CHAPTER 10

THE OLD AND NEW LAW OF RELIGION

This chapter asks you to consider the development of law and religion by looking back at the past and forward to the future. Section A focuses on the Amish, a centuries-old Christian group that lives by traditional standards. Section B examines the Nones, who are the fastest-growing "religious" group in the United States. The highlight of Section A is the Court's 1972 *Yoder* case, while Section B provides the Pew Research Center's analysis of the growing influence of the Nones (i.e., the non-religiously-affiliated) in the United States.

We first read about *Yoder* in Chapter 4, when we focused on exemptions from the neutral laws of general applicability. The Court granted the Yoders an exemption for their children from the compulsory-attendance laws, an exemption not granted by the Court to the Mormons in *Reynolds*, or to the Native American users of peyote in *Smith*. Why did the Amish families receive the exemption? Do you think that the Court was mistaken in *Yoder*, or in *Smith* and *Reynolds*? Have you identified a constitutional standard that can protect Smith, Reynolds and Yoder? Do you think their exercise of religion deserves equal protection?

In *Yoder*, reprinted below, Justice Douglas wrote in dissent that the logic of Chief Justice Burger's opinion would offer an advance for Reynolds but a retreat for Henry David Thoreau, as well as Seeger and Welsh, the conscientious objectors we met in Chapter 5. Was Douglas correct? Does *Yoder* strike the proper balance between religious freedom and respect for the law? Can it be applied to other religious groups?

A. THE OLD

Wisconsin v. Yoder

Supreme Court of the United States, 1972.
406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15.

■ MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

On petition of the State of Wisconsin, we granted the writ of certiorari in this case to review a decision of the Wisconsin Supreme Court holding that respondents' convictions for violating the State's compulsory school-attendance law were invalid under the Free Exercise Clause of the First Amendment to the United States Constitution made applicable to the States by the Fourteenth Amendment. For the reasons hereafter stated we affirm the judgment of the Supreme Court of Wisconsin.

Respondents Jonas Yoder and Wallace Miller are members of the Old Order Amish religion, and respondent Adin Yutzy is a member of the Conservative Amish Mennonite Church. They and their families are residents of Green County, Wisconsin. Wisconsin's compulsory school-attendance law required them to cause their children to attend public or private school until reaching age 16 but the respondents declined to send their children, ages 14 and 15, to public school after they complete the eighth grade.[1] The children were not enrolled in any private school, or within any recognized exception to the compulsory-attendance law, and they are conceded to be subject to the Wisconsin statute.

On complaint of the school district administrator for the public schools, respondents were charged, tried, and convicted of violating the compulsory-attendance law in Green County Court and were fined the sum of $5 each.[3] Respondents defended on the ground that the application of the compulsory-attendance law violated their rights under the First and Fourteenth Amendments. The trial testimony showed that respondents believed, in accordance with the tenets of Old Order Amish communities generally, that their children's attendance at high school, public or private, was contrary to the Amish religion and way of life. They believed that by sending their children to high school, they would not only expose themselves to the danger of the censure of the church community, but, as found by the county court, also endanger their own salvation and that of their children. The State stipulated that respondents' religious beliefs were sincere.

In support of their position, respondents presented as expert witnesses scholars on religion and education whose testimony is uncontradicted. They expressed their opinions on the relationship of the Amish belief concerning school attendance to the more general tenets of their religion, and described the impact that compulsory high school attendance could have on the continued survival of Amish communities as they exist in the United States today. The history of the Amish sect was given in some detail, beginning with the Swiss Anabaptists of the 16th century who rejected institutionalized churches and sought to return to the early, simple, Christian life de-emphasizing material

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[1] The children, Frieda Yoder, aged 15, Barbara Miller, aged 15, and Vernon Yutzy, aged 14, were all graduates of the eighth grade of public school.

[3] Prior to trial, the attorney for respondents wrote the State Superintendent of Public Instruction in an effort to explore the possibilities for a compromise settlement. Among other possibilities, he suggested that perhaps the State Superintendent could administratively determine that the Amish could satisfy the compulsory-attendance law by establishing their own vocational training plan similar to one that has been established in Pennsylvania. Under the Pennsylvania plan, Amish children of high school age are required to attend an Amish vocational school for three hours a week, during which time they are taught such subjects as English, mathematics, health, and social studies by an Amish teacher. For the balance of the week, the children perform farm and household duties under parental supervision, and keep a journal of their daily activities. The major portion of the curriculum is home projects in agriculture and homemaking. [The Superintendent rejected this proposal on the ground that it would not afford Amish children "substantially equivalent education" to that offered in the schools of the area.

success, rejecting the competitive spirit, and seeking to insulate themselves from the modern world. As a result of their common heritage, Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence. This concept of life aloof from the world and its values is central to their faith.

A related feature of Old Order Amish communities is their devotion to a life in harmony with nature and the soil, as exemplified by the simple life of the early Christian era that continued in America during much of our early national life. Amish beliefs require members of the community to make their living by farming or closely related activities. Broadly speaking, the Old Order Amish religion pervades and determines the entire mode of life of its adherents. Their conduct is regulated in great detail by the *Ordnung*, or rules, of the church community. Adult baptism, which occurs in late adolescence, is the time at which Amish young people voluntarily undertake heavy obligations, not unlike the Bar Mitzvah of the Jews, to abide by the rules of the church community.

Amish objection to formal education beyond the eighth grade is firmly grounded in these central religious concepts. They object to the high school, and higher education generally, because the values they teach are in marked variance with Amish values and the Amish way of life; they view secondary school education as an impermissible exposure of their children to a "worldly" influence in conflict with their beliefs. The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning-through-doing; a life of "goodness," rather than a life of intellect; wisdom, rather than technical knowledge, community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society.

Formal high school education beyond the eighth grade is contrary to Amish beliefs, not only because it places Amish children in an environment hostile to Amish beliefs with increasing emphasis on competition in class work and sports and with pressure to conform to the styles, manners, and ways of the peer group, but also because it takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life. During this period, the children must acquire Amish attitudes favoring manual work and self-reliance and the specific skills needed to perform the adult role of an Amish farmer or housewife. They must learn to enjoy physical labor. Once a child has learned basic reading, writing, and elementary mathematics, these traits, skills, and attitudes admittedly fall within the category of those best learned through example and "doing" rather than in a classroom. And, at this time in life, the Amish child must also grow in his faith and his relationship to the Amish community if he is to be prepared to accept the heavy obligations imposed by adult baptism. In

short, high 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 into the Amish religious community. Dr. John Hostetler, one of the experts on Amish society, testified that the modern high school is not equipped, in curriculum or social environment, to impart the values promoted by Amish society.

The Amish do not object to elementary education through the first eight grades as a general proposition because they agree that their children must have basic skills in the "three R's" in order to read the Bible, to be good farmers and citizens, and to be able to deal with non-Amish people when necessary in the course of daily affairs. They view such a basic education as acceptable because it does not significantly expose their children to worldly values or interfere with their development in the Amish community during the crucial adolescent period. While Amish accept compulsory elementary education generally, wherever possible they have established their own elementary schools in many respects like the small local schools of the past. In the Amish belief higher learning tends to develop values they reject as influences that alienate man from God.

On the basis of such considerations, Dr. Hostetler testified that compulsory high school attendance could not only result in great psychological harm to Amish children, because of the conflicts it would produce, but would also, in his opinion, ultimately result in the destruction of the Old Order Amish church community as it exists in the United States today. The testimony of Dr. Donald A. Erickson, an expert witness on education, also showed that the Amish succeed in preparing their high school age children to be productive members of the Amish community. He described their system of learning through doing the skills directly relevant to their adult roles in the Amish community as "ideal" and perhaps superior to ordinary high school education. The evidence also showed that the Amish have an excellent record as law-abiding and generally self-sufficient members of society. . . .

I

Thus a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of *Pierce*, "prepare (them) for additional obligations."

II

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 religious beliefs they and their forbears have adhered

to for almost three centuries. In evaluating those claims we must be careful to determine whether the Amish religious faith and their mode of life are, as they claim, inseparable and interdependent. A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.

