.3d (No. 2019-11671).

249. *Id.* at 4.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.* at 5.

254. Petitioner's Exhibit 38, Khan v. Schwartz, No. 2019-11671 (N.Y. App. Div.).

255. Brief for Professor Jeannie Suk Gersen as Amicus Curiae Supporting Petitioner Appellant at 2–8 at 4–5, *Khan*, 201 A.D.3d 718 (No. 2019-11671).

256. Decision at 55, *Khan*, 201 A.D.3d 718 at 719 (No. 2019-11671).

reasoned, Avrum would suffer emotional harm if he were expelled from UTA Monsey.[257]

Reva's is not the only case in which family courts have factored in an ex-Hasidic parent's noncompliance with a Hasidic school's extensive rules governing the home when awarding custody to the Hasidic parent.[258] When family courts base custody and visitation decisions on compliance with Hasidic rules, they make it harder for members of the community to exit. Courts leave ex-Hasidic parents with the impossible choice of either following Hasidism's religious rules or risk losing their child—the most severe punishment imaginable for a parent.[259]

D. BEYOND CUSTODY

Family courts also factor Hasidic schooling into decisions beyond custody and visitation. Courts often order that the child of the ex-Hasidic parent remain enrolled in Hasidic schools, even though doing so perpetuates the parents' continuing violation of state law by denying their children a basic secular education.[260] Ironically, in some cases courts assign children to Hasidic schools precisely *because* that schooling has already deprived them of the skills they would need to succeed outside the community.[261] One court even admitted, after extensive fact-finding, that a Hasidic boy's continued enrollment violated New York's compulsory education law, yet nonetheless held that it was in the child's best interests to stay.[262] The substandard nature of

257. *Id.*

258. *See, e.g.*, Weichman v. Weichman, 158 N.Y.S.3d 154 (App. Div. 2021).

259. In addition to deterring others from exiting the community and infringing on the ex-Hasidic parent's parental rights, depriving that parent of custody and/or unsupervised visitation can also harm the children by denying them a meaningful relationship with one of their parents (as I discuss imminently). The discussion drawn from interviews that follows arguably supports Clare Huntington and Elizabeth Scott's view that parental rights can serve to promote children's well-being. *See* Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371 (2020); Elizabeth S. Scott, *Parental Autonomy and Children's Welfare*, 11 WM. & MARY BILL RTS. J. 1071, 1072–74 (2003). For a more cautionary perspective on the use of parental rights as a vehicle for advancing children's interests—recently reiterated during a "good-faith conversation . . . about which legal rules best serve the interests of children," Clare Huntington, *Parental Rights: Rhetoric Versus Doctrine*, 91 U. CHI. L. REV. 503, 507 (2024)—see Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 DUKE L.J. 75, 960–110 (2021). *See also* Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448 (2018); Emily Stolzenberg, *Tribes, States, and Sovereigns' Interest in Children*, 102 N.C. L. REV. 1093, 1115 (2024) at 1121 ("[I]t is almost always in a child's interest to continue a relationship with a loving and capable parent. . . ."); Anne L. Alstott, Anne C. Dailey, & Douglas NeJaime, *Psychological Parenthood*, 106 MINN. L. REV. 2363, 2373 (2022) ("The science of attachment documents the importance of the child's bond with his or her psychological parents [and] the harm of disruptions in that relationship. . .")

260. Or they grant the Hasidic parent full educational decisionmaking authority, which amounts to the same thing. *See infra* note 261.

261. *See, e.g.*, Weisberger v. Weisberger, 60 N.Y.S.3d 265, 275 (App. Div. 2017) (upholding family court's award of education-decisionmaking authority to Hasidic father because it would not be in child's best interest "to become completely unmoored from the faith into which they were born and raised").

262. In *Weichman*, the ex-Hasidic mother requested that her son attend a Jewish Modern Orthodox school where he would receive a basic secular education. After a lengthy trial, the New York family court concluded that

Hasidic education thus produces a paradoxical situation in which it is deemed in the child's best interests to remain in substandard schools.

