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The New Thoreaus

Mark L. Movsesian[*]

Fifty years ago, in Wisconsin v. Yoder*, the Supreme Court famously indicated that "religion" denotes a communal rather than a purely individual phenomenon. An organized group like the Amish would qualify as religious, the Court wrote, but a solitary seeker like the nineteenth century transcendentalist Henry David Thoreau would not. At the time, the question was mostly peripheral; hardly any Americans claimed to have their own, personal religions that would make it difficult for them to comply with civil law. In the intervening decades, though, American religion has changed. One-fifth of us—roughly sixty-six million people—now claim, like Thoreau, to follow our own, idiosyncratic spiritual paths. The New Thoreaus have begun to appear in the cases, including recent vaccine mandate challenges, and courts will increasingly face the question whether purely idiosyncratic beliefs and practices qualify as religious for legal purposes. In this Article, I argue that* Yoder*'s insight was basically correct: the existence of a religious community is a crucial factor in the definition of religion. Religion cannot exclusively mean a communal phenomenon; a categorical rule would slight a long American tradition of respecting individual religious conscience and create difficult line-drawing problems. Nonetheless, the farther one gets from a religious community, the more idiosyncratic one's spiritual path, the less plausible it is to claim that one's beliefs and practices are religious for free exercise and other legal purposes.*

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INTRODUCTION: FIFTY YEARS LATER

This year marks the fiftieth anniversary of one of the best-known cases in the religious freedom canon: *Wisconsin v. Yoder*, in which the Supreme Court ruled that the Free Exercise Clause prevented the State of Wisconsin from requiring Amish parents to enroll their children in high school.[1] In an opinion by Chief Justice Burger, the Court applied strict scrutiny and concluded that Wisconsin had failed to show with sufficient "particularity" how its "admittedly strong interest in compulsory education" outweighed the substantial burden it had imposed on the parents' exercise of religion.[2] *Yoder* stands as one of the very few examples, and the only example outside the context of unemployment benefits, in which the Court held that claimants merited an exemption under the old regime of *Sherbert v. Verner*.[3]

Views on *Yoder* are mixed.[4] Steven Smith once called *Yoder* "perhaps the wisest of modern religion clause opinions,"[5] and another scholar has praised the decision's promotion of religious tolerance and minority rights.[6] Marc DeGirolami admires the case's careful attention to the "understandable, even admirable" concerns of the Amish community,[7] and another commentator calls *Yoder* the Court's "strongest analysis on the definition of religion."[8] But many have disparaged *Yoder*. Although she thinks the decision was "probably" correct, "[o]n balance," Martha Nussbaum criticizes *Yoder*'s favoritism for the Amish and failure to

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1. 406 U.S. 205, 234 (1972).
2. *Id.* at 236.
3. 374 U.S. 398 (1963); *see* Zalman Rothschild, *Individualized Exemptions, Vaccine Mandates, and the New Free Exercise Clause*, 131 YALE L.J. F. 1106, 1114 n.28 (2022) (classifying *Wisconsin v. Yoder* as an exception to *Sherbert v. Verner*); *see also* Nelson Tebbe, *The Principle and Politics of Liberty of Conscience*, 135 HARV. L. REV. 267, 281 & n.75 (2021) (identifying *Wisconsin v. Yoder* as the only case in which the Court ruled for religious claimants outside of the unemployment compensation context).
4. *See* SHAWN FRANCIS PETERS, THE YODER CASE 3–4 (2003) (discussing the different viewpoints on the Court's decision in *Yoder*); *see also id.* at 6 (describing the "ambiguous practical and jurisprudential legacy" of *Yoder*).
5. Steven D. Smith, Wisconsin v. Yoder *and the Unprincipled Approach to Religious Freedom*, 25 CAP. U. L. REV. 805, 805 (1996).
6. *See*, *e.g.*, James D. Gordon III, Wisconsin v. Yoder *and Religious Liberty*, 74 TEX. L. REV. 1237, 1240 (1996) ("*Yoder* is a shining symbol of religious tolerance. . . . It . . . powerfully protects the powerless . . . .").
7. Marc O. DeGirolami, *No Tears for Creon*, 15 LEGAL THEORY 245, 258 (2009).
8. Jonathan P. Kuhn, Note, *The Religious Difference: Equal Protection and the Accommodation of (Non)-Religion*, 94 WASH. U. L. REV. 191, 200 (2016).

consider sufficiently the interests of the children in the case.[9] Jessie Hill writes of the case's "sentimentality."[10] Others have decried *Yoder*'s lack of analytical rigor,[11] its failure to account for the legitimate claims of non-believers,[12] and its bias for older, established religions.[13]

In this Article, I will reflect on an aspect of *Yoder* that was not especially important at the time but that has become so fifty years later: its dicta that religion denotes a communal rather than a purely individual phenomenon.[14] Chief Justice Burger famously distinguished an idiosyncratic seeker like the nineteenth-century transcendentalist Henry David Thoreau, who would not qualify for a religious exemption, from the Amish litigants in the case, who did.[15] "Thoreau's choice" to reject "the social values of his time" and follow his own spiritual path "was philosophical and personal rather than religious," Burger wrote; "the Religion Clauses" would not apply to him.[16] By contrast, "the traditional way of life of the Amish [was] not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living."[17] Only such communal beliefs and practices could qualify as a religion for purposes of the Free Exercise Clause.

The *Yoder* Court mischaracterized Thoreau, who was "profoundly

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9. MARTHA NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 145–46 (2008); *see also* Mark Tushnet, *Of Church and State and the Supreme Court: Kurland Revisited*, 1989 SUP. CT. REV. 373, 382 ("It is not unfair to read [Chief Justice Burger's opinion] as saying that the claims of the Amish prevailed because they were a 'good' religion.").

10. B. Jessie Hill, *Discrimination,* Wisconsin v. Yoder*, and the Freedom of Association*, 60 ST. LOUIS U. L.J. 695, 701 (2016) (stating that *Yoder* is "dripping with sentimentality and nostalgia for an idyllic, agrarian America").

11. *See* Jay S. Bybee, *Substantive Due Process and Free Exercise of Religion:* Meyer*,* Pierce *and the Origins of* Wisconsin v. Yoder, 25 CAP. U. L. REV. 887, 921 (1996) (noting the "imprecision" of the Supreme Court's decision in *Yoder*).

12. *See generally* Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2012). Schwartzman argues that *Yoder* represents an "inclusive accommodation" approach to religion, *id.* at 1367, that "fails to respect the interest that nonbelievers have in being governed according to reasons that are, at least in principle, acceptable from their perspectives." *Id.* at 1377.

13. *See* Gordon, *supra* note 6, at 1238 ("[T]he arguments almost imply that new religions may be less worthy of protection.").

14. *See* Christopher C. Lund, *Religion Is Special Enough*, 103 VA. L. REV. 481, 508 (2017) (characterizing *Yoder*'s discussion of this point as "classic dicta"); *cf.* Hill, *supra* note 10, at 702 ("[T]he communal . . . aspects of the Amish religion . . . truly drive the Court's analysis [in *Yoder*]."); Zalman Rothschild, Positive Pluralism and Its Limits 10–13 (2022) (unpublished manuscript) (on file with author) (discussing the *Yoder* Court's analysis of religion as a function of community).

15. Wisconsin v. Yoder, 406 U.S. 205, 216 (1972).

16. *Id.*

17. *Id.*

religious,"[18] and whose works like *Walden* and *A Week on the Concord and Merrimack Rivers* convey a deep sense of spiritual pilgrimage.[19] As scholar Alda Balthrop-Lewis recently observed, Thoreau possessed an eclectic, "nature piety" that drew on many sources, including Christian, Hindu, and Zoroastrian.[20] Thoreau emphasized personal spiritual authenticity and the need to cut one's own "devotional path";[21] he rejected religious institutions and exclusive traditions, not belief as such.[22] His eclectic piety informed his politics and sense of social justice.[23] On one famous occasion involving payment of a poll tax, he resisted civil authority and chose prison over violating his conscience—a conscience informed by his spiritual commitments.[24] The question *Yoder*'s reference to Thoreau raises, therefore, is not whether secular philosophy can qualify as a religion for free-exercise purposes, but a somewhat different one: whether a personal, "seeker" spirituality, like Thoreau's, can do so.[25] And, *Yoder* suggests, the answer is "no."

The Court has never repudiated *Yoder*'s dicta, which sit uneasily with earlier decisions stressing the personal, non-institutional character of religion.[26] The Court held in two subsequent cases, *Thomas v. Review*

18. LAURA DASSOW WALLS, HENRY DAVID THOREAU: A LIFE 191 (2017); *see also* George C. Freeman III, *The Misguided Search for the Constitutional Definition of "Religion"*, 71 GEO. L.J. 1519, 1560 (1983) ("[T]he courts made a serious mistake when they chose [Thoreau] as a paradigm of the secular believer.").

19. *See* Douglas R. Anderson, *Roads to Divinity*, 9 PLURALIST 87, 87 (2014) (noting that Thoreau himself believed that "religiosity pervaded his works"). The Library of America has collected excellent, annotated versions of *A Week*, *Walden*, and other works by Thoreau. *See generally* HENRY DAVID THOREAU, A WEEK, WALDEN, THE MAINE WOODS, CAPE COD (Robert F. Sayre ed., 1985).

20. ALDA BALTHROP-LEWIS, THOREAU'S RELIGION: WALDEN WOODS, SOCIAL JUSTICE, AND THE POLITICS OF ASCETICISM 9 (2022); *see also id.* at 20–23 (indicating the many sources from which Thoreau drew).

21. *See* DASSOW WALLS, *supra* note 18, at 146; Anderson, *supra* note 19, at 90 ("Thoreau did not reject religious writings—he simply read them for the experience and living wisdom in them.").

22. *See* ALAN D. HODDER, THOREAU'S ECSTATIC WITNESS 132, 136–38, 160 (2001) (distinguishing Thoreau's rejection of the church from his personal religious inspiration).

23. See BALTHROP-LEWIS, *supra* note 20, at 20–23 (discussing Thoreau's reliance on a diversity of religious authorities in his writings).

24. *See id.* at 109–13. Thoreau refused to pay the tax because of his opposition to slavery and the Mexican War, *id.* at 110, a stance that should be understood in terms of the spirituality that pervades *Walden* and other writings. *See id*. at 101–06. Someone, presumably a relative, paid the tax for him, and Thoreau left prison after one night. *See* DASSOW WALLS, *supra* note 18, at 209–10.

25. ELIZABETH DRESCHER, CHOOSING OUR RELIGION: THE SPIRITUAL LIVES OF AMERICA'S NONES 3 (2016). As the word suggests, in the sociology literature, "seekers" refers to "adults who 'do more than drop out of churches and synagogues; they turn to serious metaphysical quests on their own in hopes of finding a more fulfilling way of believing and living.'" *Id.* at 275 n.6 (citation omitted).

26. I refer to the Draft Act Cases, *United States v. Seeger*, 380 U.S. 163 (1965), and *Welsh v. United States*, 398 U.S. 333 (1970) (plurality opinion). Justice Douglas noted this tension in his dissent in *Yoder*. *See* Wisconsin v. Yoder, 406 U.S. 205, 248–49 (1972) (Douglas, J., dissenting in part).

Board[27] and *Frazee v. Illinois Department of Employment Security*,[28] that an individual's religious convictions, even if not everyone in his religious community shares them, merit the protection of the Free Exercise Clause,[29] and that a claimant need not be a member of an organized religion to receive a religious exemption.[30] But neither *Thomas* nor *Frazee* disavow *Yoder*'s dicta, and both cases contain language indicating that the Free Exercise Clause does not protect entirely idiosyncratic and non-institutional claims.[31] Following the thread of the Court's jurisprudence in this area is famously difficult, but taken together the cases suggest that the existence of a community of believers remains relevant to the definition of religion for legal purposes.[32]

Until very recently, one could dismiss this question as peripheral to the work of the courts.[33] We have always had "solitary seekers" in America,[34] but very few Americans have claimed to have idiosyncratic spiritual commitments that made it impossible for them to comply with civil law.[35] Indeed, when the Court decided *Yoder* in 1972, 95 percent of Americans identified with an organized religion.[36] Today, that situation

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27. 450 U.S. 707 (1981).

28. 489 U.S. 829 (1989).

29. *Thomas*, 450 U.S. at 715–16. Just last term, dissenting in one of the COVID-19 vaccine exemption cases, Justice Neil Gorsuch quoted *Thomas*: "In this country, 'religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit . . . protection.' Nor is the free exercise of religion 'limited to beliefs which are shared by all of the members of a religious sect.'" Dr. A v. Hochul, 142 S. Ct. 552, 557–58 (2021) (Gorsuch, J., dissenting from the denial of application for injunctive relief) (alteration in original) (citations omitted).

30. *Frazee*, 489 U.S. at 834.

31. *Thomas*, 450 U.S. at 715 ("One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause . . . ."); *Frazee*, 489 U.S. at 834 n.2 (quoting *Thomas*, 450 U.S. at 715). For further discussion, *see infra* p. 554.

32. *See*, *e.g.*, L. Scott Smith, *Constitutional Meanings of "Religion" Past and Present: Explorations in Definition and Theory*, 14 TEMP. POL. & C.R. L. REV. 89, 98 (2004) ("[T]he Court, in its free exercise jurisprudence, has usually, if not always, addressed the definition of religion in an oblique and fragmentary way.")

33. *See, e.g.*, Andrew Koppelman, *Religion's Specialized Specialness*, 79 U. CHI. L. REV. DIALOGUE 71, 75 (2012) ("[I]t is remarkable how few cases have arisen in which courts have had real difficulty in determining whether something is a religion or not.").