Giving no weight to such secular considerations, however, we see that the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living. That the Old Order Amish daily life and religious practice stem from their faith is shown by the fact that it is in response to their literal interpretation of the Biblical injunction from the Epistle of Paul to the Romans, "be not conformed to this world. . . ." This command is fundamental to the Amish faith. Moreover, for the Old Order Amish, religion is not simply a matter of theocratic belief. As the expert witnesses explained, the Old Order Amish religion pervades and determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community.

The record shows that the respondents' religious beliefs and attitude toward life, family, and home have remained constant—perhaps some would say static—in a period of unparalleled progress in human knowledge generally and great changes in education. The respondents freely concede, and indeed assert as an article of faith, that their religious beliefs and what we would today call "life style" have not altered in fundamentals for centuries. Their way of life in a church-oriented community, separated from the outside world and "worldly" influences, their attachment to nature and the soil, is a way inherently simple and uncomplicated, albeit difficult to preserve against the pressure to conform. Their rejection of telephones, automobiles, radios, and television, their mode of dress, of speech, their habits of manual work do indeed set them apart from much of contemporary society; these customs are both symbolic and practical.

As the society around the Amish has become more populous, urban, industrialized, and complex, particularly in this century, government regulation of human affairs has correspondingly become more detailed and pervasive. The Amish mode of life has thus come into conflict increasingly with requirements of contemporary society exerting a hydraulic insistence on conformity to majoritarian standards. So long as compulsory education laws were confined to eight grades of elementary basic education imparted in a nearby rural schoolhouse, with a large proportion of students of the Amish faith, the Old Order Amish had little basis to fear that school attendance would expose their children to the worldly influence they reject. But modern compulsory secondary education in rural areas is now largely carried on in a consolidated school, often remote from the student's home and alien to his daily home life. As the record so strongly shows, the values and programs of the modern secondary school are in sharp conflict with the fundamental mode of life mandated by the Amish religion; modern laws requiring compulsory secondary education have accordingly engendered great concern and conflict. The conclusion is inescapable that secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child.

The impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs. Nor is the impact of the compulsory-attendance law confined to grave interference with important Amish religious tenets from a subjective point of view. It carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent. As the record shows, compulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region.[9]

In sum, the unchallenged testimony of acknowledged experts in education and religious history, almost 300 years of consistent practice,

[9] Some States have developed working arrangements with the Amish regarding high school attendance. See n. 3, supra. However, the danger to the continued existence of an ancient religious faith cannot be ignored simply because of the assumption that its adherents will continue to be able, at considerable sacrifice, to relocate in some more tolerant State or country or work out accommodations under threat of criminal prosecution. Forced migration of religious minorities was an evil that lay at the heart of the Religion Clauses. See, e.g., Everson v. Board of Education, 330 U.S. 1, 9–10, 67 S.Ct. 504, 508–509, 91 L.Ed. 711 (1947); Madison, Memorial and Remonstrance Against Religious Assessments, 2 Writings of James Madison 183 (G. Hunt ed. 1901).

and strong evidence of a sustained faith pervading and regulating respondents' entire mode of life support the claim that enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs. . . .

III

We turn, then, to the State's broader contention that its interest in its system of compulsory education is so compelling that even the established religious practices of the Amish must give way. Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption.

The State advances two primary arguments in support of its system of compulsory education. It notes, as Thomas Jefferson pointed out early in our history, that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society. We accept these propositions.

However, the evidence adduced by the Amish in this case is persuasively to the effect that an additional one or two years of formal high school for Amish children in place of their long-established program of informal vocational education would do little to serve those interests. Respondents' experts testified at trial, without challenge, that the value of all education must be assessed in terms of its capacity to prepare the child for life. It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live, but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith.

The State attacks respondents' position as one fostering "ignorance" from which the child must be protected by the State. No one can question the State's duty to protect children from ignorance but this argument does not square with the facts disclosed in the record. Whatever their idiosyncrasies as seen by the majority, this record strongly shows that the Amish community has been a highly successful social unit within our society, even if apart from the conventional "mainstream." Its members are productive and very law-abiding members of society; they reject public welfare in any of its usual modern forms. The Congress itself

recognized their self-sufficiency by authorizing exemption of such groups as the Amish from the obligation to pay social security taxes.[11] . . .

We must not forget that in the Middle Ages important values of the civilization of the Western World were preserved by members of religious orders who isolated themselves from all worldly influences against great obstacles. There can be no assumption that today's majority is "right" and the Amish and others like them are "wrong." A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.

The State, however, supports its interest in providing an additional one or two years of compulsory high school education to Amish children because of the possibility that some such children will choose to leave the Amish community, and that if this occurs they will be ill-equipped for life. The State argues that if Amish children leave their church they should not be in the position of making their way in the world without the education available in the one or two additional years the State requires. However, on this record, that argument is highly speculative. There is no specific evidence of the loss of Amish adherents by attrition, nor is there any showing that upon leaving the Amish community Amish children, with their practical agricultural training and habits of industry and self-reliance, would become burdens on society because of educational shortcomings. Indeed, this argument of the State appears to rest primarily on the State's mistaken assumption, already noted, that the Amish do not provide any education for their children beyond the eighth grade, but allow them to grow in "ignorance." To the contrary, not only do the Amish accept the necessity for formal schooling through the eighth grade level, but continue to provide what has been characterized by the undisputed testimony of expert educators as an "ideal" vocational education for their children in the adolescent years.

There is nothing in this record to suggest that the Amish qualities of reliability, self-reliance, and dedication to work would fail to find ready markets in today's society. Absent some contrary evidence supporting the State's position, we are unwilling to assume that persons possessing such valuable vocational skills and habits are doomed to become burdens on society should they determine to leave the Amish faith, nor is there any basis in the record to warrant a finding that an additional one or two

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[11] Title 26 U.S.C. § 1402(h) authorizes the Secretary of Health, Education, and Welfare to exempt members of "a recognized religious sect" existing at all times since December 31, 1950, from the obligation to pay social security taxes if they are, by reason of the tenets of their sect, opposed to receipt of such benefits and agree to waive them, provided the Secretary finds that the sect makes reasonable provision for its dependent members. The history of the exemption shows it was enacted with the situation of the Old Order Amish specifically in view. H.R.Rep.No.213, 89th Cong., 1st Sess., 101–102 (1965).

The record in this case establishes without contradiction that the Green County Amish had never been known to commit crimes, that none had been known to receive public assistance, and that none were unemployed.

years of formal school education beyond the eighth grade would serve to eliminate any such problem that might exist.

Insofar as the State's claim rests on the view that a brief additional period of formal education is imperative to enable the Amish to participate effectively and intelligently in our democratic process, it must fall. The Amish alternative to formal secondary school education has enabled them to function effectively in their day-to-day life under self-imposed limitations on relations with the world, and to survive and prosper in contemporary society as a separate, sharply identifiable and highly self-sufficient community for more than 200 years in this country. In itself this is strong evidence that they are capable of fulfilling the social and political responsibilities of citizenship without compelled attendance beyond the eighth grade at the price of jeopardizing their free exercise of religious belief. When Thomas Jefferson emphasized the need for education as a bulwark of a free people against tyranny, there is nothing to indicate he had in mind compulsory education through any fixed age beyond a basic education. Indeed, the Amish communities singularly parallel and reflect many of the virtues of Jefferson's ideal of the "sturdy yeoman" who would form the basis of what he considered as the ideal of a democratic society. Even their idiosyncratic separateness exemplifies the diversity we profess to admire and encourage. . . .

IV

Contrary to the suggestion of the dissenting opinion of Mr. Justice DOUGLAS, our holding today in no degree depends on the assertion of the religious interest of the child as contrasted with that of the parents. It is the parents who are subject to prosecution here for failing to cause their children to attend school, and it is their right of free exercise, not that of their children, that must determine Wisconsin's power to impose criminal penalties on the parent. The dissent argues that a child who expresses a desire to attend public high school in conflict with the wishes of his parents should not be prevented from doing so. There is no reason for the Court to consider that point since it is not an issue in the case. The children are not parties to this litigation. The State has at no point tried this case on the theory that respondents were preventing their children from attending school against their expressed desires, and indeed the record is to the contrary. The State's position from the outset has been that it is empowered to apply its compulsory-attendance law to Amish parents in the same manner as to other parents—that is, without regard to the wishes of the child. That is the claim we reject today.