Requiring children to remain enrolled in a Hasidic school can estrange them from their ex-Hasidic parent. These schools often teach children to disavow both the secular world and secular people, including their own parents. To illustrate, a young Hasidic father recalled that it came as no surprise when his son reported learning in school that "[non-Jews] and non-religious Jews are like animals and are not to be respected."[263] As the teacher explained, an authoritative commentary on the biblical verse "you should respect your parents and keep Shabbas"[264] renders the dictate conditional: "you should respect your parents [only] *if* they keep Shabbas."[265] On another day, the boy shared that his teacher told the class that "four-fifths of the Jewish people were not rescued from Egypt—God killed them because they were friends with the Egyptians and were secular."[266] And, expounding on the biblical verse relaying that Jacob had "been staying with Laban" and acquired cattle,[267] the teacher explained that Jacob was able to remain devoted to God while living with his non-Jewish uncle only because he saw his Aramean uncle as "cattle."[268] So too—the children were instructed—they should view "non-Jews and Jews who act like non-Jews as animals."[269]

Despite desperately wanting to leave the Hasidic community, the young father delayed doing so for years out of fear that his child would become estranged from him. That fear was not unfounded. Interviewees who left the community reported that their children grew uncomfortable in their presence and increasingly withdrew from them as a result of what they were taught in school.[270]

> The course of study at the Yeshiva consists primarily of Judaic studies with one and [a] half hours per day devoted to reading and math. The school does not provide many of the courses required under the New York Education Law. There are no Regents level courses, and there was no proof adduced at trial to show that the teachers are board-certified. After the eighth grade, [the son] will not receive instruction in any secular courses at his current Yeshiva, and he will not attain a state-recognized high school diploma.

S.W. v. Y.C.W., No. 50905/2015, at 20 (N.Y. Civ. Ct. Dec. 23, 2019). Nonetheless, the court awarded the father sole custody, including educational decisionmaking authority. The court explained that, given the thirteen-year-old's "need for stability, the potential negative impact of removing him from the lifestyle that the parties initially agreed he would follow, . . . [and that the] husband's religious beliefs comport with the lifestyle and principles that A.W. has been taught"—all factors to which the court gave "ample consideration"—it was in the best interests of the child that the father retain full legal and physical custody and that, as the father wished, the child remain enrolled in his Hasidic school. *Id.* at 22. The Appellate Division, Second Department, upheld the decision. Weichman v. Weichman, 158 N.Y.S.3d 154, 156 (App. Div. 2021). The New York Court of Appeals, New York's highest court, denied leave to appeal. Weichman v. Weichman, 39 N.Y.3d 910 (N.Y. 2023).

263. Proposed Brief for A.G., E.L., F.A., M.B. and D.F. as Amicus Curiae in Support of Petitioner-Appellant at 12, Weichman v. Weichman, 39 N.Y.3d 910 (N.Y. 2023). I interviewed the ex-Hasidic parents for this amicus brief, authored the brief, and filed it.

264. *Id.* "Shabbas" is the Hasidic pronunciation of Shabbat.

265. *Id.* at 13.

266. *Id.*

267. *Genesis* 32:4-5.

268. Proposed Brief of the A.G., E.L., F.A., M.B. and D.F. as Amicus Curiae Supporting Petitioner-Appellant at 13, *Weichman*, 39 N.Y.3d 910 (No. 50905/15).

269. *Id.*

270. *See id.* at 12. I call this "cultural alienation." If a child's school's explicit teachings serve to alienate the child from one of their parents, such teachings, I would argue, should be considered

Ordering a child to remain enrolled in a Hasidic school can also more directly constrain an ex-Hasidic parent's ability to exit. Courts often require ex-Hasidic parents to comply with Hasidic school rules whenever their child is in their home.[271] In this way, the specter of Hasidic school rules continues to govern even those who have chosen to exit the community—enforced not by rabbis, but by the state through its family courts.