34. NUSSBAUM, *supra* note 9, at 167 (defining "solitary seekers" as "affiliated with no official structure").

35. *See* Mark L. Movsesian, *Defining Religion in American Law: Psychic Sophie and the Rise of the Nones* 8 (Robert Schuman Ctr. for Advanced Stud., Research Paper No. 2014/19, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2399470.

36. In 1972, the first year it was conducted, the well-regarded General Social Survey at the University of Chicago revealed that only 5 percent of Americans said they had no religious preference. *Key Trends*, GSS DATA EXPLORER, https://gssdataexplorer.norc.org/trends [https://perma.cc/T2L3-V6TA] (scroll down to "Religion & Spirituality" and follow "Religious Affiliation & Behaviors" hyperlink; use drop-down menu and select "Religious preference" then "No Religion"); *see also* RYAN P. BURGE, THE NONES 1 (2021) (affirming the reputation of the

has changed dramatically. A fast-growing percentage of Americans, the "Nones," say they have no religious affiliation, roughly 30 percent of the population, compared to only 6 percent a generation ago.[37] The large majority of Nones are neither atheists nor agnostics.[38] They are what one might call "unaffiliated believers": people who, like Thoreau, reject institutional religion, not faith.[39] Political scientist Ryan Burge estimates that this group, the "nothing in particulars," comprise approximately one-fifth of the population.[40] Moreover, a large group of Americans, whom Tara Burton calls "religious hybrids," retain formal religious affiliations while dissenting from orthodox teachings and incorporating elements of other faith traditions.[41] When you combine unaffiliated believers with religious hybrids, Burton estimates, you may get to more than 50 percent of Americans.[42]

In short, there are many more Thoreaus than there used to be. And they have started to appear in the cases—slowly, but perceptibly, and the numbers will surely increase—including recent religion-based challenges to vaccine mandates in the context of COVID-19 and other contagious diseases.[43] In some of the mandate cases, plaintiffs with idiosyncratic beliefs have sought religious exemptions under the Free Exercise Clause, Title VII, or other federal and state laws.[44] Most of these cases hold that

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GSS as the "place to go" for American religious data since 1972); *id.* at 27–28 (discussing GSS data indicating a 95 percent religious affiliation in 1972, followed by "'hockey stick' growth" in the number of religiously unaffiliated since 1991).

37. The GSS currently puts the percentage of Nones at 29 percent, GSS DATA EXPLORER, *supra* note 36, as does the Pew Research Center. PEW RSCH. CTR., ABOUT THREE-IN-TEN U.S. ADULTS ARE NOW RELIGIOUSLY UNAFFILIATED 4 (2021) [hereinafter PEW REPORT]. A Public Religion Research Institute survey puts the number lower, at 23 percent. PUBLIC RELIGION RESEARCH INSTITUTE, THE 2020 CENSUS OF AMERICAN RELIGION 10 (2021). According to the GSS data, the percentage of Nones in 1991 was about 6 percent. BURGE, *supra* note 36, at 27.

38. *See* BURGE, *supra* note 36, at 120–21.

39. I derive this term from Burton, who speaks of "the self-proclaimed religiously unaffiliated whose behavior patterns and poll responses nevertheless suggest a belief in, and a hunger for, something bigger." TARA ISABELLA BURTON, STRANGE RITES 22 (2020). Burton herself refers to this group as the "'faithful Nones.'" *Id*.

40. BURGE, *supra* note 36, at 120–21.

41. BURTON, *supra* note 39, at 22.

42. *See id.* at 18–25 (dividing Nones into three categories, the spiritual-but-not-religious, an overlapping category she calls "Faithful Nones," and religious hybrids, which she calls the "Remixed").

43. For a recent study of accommodation claims filed by religiously unaffiliated claimants, see Michael Heise & Gregory C. Sisk, *Approaching Equilibrium in Free Exercise of Religion Cases? Empirical Evidence from the Federal Courts*, 64 ARIZ. L. REV. 989, 1021 (2022) (covering federal courts from the years 2006–2015). For earlier discussions of whether idiosyncratic beliefs qualify as religion, see Donald L. Beschle, *Does a Broad Free Exercise Right Require a Narrow Definition of Religion?*, 39 HASTINGS CONST. L.Q. 357, 376 (2012); *see generally* Movsesian, *supra* note 35; Courtney Miller, Note, "*Spiritual but Not Religious": Rethinking the Legal Definition of Religion*, 102 VA. L. REV. 833 (2016).

44. *See infra* note 168 and accompanying text.

religious exemptions cannot be limited to communal beliefs,[45] though most also hold that mandates are legal and exemptions not required.[46] But the rapid rise of the Nones has made non-institutional religion a real issue, and some courts have questioned whether idiosyncratic beliefs, disconnected from a communal tradition, can qualify as a religion in the first place.[47]

Recent changes in the Court's free-exercise jurisprudence have raised the stakes. In cases like *Fulton v. City of Philadelphia*,[48] and *Tandon v. Newsom*,[49] the Court has "dramatically expanded" the possibility of receiving a religious exemption from civil laws.[50] Those cases have adopted the so-called "most-favored-nation" theory of religious exemptions, "which holds that the denial of a religious exemption is presumptively unconstitutional," and subject to strict scrutiny, where "the state 'treats some comparable secular activities more favorably.'"[51] If the Court holds to what it said in *Fulton* and *Tandon*, qualifying as a religion will offer significant benefits to litigants, and we should expect to see an increase in claims that objections to legal requirements are religious in character.[52]

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45. *See* Hillel Y. Levin, *Why Some Religious Accommodations for Mandatory Vaccinations Violate the Establishment Clause*, 68 HASTINGS L.J. 1193, 1204–05 (2017) ("[N]early every court faced with this question has held unconstitutional religious accommodations in the vaccination context that are limited to certain 'recognized' religions."); *see also* Marie Killmond, Note, *Why Is Vaccination Different? A Comparative Analysis of Religious Exemptions*, 117 COLUM. L. REV. 913, 932–34 (2017) (discussing court rulings against exemption regimes limited to members of recognized groups).

46. *See*, *e.g.*, Erwin Chemerinsky & Michele Goodwin, *Compulsory Vaccination Laws Are Constitutional*, 110 NW. U. L. REV. 589, 606–08 (2016); Rothschild, *supra* note 14, at 1108–09 ("Until 2021, every free exercise challenge to a vaccine mandate in federal or state court had been straightforwardly rejected in favor of the government's public-health initiative."); Killmond, *supra* note 45, at 915 ("While vaccination is a hot political topic, it is largely settled as a matter of law."); *id.* at 948 ("[C]ourts express the view that countervailing values are more important [than individual religious belief] in the context of vaccination."). Rothschild believes this situation may be changing with respect to COVID-19 vaccines. Rothschild, *supra* note 14, at 1109 & n.12, 1123.

47. *See infra* pp. 561–65.

48. 141 S. Ct. 1868 (2021).

49. 141 S. Ct. 1294 (2021) (per curiam).

50. Rothschild, *supra* note 14, at 1106.

51. Andrew Koppelman, *The Increasingly Dangerous Variants of the "Most-Favored-Nation" Theory of Religious Liberty* 3 (Northwestern Pub. L. Working Paper, Paper No. 22-01, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4049209; *see also Fulton*, 141 S. Ct. at 1877 ("A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."); *Tandon*, 141 S. Ct. at 1296 ("[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise.").

52. *See* Mark Movsesian, *A Narrow Victory for Religious Liberty*, FIRST THINGS (June 23, 2021), https://www.firstthings.com/web-exclusives/2021/06/a-narrow-victory-for-religious-liberty [https://perma.cc/3DUV-342W] ("[I]f the Court is serious about strict scrutiny—that the mere

Fifty years later, then, it is a good moment to reflect on what *Yoder*'s dicta about the communal nature of religion mean in a very different America, where perhaps sixty-six million people claim, like Thoreau, to follow their own spiritual paths.[53] In the remainder of this Article, I will do three things. First, I will describe *Yoder* and the decisions that followed it, *Thomas* and *Frazee*, and show that under the Court's precedents the existence of a community of believers remains relevant to the definition of religion for purposes of the Free Exercise Clause. Second, focusing on some recent vaccine and mask mandate cases, I will show how the rise of the Nones has made that question more urgent and how courts have begun to respond.

Finally, I will argue for the basic correctness of *Yoder*'s insight about the collective nature of religion. The operative legal texts require courts to define religion somehow, and, in common understanding, religion has always suggested a collective phenomenon. Moreover, protecting beliefs and practices that are tied to a religious community, rather than purely idiosyncratic ones, promotes important associational values and reduces the dangers of fraud, trivial claims, and administrative disorder—dangers that are especially pronounced in a fissiparous culture like twenty-first century America's. Religion cannot mean an exclusively collective phenomenon; a categorical rule would slight a long American tradition of honoring individual religious conscience and create difficult line-drawing problems. But the weaker the connection to a community of believers, the less a claimant should be understood to exercise a religion for free exercise and other legal purposes.

Two notes before I begin. First, when discussing the religiously unaffiliated, the terminology can become confusing. The literature uses "Nones," "unaffiliated," "religious 'Independents,'" "spiritual-but-not-religious," "nothing in particular," and other such terms;[54] population surveys use somewhat different methodologies, which can also be perplexing.[55] In this Article, I will use the term "Nones" to refer to the

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possibility of an exception means that the state lacks a compelling interest in applying its rule to any particular litigant—it is hard to envision a religious claimant ever losing one of these cases in future.").

53. The current American population is now roughly 330 million. U.S. CENSUS BUREAU, U.S. AND WORLD POPULATION CLOCK, https://www.census.gov/popclock/ [https://perma.cc/2LX3-RM4H] (showing current U.S. population estimate). Using Ryan Burge's estimate for the percentage of unaffiliated believers (and leaving aside religious hybrids), one-fifth of the population would thus amount to roughly 66 million people. *See* BURGE, *supra* note 36, at 120 (discussing religious continuum in the United States).

54. *See, e.g.*, BURGE, *supra* note 36, at 29, 31 (referencing "Nones," "nothing in particular," and "unaffiliated"); BURTON, *supra* note 39, at 18 (referencing "spiritual but not religious"); Movsesian, *supra* note 35, at 2 (referencing "religious 'Independents'") (citation omitted).

55. *Cf.* BURGE, *supra* note 36, at 29–31 (comparing answer options among three surveys, where

religiously unaffiliated generally, a category that includes atheists and agnostics, and "unaffiliated believers" to refer to a subset of Nones—people who, like Thoreau, reject organized religion but nonetheless have faith that they express in idiosyncratic, non-institutional ways.[56] Distinguishing between Nones and unaffiliated believers improves clarity[57] and allows one to focus on the precise issue I address here—namely, whether an individual must show that his or her beliefs and practices are linked with a religious community in order to claim a religious accommodation.[58]

Second, to ask whether the existence of a community of believers is relevant is to raise the issue of how to define religion generally, "a notoriously complex and controversial endeavor."[59] Scholars have long mooted the question without reaching consensus;[60] indeed, some maintain that we should stop trying.[61] A robust debate also exists about

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GSS simply utilizes a "no religion" option but Pew and Cooperative Congressional Election Study differentiate among types of religious Nones).

56. *Cf. id.* at 31–32 (distinguishing among three distinct groups of Nones: atheists, agnostics, and "those who believe in nothing in particular").

57. *See id.* at 32 (discussing benefits of distinguishing among types of Nones).

58. Of course, organized religious bodies as such merit the protection of the Free Exercise Clause. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 189 (2012). I address here a different question, which the *Yoder* dicta raise: whether individual claims without a serious connection to organized religious groups also merit such protection.

59. Robin Charlow, *The Elusive Meaning of Religious Equality*, 83 WASH. U. L. Q. 1529, 1540 (2005).

60. *See* W. Cole Durham, Jr. & Elizabeth A. Sewell, *Definition of Religion*, *in* RELIGIOUS ORGANIZATIONS IN THE UNITED STATES 3, 3 (James A. Serritella et al. eds., 2006) ("In addressing the question of the definition of religion, scholars in the field appear to agree only on their disagreement."); *see also* Nelson Tebbe, *Nonbelievers*, 97 VA. L. REV. 1111, 1130–40 (2011) (outlining various academic and legal definitions of religion); Lael Weinberger, *Religion Undefined: Competing Frameworks for Understanding "Religion" in the Establishment Clause Context*, 86 U. DET. MERCY L. REV. 735, 737–47 (2009) (noting "two different frameworks for using the terms 'religion' and 'religious' . . . in American Christianity"). Some scholars have argued that "religion" has different meanings under the Establishment Clause and the Free Exercise Clause. *See* Carolyn A. Deverich, *Establishment Clause Jurisprudence and the Free Exercise Dilemma: A Structural Unitary-Accomodationist Argument for the Constitutionality of God in the Public Square*, 2006 B.Y.U. L. REV. 211, 242–43. I take no position on that point, but it would be strange for the same word to have two different meanings in the same constitutional text.

61. *See*, *e.g.*, ELIZABETH SHAKMAN HURD, BEYOND RELIGIOUS FREEDOM 29 (2015) (challenging the treatment of religion as an "isolable entity"); CÉCILE LABORDE, LIBERALISM'S RELIGION 2 (2017) (arguing that the category of religion "can be dispensed with" in politics); WINNIFRED FALLERS SULLIVAN, THE IMPOSSIBILITY OF RELIGIOUS FREEDOM 150–59 (2d ed. 2018) (arguing that "'religion' can no longer be coherently defined for purposes of American law" and suggesting that law should focus on protecting equality instead); *cf.* Tebbe, *supra* note 60, at 1140 ("[T]he search for a legal definition of religion . . . may not be as pressing as it is commonly said to be."); Christopher L. Eisgruber & Lawrence G. Sager, *Does It Matter What Religion Is?*, 84 NOTRE DAME L. REV. 807, 809 (2009) (arguing, in the context of an egalitarian framework, that "[i]nsofar as definitions of religion are needed at all, conventional, common-sense definitions will suffice"). I discuss this scholarship further, *infra*, at pp. 566–67.

whether religion as such merits special legal protection.[62] I lack space to engage either debate thoroughly; anyway, the arguments are quite familiar. The Court has made clear that religion, as such, remains a distinct, specially protected constitutional category.[63] For purposes of this Article, I will adopt a leading definition of religion for legal purposes, the commonsense, analogical approach associated most closely with Kent Greenawalt.[64] That helpful approach treats the existence of a community as a crucial factor among others in deciding whether something qualifies as a religion.[65] I will argue that it is correct to do so.