V

For the reasons stated we hold, with the Supreme Court of Wisconsin, that the First and Fourteenth Amendments prevent the State from compelling respondents to cause their children to attend formal

high school to age 16.[26] Our disposition of this case, however, in no way alters our recognition of the obvious fact that courts are not school boards or legislatures, and are ill-equipped to determine the "necessity" of discrete aspects of a State's program of compulsory education. This should suggest that courts must move with great circumspection in performing the sensitive and delicate task of weighing a State's legitimate social concern when faced with religious claims for exemption from generally applicable education requirements. It cannot be overemphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some "progressive" or more enlightened process for rearing children for modern life.

Aided by a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society, the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State's enforcement of a statute generally valid as to others. Beyond this, they have carried the even more difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education in terms of precisely those overall interests that the State advances in support of its program of compulsory high school education. In light of this convincing showing, one that probably few other religious groups or sects could make, and weighing the minimal difference between what the State would require and what the Amish already accept, it was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish. Sherbert v. Verner, supra.

Nothing we hold is intended to undermine the general applicability of the State's compulsory school-attendance statutes or to limit the power of the State to promulgate reasonable standards that, while not impairing the free exercise of religion, provide for continuing agricultural vocational education under parental and church guidance by the Old

[26] What we have said should meet the suggestion that the decision of the Wisconsin Supreme Court recognizing an exemption for the Amish from the State's system of compulsory education constituted an impermissible establishment of religion. In Walz v. Tax Commission, the Court saw the three main concerns against which the Establishment Clause sought to protect as "sponsorship, financial support, and active involvement of the sovereign in religious activity." 397 U.S. 664, 668, 90 S. Ct. 1409, 1411, 25 L. Ed. 2d 697 (1970). Accommodating the religious beliefs of the Amish can hardly be characterized as sponsorship or active involvement. The purpose and effect of such an exemption are not to support, favor, advance, or assist the Amish, but to allow their centuries-old religious society, here long before the advent of any compulsory education, to survive free from the heavy impediment compliance with the Wisconsin compulsory-education law would impose. Such an accommodation "reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall." Sherbert v. Verner, 374 U.S. 398, 409, 83 S. Ct. 1790, 1797, 10 L. Ed. 2d 965 (1963).

Order Amish or others similarly situated. The States have had a long history of amicable and effective relationships with church-sponsored schools, and there is no basis for assuming that, in this related context, reasonable standards cannot be established concerning the content of the continuing vocational education of Amish children under parental guidance, provided always that state regulations are not inconsistent with what we have said in this opinion.

Affirmed.

■ MR. JUSTICE DOUGLAS, dissenting in part.

I

I agree with the Court that the religious scruples of the Amish are opposed to the education of their children beyond the grade schools, yet I disagree with the Court's conclusion that the matter is within the dispensation of parents alone. The Court's analysis assumes that the only interests at stake in the case are those of the Amish parents on the one hand, and those of the State on the other. The difficulty with this approach is that, despite the Court's claim, the parents are seeking to vindicate not only their own free exercise claims, but also those of their high-school-age children. . . .

II

. . . On this important and vital matter of education, I think the children should be entitled to be heard. While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views. He may want to be a pianist or an astronaut or an oceanographer. To do so he will have to break from the Amish tradition.

It is the future of the student, not the future of the parents, that is imperiled by today's decision. If 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. The child may decide that that is the preferred course, or he may rebel. It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny. If he is harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may be stunted and deformed. The child, therefore, should be given an opportunity to be heard before the State gives the exemption which we honor today.

The views of the two children in question were not canvassed by the Wisconsin courts. The matter should be explicitly reserved so that new hearings can be held on remand of the case. . . .

III

I think the emphasis of the Court on the "law and order" record of this Amish group of people is quite irrelevant. A religion is a religion

irrespective of what the misdemeanor or felony records of its members might be. I am not at all sure how the Catholics, Episcopalians, the Baptists, Jehovah's Witnesses, the Unitarians, and my own Presbyterians would make out if subjected to such a test. It is, of course, true that if a group or society was organized to perpetuate crime and if that is its motive, we would have rather startling problems akin to those that were raised when some years back a particular sect was challenged here as operating on a fraudulent basis. United States v. Ballard, 322 U.S. 78, 64 S.Ct. 822, 88 L.Ed. 1148. But no such factors are present here, and the Amish, whether with a high or low criminal record, certainly qualify by all historic standards as a religion within the meaning of the First Amendment.

The Court rightly rejects the notion that actions, even though religiously grounded, are always outside the protection of the Free Exercise Clause of the First Amendment. In so ruling, the Court departs from the teaching of Reynolds v. United States, 98 U.S. 145, 164, 25 L.Ed. 244, where it was said concerning the reach of the Free Exercise Clause of the First Amendment, "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order." In that case it was conceded that polygamy was a part of the religion of the Mormons. Yet the Court said, "It matters not that his belief (in polygamy) was a part of his professed religion: it was still belief and belief only." Id.

Action, which the Court deemed to be antisocial, could be punished even though it was grounded on deeply held and sincere religious convictions. What we do today, at least in this respect, opens the way to give organized religion a broader base than it has ever enjoyed; and it even promises that in time Reynolds will be overruled.

In another way, however, the Court retreats when in reference to Henry Thoreau it says his "choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses." That is contrary to what we held in United States v. Seeger, 380 U.S. 163, where we were concerned with the meaning of the words "religious training and belief" in the Selective Service Act, which were the basis of many conscientious objector claims. We said:

> Within that phrase would come all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition. This construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well-established

> congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets.

Welsh v. United States, 398 U.S. 333, was in the same vein, the Court saying:

In this case, Welsh's conscientious objection to war was undeniably based in part on his perception of world politics. In a letter to his local board, he wrote:

> "I can only act according to what I am and what I see. And I see that the military complex wastes both human and material resources, that it fosters disregard for (what I consider a paramount concern) human needs and ends; I see that the means we employ to 'defend' our 'way of life' profoundly change that way of life. I see that in our failure to recognize the political, social, and economic realities of the world, we, *as a nation*, fail our responsibility as a nation."

The essence of Welsh's philosophy, on the basis of which we held he was entitled to an exemption, was in these words:

> "I believe that human life is valuable in and of itself; in its living; therefore I will not injure or kill another human being. This belief (and the corresponding 'duty' to abstain from violence toward another person) is not 'superior to those arising from any human relation.' On the contrary: it is essential to every human relation. I cannot, therefore, conscientiously comply with the Government's insistence that I assume duties which I feel are immoral and totally repugnant."

I adhere to these exalted views of "religion" and see no acceptable alternative to them now that we have become a Nation of many religions and sects, representing all of the diversities of the human race.

NOTES AND QUESTIONS

1. *Old and New Religions*. Do you agree with the result of *Yoder*? Why or why not? Did the result depend upon the status of the Amish as an established religious tradition? Why did Chief Justice Burger point out that the Amish are not a progressive community with new educational ideas? Was he trying to prevent the First Amendment from protecting non-traditional groups?

"Native American religions are land based. There are certain geographical sites or physical formations that are held to be 'sacred' as an integral part of the religion. Religious practitioners therefore hold certain ceremonies, collect plants, or make pilgrimages to such places on recurring bases." Alex Tallchief Skibine, Towards a Balanced Approach for the Protection of Native American Sacred Sites, 17 Mich. J. Race & L. 1, 2 (2011). Although many of these sacred sites are on federal lands, courts have repeatedly rejected Native American lawsuits requesting access to sacred sites. If sacred sites are necessary to the "continuing existence of Indians as

a tribal people," should the Supreme Court follow *Yoder* whenever it hears Native American cases? Id. at 5.

Did the Chief Justice have too limited a definition of religion or did he offer broad protection to religious freedom? According to Justice Douglas, the Court retreated from *Seeger* and *Welsh* and yet advanced over *Reynolds*. Indeed, Douglas anticipated that *Reynolds* would be overruled. As we learned in Chapters 1 and 4, *Reynolds* was not overruled but rather was reinforced by *Employment Division v. Smith*. Does this mean that the Court has offered more protection to the Amish than to newer religious groups such as the Mormons? If the age of a tradition is a good indication that it deserves constitutional protection, should the Native American peyote users receive more protection than anyone else?