Such rules inhibit ex-Hasidic parents' ability to cultivate a new life and identity. One ex-Hasidic mother, who is gay, described it as "excruciatingly painful"

"alienation" for custody purposes—that is, alienation the legal doctrine, not "alienation syndrome," the controversial medical term. *See* Hanson v. Spolnik, 685 N.E.2d 71, 84 (Ind. Ct. App. 1997) (accepting parental alienation as a doctrine while rejecting it as a syndrome). Yet—problematically in my view—such teachings would not be recognized as alienation by a court, because they do not fit neatly into the conventional doctrinal category of "parental alienation" under family law. *See, e.g.*, Palazzolo v. Mire, 10 So.3d 748, 771 (4th Cir. 2009) ("[T]he classic alienated child [is] one that unjustifiably turns against the alienated (rejected) parent *solely* as a result of the alienating parent's hostile actions . . ." (emphasis added)).

For example, imagine the difficulty of maintaining a meaningful relationship with a gay parent when the child is taught that same-sex intimacy is an abomination. *See* Leviticus 20:13. Yet a court would not take such "cultural alienation" into account. In *Weisberger v. Weisberger*, a gay ex-Hasidic parent argued that Hasidic schools inculcate anti-LGBTQ attitudes, but this did not alter the outcome. *See, e.g.*, 60 N.Y.S.3d 265, 269 (App. Div. 2017) (gay ex-Hasidic mother unsuccessfully sought for her child to "attend a conservative or progressive modern orthodox Jewish school" that was "inclusive of gay individuals"); Proposed Brief for A.G., E.L., F.A., M.B. and D.F. as Amicus Curiae Supporting Petitioner Appellant at 13, *Weichman*, 39 N.Y.3d 910 (No. 50905/15) (gay ex-Hasidic mother unsuccessfully objected to her son attending an ultra-Orthodox yeshiva where he was being inculcated with a negative attitude toward LGBTQ people).

The inverse risk also deserves attention: a child may become alienated from the *Hasidic* parent if enrolled in a secular school. If an ex-Hasidic parent is granted custody and the child attends a secular school, or even a Modern Orthodox Jewish school, the child will inevitably be exposed to ideas and values at odds with the Hasidic parent's worldview. Courts thus face a dilemma: ordering Hasidic schooling risks alienating the child from the ex-Hasidic parent, while ordering secular schooling risks alienating the child from the Hasidic parent. *See* Zummo v. Zummo, 574 A.2d 1130, 1157 (Pa. Super. Ct. 1990) ("*Both* parents have rights to inculcate religious beliefs in their children." (emphasis added)). One might argue that there is an important difference: if the child attends a secular school—or especially a Modern Orthodox school—he will not typically be explicitly taught that his Hasidic parent's life is wrong, sinful, and to be avoided, as he would be in a Hasidic school, where secular life is denounced as dangerous and corrupt. *See supra* notes 263–69 and accompanying text. Yet to the extent that Hasidism and secularism are inherently at odds, it is hard to see how *any* choice of schooling will not risk estranging the child from one of his parents. The "right to exit" of the ex-Hasidic parent and the "right to remain" of the Hasidic parent thus stand in deep and perhaps irreconcilable tension.

This inevitable tension, necessarily resulting in a tradeoff, is a tragedy. It is not my aim to prescribe how it should be resolved, even if that were possible. My more modest aim is to argue that in divorce cases involving a parent seeking to leave an insular religious community, the costs of exit should at least be taken seriously. I will, however, (very) tentatively offer one "solution," which is perhaps the least-worst alternative: each parent could presumptively share equal authority over educational decisions. That default rule could be implemented in different ways. For example, if there are an even number of children, each parent could be granted full authority over the schooling of an equal number of them. Alternatively, parents could be required to delegate all education-related decisions to an "education arbitration panel," composed of three arbiters, one chosen by each parent, and a third selected jointly by the two arbiters.