I. *YODER* AND IDIOSYNCRATIC BELIEFS

Yoder began in the summer of 1968, when Old Order Amish parents in the town of New Glarus, Wisconsin, about twenty-five miles outside Madison, announced that they would found private, religious schools for their children.[66] Before that time, the Amish, who had established a community in New Glarus only a few years earlier, had sent their children to public schools.[67] But the parents objected to their daughters' participation in gym class—specifically, to the uniforms the public schools required their daughters to wear, which the parents believed immodest and contrary to biblical principles, and to the requirement that their daughters change and shower with other girls.[68] The local school board refused to excuse the Amish children from these requirements—that would lead to "chaos," the board insisted, since other parents would then seek exemptions from other school rules—and the state legislature refused to grant an exemption as well.[69] In response, the Amish parents

62. *See, e.g.* Schwartzman, *supra* note 12, at 1355 (arguing that religion does not merit special treatment); Tebbe, *supra* note 3, at 272 ("[F]ree exercise exemptions properly protect not just religion as such but a broader class of beliefs and practices . . . ."). *But see, e.g.,* Koppelman, *supra* note 33, at 77–78 (arguing that "singling out religion" is "justified"); Lund, *supra* note 14, at 486 ("Religion may not be uniquely special, but it is special.").

63. *See Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 565 U.S. at 189; *see also* Lund, *supra* note 14, at 483 (discussing *Hosanna-Tabor* decision).

64. 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION 139–46 (2006).

65. *Id.* at 139–40. Among the other factors Greenwalt discusses are

> a belief in God or gods; belief in a spiritual domain that transcends everyday life; a comprehensive view of the world and human purposes; a belief in some form of afterlife; communication with God or gods through ritual acts of worship and through corporate and individual prayer; a particular perspective on moral obligations that is derived from a moral code or from a conception of a divine nature; practices involving repentance and forgiveness of sins; "religious" feelings of awe, guilt, and adoration; [and] the use of sacred texts.

Id.

66. *See* PETERS, *supra* note 4, at 7, 29 (detailing the background from which *Yoder* originated).

67. *See id.* at 22 ("In the mid-1960s, a few dozen Amish children attended the public schools in New Glarus.").

68. *Id.* at 22–23.

69. *Id.* at 23–27.

decided to establish their own schools, which, in conformity with Amish practice, would run only through the eighth grade, up to age fourteen.[70]

The Amish exit posed a practical problem for the board. State funding depended on the number of children in school; if the Amish left, that would cost the public schools $18,000 a year.[71] The board therefore proposed a deal: the Amish children could attend public school for the first three weeks of the school year, when enrollment was calculated for funding purposes; after that, the children could attend their own religious schools.[72] The Amish refused to go along with this "chicanery," which only tended to confirm their suspicions about the outside world in general and the public schools in particular.[73] The board superintendent then began an investigation of the Amish for violating state truancy laws, which required children to attend high school, up to age sixteen—two years longer than the Amish religious schools required.[74]

At the eventual Supreme Court argument, Justice Harry Blackmun asked about the suggestion of retaliation in *Yoder*.[75] Under current doctrine, in fact, the superintendent might have violated the Free Exercise Clause by singling out the Amish parents for disfavored treatment.[76] For his part, the superintendent insisted that he was only trying to ensure that Amish children received a necessary high-school education.[77] At the Supreme Court, the attorney for Wisconsin maintained that the loss of state funding was too insignificant to have made a difference.[78] Probably, the superintendent had mixed motives.[79] Whatever the case, the investigation uncovered violations of the truancy laws, and state prosecutors filed criminal cases against three Amish parents who had

70. *Id.* at 27, 31–32. Amish families did not hold to "a hard-and-fast age limit for schooling," but "many . . . took their children out of school" by age 14. *Id.* at 28.

71. *See* PETERS, *supra* note 4, at 32. Naturally, this "reduction in state aid" would have been "absorbed by" local taxpayers. *Id.*

72. *Id.*

73. *Id.*

74. *See id.* at 32–33.

75. Transcript of Oral Argument at 7–8, Wisconsin v. Yoder, 406 U.S. 205 (Dec. 8, 1971) (No. 70-110).

76. *Cf.* Trinity Lutheran Church of Columbia v. Comer, 137 S. Ct. 2012, 2020 (2017) ("In recent years, when this Court has rejected free exercise challenges, the laws in question have been neutral and generally applicable without regard to religion. We have been careful to distinguish such laws from those that single out the religious for disfavored treatment.").

77. PETERS, *supra* note 4, at 33. The superintendent argued that missing "two critical years of high school" would leave Amish children "woefully unprepared to face" the challenges of living outside the Amish community if they ever "became disenchanted with their religious faith." *Id.*

78. Transcript of Oral Argument, *supra* note 75, at 8.

79. *See* PETERS, *supra* note 4, at 33 (arguing that the superintendent was motivated both by a desire "to retaliate" against the Amish "for their refusal to participate in his scheme to inflate the local public school census" and by "legitimate concerns over maintaining discipline in the local schools").

failed to send their children to school through age sixteen.[80] The parents were convicted of misdemeanors and fined five dollars each.[81]

On appeal, the Wisconsin Supreme Court ruled that the convictions violated the Free Exercise Clause.[82] The court concluded, under the compelling interest test of *Sherbert v. Verner*,[83] that Wisconsin's interest in having children attend high school for two more years did not justify the burden placed on the religious liberty of the Amish.[84] The United States Supreme Court agreed to hear the case, and Wisconsin urged reversal, noting that all other courts to consider the question had ruled that compulsory school-attendance laws were constitutional, including as applied to the Amish.[85] On their side, the Amish received support from several religious organizations, including the National Council of Churches and the American Jewish Congress, all of whom urged the Court to affirm the judgment below.[86] These groups urged the Court to consider that its "decision" in *Yoder* "could affect numerous religious minority groups."[87]

By a vote of 6-1, the Supreme Court affirmed.[88] Oddly, because no one in the case had disputed the point, Chief Justice Warren Burger began his opinion for the Court with a long, somewhat repetitive demonstration of the religious nature of the Amish parents' objections.[89] "Amish objection to formal education beyond the eighth grade is firmly grounded in . . . religious concepts," he wrote.[90] As a matter of Christian conviction, the Amish pursued "life in a church community separate and apart from the world . . . ."[91] They governed themselves according to a

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80. *Id.* at 35–36.
81. Wisconsin v. Yoder, 406 U.S. 205, 208 (1972).
82. *See* State v. Yoder, 182 N.W.2d 539, 547 (Wis. 1971) (concluding that there was no compelling state interest in mandating two years of high school sufficient to overcome the burden on the First Amendment rights of the Amish).
83. Sherbert v. Verner, 374 U.S. 398 (1963).
84. State v. Yoder, 182 N.W.2d at 540–47. The court reserved the right to reconsider the question if developments showed that exempting the Amish would "seriously jeopardize[]" Wisconsin's compulsory education law. *Id.* at 547.
85. *See* PETERS, *supra* note 4, at 129.
86. *Id.* at 130–31 ("No outside group, religious or otherwise, submitted a brief advocating reversal.").
87. *Id.* at 131.
88. Justices Powell and Rehnquist, who joined the Court after argument, "arrived too late to take part in deciding the case." *Id.* at 142; *see also* Wisconsin v. Yoder, 406 U.S. 205, 236 (1972) (noting that Justices Powell and Rehnquist did not participate).
89. *See Yoder*, 406 U.S. at 219 ("Neither the findings of the trial court nor the Amish claims as to the nature of their faith are challenged [by the state]."); *see also* Lund, *supra* note 14, at 508 (characterizing *Yoder*'s discussion of this point as "classic dicta").
90. *Yoder*, 406 U.S. at 210.
91. *Id.*

set of regulations known as the "the *Ordnung*,"[92] which had not changed for centuries and which the community "strictly enforced."[93] These regulations promoted a simple, agrarian lifestyle that the Amish believed the Bible required.[94] A high-school education, they worried, would introduce worldly values of success and competition that would ultimately destroy their godly way of living.[95]

Here, Burger drew the distinction between the Amish and Thoreau.[96] The choice of the Amish to separate themselves from outsiders did not rest on "subjective" values or "philosophical and personal" beliefs.[97] Such idiosyncratic commitments could not excuse citizens from complying with the civil law, since, as Burger wrote, 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."[98] Rather, the Amish rejection of the outside world, including the sort of education that would fit them to live in that world, derived from religious conviction, supported by "almost 300 years" of organized practice "pervading and regulating" every aspect of their way of life.[99] As such, and in distinction to Thoreau's solitary quest, the Amish choice qualified as the exercise of religion to which the First Amendment applied.[100]

Having shown that Wisconsin's compulsory schooling law burdened the Amish community's exercise of religion, Burger went on to write that the law failed strict scrutiny.[101] He applied the *Sherbert* analysis and concluded that Wisconsin's interest in an educated citizenry was not "compelling" enough to make the Amish "give way."[102] An "additional one or two years of formal high school for Amish children"[103] would do comparatively little to advance the state's interests, especially as the

92. *Id.*
93. *Id.* at 216.
94. *See id.* at 210 ("A related feature of [the Amish] is devotion to a life in harmony with nature and the soil, as exemplified by the simple life of the early Christian era . . . ."); *see also id.* at 216–17 (discussing how the Amish way of life, including "their attachment to nature and the soil," follows from their "literal interpretation" of a Biblical passage).
95. *See Yoder*, 406 U.S. at 210–11.
96. *Id.* at 216.
97. *Id.* ("[T]he traditional way of life of the Amish is . . . one of deep religious conviction, shared by an organized group, and intimately related to daily living.").
98. *Id.* at 215–16.
99. *Id.* at 219.
100. *See Yoder*, 406 U.S. at 219 ("[E]vidence of a sustained faith pervading and regulating respondents' entire mode of life support[s] the claim that enforcement of the [compulsory education requirement] . . . would gravely endanger if not destroy the free exercise of respondents' religious beliefs.").
101. *See generally id.* at 219–36.
102. *See id.* at 221.
103. *Id.* at 222.

Amish were model citizens who had demonstrated "the adequacy of their alternative mode of continuing informal vocational education."[104] He pointed to the Amish community's "long history as a successful and self-sufficient segment of American society"—a record "that probably few other groups or sects could make . . . ."[105] He also rejected the idea that the state had to intervene to protect the rights of the children themselves.[106] The parents' refusal to send their children to high school, Burger wrote, did not threaten the children's physical or mental health, or their capacity to engage as productive members of society, in a way that would justify state intervention.[107]

Justice Douglas filed a lone, partial, dissent.[108] Mostly, he argued that the Court had failed to consider fully the interests of the Amish children who might wish to receive a high-school education, notwithstanding their parents' views.[109] But he also rejected the Court's dicta on the nature of religion.[110] The Amish obviously qualified as a religion, Douglas conceded.[111] But in emphasizing the communal character of the Amish religion, Burger had ignored the Court's earlier decisions in the Draft Act Cases, *United States v. Seeger*[112] and *Welsh v. United States*,[113] which suggested that entirely personal beliefs could qualify as religion for some legal purposes—in Douglas's view, the only "acceptable" conclusion, "now that we have become a Nation of many religions and sects, representing all of the diversities of the human race."[114] The Court's dicta about the Amish unfairly privileged organized religion over individual seekers.[115]

In the fifty years since *Yoder*, the Court has never repudiated the decision's dicta on the collective nature of religion. Indeed, the Court has never adopted a comprehensive definition of religion, for constitutional

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104. *Id.* at 235.
105. *Yoder*, 406 U.S. at 235–36.
106. *See id.* at 234 ("[T]he Amish have introduced persuasive evidence undermining the [State's arguments] . . . in terms of the welfare of the child and society as a whole").
107. *See id.*
108. *Id.* at 241 (Douglas, J., dissenting in part). Justices Stewart, *id.* at 237 (Stewart, J., concurring), and White, *id.* (White, J., concurring), each filed concurrences, for reasons that are not important here.
109. *See id.* at 241–46 (Douglas, J., dissenting in part). Douglas wrote that 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." *Id.* at 241.
110. *See Yoder*, 406 U.S. at 246.
111. *Id.* at 246–47.
112. 380 U.S. 163 (1965).
113. 398 U.S. 333 (1970) (plurality opinion).
114. *Yoder*, 406 U.S. at 249 (Douglas, J., dissenting in part).
115. *See id.* at 243 (Douglas, J., dissenting in part) ("Religion is an individual experience.").

or other purposes.[116] Nonetheless, two cases that follow *Yoder* suggest that religion can be an individual phenomenon—in some circumstances and within limits.[117] In *Thomas v. Review Board*, the Court held that a Jehovah's Witness who worked at a steel factory could claim a religious exemption to working on weapons, even though the Jehovah's Witnesses apparently do not consider working on weapons a sin, and another Jehovah's Witness at the same factory did not object to working on weapons.[118] The Free Exercise Clause did not require that religious beliefs be "acceptable, logical, consistent or comprehensible to others,"[119] the Court explained, or "shared by all of the members of a religious sect."[120]

Several years later, in *Frazee v. Illinois Department of Employment Security*, the Court ruled unanimously that the Free Exercise Clause protected a claimant who argued that he could not work on Sundays because he was a Christian—even though he did not belong to any church.[121] "[M]embership in an organized religious denomination, especially one with a specific tenet forbidding . . . work on Sunday would simplify the problem of identifying sincerely held religious beliefs," the Court explained.[122] But the Clause did not require a claimant to show that he was "responding to the commands of a particular religious organization."[123]

Thomas and *Frazee* are in tension with *Yoder*'s dicta.[124] But neither case disavows those dicta, and neither suggests that religion can be an entirely idiosyncratic matter. The *Thomas* Court explained that some claims might be "so bizarre, so clearly nonreligious in motivation," as to fall outside the protection of the Free Exercise Clause.[125] *Thomas* itself did not involve such a claim. The debate among Jehovah's Witnesses about whether one could permissibly work on weapons was a typical

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116. *See* Rebecca Redwood French, *From* Yoder *to Yoda: Models of Traditional, Modern, and Postmodern Religion in U.S. Constitutional Law*, 41 ARIZ. L. REV. 49, 50–51 (1999).