Can the inconsistency in the Court's precedents be solved by Congress and the state legislatures? Should the Yoders, Reynolds, and Smith all receive exemptions from neutral laws from the legislature rather than the courts? What about a modern-day Thoreau?

Do you think *Yoder* should be overruled? If so, for what reason? Because the facts of Amish life have changed? Because *Yoder* is inconsistent with other First Amendment doctrine? Because keeping children from school has a negative impact on their education? See Gage Raley, Note, *Yoder* Revisited: Why the Landmark Amish Schooling Case Could—and Should—Be Overturned, 97 Va. L. Rev. 681 (2011). If most Amish no longer work on family farms, is there a good argument that Amish schoolchildren need compulsory public education in order to be prepared to earn a living? Do you agree that the American economy has changed so much since the 1970s that "[i]n today's world, . . . Amish children are not prepared to be economically productive adults without a high school education"? Id. at 695. If Amish parents now work in sawmills and woodworking plants instead of on farms, is there more reason to apply the child labor laws to the Amish? Id. at 699.

2. *Amish Cases*. In United States v. Lee, 455 U.S. 252 (1982), Edwin Lee, a farmer and carpenter, did not withhold Social Security taxes for his employees or pay the employer's share of taxes for them. The Amish believe that they should care for the members of their community rather than having the government do so through the Social Security system. The Supreme Court upheld the imposition of the taxes on Amish employers. Is this result consistent with *Yoder*? See 26 U.S.C. § 3127 (granting exemption to religious faiths opposed to Social Security).

If Amish farmers believe 1) farming is required by their religion; 2) they "are endowed by their Creator with dominion and control over all the animals on earth"; 3) they are not allowed to mark animals; 4) they are not allowed to use technology, including radio frequencies, scanners and computer programs; and 5) they are discouraged from outside contact; should they be exempt from the National Animal Identification System, which requires Premises Identification Numbers for each of their farms and radio frequency identification devices for each of their cattle? The data are stored on a large national database. See Farm-To-Consumer Legal Defense Fund v. Vilsack, 636 F.Supp.2d 116 (D.D.C. 2009).

Andy Bontrager purchased property from an owner who had been ordered by the state to install a new septic system. Bontrager did not install the system, and was charged under Ohio law with failing to obey a public health order requiring a sewage system. Bontrager did not install the system because it uses electricity, which violates his Amish religious beliefs. According to Bontrager,

> there are different "sects" (for lack of a better term) of the Amish—each has its own church and bishop based upon geography, i.e., where they reside in relation to the particular church. According to the defendant, while they all follow the same general religious beliefs, they all operate somewhat independently of each other. The defendant agreed that his particular church and bishop permit the possession of a telephone (in an outbuilding). If a member of his church is a construction contractor, that person is permitted to have a cell phone (only on the job). Members of the church are permitted to have gasoline-powered motors, which he has on his property and which operates a water pump for his drinking water, among other things. Conversely, while some sects allow the use of electricity, the defendant's church and bishop do not, and defendant testified that he would be expelled from the church if he complied with the Department of Health's regulation with regard to this particular septic system.

State v. Bontrager, 149 Ohio Misc.2d 33, 897 N.E.2d 244, 246–47 (2008). When Bontrager challenged his conviction, the state responded that it had compelling interests in "preventing the discharge of untreated septic/sewage from being washed downstream in the surface waters and into the groundwater." Id. Should the court uphold Bontrager's conviction? Should his testimony about different Amish sects be relevant to the decision?

Kentucky law requires drivers of slow-moving vehicles to append a fluorescent yellow-orange triangle with a dark red reflective border on their vehicles for visibility and safety. Violation of the law is a misdemeanor with a possible fine of $20 to $30. Members of the Old Order Swartzentruber sect of the Amish religion, who operated horse-and-buggy vehicles with gray reflective tape, were convicted in judge and jury trials. The Amish believe that the bright triangle contradicts their religious obligation to be plain and forces them to display the trinity, which is not a symbol of the Amish faith. The Kentucky Supreme Court ruled that the Kentucky Constitution offers the same protection to religious freedom as the federal constitution and upheld the convictions because "the vehicles are regulated on the public highways because they are slow, not because they are a religious choice." Gingerich v. Kentucky, 283 S.W.3d 835, 844 (Ky. 2012). What would have happened if *Yoder* strict scrutiny had applied? Would the court have been forced to accept the Amish choice to use gray or silver reflective tape?

The Iowa Supreme Court ruled that a Mitchell County ordinance protecting county roads violated the free exercise rights of the Old Order Groffdale Conference Mennonite Church. The Mennonites' religion prohibits them from driving tractors unless they are equipped with steel cleats. The steel wheel requirement was put into effect about 40 years ago to keep

Mennonites from riding tractors for pleasure. A member driving a tractor without steel wheels is expelled from the church. The statute was passed after the county used a new resurfacing concrete that was damaged by the steel cleats. According to the law:

> No person shall drive over the hard surfaced roadways, including but not limited to cement, concrete and blacktop roads, of Mitchell County, or any political subdivision thereof, a tractor or vehicle equipped with steel or metal tires equipped with cleats, ice picks, studs, spikes, chains or other projections of any kind or steel or metal wheels equipped with cleats, ice picks, studs, spikes, chains, or other projections of any kind.

The Iowa court ruled that the law, although neutral, was not a law of general applicability under *Smith*. The law contained an exception for school buses, which are allowed to use ice grips and tire studs year round, and did not regulate various other sources of road damage besides steel wheels. Because the law was not of general applicability, the court applied strict scrutiny. Without examining the government's compelling interest, the court ruled that the statute was not narrowly tailored to protecting the roads. According to the court, "Given the lack of evidence of the *degree* to which the steel lugs harm the County's roads, the undisputed fact that other events cause road damage, and the undisputed fact that the County had tolerated steel lugs for many years before 2009, it is difficult to see that an outright ban on those lugs is necessary to serve a compelling state interest." Mitchell County v. Zimmerman, 810 N.W.2d 1, 17 (Iowa 2012). What means are more narrowly tailored? See id. (Mennonites could add money to a fund for the roads).

Although the rule against steel cleats was based on the Biblical text of Romans 12:2 ("be not conformed to this world"), the religious practice allowing Mennonites to use tractors (instead of horses and buggies) as long as they had steel cleats was only 40 years old. Should that have affected the ruling under *Yoder*? Or does *Yoder* require a win for the Mennonites? Is the reasoning of *Zimmerman* consistent with *Gingerich*, the Kentucky case about orange triangles?

Christian, non-Amish parents challenged the provisions of the Pennsylvania Home Schooling statute, which required them to submit a log of their children's education and samples of their children's homework to the state. A school district official then reviewed the materials to determine if parents met the minimum hours of instruction and course requirements and if the children were making progress. The parents believed that God had given them "sole responsibility" for their children's education and that the school district's supervision therefore violated the free exercise of their religion. See Combs v. Homer-Center School Dist., 540 F.3d 231 (3d Cir. 2008). Should the Court grant the parents an exemption under *Yoder* because their children's education was involved? Does *Yoder* identify a constitutional right to home-school? Would it violate Equal Protection for the Yoders to get an exemption but not the Combs family?

Yup'ik Eskimos in Alaska were prosecuted for fishing on the Kuskokwim River using gillnets of a prohibited mesh size. The mesh size was restricted in order to protect Chinook salmon from capture. The Yup'ik argued that subsistence fishing for Chinook salmon was part of their free exercise of religion protected by the Alaska Constitution. Testimony established "king salmon play a central role in traditional Yup'ik fish camps, which is where Yup'ik spiritual values are taught to the next generation." An Alaska appeals court rejected the claim, ruling the state had a compelling interest in preserving the viability of the Kuskokwim River king salmon. Is this consistent with *Yoder*? See Phillip v. State, 347 P.3d 128 (Alaska Ct. App. 2015).

Lenawee County, Michigan sued several Amish families, asking the court to "authorize the County to enter onto the Property and to demolish the buildings"—i.e., the Amish homes and farms—because the Amish did not use running water or modern sewage systems. For religious reasons, they instead relied on carrying their water indoors from a well and using organic methods on their farms instead of electricity and modern plumbing. The ACLU counterclaimed under the Constitution and the Fair Housing Act. What should happen to this lawsuit? See ACLU Michigan, County Threatens Religious Freedom of Amish Community, https://www.aclumich.org/en/cases/county-threatens-religious-freedom-amish-community. Should the homes be destroyed or the Amish way of life protected? Does *Yoder* suggest the Amish should win?