271. *See, e.g.*, S.W. v. Y.C.W., No. 50905/2015, at 27 (N.Y. Civ. Ct. Dec. 23, 2019) (ordering that the mother "shall not take the child to a place or expose the child to an activity that violates rules, practices, traditions and culture of the child's Orthodox Jewish Chasidic Faith"); Cohen v. Cohen, 114 N.Y.S.3d 458, 463 (App. Div. 2019).

to perform "a Hasidic lifestyle and value system" she "did not believe in."[272] "Having to serve strictly Hasidic-approved Kosher food and live her 'day-to-day life' not in accordance with her values was 'violating' for her."[273] "She had been 'hurt by the [Hasidic] system and wanted to do better for [herself] and [her] children, yet [she] was being court-ordered to run [her] whole day-to-day life around this system of beliefs and values and practices.'"[274] In effect, the state mandated that she continue performing the very religious practices she sought to discard, subordinating her parental decisionmaking rights to the demands of her former community. The court's order thus deprived her of the ability to fully exercise the right to exit her religion.

E. THE FAILURE OF FAMILY LAW

How is any of this constitutional? How can a court factor compliance with religious dictates into custody determinations? The answer lies in the best-interests-of-the-child standard.[275] Courts circumvent constitutional hurdles by insisting that they are not judging a parent's irreligiosity as such, but rather protecting the child from the emotional and social fallout of expulsion.[276] And when directing parents to follow Hasidic school rules in their own home, courts rely on a fictional distinction between ordering a parent to *be* religious, which courts acknowledge would be unconstitutional, and merely ordering a parent to abide by Hasidic school rules to maintain custody or visitation, which, they claim, is not.

For example, in *Weisberger v. Weisberger*, a New York appellate court rejected as unconstitutional a clause in a divorce settlement that would have required an ex-Hasidic gay mother to abide by Hasidic norms in her children's presence.[277] Three years later, a New York appellate court similarly held that a family court's order that an ex-Hasidic parent's "behavior and conduct when in the presence of the children must and should be consistent with the cultural norms … established by the parents" is unconstitutional when the "cultural norms" in question are "the religious requirements of Hasidic Judaism."[278] According to these appellate courts, conditioning custody or visitation on a parent's commitment to act religiously is unconstitutional. Yet, in the same breath, they conclude that conditioning custody or visitation on a parent's maintaining a Hasidic-school-compliant home *is* somehow consistent with the Constitution.

Much as New York has failed to account for the right of exit in its education policy, its family and appellate courts have likewise not adequately confronted

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272. *Cohen*, 114 N.Y.S.3d at 16.

273. *Id.*

274. *Id.* (alterations in original).

275. *Cf.* Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631 (2006) (pointing to the tension between some courts' application of the best-interest-of-the-child standard and parents' free speech rights).

276. *Id.* at 16–19.

277. Weisberger v. Weisberger, 60 N.Y.S.3d 265, 275 (App. Div. 2017).

278. Cohen v. Cohen, 122 N.Y.S.3d 650, 652 (App. Div. 2020).

the implications of custody and visitation determinations for those seeking to exit Hasidic communities. These courts have failed to appreciate that conditioning custody and visitation on compliance with Hasidic schools' norms is functionally indistinguishable from mandating religious observance. A custody order that denies a mother custody or visitation because she has not conformed to cultural and religious standards amounts, in effect, to state-compelled adherence to those religious norms. It may appear more egregious to order a parent to *behave* religiously, but ordering her to comply with Hasidic school rules requires her to perform religion all the same. If she wishes to spend time with her children in her home, she must keep a strictly Kosher kitchen according to Hasidic standards; her house must be Sabbath observant; her children must not be exposed to the internet, television, or any secular literature; she cannot have pets—and the list goes on.