117. *Cf.* Eisgruber & Sager, *supra* note 61, at 815 ("The Supreme Court held, in effect, that *Thomas* and *Frazee* were the ultimate authorities on—sovereign over—their own religious beliefs.").

118. Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 715 (1981). The Indiana Supreme Court had ruled that the claimant's objection to working on weapons was more in the nature of a "'personal philosophical choice.'" *Id.* at 713.

119. *Id.* at 714.

120. *Id.* at 715–16.

121. Frazee v. Ill. Dep't of Emp. Sec., 489 U.S. 829, 832–35 (1989).

122. *Id.* at 834.

123. *Id.*

124. For an interesting discussion of the tension between *Thomas* and *Yoder*, see Samuel J. Levine, *Rethinking the Supreme Court's Hands-Off Approach to Questions of Religious Practice and Belief*, 25 FORDHAM URB. L.J. 85, 95–100 (1997).

125. *Thomas*, 450 U.S. at 715.

"[i]ntrafaith" dispute, an apparently good-faith disagreement of the sort "not uncommon among followers of a particular creed . . . ."[126] Similarly, in *Frazee*, someone who considered himself a Christian claimed that he could not work on Sundays.[127] Not all Christians shared that conviction, but it was hardly a "bizarre or incredible" claim in the context of Christianity.[128] A more singular claim, the Court implied, one that departed more seriously from a religion's conventional baseline, might receive different treatment.[129]

Fairly read, therefore, neither *Thomas* nor *Frazee* suggests that the existence of a religious community is irrelevant to the definition of religion. To the contrary, both cases suggest that the absence of a connection to a religious tradition, as evidenced by a genuine intrafaith dispute, as in *Thomas*, or a well-known communal practice, as in *Frazee*, would tend to disqualify a claim under the Free Exercise Clause.[130] Even after *Thomas* and *Frazee*, the existence of a community of believers remains relevant to the definition of religion for free exercise purposes.

II. THE NEW THOREAUS

Until very recently, one could dismiss the tension between communal and idiosyncratic religion as peripheral to the work of the courts.[131] True, "solitary seekers" have long been a part of American religious culture.[132] By some estimates, in fact, formal church membership was quite low in the Early Republic, when critics decried "the proliferation of 'deists, nothingarians, and anythingarians' across the American frontier."[133] By 1972, however, the year the Court decided *Yoder*, almost all Americans identified with a formal religious tradition.[134] Researchers at the University of Chicago conducted the first General Social Survey (GSS) that same year, which showed that only 5 percent of Americans claimed to have no religious identity, a percentage that remained stable for a

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126. *Id.*

127. Frazee v. Ill. Dep't of Emp. Sec., 489 U.S. 829, 830 (1989).

128. *Id.* at 834 n.2.

129. *See id.*

130. *See id.* at 834 n.2; Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 715 (1981)

131. *See* Koppelman, *supra* note 33, at 75 (noting how few cases have asked courts to determine whether something is a religion).

132. NUSSBAUM, *supra* note 9, at 167 (referencing early colonial "solitary seekers" like Roger Williams).

133. BURTON, *supra* note 39, at 40. Sociologist Rodney Stark once estimated that "[b]y 1850" only "a third of Americans belonged to a local congregation." RODNEY STARK, AMERICA'S BLESSINGS 11 (2012). Religious participation was dramatically lower in the colonial period. *Id.* at 9.

134. GSS DATA EXPLORER, *supra* note 36 (revealing that only 5 percent of Americans identified as having no religious affiliation in 1972).

generation.[135] Notwithstanding occasional litigation like the Draft Act Cases, apparently, few of these Americans ever sought religious exemptions from civil law.[136] As a result, courts could avoid answering the question whether the Free Exercise Clause protects idiosyncratic beliefs and practices. The issue almost never came up.[137]

That situation has changed dramatically. Starting in the 1990s, the number of religiously unaffiliated Americans in the GSS and other surveys has exploded, in what sociologists refer to as the "rise of the Nones."[138] Political scientist Ryan Burge recounts that Nones "zoomed past 10 percent of the population by 1996, crossed the 15 percent threshold just a decade later, and managed to reach 20 percent by 2014."[139] By 2018, the percentage was more than 23 percent.[140] The most recent GSS, in 2021, shows that Nones make up 29 percent of Americans, which makes them the largest single "religious" group in the country, significantly ahead of Catholics (22 percent), mainline Protestants (21 percent), and other Christians (21 percent)—though, when aggregated, Christians comprise the clear majority of Americans (64 percent).[141] Some researchers question these percentages,[142] but well-regarded surveys other than the GSS report similar findings.[143] The most recent Pew Research Center Report in 2021, for example, also estimates that Nones make up 29 percent of Americans.[144]

Scholars debate why this large-scale religious disaffiliation, which appears particularly pronounced among younger Americans, has occurred.[145] Many factors may play a role: changes in family structure,

135. *Id.*; *see also* MARK CHAVES, AMERICAN RELIGION 5 (2011) (describing "the remarkable continuity in American religiosity between 1972 and 2008).

136. *See supra* pp. 542–43 n.26, 552 (discussing the Draft Act Cases).

137. *Cf.* Koppelman, *supra* note 33, at 75 ("[I]t is remarkable how few cases have arisen in which courts have had any difficulty in determining whether something is a religion or not.").

138. DAVID E. CAMPBELL ET AL., SECULAR SURGE 22 (2021).

139. BURGE, *supra* note 36, at 2.

140. *Id.* at 28.

141. GSS DATA EXPLORER, *supra* note 36.

142. For example, Robert Wuthnow observes that the percentages of Nones across surveys can be unstable from year to year and points out the very low response rates in polls on religion, which makes such polls less credible. ROBERT WUTHNOW, INVENTING AMERICAN RELIGION: POLLS, SURVEYS, AND THE TENUOUS QUEST FOR A NATION'S FAITH 6, 13, 153 (2015). For more on the problems of polling with respect to the numbers of Nones, see Mark L. Movsesian, Masterpiece Cakeshop *and the Future of Religious Freedom*, 42 HARV. J.L. & PUB. POL'Y 711, 723–24 (2019).

143. *See* CAMPBELL ET AL., *supra* note 138, at 23 ("[T]he GSS is not alone, as other sources of data show precisely the same trend [of the growing number of Nones].").

144. PEW REPORT, *supra* note 37, at 4.

145. *See* BURTON, *supra* note 39, at 16 (noting the higher percentages of religiously unaffiliated among younger Americans). Polls on religious affiliation typically refer to the American population as a whole, but some racial disparities exist. For example, as of 2018, Asians seemed more likely to be Nones (about 40 percent) than Whites (about 33 percent), Blacks (about 32

including high rates of divorce and religious intermarriage; generational replacement, as Nones grow up and raise their own children without religious identities; and shifting ideas about sexuality and gender, which may tend to alienate Americans, especially the young, from the traditional views that most organized religions continue to hold.[146] The rise of the Nones may also reflect the growing polarization of American culture generally.[147] Americans with strong religious identities appear to maintain them over time.[148] Nones tend to come from the ranks of the nominally affiliated, people who formally identify with a religion but "show only modest levels of commitment."[149] As in so many areas of life, in religion, Americans seem to be moving to the extremes on either end, while the "middle disappears."[150]

Most Nones are neither atheists nor agnostics. According to the 2021 Pew Research Center, which, unlike the GSS, breaks down the Nones into subgroups, only 4 percent of Americans today describe themselves as atheists, and only 5 percent describe themselves as agnostics.[151] Both percentages are roughly double what they were a decade ago, but they are still relatively small.[152] By contrast, 20 percent of Americans in the Pew Survey say they are "nothing in particular."[153] This much larger and faster growing subgroup does not reject faith as such. In fact, a large majority of them, 72 percent, believe in a higher power.[154] According to Harvard's Cooperative Congressional Election Study in 2018, "35 percent of nothing in particulars say that religion is 'somewhat' or 'very'

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percent), and Hispanics (about 30 percent). BURGE, *supra* note 36*,* at 91. The percentage of Black Nones grew dramatically between 2008 and 2018. *Id.* at 90. The large majority fit in the category of unaffiliated believers. *See id.* at 92. For more on how pollsters can make inappropriate generalizations based on the majority, a phenomenon Wuthnow refers to as "White norming," see WUTHNOW, *supra* note 142, at 195.

146. *See* Movsesian, *supra* note 142, at 726–28; *see also* RYAN P. BURGE, 20 MYTHS ABOUT RELIGION AND POLITICS IN AMERICA 166 (2022) (arguing that "generational replacement," which occurs as young Americans supplant older Americans who die off, is the "biggest engine" powering the "growth" of the Nones).

147. *See* Movsesian, *supra* note 142, at 728 (noting the increase in the Nones is occurring along with an increase in religiosity among the traditionally religious).

148. *See* BURGE, *supra* note 146, at 13 ("[The number] of those who are intensely religious [has] not changed in any meaningful way in the past fifty years.").

149. Movsesian, *supra* note 142, at 728 ("The moderately religious are rapidly ending their affiliations and becoming Nones, while the Traditionally Religious are maintaining their affiliations or even increasing their intensity.").

150. BURGE, *supra* note 146, at 183. Burge observes that many Americans, forced to choose between "theologically conservative" or "completely irreligious" identities, become Nones. *Id.* Lilliana Mason has recently written about polarization in Americans' social and political identities. LILLIANA MASON, UNCIVIL AGREEMENT: HOW POLITICS BECAME OUR IDENTITY (2018).

151. PEW REPORT, *supra* note 37, at 14.

152. *Id.*

153. *Id.*

154. BURTON, *supra* note 39, at 20.

important in their lives . . . ."[155] What this group rejects is not belief, but institutional religion.

One might call this group, which amounts to perhaps sixty-six million Americans, "unaffiliated believers."[156] In Elizabeth Drescher's phrase, they are "self-authorizing and idiosyncratic in choosing or constructing modes of spiritual practice . . . ."[157] They avoid institutional religion, with its corrupt and oppressive hierarchies and demands for conformity, which, they maintain, obscure the genuinely transcendent. The stress on personal authenticity and individual discernment makes these unaffiliated believers the clear heirs of nineteenth century transcendentalists like Thoreau, who, as we have seen, also rejected institutional religion and insisted that each person must follow his or her own spiritual path.[158] Unaffiliated believers are, in other words, precisely the sort of people *Yoder*'s dicta excludes from the constitutional definition of religion.

In addition to unaffiliated believers, another, more liminal group exists, which Tara Burton refers to as "religious hybrids."[159] These are people who retain formal affiliations and adhere to some elements of their faith traditions, but who also "feel free to disregard elements that don't necessarily suit them, or to supplement their official practice with spiritual or ritualistic elements, not to mention beliefs, from other traditions."[160] For example, she notes, 29 percent of American Christians say that they believe in reincarnation, even though Christianity rejects the concept, and she writes of a Presbyterian minister who is also a practicing Buddhist.[161] Again, "mix and match" religiosity is not new in America.[162] But what was once a fringe phenomenon has gone mainstream, aided, perhaps, by the growth of the internet, which allows people to research and curate spiritualities in ways not possible in the past.[163] If one combines "religious hybrids" with unaffiliated believers, Burton estimates, one may reach more than half the American population.[164]

155. BURGE, *supra* note 36, at 116.

156. On the term "unaffiliated believers," see *supra* note 39 and accompanying text.

157. DRESCHER, *supra* note 25, at 3.

158. For a discussion of Thoreau's beliefs, see *supra* pp. 541–42.

159. BURTON, *supra* note 39, at 22.

160. *Id.*

161. *Id.* at 22–23.

162. *Id.* at 23 ("Syncretism has long been a hallmark of American immigrant traditions—particularly those of nonwhite Americans.").

163. *See* OLIVIER ROY, HOLY IGNORANCE 160 (2010) (explaining how the internet contributes to the formation of individuated spiritualities); *cf.* Alicia Novak, *The Religious and Philosophical Exemptions to State-Compelled Vaccination: Constitutional and Other Challenges*, 7 U. PA. J. CONST. L. 1101, 1124–25 (2005) (discussing the role of the internet in promoting claims of religious objections to vaccination requirements).