In a challenge by members of the Amish community to their septic system requirements, Minnesota state courts ruled for the government. Instead of the required septic systems, the Amish used mulch basins to drain water from their homes. The courts ruled that the government had a compelling government interest in public health and environmental safety to support their requirements, and so the Amish claim was rejected. See Mast v. Cty. of Fillmore, No. A19–1375, 2020 WL 3042114, at *5 (Minn. Ct. App. June 8, 2020), review denied (Aug. 25, 2020), cert. granted, judgment vacated sub nom. Mast v. Fillmore Cty., Minnesota, 141 S. Ct. 2430, 210 L. Ed. 2d 985 (2021). The U.S. Supreme Court vacated the judgment, and remanded the case for consideration in light of its decision in *Fulton v. Philadelphia*, which we read in Chapter 4. What should happen to the case now? Justice Gorsuch wrote, "In this country, neither the Amish nor anyone else should have to choose between their farms and their faith." Mast v. Fillmore Cty., Minnesota, 141 S. Ct. 2430, 2434 (2021). Do you agree? Does this mean *Yoder* and *Fulton* are similar in their implications for free exercise?

3. *Individual and Community*. We learned in Chapter 6 that First Amendment case law struggles with the balance between institutional and individual free exercise. What reading of the religion clauses do you prefer: one that is "religious communitarian" or "secular individualist"? See Frederick Mark Gedicks, The Rhetoric of Church and State (1995). According to Professor Gedicks, religious communitarianism "understands religion to be the principal, if not the exclusive, source of certain values and practices that lie at the base of civilized society. . . . [It] presupposes a faith that relies

primarily on tradition and authority, and only secondarily on reason, to articulate and defend these values and practices." In contrast, in secular individualism, "knowledge is discovered by the right application of critical reason, and never by simple appeal to religious authority or tradition." Id. at 11–12. Was Chief Justice Burger a religious communitarian and Justice Douglas a secular individualist? Which cases that you have read in this book appear to be "secular individualist" and which are "religious communitarian"? Consider *Sherbert* and *Smith*, *Everson* and *Zelman*, *Şahin* and *Yoder*. How can the courts and the legislatures strike a proper balance between the individual's right to free exercise and the protection of religious organizations?

Did *Yoder* place the community's religious freedom above the individual's, or the parents' free exercise above their children's? Was Justice Douglas correct that the Court should have paid more attention to the child's religious freedom? What should be the result if the children wanted to continue in a local public school and the parents wanted them to stay at home? How do you react to the following criticism of *Yoder*?

> There is something breathtakingly condescending, as well as inhumane, about the sacrificing of anyone, especially children, on the altar of "diversity" and the virtue of preserving a variety of religious traditions. The rest of us are happy with our cars and computers, our vaccines and antibiotics. But you quaint little people with your bonnets and breeches, your horse buggies, your archaic dialect and your earth-closet privies, you enrich our lives. Of course you must be allowed to trap your children with you in your seventeenth-century time warp, otherwise something irretrievable would be lost to us: a part of the wonderful diversity of human culture. A small part of me can see something in this. But the larger part is made to feel very queasy indeed.

Richard Dawkins, The God Delusion 331 (2006). What ruling would a judge who believed as Dawkins does make based on the facts of *Yoder*? Should the Court have tried to determine what the children might want or given them some agency in the process? Does failing to do so and "trapping" children in this system, as Dawkins argues, establish a religion or present an Establishment Clause problem?

Do you agree courts should use strict scrutiny in cases where "plaintiffs demonstrate that indirect burdens on their religiously motivated exercises of secular constitutional rights may impose costs felt throughout their religious communities"? A theory of group harm focuses on minority vulnerability rather than individual rights. Does this theory help to explain and justify the Court's reasoning in *Yoder*? If this group harm theory became the law of free exercise, would Muslim plaintiffs have a better chance of winning lawsuits against the government for profiling in counterterrorism situations because profiling inflicts group harm on the entire Muslim community? See Tabbaa v. Chertoff, 509 F.3d 89 (2d Cir. 2007), a case that denied the free exercise claims of Muslim citizens who were detained at the border because the searches were the least restrictive means of meeting the government's compelling interest in security; Murad Hussain, Defending the

Faithful: Speaking the Language of Group Harm in Free Exercise Challenges to Counterterrorism Profiling, 117 Yale L.J. 920, 956–59 (2008). What groups other than the Amish and Muslims would gain advantage by a theory of group harm?

4. *Preservation of Religious Traditions*. As the opinion stated, "Dr. Hostetler testified that compulsory high school attendance could not only result in great psychological harm to Amish children, because of the conflicts it would produce, but would also, in his opinion, ultimately result in the destruction of the Old Order Amish church community as it exists in the United States today." Should the First Amendment protect diverse religious traditions, or does democracy require that some groups learn to adjust to the modern world? Do you agree with the balance the Court struck in the following case?

Michigan required drivers of slow-moving vehicles to place a fluorescent orange-yellow triangle on their vehicles to protect traffic safety. Members of the Old Order Amish appealed the regulation because it violated their religion to place the triangles on their horse-drawn wagons. They believed that the triangle reflected confidence in man instead of God and demonstrated a lack of trust in God. The Amish were willing to use reflector tape and lanterns on their wagons, similar to an arrangement that was worked out between the State of Ohio and its Amish residents. The state court ruled that under *Yoder*, the government had not met its burden under the compelling interest test. See People v. Swartzentruber, 170 Mich.App. 682, 429 N.W.2d 225 (1988). Why shouldn't the Michigan Amish just move to Ohio? See *Yoder*, supra, at 218 n.9 ("Forced migration of religious minorities was an evil that lay at the heart of the Religion Clauses. See, e.g., Everson v. Board of Education of Ewing Township, 330 U.S. 1, 9–10, 67 S.Ct. 504, 508–509, 91 L.Ed. 711 (1947); Madison, Memorial and Remonstrance Against Religious Assessments, 2 Writings of James Madison 183 (G. Hunt ed. 1901).").

If the principles of *Smith* were applied to the facts of *Yoder*, would the Amish lose their case? Does that mean that the application of neutral laws of general applicability might destroy certain religious traditions? Or can members of those traditions count on the legislative branch to protect them from destruction? In an article examining the role of exemptions in constitutional law, Professor Kent Greenawalt writes:

> The idea underlying privilege is that religion or conscience deserves special consideration, because it is particularly valuable or important, or because many people care intensely about it.
>
> One argument based on privilege is that the state should aim to preserve a way of life that is intimately connected to the practice for which an exemption is sought. Reserving other claims of privilege for later consideration, we may dispose of the preservation argument, as far as religion is concerned. A liberal state cannot have the aim to preserve a religion, in the sense that some multiculturalists believe the state should try to preserve minority cultures.

Kent Greenawalt, Law and Morality: Constitutional Law: Moral and Religious Convictions as Categories for Special Treatment: The Exemption Strategy, 48 Wm. & Mary L. Rev. 1605, 1609 (2007). Why should a liberal state not preserve religions? Was it important for the Court to preserve the traditional culture of the Amish in *Yoder*? Should the legislatures seek to preserve other minority religions? Which ones?

Like the Amish, the Hutterite Brethren Church also began in the 16th century as part of the Anabaptist movement during the Protestant Reformation. Hutterites practice a communal lifestyle. The Big Sky Colony in Montana is a religious corporation formed for the purpose of operating "a Hutterische Church Brotherhood Community." As part of their communal agreement, the Colony's members do not receive wages for their work. Instead, the Colony provides food, shelter, clothing, and medical care to members who engage in commercial activity. The Colony does, however, engage in "commercial activities with nonmembers for remuneration," primarily farming and agricultural production. For that reason, Montana required the Colony to participate in the state's workers' compensation system.