My point is not to take issue with the best-interests-of-the-child standard, a bedrock principle of family law.[279] Rather, I aim to raise two concerns about how courts apply this standard in cases involving parents who have left or wish to leave their religious community. First, courts often adopt an unduly narrow view of the interests of these parents' children. This Article's second Part illustrates how Hasidic education subverts a core interest of Hasidic children: preserving their right of exit from their community. Even if educational continuity appears beneficial in the short term, a longer view may reveal a very different understanding of the child's "best interests."[280]

Meanwhile, this Article's third Part highlights that in some custody settings, children are not the only party worthy of courts' concern. Parents seeking to exit insular religious communities are also vulnerable. In many respects, they are effectively trapped in the community of their youth. Family law, and the courts that apply it, could adopt a more panoramic approach to custody determinations, one that accounts for the vulnerability of parents as well as children.[281] A court that considers only the child's best interests, while ignoring the parents' interests, can make exit from an insular religious community more difficult.[282] And the cost is not borne solely by the parent before the court. A court that denies an ex-Hasidic parent custody, visitation, or educational decisionmaking authority sends a message to all members of the community who are contemplating—or might one day contemplate—exit: if they leave, they risk losing their children. Few deterrents are more powerful.

CONCLUSION

This Article has called attention to *Yoder*'s neglected promise of a right to exit religion. As *Yoder* recognized, there is value in preserving distinctive cultures.

279. *See supra* note 52.

280. *See supra* note 230.

281. *See, e.g.*, Langford v. Langford, 138 So. 3d 101, 104 (La. Ct. App. 2014) ("The paramount consideration in any determination of child custody is the best interest of the *child*." (emphasis added)).

282. Proposed Brief for A.G., E.L., F.A., M.B. and D.F. as Amicus Curiae in Support of Petitioner-Appellant at 12–13, Weichman v. Weichman, 39 N.Y.3d 910 (N.Y. 2023).

But when an insular community is preserved at the expense of its members' ability to exit, *Yoder* instructs that pluralism is no longer a sufficient justification for religious accommodation.

Rather than offer a comprehensive account of this "right," this Article has aimed more modestly to begin a conversation. Many questions remain. One concerns state action: under what conditions has the state acted to undermine the right to exit religion?[283] Another concerns scope: what exactly does this right entail? Exiting an insular religious community almost always carries psychological, social, and economic costs, and there is no reason to assume that it must be cost-free.[284] Rather, it is best to conceive of this right—as *Yoder* did, on my reading—as a right against prohibitive costs: those so great that they would deter most members of an insular religious community from leaving.

This Article has identified two costs that may be understood as prohibitive: the difficulty of navigating the modern secular world without a rudimentary secular education[285] and the risk of losing access to one's children.[286] These costs are not speculative. Drawing on interviews with current and former members of the Hasidic community, the Article illustrates the concrete ways in which they render exit from an insular religious community extraordinarily difficult.[287] But this is only a beginning. Determining precisely which costs of exiting religion are truly prohibitive, why they matter normatively, and when they may be outweighed by competing costs[288]—including costs to parents, communities, and pluralism itself—is the work of future theoretical and empirical inquiry.

Yoder anticipated the importance of protecting against such prohibitive costs, yet half a century later its promise remains unfulfilled. The case studies of Hasidic education and Hasidic custody determinations examined in this Article underscore the concrete ways in which the right of exit remains more hypothetical than real in America today. New York's long tradition of accommodating Hasidic schools and its treatment of ex-Hasidic parents in custody disputes reduce the "right to exit religion" to a right in name only for New York's Hasidim. Nor are they likely alone. One can only speculate how many other members of insular religious communities are likewise deprived of *Yoder*'s promised right.[289]

283. *See supra* Section I.D.

284. *See supra* notes 202–17 and accompanying text.

285. *See supra* notes 205–09 and accompanying text.

286. *See supra* note 239–45 and accompanying text.

287. *See supra* notes 202–17 and accompanying text.

288. *See* Green, *supra* note 24, at 184 ("[T]here is no denying that there are costs to respecting the right of exit.").

289. *See*, *e.g.*, *supra* note 127.