164. BURTON, *supra* note 39, at 25.

In short, there are many more Thoreaus than there used to be. And they have started to appear, slowly, but perceptibly, in the cases.[165] Thoreau stoically went to prison rather than violate his beliefs, but his spiritual successors are more litigious.[166] For example, a recent study by Michael Heise and Gregory Sisk shows that Nones brought about 6 percent of the religious accommodations claims in the federal courts from the years 2006-2015.[167] Atheists and agnostics brought most of those claims, but 40 percent were brought by unaffiliated believers—"claims that were loosely religious or spiritual in nature but not associated with a recognized religious grouping . . . ."[168] Claims brought by Nones prevailed much less frequently than claims brought by members of recognized religious groups, with a success rate of roughly 25 percent, compared to 39 percent for claims from the religiously affiliated.[169] The main takeaway, though, is that Nones, including unaffiliated believers, have begun to bring a small but significant percentage of religious accommodation claims in the federal courts.[170]

In coming years, this percentage will likely increase. Nones have been significant in numbers only for the last two or three decades; as the percentage of unaffiliated believers in American society continues to grow, one should expect to see a rise in the number of idiosyncratic claims as well. As Maimon Schwartzchild writes, "today's array of religious groups, doctrines, notions, and practices is liable to be a source of considerably more varied claims for religious exemptions than was the case when the mainline churches enjoyed more ascendancy and when," as in the 1950s, "the religious landscape of the country could plausibly be described in a book entitled *Protestant-Catholic-Jew*."[171] Nelson Tebbe observes that "nonbelievers" can bring many colorable free-exercise claims, such as the right to a vegetarian diet in prison, to wear

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165. *See generally* Beschle, *supra* note 43, at 376; Movsesian, *supra* note 35, at 2; Miller, *supra* note 43, at 844–47.

166. *See supra* note 24 and accompanying text.

167. *See* Heise & Sisk, *supra* note 43, at 44 ("Despite extended investigation with the greater availability of court docket filings to identify religious background of claimants, we found that claimants for 5.7 percent of observations were affirmatively non-religious in nature, were vague and doubtful as to religious basis, or had no detectable religious affiliation.").

168. *Id.*

169. *See id.* at 45 (comparing success rates for religious and non-religious claimants).

170. In a separate study of great interest, Heise and Sisk write about the growing number of Nones who serve on the federal bench. *See generally* Gregory C. Sisk & Michael Heise, *Where to Place the "Nones" in the Church and State Debate? Empirical Evidence from Establishment Clause Cases in Federal Court*, 96 ST. JOHN'S L. REV. (forthcoming 2022) (manuscript on file with author).

171. Maimon Schwarzschild, *Do Religious Exemptions Save?*, 53 SAN DIEGO L. REV. 185, 193 (2016). The reference is to Will Herberg's landmark study of American religion in the 1950s. WILL HERBERG, PROTESTANT, CATHOLIC, JEW: AN ESSAY IN AMERICAN RELIGIOUS SOCIOLOGY (1955).

certain clothing or insignia, and to display symbols on public property.[172] Tebbe refers to atheists and agnostics,[173] but his observations apply to unaffiliated believers as well. The varieties of idiosyncratic spiritual practices in America today are "capable of generating commands of conduct" that "closely track familiar religious" claims for exemptions.[174]

Recent litigation surrounding vaccine and mask mandates, including with respect to COVID-19, offers a good example. States first introduced compulsory vaccination laws in the nineteenth century.[175] Such laws are ubiquitous today, especially with respect to school-age children.[176] Yet the "'anti-vaxxer' movement" has grown in recent decades, especially in "wealthy, educated communities," and especially with respect to certain vaccines.[177] Notwithstanding occasional examples,[178] vaccine hesitancy has little to do with organized religion, which mostly does not object to vaccinations.[179] Many anti-vaxxers do, however, raise "philosophical" objections, some of which turn out, on inspection, to reflect the spirituality of unaffiliated believers.[180]

For example, some (though not all) anti-vaxxers subscribe to "an 'ethics of purity' that encompasses both physical and spiritual purity and that informs their life choices well beyond the vaccination context."[181] Tara Burton refers to this worldview as "Wellness Culture," which she maintains is "a theology"[182] that enchants the world and provides

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172. Tebbe, *supra* note 60, at 1156–57.

173. *See id.* at 1119 (explaining the scope of the study).

174. *Id.* at 1157.

175. *See* Chemerinsky and Goodwin, *supra* note 46, at 596 (emphasizing a concern among nineteenth-century state and local governments over a risk of disease outbreak among school-age children in public school).

176. *See* Debbie Kaminer, *Vaccines in the Time of COVID-19: How Government and Businesses Can Help Us Reach Herd Immunity*, 2020 WIS. L. REV. FORWARD 101, 110 ("All fifty states currently require some compulsory vaccination for children attending daycare facilities and K-12 schools.").

177. Killmond, *supra* note 45, at 914 (2017). For example, parents have resisted the measles, mumps, and rubella (MMR) vaccine for their children. *See generally* Jonathan Bowes, *Measles, Misinformation, and Risk: Personal Belief Exemptions and the MMR Vaccine*, 3 J.L. & BIOSCIS. 718 (2016).

178. *See* Kaminer, *supra* note 176, at 107–08 (recounting the 2019 challenge to measles vaccinations in New York City by Orthodox Jewish congregations).

179. *See* Levin, *supra* note 45, at 1207 (noting "the paucity" of organized religions that "reject vaccination").

180. On "philosophical" objections generally, see Bowes, *supra* note 177, at 721–23.

181. Levin, *supra* note 45, at 1207. Wellness Culture does not account for all objections to vaccines, of course. Some parents oppose vaccination as medically dangerous or unnecessary, or as an interference with the parents' own, overriding duty to protect their children. *See* Bowes, *supra* note 177, at 724. A political, "anti-authority" element exists in the anti-vaxxer movement as well, in contrast to "utilitarian" convictions on the other side. *See id.*

182. BURTON, *supra* note 39, at 94.

adherents with "a sense of meaning, of order."[183] Wellness Culture, she relates, promotes personal authenticity and rejects the spiritual pollution of the wider society.[184] People "are born good," it teaches, but "are tricked, by Big Pharma, by processed food, by civilization itself, into living something that falls short of our best life."[185] To escape this trap, people must follow their intuitions and resist "toxins,"[186] including vaccines.

In addition, individual members of organized religions that do not oppose vaccines sometimes see things differently from the larger group, based on their own understandings of what their religion requires.[187] For example, some Catholics have objected to some COVID-19 vaccines on the ground that the vaccines derive from aborted fetal tissue, notwithstanding the fact that the Church itself does not object to the vaccines.[188] (The Catholic Church also teaches that people may not be forced to receive medical treatment, including vaccines, against their will.)[189] And then there are religious hybrids who adopt elements of Wellness Culture while formally remaining adherents of traditional religions.[190] In one recent case, for example, a hospital employee objected to receiving a COVID-19 vaccine "on the basis of his Christian religious belief that he must keep his 'body as pure of any foreign substances as humanly possible.'"[191]

In recent cases, litigants with idiosyncratic beliefs have sought

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183. *Id.* at 98. Burton also observes that Wellness Culture "has an implicitly moral character to it." *Id.*

184. *See generally id.* at 91–106.

185. *Id.* at 94.

186. *Id.* at 98 ("The language of energy, toxins, adaptogens, and neuron velocity—so much of it rooted in flawed or outright fallacious science—is also about providing us with a sense of meaning, of order. There is an implicit theology to wellness culture, even if it more closely resembles the Force of *Star Wars* than any more concretely developed system.").

187. *Cf.* Bowes, *supra* note 177, at 721 (noting that "strict" adherents of some religions will seek exemptions from vaccine requirements, even though not all adherents will).

188. One notable case involved a Catholic nun and physician, Sister Dierdre Byrne, who resisted receiving a COVID-19 vaccine on these grounds. Andrea Picciotti-Bayer, *Sister Dede's Medical License Restored, after Temporary Religious Exemption from Vaccine Mandate for Health Care Workers*, NAT'L CATH. REG. (Mar. 13, 2022), https://www.ncregister.com/commentaries/sister-dede-s-medical-license-restored-after-temporary-religious-exemption-from-vaccine-mandate-for-health-care-workers [https://perma.cc/RXY9-4TTE].

189. *See generally id.*; *see also* Gwyneth Spaeder, *Can Catholics Object to COVID-19 Vaccines on Religious Grounds?*, PUB. DISCOURSE (Nov. 2, 2021), https://www.thepublicdiscourse.com/2021/11/78761/ [https://perma.cc/5GWR-NMXH] (explaining that the Catholic Church considers "passive material cooperation" with the COVID-19 vaccine "morally licit in the absence of other options").

190. *See* BURTON, *supra* note 39, at 99 ("[Wellness Culture is] also found in hybrid form within ostensibly Christian culture").

191. Together Employees v. Mass Gen. Brigham Inc., 573 F. Supp. 3d 412, 426 (D. Mass. 2021), *aff'd*, 32 F.4th 82 (1st Cir. 2022).

religious exemptions from mandates under the Free Exercise Clause, Title VII, or other federal and state laws.[192] Although most courts have ruled that mandates are legal and religious exemptions not required (because, for example, the state's compelling interest in public health outweighs the burden on religion),[193] most also have held that religious exemptions, if they are available, cannot be limited to orthodox members of organized religious groups.[194] Some courts believe this last result follows from *Thomas* and *Frazee*, which, as we have seen, can be read to suggest that religious exemptions must, in principle, extend to idiosyncratic beliefs and practices as well as traditional, communal

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192. *E.g.*, Kane v. DeBlasio, 19 F.4th 152, 168 (2d Cir. 2021) (per curiam) (challenging a COVID-19 vaccine mandate under the Free Exercise Clause by Orthodox Christian and other Christian plaintiffs whose anti-vaccine views were not shared by their congregations); Resurrection Sch. v. Hertel, 11 F.4th 437, 455 n.12 (6th Cir. 2021) (challenging a COVID-19 mask requirement under the Free Exercise Clause by Catholic plaintiffs who objected to masks), *dismissed as moot*, 35 F.4th 524 (6th Cir. 2022) (en banc); Fallon v. Mercy Cath. Med. Ctr., 877 F.3d 487, 490, 492 (3d Cir. 2017) (challenging a flu vaccine mandate under Title VII based on idiosyncratic objections vaguely associated with Buddhism); Brown v. Children's Hosp. of Phila., 794 F. App'x 226, 226 (3d Cir. 2020) (per curiam) (challenging a flu vaccine mandate under Title VII based on an African Holistic Health lifestyle); Colonel Fin. Mgmt. Officer v. Austin, No. 8:22-cv-1275-SDM-TGW, 2022 WL 3643512, at *14 (M.D. Fla. Aug. 18, 2022) (challenging a COVID-19 vaccine mandate under the Religious Freedom Restoration Act ("RFRA") by Christian and Muslim plaintiffs objecting to vaccines as a desecration of the body); Brox v. Woods Hole, Martha's Vineyard, & Nantucket Steamship Auth., No. 22-10242-RGS, 2022 WL 715566, at *4 n.7 (D. Mass. Mar. 10, 2022) (challenging a COVID-19 vaccine mandate under the Free Exercise Clause based on "idiosyncratic" beliefs about God's desires); Harris v. Univ. of Mass., Lowell, 557 F. Supp. 3d 304, 311 (D. Mass 2021) (challenging a COVID-19 vaccine mandate under RFRA based vaguely on tenets of Catholicism); *Together Employees*, 573 F. Supp. 3d at 440 (challenging a COVID-19 vaccine mandate under Title VII and the Americans with Disabilities Act based on religious beliefs that "do not appear to comport entirely with the doctrine of any organized religion"); Federoff v. Geisinger Clinic, 571 F. Supp. 3d 376, 388 (M.D. Pa. 2021) (challenging a COVID-19 vaccine-and-testing mandate under Title VII based on vague Buddhist beliefs, the Nuremberg Code, and a precept of Christian faith that they were "made in God's image"); Geerlings v. Tredyffrin/Easttown Sch. Dist., No. 21-cv-4024, 2021 WL 4399672, at *2–3 (E.D. Pa. Sept. 27, 2021) (challenging a COVID-19 mask mandate under the Free Exercise Clause based on idiosyncratic objections by Christian and unaffiliated plaintiffs); *Ex rel* C.C., 877 S.E.2d 555, 564 (Ga. 2022) (challenging a COVID-19 vaccine mandate under the Free Exercise Clause based on secular objections by plaintiffs who did not observe a particular religion).

193. *See*, *e.g.*, Chemerinsky & Goodwin, *supra* note 46, at 606–08; Levin, *supra* note 45, at 1203–04; Rothschild, *supra* note 3, at 1108–09; Killmond, *supra* note 45, at 915; *id.* at 948. Rothschild believes that courts are more likely to rule that religious exemptions are required in the COVID-19 vaccine context. *See* Rothschild, *supra* note 3, at 1109 & n.12; *id.* at 1123. The Supreme Court has twice upheld the constitutionality of vaccine mandates, *Jacobson v. Massachusetts*, 191 U.S. 11 (1905), and *Zucht v. King*, 260 U.S. 174 (1922), but neither decision addressed a Free Exercise challenge. Killmond, *supra* note 45, at 926–28. The Court recently denied certiorari in two cases raising Free Exercise challenges to vaccine mandates. Does 1–3 v. Mills, 142 S. Ct. 1112 (2022); Dr. A v. Hochul, 142 S. Ct. 2569 (2022).