Do you agree with the Colony's argument that forced participation in workers' comp violates free exercise and establishment? Does *Yoder* mandate an outcome for the Colony? What would happen to the Colony if it were forced to comply with labor laws even though it never provides wages to workers? Compare Big Sky Colony, Inc. v. Montana Dep't of Labor & Indus., 291 P.3d 1231, 1241 (Mont. 2012) (The Court in *Yoder* recognized " 'even when religiously based, [one's activities] are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare.' The workers' compensation system in Montana undoubtedly promotes the health, safety, and welfare of workers.") with id. at 1247 (Mont. 2012) (Rice, J. dissenting) (In *Yoder*, the Supreme Court stated " 'we must be careful to determine whether the Amish religious faith and their mode of life, are . . . inseparable and interdependent.' As in *Yoder,* the record here supports the determination that the communal way of life of the Colony is 'one of deep religious conviction, shared by an organized group, and intimately related to daily living.' The command to live communally and without property or legal claims is fundamental to the Hutterite faith.") Does it affect your analysis if Hutterite members never associate with non-members?

5. *A Nation of Many Religions and Sects*. Justice Douglas observed that the United States had become a "[n]ation of many religions and sects," and accordingly defended the broad definition of religion in the conscientious objection cases that we studied in Chapter 5. Are the *Seeger* and *Welsh* definitions of religion broad enough to encompass the religions described in the following reading? Should these many religious groups receive the same treatment as the Amish? Does the increasing diversity of the American religious population that is described in the following article persuade you that *Yoder* should be overruled or, alternatively, that it should apply to all religious groups?

What should happen to the First Amendment now that the fastest-growing portion of the population is the religiously-unaffiliated, whom you meet in Section B?

B. THE NEW

About Three-in-Ten U.S. Adults Are Now Religiously Unaffiliated*

Gregory A. Smith, The Pew Research Center on Religion & Public Life. Dec. 14, 2021. https://www.pewforum.org/2021/12/14/about-three-in-ten-u-s-adults-are-now-religiously-unaffiliated/.

The secularizing shifts evident in American society so far in the 21st century show no signs of slowing. The latest Pew Research Center survey of the religious composition of the United States finds the religiously unaffiliated share of the public is 6 percentage points higher than it was five years ago and 10 points higher than a decade ago.

Christians continue to make up a majority of the U.S. populace, but their share of the adult population is 12 points lower in 2021 than it was in 2011. In addition, the share of U.S. adults who say they pray on a daily basis has been trending downward, as has the share who say religion is "very important" in their lives.

Currently, about three-in-ten U.S. adults (29%) are religious "nones"—people who describe themselves as atheists, agnostics or "nothing in particular" when asked about their religious identity. Self-identified Christians of all varieties (including Protestants, Catholics, members of the Church of Jesus Christ of Latter-day Saints, and Orthodox Christians) make up 63% of the adult population. Christians now outnumber religious "nones" by a ratio of a little more than two-to-one. In 2007, when the Center began asking its current question about religious identity, Christians outnumbered "nones" by almost five-to-one (78% vs. 16%).

The recent declines within Christianity are concentrated among Protestants. Today, 40% of U.S. adults are Protestants, a group that is broadly defined to include nondenominational Christians and people who describe themselves as "just Christian" along with Baptists, Methodists, Lutherans, Presbyterians and members of many other denominational families. The Protestant share of the population is down 4 percentage points over the last five years and has dropped 10 points in 10 years.

By comparison, the Catholic share of the population, which had ticked downward between 2007 and 2014, has held relatively steady in recent years. As of 2021, 21% of U.S. adults describe themselves as Catholic, identical to the Catholic share of the population in 2014.

* Visit www.pewforum.org to view the tables and graphics that accompany this text.

Within Protestantism, evangelicals continue to outnumber those who are not evangelical. Currently, 60% of Protestants say "yes" when asked whether they think of themselves as a "born-again or evangelical Christian," while 40% say "no" or decline to answer the question.

This pattern exists among both White and Black Protestants. Among White Protestants, 58% now say "yes" when asked whether they think of themselves as born-again or evangelical Christians, compared with 42% who say "no" (or decline to answer the question). Among Black Protestants, evangelicals outnumber non-evangelicals by two-to-one (66% vs. 33%).

Overall, both evangelical and non-evangelical Protestants have seen their shares of the population decline as the percentage of U.S. adults who identity with Protestantism has dropped. Today, 24% of U.S. adults describe themselves as born-again or evangelical Protestants, down 6 percentage points since 2007. During the same period, there also has been a 6-point decline in the share of adults who are Protestant but not born-again or evangelical (from 22% to 16%).

These are among the key findings of the latest National Public Opinion Reference Survey (NPORS), conducted by Pew Research Center from May 29 to Aug. 25, 2021. Today, fewer than half of U.S. adults (45%) say they pray on a daily basis. By contrast, nearly six-in-ten (58%) reported praying daily in the 2007 Religious Landscape Study, as did 55% in the 2014 Landscape Study. Roughly one-third of U.S. adults (32%) now say they seldom or never pray, up from 18% who said this in 2007.

Random-digit-dial (RDD) telephone surveys conducted in 2017 and 2019 found fewer U.S. adults saying religion is "very important" in their lives compared with previous telephone polls. And the 2021 NPORS finds that 41% of U.S. adults now say religion is "very important" in their lives, 4 points lower than the 2020 NPORS and substantially lower than all of the Center's earlier RDD readings on this question.

Other key findings from the 2021 NPORS include:

More than six-in-ten Black Protestants (63%) say they attend religious services at least once or twice a month, with monthly attendance peaking at 70% among Black evangelical Protestants. Fully 56% of White evangelical Protestants also say they attend religious services at least once a month. Regular religious attendance is much less common among U.S. Catholics (35% of whom say they attend monthly or more often) and White Protestants who are not born-again/evangelical (28%). And frequent religious attendance is almost unheard of among religious "nones," 97% of whom say they attend a few times a year or less. (Although the NPORS includes respondents from many religious backgrounds, including Jews, Muslims, Hindus, Buddhists and others, the sample did not have enough interviews with members of these religious groups to report separately on their religious practices. However, Pew Research Center has conducted several surveys designed

specifically to describe the attributes of these and other relatively small religious communities in the United States.

In addition to the 63% of U.S. adults who identify as Christians, the 2021 NPORS finds that 6% of adults identify with non-Christian faiths. This includes 1% who describe themselves as Jewish, 1% who are Muslim, 1% who are Buddhist, 1% who are Hindu and 2% who identify with a wide variety of other faiths. [A different poll] estimates that 1.7% of U.S. adults identify as Jewish by religion.)

One-in-five U.S. adults (20%) now describe their religion as "nothing in particular," up from 14% who said this 10 years ago.

NOTES AND QUESTIONS

1. *The New Non-Affiliated*. What will it mean to the First Amendment if fewer Americans identify with religion? Do you think the United States will enter into a period of decline, chaos and unhappiness if Americans become less religious? Which countries in the world would you guess are the least religious? Would you expect those countries to have a lower standard of living and unhappier citizens? See Phil Zuckerman, Society Without God: What the Least Religious Nations Can Tell Us About Contentment 2 (2008) (Denmark and Sweden "are probably the least religious countries in the world, and possibly in the history of the world," and among the best countries in the world to live in. They have low crime rates, good environments, healthy democracies, low levels of corruption, excellent schools, architecture and arts; strong economies, and so forth).

How do you expect American politics to be affected by the Rise of the Nones? Exit polls showed that 12% of voters in the 2012 presidential election were Nones and they voted Democratic by 70–26%. Does this surprise you, given that we learned in Chapter 9 that President Obama intentionally appealed to religious voters and rejected President Kennedy's separationist approach to church and state? Are you surprised that before the election the Obama advisers didn't "view [secularists] as a constituency"? See Kimberly Winston, The "Nones" Say 2012 Election Proves They Are A Political Force, Religion News, Nov. 8, 2012, at http://www.religionnews.com/politics/election/the-nones-say-2012-election-proves-they-are-a-political-force.