194. *See* Levin, *supra* note 45, at 1204–05 (explaining that selective religious accommodations are problematic); *see also* Killmond, *supra* note 45, at 932–34 (discussing similar issues with religious exemptions).

ones.[195] Other courts have concluded that limiting religious exemptions to members of organized groups would violate the Establishment Clause by violating the neutrality principle and entangling the government in religious controversies.[196]

As I have explained, though, both *Thomas* and *Frazee* contain language that suggests limits to the idea that purely idiosyncratic beliefs and practices merit the protection of the Free Exercise Clause.[197] And, in some of the recent mandate cases, lower courts have denied that idiosyncratic, non-institutional claims can qualify as a religion for legal purposes. For example, in *Brox v. Woods Hole, Martha's Vineyard, and Nantucket Steamship Authority*, plaintiff employees claimed that a state agency had violated the Free Exercise Clause, as well as other federal and state constitutional and statutory provisions, when it required them to receive COVID-19 vaccines notwithstanding their religious objections.[198] The court ruled against plaintiffs, in part because it believed that their objections "have no grounding in religious practice but are rather expressions of idiosyncratic personal belief."[199] Plaintiffs had asserted, among other things, "Jesus tells me that it is unwise to put the COVID vaccine into my body, his creation"; "I believe my God will guide me and protect me and [God] has told me not to get the vaccine at this time"; and "I have a strong belief [that] natural & ancient remedies are what God intended me to use, to prevent and help cure illness."[200]

These objections reflect the spirituality of unaffiliated believers and religious hybrids that I have described. Yet the court dismissed the idea that they qualified as "*bona fide* religious practices" that merited accommodations.[201] *Brown v. Children's Hospital of Philadelphia*,[202] a

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195. For example, the Second Circuit recently cited *Frazee* in concluding that New York could not limit vaccine exemptions to members of organized religions, *Kane*, 19 F.4th at 168, and the Sixth Circuit recently cited *Thomas* in concluding that Michigan could not deny religious exemptions to Catholics who objected to vaccines, notwithstanding the Church's acceptance of them. *Resurrection Sch.*, 11 F.4th at 455 n.12. For discussion of *Thomas* and *Frazee*, see *supra* pp. 553–54.

196. *See* Killmond, *supra* note 45, at 932–33; *see also* Levin, *supra* note 45, at 1204–05.

197. *See supra* p. 553.

198. Brox v. Woods Hole, Martha's Vineyard, & Nantucket Steamship Auth., No. 22-10242-RGS, 2022 WL 715566, at *2 (D. Mass. Mar. 10, 2022).

199. *Id.* at *4 n.7.

200. *Id.* (internal quotations omitted).

201. *Id.* at *4 (emphasis in original).

202. 794 Fed. App'x. 226 (3d Cir. 2020) (per curiam). According to internal court rules, the Third Circuit does not regard the per curiam opinion in *Brown* as binding precedent. *Id.* at 226. *See also* 3RD CIR. R. 5.7 (asserting that a per curiam opinion is not binding precedent). That does not affect my purpose in discussing the opinion here, however. Whether it binds future panels or not, the opinion reflects how judges view idiosyncratic religious claims. Indeed, at least one other court has quoted *Brown* in discussing whether idiosyncratic beliefs qualify as a religion for Free Exercise

recent Third Circuit decision, provides another example. In *Brown*, a pro se plaintiff argued that her employer violated Title VII, which prohibits employment discrimination based on religion, when it fired her for refusing to receive a flu vaccine.[203] The plaintiff's objections did not rest on the teachings of an organized religion; she conceded that she "'did not have a pastor to validate [her] beliefs.'"[204] She rejected the flu vaccine, she said, on the basis of her "African Holistic Health lifestyle."[205]

African Holistic Health is not affiliated with an organized religion, but it is very much a spiritual program and is part of the Wellness Culture that attracts many in the anti-vaxxer movement.[206] According to physician Kamau Kakoyi, who directs the Center for Holistic Medicine in New York, African Holistic medicine is based on herbal healing, which, in turn, is connected "to God and the ancestors . . . ."[207] The mission statement of the African Holistic Health Chapter of New York calls it "a sacred support system."[208] African Holistic Health thus reflects the mystical view of the physical world that many unaffiliated believers in America share. Yet the Third Circuit dismissed the idea that plaintiff's objections to the flu vaccine were religious.[209] Indeed, the court wrote, her objections lacked any "religious component" at all.[210]

Geerlings v. Tredyffrin/Easttown School District, which concerns a mask requirement rather than a vaccine mandate, provides a final example.[211] In that case, four plaintiffs sought to enjoin a local school district's requirement that children wear masks to help slow the spread of COVID-19, on the grounds that the requirement violated their Free Exercise rights.[212] Two of the plaintiffs were Christians (one of whom was a deacon) who had stopped attending services when their local churches began requiring masks, because, in their view, mask-wearing

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purposes. *See* Geerlings v. Tredyffrin/Easttown Sch. Dist., No. 21-cv-4024, 2021 WL 4399672, at *6 (E.D. Pa. Sept. 27, 2021).

203. *Brown*, 794 F. App'x at 226.

204. *Id.* (alteration in original).

205. *Id.*

206. *See supra* note 182 (discussing the characteristics of Wellness Culture).

207. Nneoma Ekwegh, *Understanding African Holistic Health*, AMAKA (July 13, 2021), https://amaka.studio/explore/articles/understanding-african-holistic-health [https://perma.cc/QM7B-ZPHF].

208. *Mission Statement*, AFRICAN HOLISTIC HEALTH CHAPTER OF NEW YORK, https://africanholistic.weebly.com/our-mission.html [https://perma.cc/EK7K-UBE8] (last visited Nov. 17, 2022).

209. *See Brown*, 794 F. App'x at 227.

210. *Id.* at 228 (referencing the plaintiff's advance directive, which lacked "any religious component").

211. Geerlings v. Tredyffrin/Easttown Sch. Dist., No. 21-cv-4024, 2021 WL 4399672 (E.D. Pa. Sept. 27, 2021).

212. *See id.* at *2 (describing their "strong objections" to wearing masks as "religious or spiritual in nature").

"'dishonor[ed] God'" and harmed the "'temple'" of the body.[213] Another plaintiff said he believed in Jesus but did not go to church and described himself as spiritual rather than religious.[214] He believed that God had saved him from past trauma and that masks were "a mockery of the gift of life" that "show[ed] a lack of gratitude to the creator."[215] Finally, the last plaintiff had "no church affiliation" and subscribed to no Bible.[216] On the basis of his own research, he had come to believe in "'something else out there,'" not "'just us,'" which led him to reject masks for his daughter to protect her from "harmful effects."[217]

Relying in part on *Yoder*, the court ruled that none of these claims merited protection as religious under the Free Exercise Clause.[218] The claims were personal and disconnected from a comprehensive set of beliefs and practices—in other words, unrelated to the teachings of an organized religious community.[219] For example, the first two plaintiffs' objections to masks did not correspond to any teachings or practices of the Christian faiths to which they claimed to belong.[220] Similarly, the fourth plaintiff could not "identify any source for his belief that masks disrespect the creator" other than his own convictions.[221] His "objection to masks," the court said, "appears to be an isolated concept that is personal to him . . . ."[222] Finally, the fourth plaintiff could adduce only his own, private intuitions about "'something else out there.'"[223] Idiosyncratic beliefs of that sort, even if "commendable," did not amount to religion for free-exercise purposes.[224]

For the moment, cases like *Brox*, *Brown*, and *Geerlings* remain outliers. Most courts continue to hold that idiosyncratic, non-institutional beliefs can qualify as religious for free exercise and other legal purposes. But the tremendous growth in the number of unaffiliated believers and religious hybrids will put increasing pressure on courts in vaccine cases and in other contexts, too.[225] The New Thoreaus have changed the cultural landscape and will likely influence the legal landscape as well.

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213. *Id.* (referencing the Bible generally for these assertions).
214. *See id.* at *3.
215. *Id.*
216. *Geerlings*, 2021 WL 4399672, at *8.
217. *Id.* at *3.
218. *See id.* at *8 (citing Wisconsin v. Yoder, 406 U.S. 205, 215–16 (1972)).
219. *See id.* at *7.
220. *Id.* at *6–7. The court also had questions about the plaintiffs' sincerity. *Id.*
221. *Geerlings*, 2021 WL 4399672, at *8.
222. *Id.*
223. *Id.* at *3.
224. *Id.* at *8.
225. *Cf.* Novak, *supra* note 163, at 1101–02 ("As the number of alternative and 'spiritual' treatments increase . . . the number of people who seek an inoculation exemption for their children for non-medical reasons will continue to increase.").

Fifty years after *Yoder*, the debate as to whether religion is properly understood as a collective or entirely personal phenomenon turns out to be quite consequential.

III. On the Communal Character of Religion

I lack the space to resolve that debate definitively here. Nonetheless, *Yoder*'s insight about the collective nature of religion seems, to me, essentially correct: the existence of a community of believers is a crucial factor in a plausible definition of religion for legal purposes. The operative legal texts require courts to define religion somehow, and in common understanding, "religion" always has suggested a collective phenomenon. Moreover, protecting beliefs and practices that are tied to a religious community, rather than purely idiosyncratic ones, promotes important associational values and reduces the dangers of fraud, trivial claims, and administrative disorder—dangers that are especially pronounced in a fissiparous culture like twenty-first century America's. Religion cannot mean an exclusively communal phenomenon; a categorical rule would slight a long American tradition of respecting individual religious conscience and create difficult line-drawing problems. Nonetheless, the further one gets from a religious community, the more idiosyncratic one's spiritual path, the less plausible it is to claim that one is exercising a religion for legal purposes.

A. Is it Necessary to Define Religion?

Of course, many scholars maintain that we should avoid defining religion at all. "It is impossible to discern any common core or essence to all the world religions," Cécile Laborde writes; "[t]here is no feature, or set of features, that all religions share."[226] Elizabeth Hurd contends that religion is "too unstable a category to be treated as an isolable entity . . . ."[227] A categorical definition of religion would depend on contested, culturally bound assumptions and threaten "'mini-establishments'" in violation of constitutional principles.[228] In particular, Hurd writes, a communal definition of religion would privilege organized groups and slight the growing "'DIY religion'" of unaffiliated believers, which exists "outside of churches, synagogues, and mosques."[229] For these reasons, Laborde, Hurd, and many others argue that law should not

226. Laborde, *supra* note 61, at 20.

227. Hurd, *supra* note 61, at 6.

228. *Id.* at 112. As we have seen, in the vaccine context, some lower courts have agreed, concluding that the Establishment Clause forbids limiting religious exemptions to orthodox members of organized religions. *See supra* text accompanying note 196.

229. Hurd, *supra* note 61, at 127.

define religion.[230] Alternatively, law should expand the category of religion to include a variety of other associational interests that implicate similar concerns.[231] Indeed, the claim that religion is not special, and thus does not require a precise definition, is thought to be obvious in the legal academy today—"ho-hum," in Steven Smith's phrase.[232]

One might even think that defining religion is unnecessary under current free-exercise doctrine. In many cases, courts can duck difficult definitional questions by employing an assume-and-avoid strategy: a court can assume *arguendo* that a plaintiff's claim is religious and resolve the case on other grounds.[233] Under *Employment Division v. Smith*, for example, even if a claim is religious, no right to an exemption exists where a law is neutral and generally applicable.[234] In such a case, it won't really matter whether a claim is in fact religious or not, so a court can escape the question.[235] Even if strict scrutiny does apply, a court can admit (for the sake of the argument) that a claim is religious and hold that the measure in question is narrowly tailored to promote a compelling state interest.[236] One might think that the assume-and-avoid approach allows courts to escape some of the neutrality and other problems that exist when one tries to define religion for legal purposes.

These are plausible arguments, but the operative legal texts require courts to define religion somehow. The Free Exercise Clause, the Religious Freedom Restoration Act (RFRA), Title VII, and many other federal and state laws all refer expressly to "religion"; courts cannot simply wave away the term.[237] These laws authorize courts to block

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230. *See id*. at 6 (emphasizing the instability of religion makes it difficult to apply to law and politics); LABORDE, *supra* note 61, at 20 ("There is no feature, or set of features, that all religions share.").

231. *See supra* note 62 and accompanying text.

232. STEVEN D. SMITH, THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM 139 (2014) (identifying a recent gravitation among scholars and theorists to the idea that religious freedom no longer warrants any special constitutional commitment).

233. A recent COVID-19 vaccine case provides a good example. Plaintiffs with idiosyncratic beliefs sought religious accommodations under Title VII. The court accepted for the sake of argument that the plaintiffs' beliefs were religious but went on to rule that accommodations were not required. Together Emp. v. Mass Gen. Brigham Inc., 573 F. Supp. 3d 412, 441 (D. Mass. 2021), *aff'd*, 32 F.4th 82 (1st Cir. 2022).

234. 494 U.S. 872, 879 (1990) ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'").

235. *See* 1 GREENAWALT, *supra* note 64, at 125 ("[The *Smith* decision] eliminated a need to decide whether some claims are religious . . . .").

236. *See* Andrew Koppelman, *Conscience, Volitional Necessity, and Religious Exemptions*, 15 LEGAL THEORY 215, 222 (2009) ("[A free exercise claim] can be defeated by a strong enough state interest".).

237. *See* Eduardo Peñalver, Note, *The Concept of Religion*, 107 YALE L.J. 791, 792 (1997) (arguing that the text of the First Amendment makes "discussion of a constitutional definition" of religion "unavoidable").

government action that impinges on citizens' "religion," not other worthy commitments, which typically receive protection under other legal doctrines.[238] For example, if their decisions applying the Free Exercise Clause are to have legitimacy, courts cannot employ "religion" as a term of art that covers "personal autonomy" generally.[239] Doing so would inappropriately expand the power of the courts to overturn democratically enacted legislation and create a potentially "illimitable" right to stymie measures in the public interest.[240]

Moreover, notwithstanding the conventional wisdom in the academy, the Court has made clear that it understands religion as a distinct and special legal category—and that it does not think doing so violates the Establishment Clause.[241] In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, for example, the ministerial exception case, the Court unanimously rejected as "untenable" the position that "religion" should be assimilated into a general right of association for constitutional purposes.[242] "[T]he text of the First Amendment," the Court explained, "itself . . . gives special solicitude to . . . religious institutions."[243] Only by ignoring the constitutional text could one maintain that "the First Amendment analysis should be the same, whether the association in question is the Lutheran Church, a labor union, or a social club."[244] As long as *Hosanna-Tabor* remains good law—and no reason exists to think the Court will change its mind—religion as such

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238. *See* Lund, *supra* note 14, at 512–13. As Lund pithily observes, "the Free Exercise Clause is not the only provision in the Constitution." *Id.* at 513.