In the 2016 presidential primaries, 57% of Republican Nones supported Donald Trump and 61% of Democratic Nones supported Bernie Sanders. See Pew Research Center, Campaign Exposes Fissures Over Issues, Values and How Life Has Changed in the U.S. (March 2016). According to religion scholar Mark Silk, it's "fair to say that, for the first time in American history, the Nones [are] making their influence felt on the presidential nominating process." Mark Silk, The Year of the Nones, Religion News, Apr. 1, 2016, at http://religionnews.com/2016/04/01/nones-presidential-election-trump-sanders/. That trend continued. Wrote one commentator:

> U.S. voters hit two important milestones in the 2018 midterm. First, Protestants were not the majority of the electorate, according to Religion News Service. Second, as white evangelical Christians,

> who carried Trump into office on a wave of Christian nationalism, are barely maintaining their share in the electorate, nonreligious people are gaining. "Nones"—those who self-identify as nonreligious on surveys like those conducted by the Pew Research Center—sharply increased their share of the U.S. electorate, from 11 percent in 2006 to 17 percent in 2018. That's a massive, 55 percent increase.
>
> A second, similar metric shows the same growth: The number of people in the United States who enter the voting booth but not church is also surging, from 18 percent in 2014 to 27 percent in 2018. That's another big jump of 50 percent. Nones are also younger and the fastest-growing religious identification. That means as evangelicals age out, Nones replace them in age groups that are more likely to vote.

Andrew Seidel, "Politicians, Take Note: Secular Voters Are a Powerful, and Growing, Part of the Population," Rewire News (Nov. 15, 2018). Do you think the candidates will change more as the number of Nones increases? How would a candidate appeal to the Nones?

In 2018, U.S. Representatives Jamie Raskin, Jared Huffman, Dan Kildee, and Jerry McNerney formed the first ever Congressional Freethought Caucus, which is dedicated to four goals, including promoting "public policy formed on the basis of reason, science, and moral values;" and "protect[ing] the secular character of our government by adhering to the strict Constitutional principle of the separation of church and state." In early 2022, membership in the caucus had grown to 16 representatives. Is this a sign that religiosity is less politically valuable?

In the 2020 presidential election, white evangelical Christians voted for Trump, while Black Protestants and the religiously unaffiliated voted for Biden. Why do you think there was this breakdown? See Justin Nortey, Most White American who regularly attend worship services voted for Trump in 2020. PEW RESEARCH, Aug. 20, 2021, at https://www.pewresearch.org/fact-tank/2021/08/30/most-white-americans-who-regularly-attend-worship-services-voted-for-trump-in-2020/. How will American life be influenced by the fact that Joe Biden is the second Catholic president of the United States? When do you expect the president of the United States to be a None? When will Nones' percentages in political office match their presence in the population?

2. *Christian Nationalism*. The single most accurate predictor of whether or not a person voted for Donald Trump in the 2016 election was not religion, wealth, education, or even political party; it was believing the United States is and should be a Christian nation. Researchers studied this connection and were able to control for other characteristics to ensure that Christian nationalism was not simply a proxy for other forms of intolerance or other variables related to vote choice. They concluded, "The more someone believed the United States is—and should be—a Christian nation, the more likely they were to vote for Trump." See Andrew L Whitehead, Samuel L Perry, Joseph O Baker; "Make America Christian Again: Christian

Nationalism and Voting for Donald Trump in the 2016 Presidential Election, Sociology of Religion," Volume 79, Issue 2, 19 May 2018, Pages 147–171, https://doi.org/10.1093/socrel/srx070; Andrew L. Whitehead, Joseph O. Baker and Samuel L. Perry, "Despite porn stars and Playboy models, white evangelicals aren't rejecting Trump. This is why," The Washington Post, March 26, 2018, at https://wapo.st/2I4wZO8. Christian nationalism continued to play a major role in Trump's presidency and in the 2020 election. In fact, leading experts released a report in 2022 entitled "Christian Nationalism at the January 6, 2021, Insurrection," a joint project from Baptist Joint Committee for Religious Liberty (BJC) and the Freedom From Religion Foundation (FFRF), delineating the role Christian nationalism played in last year's assault on the U.S. Capitol. See www.FFRF.us/Jan6Report. As secularism and the Nones are on the rise, Christian Nationalism is rising and becoming more violent. What do you think the future holds for Christian Nationalism?

3. *The New Spirituality*. Consistent with the Pew findings, some scholars of religion describe a "new spirituality," in which many Americans claim to be spiritual rather than religious. Although the new spirituality has many definitions, "it seems to stress ideas of self-help and personal healing." See Catherine L. Albanese, America: Religions and Religion 238 (4th ed. 2007). Will the new spirituality undermine traditional group religions like the Amish? Is the new spirituality a religion for First Amendment purposes?

As the nature of the American religious population has changed, so too has its spirituality. Professor Robert Wuthnow explains that many Americans have moved from a spirituality of dwelling to one of seeking. "A spirituality of dwelling emphasizes *habitation*: God occupies a definite place in the universe and creates a sacred space in which humans too can dwell; to inhabit sacred space is to know its territory and to feel secure. A spirituality of seeking emphasizes *negotiation*: individuals search for sacred moments that reinforce their conviction that the divine exists, but these moments are fleeting; rather than knowing the territory, people explore new spiritual vistas, and they may have to negotiate among complex and confusing meanings of spirituality." Robert Wuthnow, After Heaven: Spirituality in America Since the 1950s 3–4 (1998). Do you think Chief Justice Burger would have been skeptical about offering First Amendment protection to the seekers? Can the First Amendment protect both types of spirituality? How? Does a spirituality of seeking meet any of the criteria for a religion that we studied in Chapter 1?

4. *Causes of Unaffiliation*. Earlier Pew reports examined four possible causes for the rise in numbers of the unaffiliated. First is political backlash: young Americans have rejected traditional religion because it is associated with conservative politics. Second are delays in marriage: married people are more likely to be religious than the non-married. Third is broad social disengagement: Americans today engage in fewer communal activities, including religion. Fourth is the secularization thesis, which has predicted for some time that religions diminish with economic development. See Pew Forum on Religion & Public Life, "Nones" on the Rise: One-in-Five Adults Have No Religious Affiliation, Oct. 9, 2012. Which, if any, of these

explanations do you find persuasive in explaining the origins of the Nones? According to the secularization thesis, as nations' gross domestic product increases, their religiosity usually declines. The United States, however, is an exception to the thesis because it has high economic success and high religious participation. What can explain this difference in the United States?

5. *Divided by God or More Tolerant?* According to Professor Noah Feldman, the United States is "divided by God,"

> in that we cannot agree on the role religion should take in regard to government, and vice versa. For this the responsibility lies with us and with the structure of our man-made Constitution. Perhaps, too, it might be said that God has divided us, by virtue of the profound religious diversity that we have long had and that is daily expanding. Since Madison, this diversity has often been called a blessing and a source of strength or balance, yet is also remains, as it has always been, a fundamental challenge to the project of popular self-government.

Noah Feldman, Divided By God: America's Church-State Problem—And What We Should Do About It 251 (2005). A blessing and a challenge? What do you think of Justice O'Connor's assessment of the ability of the First Amendment to deal with that challenge? Recall that in the Ten Commandments cases that we studied in Chapter 3, she wrote:

> Reasonable minds can disagree about how to apply the Religion Clauses in a given case. But the goal of the Clauses is clear: to carry out the Founders' plan of preserving religious liberty to the fullest extent possible in a pluralistic society. By enforcing the Clauses, we have kept religion a matter for the individual conscience, not for the prosecutor or bureaucrat. At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish. The well-known statement that "[w]e are a religious people," *Zorach v. Clauson*, 343 U.S. 306, 313, 72 S.Ct. 679, 96 L.Ed. 954 (1952), has proved true. Americans attend their places of worship more often than do citizens of other developed nations, R. Fowler, A. Hertzke, & L. Olson, Religion and Politics in America 28–29 (2d ed. 1999), and describe religion as playing an especially important role in their lives, Pew Global Attitudes Project, Among Wealthy Nations U.S. Stands Alone in its Embrace of Religion (Dec. 19, 2002). Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?

McCreary County, Ky. v. American Civil Liberties Union of Ky., 545 U.S. 844, 882 (2005). Can the system that has served us so well continue to work in an era of new religious diversity?

In *American Grace: How Religion Divides and Unites Us* (2010), political scientists Robert D. Putnam & David E. Campbell provide a broad description and analysis of "old and new" religion in American culture. One feature that the authors emphasize is the paradox that although "Americans have become polarized along religious lines" and the "moderate religious middle" is shrinking, nonetheless Americans enjoy a high degree of peaceful religious pluralism and tolerance. Id. at 3.