239. Freeman, *supra* note 18, at 1564. Little hard evidence exists on what the Framers meant by the word "religion" in the Free Exercise Clause. *See*, *e.g.*, JOHN WITTE ET AL., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 124–25 (5th ed. 2022). At the time of the Framing, "religion" could refer to conventional "sects, societies, and denominations," especially "Protestant Christian faiths," but also to non-institutional beliefs like Deism. *Id.* at 125. Nonetheless, the drafting history offers some evidence that the Framers intended the Clause to cover communal rather than purely idiosyncratic phenomena. The Framers famously chose to protect the "free exercise of religion" rather than the "rights of conscience." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1488 (1990); *see also* Lee J. Strang, *The Meaning of "Religion" in the First Amendment*, 40 DUQ. L. REV. 181, 233–34 (2002). Although the Framers did not explain why they preferred the former phrase, as McConnell observes, "'Religion' . . . connotes a community of believers," while "conscience" suggests individual judgment. *See* McConnell, *supra*, at 1490. Even if "religion" could refer to a non-institutional phenomenon like Deism, then, the fact that the Framers chose a word with communal connotations over the more obviously personal "conscience" suggests they had collective phenomena in mind.

240. Freeman, *supra* note 18, at 1564.

241. *See, e.g.*, Gilad Abiri, *The Distinctiveness of Religion as a Jeffersonian Compromise*, 125 PENN ST. L. REV. 95, 102 (2020) (observing that the Court unanimously has adopted "a *distinctivist* paradigm" which treats religious institutions "as constitutionally special").

242. 565 U.S. 171, 189 (2012); *see also* Lund, *supra* note 14, at 483.

243. *Hosanna-Tabor*, 565 U.S. at 189.

244. *Id.*

will continue to receive special treatment under the Constitution.

With respect to anti-establishment concerns, the Court made clear in *Cutter v. Wilkinson* that religious accommodations in principle do not violate the Establishment Clause.[245] True, the *Cutter* Court indicated that accommodations could not "differentiate among bona fide faiths" by singling out sects for favored or disfavored treatment.[246] But that assumes that one can legitimately identify "bona fide faiths" in the first place—that is, that one can legitimately define religion for free-exercise purposes. That assumption makes sense. If the act of defining the category of "religion" for purposes of the Free Exercise Clause would itself contravene the Establishment Clause, the Religion Clauses would be self-defeating; one could not apply one clause without violating the other.[247] That result cannot be what the Constitution contemplates.

Finally, recent developments at the Court, to which I allude above, will make it harder for courts to employ an assume-and-avoid strategy. Two terms ago, in *Fulton v. City of Philadelphia*, the Court cut back on *Smith*,[248] ruling that any government discretion to grant exemptions means that a law burdening the exercise of religion is not generally applicable, and thus strict scrutiny applies.[249] After *Fulton*, it will no longer be as easy for courts to assume *arguendo* that a claim is religious on the ground that nothing would change as a result. After *Fulton*, courts will need to employ strict scrutiny much more frequently—and, in practice, strict scrutiny is hardly a neutral test, turning on judges' prior commitments about the character and beneficence of religion, the importance of various public policy goals, and other factors.[250] If one hoped to avoid the neutrality problems associated with defining religion, strict scrutiny does not provide a hopeful option.

B. Community as a Crucial Factor

Notwithstanding the difficulties scholars have identified, then, courts cannot entirely avoid defining religion. The best method is the familiar

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245. 544 U.S. 709, 713 (2005) ("This Court has long recognized that the government may . . . accommodate religious practices . . . without violating the Establishment Clause.") (alteration in original) (citation omitted).

246. *Id.* at 723–24.

247. *See* Eisgruber & Sager, *supra* note 61, at 807; *id.* at 811. Eisgruber and Sager argue that avoiding too close a definition of religion allows courts to avoid this dilemma, though they concede that, even under their egalitarian framework, some definition of religion—a "conventional, common sense" understanding—is necessary to apply the Religion Clauses. *Id.* at 809; *see also id.*at 828.

248. 141 S. Ct. 1868 (2021).

249. Rothschild, *supra* note 3, at 1107 ("*Fulton* . . . represents a significant expansion of the right to free exercise of religion.").

250. Mark L. Movsesian, *Law, Religion, and the COVID-19 Crisis*, 37 J.L. & RELIGION 9, 19–20 (2022) (discussing Supreme Court's application of strict scrutiny in COVID-19 cases).

analogical approach associated most closely with Kent Greenawalt.[251] That "flexible," commonsense approach recognizes that no single factor can capture the full complexity of religion.[252] Instead, it asks how closely a phenomenon resembles something that everyone would concede to be a religion; the closer the "'family resemblance,'" the more likely the phenomenon qualifies as a religion.[253] In Greenawalt's description, courts "decide what constitutes religion by seeing when the concept of religion indisputably applies, and asking how closely analogous the doubtful instances are to the indisputable instances."[254] Courts do this based on multiple factors that can be divided into the three broad categories: "beliefs, practices, and organizations."[255]

The analogical approach ties religion to common understandings that resolve most cases and avoid some of the "theoretically intractable" problems about the nature of religion.[256] True, the approach does not capture everything one needs to know to understand religion fully and does not completely answer objections about potential bias, since what seems indisputably religious may depend on contested traditions that exclude unfamiliar expressions.[257] But no definition, of religion or anything else, can include "every feature, property, and capacity of an object" that "one might wish to know,"[258] and no definition can be completely neutral, in the sense of relying on no culturally specific, substantive criteria at all.[259] The analogical approach captures the reality of religion in daily life and at least "moderate[s]" the possibility of bias.[260] Moreover, by relying on several factors, none of which it treats as typically dispositive, the approach promotes a beneficial flexibility and

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251. 1 GREENAWALT, *supra* note 64, at 139.
252. Tebbe, *supra* note 60, at 1137 (discussing Greenwalt's approach to defining religion for legal purposes).
253. 1 GREENAWALT, *supra* note 64, at 139.
254. *Id.*
255. *Id.*
256. ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY 7 (2013).
257. *See* 1 GREENAWALT, *supra* note 64, at 140 (explaining why the analogical approach is not perfect).
258. CHRISTIAN SMITH, RELIGION: WHAT IS IT, HOW IT WORKS, AND WHY IT MATTERS 61 (2017).
259. *Cf.* Lund, *supra* note 14, at 514 ("[M]ost of our constitutional categories are the product of . . . cultural and historical circumstance."). Even disaggregated approaches that hold that religion is too complex to be useful as a legal category fail to achieve neutrality, in the sense of disinterest about what substantive values the law should promote. As Marc DeGirolami has argued in another context, deferring to subjective understandings of religion, rather than relying on objective definitions, does not qualify as "neutral," since it amounts to "the promotion of certain conceptions of religion and the demotion of others." Marc O. DeGirolami, *Religious Accommodation, Religious Tradition, and Political Polarization*, 20 LEWIS & CLARK L. REV. 1127, 1148 (2017).
260. GREENAWALT, *supra* note 64, at 140 (noting that a concentration on religions most familiar in the United States might "slant conclusions undesirably" by favoring features found in Western religions).

practicality in defining religion for legal purposes.[261]

The existence of a community of believers—in Greenawalt's phrase, some "organization to facilitate the corporate aspects of religious practice and to promote and perpetuate beliefs and practices"—is a crucial factor in qualifying something as a religion under the analogical approach.[262] This makes sense, for several reasons. First, the existence of a community captures something important about the social reality of religion. In lived experience, religion suggests a group of people linked with one another, through time, in worship.[263] As Christian Smith writes, "religions are almost invariably social activities—communities of memory engaged in carrying on particular traditions."[264] Without a communal structure to give them meaning, religious practices like prayer, fasting, and so on would be incoherent, "simply the strange doings of odd people."[265] "Communal memory" and authority give religion much of its "formative power . . . ."[266] Indeed, "in the absence of inherited historical traditions, most new religious movements simply invent them as needed."[267]

Second, a focus on community jibes with an important goal of religious freedom in the liberal state: promoting private associations that encourage cooperative projects and check state power.[268] About the same time that Thoreau built his cabin on Walden Pond, another perceptive observer of American life, Alexis de Tocqueville, explained why this is so.[269] By encouraging people to identify with and look out for one another, Tocqueville wrote, private associations militate against the self-centeredness and social isolation that liberalism tends to promote—and that Thoreau, in his way, embodied.[270] Thoreau found his

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261. *See id*. at 140–41. Greenawalt maintains that in unique circumstances "a single feature could be sufficient to make a particular act religious." *Id.* at 141.

262. *Id.* at 140.

263. *See* Lael Weinberger, *The Limits of Church Autonomy*, NOTRE DAME L. REV. (forthcoming 2023) (manuscript at 5) (on file with author). The word itself implies this: "religion" most likely comes from the Latin *religare*, "to bind," suggesting a connection between the believer, the gods, and other worshippers. NICHOLAS WADE, THE FAITH INSTINCT 2 (2009).

264. SMITH, *supra* note 258, at 27.

265. *Id.* at 26 (emphasizing that religious practices "are never random, idiosyncratic, or arbitrary," because "[i]f they were, then they could not be meaningful").

266. *Id.* at 27.

267. *Id.*

268. *See* Tebbe, *supra* note 3, at 275.

269. *See generally* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Harvey C. Manfield & Delba Winthrop trans., 2000). Tocqueville published *Democracy in America* in 1835 and 1840. *Id.* at xli. Thoreau lived at Walden Pond from 1845 to 1847, see DASSOW WALLS, *supra* note 18, at 181–231, although he did not publish *Walden* until 1854. *See id*. at 344.

270. Movsesian, *supra* note 35, at 14 (discussing Tocqueville's belief that American democracy had overcome liberalism's tendency towards individualism by promoting voluntary associations,

solitude beneficial, but social isolation can also facilitate the rise of despotism. The despotic state desires nothing more than for individual citizens to feel isolated from and indifferent to others, so that it can easily divide and dominate them all.[271]

By promoting cooperation and helping to "hold [state actors] to account," private associations thus perform "necessary" functions in "a democratic republic."[272] And religious groups perform these functions especially well.[273] As Steven Smith observes, "among existing associations, the church seems the best qualified" to resist the "individualism that afflict[s] modernity."[274] Compared to other private associations, membership in religious groups is "most closely associated with . . . forms of civic involvement, like voting, jury service, community projects, talking with neighbors, and giving to charity."[275] Regular churchgoers are more likely to work on community projects, participate in town meetings and other political activities, and press for social reform.[276] It is institutional religion, not the Thoreauvian beliefs of isolated individuals, that offers the most "substantial . . . challenges to . . . existing politico-cultural mores."[277]

Third, the existence of a religious community reduces "the possibility of fraudulent claims."[278] Everyone agrees that courts need not honor a religious claim that a litigant does not genuinely hold or raises merely as a pretext.[279] But religious sincerity, which inevitably depends on a claimant's subjective state of mind, is notoriously difficult for courts to evaluate.[280] Often, all a judge can go on are the claimant's self-serving

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including religious organizations); *see also* Steven D. Smith, The Church in the Twilight 48–49 (Mar. 31, 2022) (unpublished manuscript) (manuscript on file with author) (describing how "the church counters modern individualism").

271. *See* Movsesian, *supra* note 105, at 14.

272. Tebbe, *supra* note 3, at 275.

273. *See* Smith, *supra* note 270, at 48–49 (discussing the church's ability to counteract individualism in modern society).

274. *Id.* at 49.

275. ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 67 (2000).

276. *See* Movsesian, *supra* note 35, at 14 (discussing participation in religious organizations encouraging social engagement).

277. DeGirolami, *supra* note 259, at 1155; *see also* Smith, *supra* note 270, at 48–49 (noting the church's potential to renew community and counter modern individualism).

278. Schwartzman, *supra* note 12, at 1420 (discussing objections to broadening exemptions to include non-religious claims).

279. *See* W. COLE DURHAM, JR. & BRETT G. SCHARFFS, LAW AND RELIGION: NATIONAL, INTERNATIONAL, AND COMPARATIVE PERSPECTIVES 44 (2d ed. 2019) (noting the importance of determining the sincerity of religious beliefs); *see also id.* at 57 (discussing the sincerity factor).

280. *See e.g.*, Charlotte Garden, *Religious Employers and Labor Law: Bargaining in Good Faith?*, 96 B.U. L. REV. 109, 145 (2016) ("The difficulty of assessing whether subjective religious beliefs are sincere is palpable.").

statements.[281] The existence of a religious community to which the claimant belongs can provide powerful objective evidence of the claimant's good faith.[282] A continuous tradition of teaching and worship, and an organized body that enforces discipline, can go a long way toward demonstrating the claimant's genuineness about his religious convictions.[283]

Fourth, the existence of a community helps ensure that religious claims are based on deep convictions rather than ephemeral notions—that the claims are not frivolous and fleeting, but serious.[284] It is one thing for the state to accommodate a citizen's profoundly held beliefs. To do so honors the citizen's dignity and treats him or her with appropriate respect.[285] It is another to defer to commitments that may be temporary and superficial.[286] Not all idiosyncratic commitments fit that description, of course, and beliefs can be religious even if novel.[287] But the existence of an established religious community can screen out passing whims that the state need not honor. An institutional religion, one that has "the intellectual, spiritual, and aesthetic resources that grow with historic development," is likely to promote the sort of serious convictions that should most command the state's respect.[288]

Fifth, and finally, making the definition of religion turn at least in part on the existence of a religious community can reduce the potential for administrative disorder. Long ago, the Supreme Court warned that if personal spiritual convictions were sufficient to override legal obligations, anarchy could result: "every citizen [would] become a law unto himself."[289] One should not overstate this concern, but, as I explain below, the rise of the Nones makes it especially important today. Requiring a claimant to show that his or her objections are not merely personal, but instead derive from the teachings of an organized body of

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281. *See* Movsesian, *supra* note 35, at 15.

282. *See* DURHAM & SCHARFFS, *supra* note 279, at 57 ("Being a member of a group that teaches [certain] beliefs and claims to be religious is helpful [to establishing the sincerity of a plaintiff's claim].").

283. *See* NUSSBAUM, *supra* note 9, at 165 ("Even when a person has a somewhat divergent interpretation of his or her religion . . . we can at least study the tradition, understand its debates, and see how the person fits in.").

284. *Cf.* DeGirolami, *supra* note 259, at 1148 ("[An exclusively subjective focus] fosters a very particular conception of religion, one that a critic might perceive as debased, ephemeral, shallow, and unserious").

285. *See* NUSSBAUM, *supra* note 9, at 169.

286. *See* Movsesian, *supra* note 35, at 15 (observing that a "pluralist democracy" requires compromise and that citizens "cannot expect to receive exemptions" for "each passing whim").

287. *Cf.* Gordon, *supra* note 6, at 1238 (criticizing the suggestion that new religions do not merit constitutional protection).

288. Schwarzschild, *supra* note 171, at 198.

289. Reynolds v. United States, 98 U.S. 145, 167 (1878). The Court quoted this language in *Reynolds* approvingly more than a century later. *See* Emp. Div. v. Smith, 494 U.S. 872, 879 (1990).

believers, obviously can reduce the potential for conflict with state laws—especially in a society where large numbers claim to follow their own spiritual paths.

C. A Sliding Scale

In short, under the analogical approach, the existence of a community is properly seen as crucial to the definition of religion. It is not the only factor, though, nor should it be. As I have explained, much of the benefit of the analogical approach lies in its flexibility and recognition of religion's complex and polyvalent character.[290] Moreover, categorically limiting legal protection to collective beliefs and practices would create two serious problems. First, excluding non-institutional, idiosyncratic beliefs would contradict a long American tradition of honoring individual religious conscience.[291] "To the extent that religion is distinctly 'American,'" Robert Wuthnow observes, "[i]t necessarily centers on the aims and aspirations of individuals."[292] Unaffiliated believers like Thoreau and his spiritual descendants reflect something important about our culture, about the way we historically have understood religion in America and the way we continue to understand it today.[293] Martha Nussbaum gives an even earlier example, but the point is the same—"From the early colonial days on," she writes, "many religious Americans have been, like Roger Williams, solitary seekers, affiliated with no official structure . . . ."[294] She adds, "our tradition has shown a great deal of skepticism about organized structure."[295]

Scholars debate the relative influence of the collective and individualist conceptions of religion in American law—a debate that *Yoder*, *Thomas*, and *Frazee* reflect.[296] American law obviously protects both. But it is hard to deny that our tradition has consistently honored individual religious conviction as such: "the freedom of each individual to believe and live in accordance with his or her own religious faith."[297] The Lockean and evangelical strains, which work together to promote a

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290. *See supra* pp. 569–70.
291. *See*, *e.g.*, Nathan S. Chapman, *Disentangling Conscience and Religion*, 2013 U. ILL. L. REV. 1457, 1464 (2013) ("Scholars agree that in our founding era . . .'freedom of conscience' dominantly referred to individual religious liberty.") (alteration in original) (internal quotations and emphasis omitted).
292. WUTHNOW, *supra* note 142, at 2.
293. *See* HODDER, *supra* note 22, at 161 (discussing Thoreau's influence on the recognition of "'nature religion'" in twenty-first century America).
294. NUSSBAUM, *supra* note 9, at 167.
295. *Id.*
296. For a discussion of these three cases, see *supra* Part I. For a discussion of the debate among scholars on the relative strength of the collective and individualist conceptions, see DeGirolami, *supra* note 259, at 1143–44.
297. Smith, *supra* note 270, at 37.

focus on individual conscience, have appeared in our jurisprudence from the beginning and remain highly influential.[298] Moreover, and notwithstanding the problems of alienation, anomie, and unserious claims, honoring individual religious conscience promotes the important values of autonomy, dignity, and personal well-being.[299] Declining entirely to protect idiosyncratic claims would slight those important values and depart too much from our long tradition to be legitimate.

Second, limiting religion exclusively to communal beliefs and practices would entail difficult line-drawing problems, for example, with respect to identifying religious communities and what they teach. Of course, civil courts lack competence to determine which religious expressions are correct in a metaphysical sense—that is not the issue.[300] Courts identifying religion for these purposes would do so as an external, empirical matter—a description of things as they are.[301] Even so, courts might have a hard time identifying whether a community exists and what it teaches about a specific question.[302] Most religions, especially if they have existed for any length of time, have both majority and minority strains, and religions that have existed for millennia typically have many expressions.[303] Determining which expression among many qualifies as the "true" representative of a religious tradition can be difficult.[304]

Moreover, religious doctrines and structures can change over time; the comparatively static nature of the Amish beliefs and practices at issue in

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298. *See* Chapman, *supra* note 291, at 1470 (discussing Locke's views on individual conscience); *see also* Smith, *supra* note 270, at 37 & n.114 (discussing the influential Protestant view of individual religious conscience in the early republic).

299. *See* Movsesian, *supra* note 35, at 11–12.

300. *See* Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 716 (1981) (discussing the incapacity of courts to interpret scripture).

301. Describing the approach in English law, Christopher McCrudden contrasts an "external perspective," which considers religion objectively as an observable, empirical phenomenon, and an "internal perspective," which considers religion from the subjective perspective of the believer. Christopher McCrudden, *Religion, Human Rights, Equality and the Public Sphere*, 13 ECCLESIASTICAL L.J. 26, 30–32 (2011). McCrudden believes that English courts increasingly adopt the first perspective, a trend he criticizes. *Id.*

302. *See* Ronald J. Colombo, *When Exemptions Discriminate: Unlawfully Narrow Religious Exemptions to Vaccination Mandates by Private Colleges and Universities*, 44 W. NEW ENG. L. REV. 293, 317 (2022) ("[R]eligious questions can be notoriously complicated, and intrareligious disputes are far from uncommon.").

303. *See, e.g.*, MATTHEW BOWMAN, CHRISTIAN: THE POLITICS OF A WORD IN AMERICA 3–4 (2018) (describing the "malleability" of forms that Christianity has taken throughout history).

304. A similar problem comes up in determining, under strict scrutiny, whether a law "substantially burdens" religious exercise: it is sometimes difficult to evaluate from the outside how important a given belief or practice is within the context of a religion's teaching. *See, e.g.*, Gabrielle M. Girgis, *What Is a "Substantial Burden" on Religion under RFRA and the First Amendment?*, 97 WASH. U. L. REV. 1755, 1775 (2020); *see also* Marc O. DeGirolami, *Substantial Burdens Imply Central Beliefs*, 2016 U. ILL. L. REV. ONLINE 19, 19 (2016).

Yoder is atypical.[305] Sometimes within a religion, orthodoxies start out as heresies, the idiosyncratic views of a limited number of believers.[306] At any one moment, then, it might not be so clear—again, purely as a descriptive matter—what the position of a religion is. These line-drawing problems will not always pose insurmountable obstacles. Law very frequently relies on generalizations,[307] and in many situations, courts should be able to identify a religious community and its teachings fairly as empirical matters.[308] But the problems are significant enough to give one pause about categorically limiting free exercise protection to religious communities.

The best approach, as my colleague Marc DeGirolami has suggested in a similar context, would be to adopt a sort of sliding scale.[309] The closer one can tie one's beliefs and practices to those of an established religious community, the more one's claims qualify as religious for legal purposes. Conversely, the farther one gets from a religious community, the more idiosyncratic one's spiritual path, the less plausible is the claim that one is exercising a religion. *Thomas* and *Frazee* are suggestive in this regard.[310] *Thomas*, recall, concerned what the Court characterized as a genuine, "intrafaith" dispute among Jehovah's Witnesses about the permissibility of working on weapons.[311] Such a dispute, the Court explained, was "not uncommon among followers of a particular creed . . . ."[312] In the context of the religious tradition to which he belonged, Thomas's objections were not novel and unique to him, but a matter of good faith disagreement with his fellow believers. The Court was correct in recognizing his objections as religious.

Similarly, *Frazee* involved a claim by someone who called himself a Christian and maintained that he could not in good conscience work on Sundays.[313] As the Court recognized, in the context of Christianity, this was hardly a "bizarre" position, even if most American Christians no longer shared it, and even if the claimant did not formally belong to a

305. *See supra* note p. 550–55 (discussing *Yoder*'s analysis of the Amish community).

306. *See* ABDULLAHI AHMED AN-NA'IM, ISLAM AND THE SECULAR STATE 31 (2008) (discussing historical development of Islamic law).

307. *See, e.g.,* JOHN HART ELY, DEMOCRACY AND DISTRUST 155–56 (1980); *see also* Alexandra Timmer, *Judging Stereotypes: What the European Court of Human Rights Can Borrow from American and Canadian Equal Protection Law*, 63 AM. J. COMP. L. 239, 269 (2015) ("[L]aws are inevitably based on generalizations.").

308. *Cf.* Andrew Koppelman, *And I Don't Care What It Is: Religious Neutrality in American Law*, 39 PEPP. L. REV. 1115, 1121 (2013) ("[American] [c]ourts almost never have any difficulty in determining whether something is as religion or not.").

309. DeGirolami, *supra* note 259, at 1144 (discussing the substantial burden test).

310. For a discussion of these cases, see *supra* Part I.

311. Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 715 (1981).

312. *Id.*

313. Frazee v. Ill. Dep't of Emp. Sec., 489 U.S. 829, 833 (1989).

church.[314] Purely as a descriptive matter, refraining from work on Sundays is not an idiosyncratic position for someone who calls himself a Christian; it suggests neither fraud nor a lack of seriousness.[315] Once again, given the faith tradition to which he claimed to subscribe, *Frazee*'s objections were properly characterized as religious.[316]

In short, the claims in *Thomas* and *Frazee* had plausible links to religious communities and did not implicate concerns about hyper-individualism, fraud, and lack of seriousness. Contrast those decisions with the vaccine and mask mandate cases from the lower courts that I describe above, in which plaintiffs sought accommodations because of purportedly Christian objections to placing foreign substances in one's body or covering one's face in mockery of the Creator.[317] In the context of the Christian faiths to which the plaintiffs claimed to belong, and again speaking only descriptively, those claims do indeed qualify as bizarre. They do not reflect genuine intrafaith disputes and do not cohere with historic beliefs and practices whose religious origin is unquestionable. The lower courts were correctly skeptical that the claims qualified as religious.

Or consider the claim of the unaffiliated believer in *Geerlings* who sought a religious exemption to a COVID-19 mask requirement because of his own, personal intuitions about a vague, "something . . . out there" beyond "just us" that made him feel that masks would have "harmful effects."[318] Courts should be especially chary of such claims, which lack even a purported connection to a religious tradition. To treat such claims as religious, for legal purposes, would contravene the common understanding that religion is a communal phenomenon and fail to advance the important associational benefits organized religion can confer. It would increase the potential for fraudulent and trivial claims and administrative disorder, in a country of perhaps sixty-six million unaffiliated believers, each of whom could make similar claims about the requirements of "something . . . out there" beyond "just us."[319]

To be sure, the analogical approach does not resolve cases in the

314. *Id.* at 834 n.2.

315. For example, the current catechism of the Roman Catholic Church provides, "On Sundays . . . the faithful are to refrain from engaging in work or activities that hinder the worship owed to God, the joy proper to the Lord's Day, the performance of the works of mercy, and the appropriate relaxation of mind and body." CATECHISM OF THE CATHOLIC CHURCH § 2185 (2d ed. 1994). Indeed, the Catechism teaches that Christians "should seek recognition of Sundays . . . as legal holidays." *Id.* § 2188.

316. *Frazee*, 489 U.S. at 834 & n.2.

317. *See supra* pp. 562–63.

318. *See supra* pp. 564–65.

319. For further discussion of *Geerlings*, see *supra* pp. 564–65. For further discussion of the potential problems of fraudulent and trivial claims and administrative disorder, see *supra* pp. 572–73.

manner of a bright-line rule. The approach turns on the facts and depends a great deal on judgment; in any particular case, whether a claim qualifies as religious may be genuinely uncertain. Line-drawing problems will remain. Nonetheless, by making the existence of a religious community a crucial factor, the analogical approach offers the benefits of tying religion to common understandings and avoiding the problems associated with defining religion in idiosyncratic terms, while remaining true to our cultural and legal traditions and minimizing the difficulties that a more categorical approach would entail.

CONCLUSION

Fifty years later, and in ways the Court could not have foreseen at the time, *Yoder*'s dicta on the communal character of religion turn out to have real significance. In 1972, the question whether religion could be a purely individual pursuit was a peripheral one. Not many Americans claimed to have their own, personal religions. In the intervening decades, though, America has changed. One-fifth of us—roughly sixty-six million people—now claim, like Thoreau, to follow our own, idiosyncratic spiritual paths. The New Thoreaus already have begun to appear in the case law; their numbers will likely increase, and courts will need to decide whether they can plausibly claim to exercise a religion for legal purposes. I have argued here that *Yoder*'s insight was basically correct: the existence of a religious community is a crucial factor in the definition of religion. Religion cannot mean an exclusively communal phenomenon; a categorical rule would slight a long American tradition of respecting individual religious conscience and create difficult line-drawing problems. Nonetheless, the farther one gets from a religious community, the more idiosyncratic one's spiritual path, the less plausible it is to claim that one's beliefs and practices are religious, for legal purposes.