Putnam and Campbell describe the years since the 1950s as characterized by three seismic phases including a shock and two aftershocks. The shock: during the long 1960s the Baby Boom generation departed from conventional religion and morality and commentators proclaimed "God is dead." The first aftershock (1970s and 1980s): the rise of religious conservatism in the Religious Right, primarily due to concerns about sexual immorality, especially an increase in premarital sex. Politicians who took advantage of this atmosphere to develop a religious politics triggered the second aftershock (1990s and 2000s): youth disaffection with organized religion because it is too political and judgmental. This period includes the growth in numbers of the Nones.

The last chapter of the book concludes that "America's grace" has been to maintain religious pluralism even with the growth of religious polarization. How have Americans accomplished this? "By creating a web of interlocking personal relationships among people of many different faiths" (550). The authors argue that Americans have now embraced religious diversity instead of merely tolerating it, and that this is due in part to the U.S. Constitution. They also identify an "Aunt Susan principle"; if your aunt is of another religion, you are more likely to tolerate that religion. As Americans are more frequently exposed to persons of diverse religion, they become more tolerant. Do you agree?

Sociologist Mark Chaves, in *American Religion: Contemporary Trends* (2011) also mentions that, despite religious polarization in American politics, Americans' increasing daily interactions with friends and family members of diverse religious backgrounds have left them more tolerant of other religions. *American Religion* is a concise book that meets its goal of presenting "key big-picture changes in American religion since 1972" in an accessible manner. Id. at 3. According to Chaves, statistics show that "talk of increased religiosity in the United States in recent decades is baseless" and that there is a small trend toward decreased religious belief in America. Id. at 15.

6. *The World's Religions and Global Religion*. Although Nones are on the rise in the United States, the religiously unaffiliated are projected to decline as a share of the world's population in the decades ahead because their net growth through religious switching will be more than offset by higher childbearing among the younger affiliated population. The religiously unaffiliated made up 16.4% of the world's population in 2010 and are expected to make up 13.2% of the world's population in 2050. See Conrad Hackett et al., The Future Size of Religious Affiliated and Unaffiliated Populations, 32 Demographic Research 829 (2015), at http://www.demographic-research.org/Volumes/Vol32/27/.

Another Pew Forum study expects the number of Muslims worldwide to nearly equal the number of Christians by 2050. Islam is expected to be the fastest growing religion in the world. See Pew Research Center, Number of Muslims Worldwide Expected to Nearly Equal Number of Christians by 2050; Religiously Unaffiliated Will Make Up Declining Share of World's Population, Apr. 2, 2015, at http://www.pewforum.org/2015/04/02/number-of-muslims-worldwide-expected-to-nearly-equal-number-of-christians-by-2050-religiously-unaffiliated-will-make-up-declining-share-of-worlds-population/. Because all religions (except Buddhism) are expected to grow, atheists, agnostics and Nones will become a declining share of the world's population. The projections suggest that, if current trends continue, by 2050:

> In Europe, Muslims will make up 10% of the overall population.
>
> India will retain a Hindu majority but also will have the largest Muslim population of any country in the world, surpassing Indonesia.
>
> In the United States, Christians will decline from more than three-quarters of the population in 2010 to two-thirds in 2050, and Judaism will no longer be the largest non-Christian religion. Muslims will be more numerous in the U.S. than people who identify as Jewish on the basis of religion.
>
> Four out of every 10 Christians in the world will live in sub-Saharan Africa.
>
> The global Buddhist population is expected to remain fairly stable because of low fertility rates and aging populations in countries such as China, Thailand and Japan.
>
> Jews, the smallest religious group for which separate projections were made, are expected to grow 16%, from a little less than 14 million in 2010 to 16.1 million worldwide in 2050.

Id. How do you think these trends will affect international religious freedom?

7. *Global Restrictions on Religion*. Religious terrorism increased from 2013 to 2014 while both governmental restrictions on religion and social hostilities among private parties involving religion decreased slightly worldwide. See Pew Research Center, Trends in Global Restrictions on Religion (Jun. 23, 2016). Countries with high or very high levels of governmental restrictions dropped from 28% to 24%. Id. Countries with social hostilities involving religion dropped from 27% to 23%. Id. "Among the world's 25 most populous countries, the highest overall restrictions on religion were in Egypt, Indonesia, Pakistan, Russia and Turkey, where both the government and society at large imposed numerous limits on religious beliefs and practices. China had the highest level of government restrictions in 2014, while Pakistan had the highest level of social hostilities involving religion." In contrast, Brazil, the Democratic Republic of the Congo, Japan, the Philippines, and South Africa have the lowest levels of restrictions and hostilities. Id. Christians and Muslims faced harassment in the largest number of countries, and harassment against Jews continued an 8-year rise. Religion-led terrorism led to injuries or deaths in 40 countries in 2012, 51 countries in 2013, and 60 countries in 2014.

The United States was one of three countries with the largest increase in social hostilities involving religion. This increase was due primarily to a growth in anti-Semitic activities. 58% of religious hate crimes in the U.S. were anti-Jewish and 16% were anti-Muslim. Id. What do you think explains these trends? See also Michael Lipka & Samirah Majumdar, How religious restrictions around the world have changed over a decade, PEW RESEARCH, Jul. 16, 2019, at https://www.pewresearch.org/fact-tank/2019/07/16/how-religious-restrictions-around-the-world-have-changed-over-a-decade/ (" "Government restrictions on religion have increased globally between 2007 and 2017 in all four categories studied: favoritism of religious groups, general laws and policies restricting religious freedom, harassment of religious groups, and limits on religious activity."). Researchers have "found that Christian nationalism, support for QAnon, and anti-Semitism are linked. . . . Christian nationalism and QAnon support work together to drive up anti-Semitism. Without QAnon belief, Christian nationalists adopted only somewhat more anti-Semitic beliefs as those who rejected Christian nationalism. . . . But Christian nationalists who fell in with the QAnon conspiracy theory subscribed to twice as many anti-Semitic tropes as those who disagreed with QAnon, as we can see in the figure below when comparing black to yellow bars." See Paul A. Djupe and Jacob Dennen, "Christian nationalists and QAnon followers tend to be anti-Semitic. That was seen in the Capitol attack," Washington Post (Jan. 26, 2021) at https://wapo.st/3KkRAOp.

8. *Future and Past of Global Religion*. The early settlers came to America to escape religious persecution, see Everson v. Board of Education of Ewing Township, 330 U.S. 1, 8–9 (1947), and numerous groups have followed them here for that reason. According to Justice O'Connor, "[o]ur guiding principle has been James Madison's—that '[t]he Religion . . . of every man must be left to the conviction and conscience of every man.' Memorial and Remonstrance Against Religious Assessments, 2 Writings of James Madison 183, 184 (G. Hunt ed. 1901)." Can that guiding principle be enforced worldwide? Should it be?

Scholars of religion now discuss the implications of globalization for religion. As Professor Ninian Smart, whose description of religion you studied in Chapter 1, explained in an essay written shortly before his death:

> As any acquaintance with the history of religions will show, especially in the last four hundred years, faiths alter. There are evolutionary changes in their rituals, their societal emplacement, their doctrines, and perhaps especially their ethics and laws. One of the great myths is that religion is always the same: that an evangelical from Missouri has the same values as the Apostle Paul, for example. People dearly believe that they believe exactly as did their forefathers. They may of course get the heart of their faith essentially right—they may conform to the basic values of the great leaders and creeds of their traditions. But this does not mean that the religions have not changed. In a global world they are probably doing so more than ever.

Ninian Smart, The Global Future of Religion, in Mark Juergensmeyer, ed. The Oxford Handbook of Global Religions 625 (2006). Smart explored the irony that the same global forces of communication and technology that allow religions to learn from and interact positively with each other have also permitted "more intense consolidation" of other traditions. Id. at 628. Global religion therefore allows for both continuity and change in the world's religions.

What values could govern a world of global religion? See id. at 629 (a common ideology might include nonviolence, democracy, and "some overarching sense of order and respect."). Smart concluded:

> The threat of globalization is that it tries to get everyone doing the same thing and thinking alike. In some ways the world is becoming too compact. The idea of a global higher order has the advantage of not imposing a single ethic or ethos on the rest of the world, except for the higher order pattern of civility.

Id. at 630. Do you think the system devised by James Madison will contribute to this higher order, or will a new constitutional system be necessary?