

NOTE

“SPIRITUAL BUT NOT RELIGIOUS”: RETHINKING THE LEGAL DEFINITION OF RELIGION

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Through the statutory mechanisms of RFRA and RLUIPA, Free Exercise jurisprudence has expanded the scope of religious protection. In the absence of a clear legal definition of religion, however, this protection has an unknown and biased reach. In particular, courts and legal scholars embody a misunderstanding of a burgeoning group of Americans who identify as “spiritual but not religious,” excluding them from religious protection. This Note uses a recent case, which dismissed as nonreligious the beliefs of a plaintiff whose beliefs are paradigmatic of this growing cohort, to analyze how the law defines religion. It argues that while such belief systems reject the institutional characteristics of organized religion, they are sufficiently analogous to religious belief systems to deserve the same legal protection.

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INTRODUCTION

OWING in part to a study by the Pew Research Center,¹ conversation has proliferated around religiously unaffiliated Americans, a group often labeled the “Nones.”² Between 2007 and 2014, the group increased from 16% to 23% of all U.S. adults,³ a trend that largely reflects a generational divide and is thus likely to continue.⁴ But the category consists

¹ Pew Research Ctr., “Nones” on the Rise 9–10 (Oct. 9, 2012), <http://www.pewforum.org/files/2012/10/NonesOnTheRise-full.pdf> [<https://perma.cc/9P7L-HA33>].

² See, e.g., Heidi Glenn, *Losing Our Religion: The Growth of the ‘Nones’*, NPR, <http://www.npr.org/blogs/thetwo-way/2013/01/14/169164840/losing-our-religion-the-growth-of-the-nones> [<https://perma.cc/9P7L-HA33>] (last updated Jan. 14, 2013, 3:27 PM); Steve McSwain, “Nones!” are now “Dones” Is the Church Dying?, *HuffPost Religion*, http://www.huffingtonpost.com/steve-mcswain/nones-and-now-the-dones-t_b_6164112.html [<https://perma.cc/6RF7-XTJD>] (last updated Jan. 15, 2015, 5:59 AM). For legal discourse, see Mark L. Movsesian, *Defining Religion in American Law: Psychic Sophie and the Rise of the Nones* 8–10 (Robert Schuman Ctr. for Advanced Stud. Working Paper No. 19, 2014).

³ Pew Research Ctr., *U.S. Public Becoming Less Religious* 3 (Nov. 3, 2015), http://www.pewforum.org/files/2015/11/201.11.03_RLS_II_full_report.pdf [<https://perma.cc/DP5R-RPPY>].

⁴ *Id.* at 7, 22; Pew Research Ctr., *supra* note 1, at 10–11, 30. For helpful summaries of the historical and cultural forces behind the trend, see Rebecca French, *Shopping for Religion*:

of quite different positions on religious belief: Among other differences, slightly less than one-third identify as atheist or agnostic,⁵ 18% consider themselves “religious” but are unaffiliated with a particular faith tradition, and 37% classify themselves as “spiritual but not religious.”⁶

This Note addresses the latter subset of this category, the estimated seventeen million Americans who identify as “spiritual but not religious,”⁷ and asks whether they should be accorded legal protection through the Religion Clauses.⁸ Despite being unaffiliated with a particular religion, these individuals embrace a deeply held spiritual worldview; and their belief systems are both identifiable and similar to religious belief systems in important ways. But courts and commentators evince skepticism about whether “spiritual but not religious” belief systems (“SBNR”)⁹ constitute “religion” for purposes of legal protection, and legal scholars have largely overlooked this category.

This omission becomes clear through an understanding of how the law treats different types of belief systems. Prototypical religions, like Christianity,¹⁰ receive broad protection regardless of whether they em-

The Change in Everyday Religious Practice and Its Importance to the Law, 51 *Buff. L. Rev.* 127, 133–36 (2003); Movsesian, *supra* note 2, at 8–10.

⁵ Pew Research Ctr., *America’s Changing Religious Landscape* 4 (May 12, 2015), <http://www.pewforum.org/files/2015/05/RLS-08-26-full-report.pdf> [<https://perma.cc/F3YH-34UK>] (indicating that 7.1% of U.S. adults identify as atheist or agnostic, slightly less than one-third of the 22.8% who are religiously unaffiliated).

⁶ Pew Research Ctr., *supra* note 1, at 22. Other researchers have criticized the breadth of the label as failing to account for longitudinal movement in and out of religious categories, citing data that suggest that as many as 30% of the category encompasses traditional religious believers who are temporarily unaffiliated because they are switching traditions or in the midst of a faith-based crisis. Chaeyoon Lim, Carol Ann MacGregor & Robert D. Putnam, *Secular and Liminal: Discovering Heterogeneity Among Religious Nones*, 49 *J. Sci. Study of Religion* 596, 596 (2010).

⁷ The 2012 Pew Study notes that the estimated number of religiously unaffiliated Americans is forty-six million and that 37% of this group identifies as “spiritual but not religious.” Pew Research Ctr., *supra* note 1, at 9–10. Thus, the absolute number of SBNRs is an estimated seventeen million. For present purposes, this Note ignores the effect of general population increase since 2012.

⁸ U.S. Const. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

⁹ One of the first uses of this term and first attempts at studying the SBNR group can be found in Robert C. Fuller, *Spiritual, But Not Religious: Understanding Unchurched America* 5–7 (2001); see also Boaz Huss, *Spirituality: The Emergence of a New Cultural Category and its Challenge to the Religious and the Secular*, 29 *J. Contemp. Religion* 47, 47 (2014) (crediting Fuller with use of the acronym “SBNR”).

¹⁰ For an argument that Christianity is the Supreme Court’s religious prototype, see Mark Tushnet, *Religion and the Roberts Court: The Limits of Religious Pluralism in Constitution-*

brace a traditional belief in God, an afterlife, or other particular dogma. In other words, courts do not accord religious status based on the substance of a religion's beliefs. Beyond this core category of believers, modern doctrine also protects idiosyncratic versions of traditional religions: "Religious observances need not be uniform to merit the protection of the first amendment. . . . [D]iffering beliefs and practices are not uncommon among followers of a particular creed."¹¹ In other words, members of recognized religions do not have to subscribe to shared beliefs in order to receive legal protection.

SBNR is the next logical step in expanding the reach of religious protection. These belief systems do not embrace a common name or other institutional characteristics. Instead, they reflect a personal approach to formulating one's spirituality; each practitioner constructs a system of spiritual beliefs and practices rather than follow an externally derived dogma. In this sense, SBNR is *highly* individualized, and thus pushes past the two categories described above. It does, however, embody a nonrational, spiritually focused worldview.

Instead of discussing this category, the academic literature has pushed the discourse to the outer boundaries of defining religion, advocating for protection for atheists, agnostics, and other "nonbelievers,"¹² and for purely secular claims of conscience.¹³ Courts, too, have skipped over SBNR, according legal protection to belief systems that are arguably less religious. One court held that a petitioner's beliefs were religious simply because he derived them from the Old Testament, even though

al Law, in *The Rise of Corporate Religious Liberty* 465 (Micah Schwartzman et al., eds., 2016).

¹¹ *Dettmer v. Landon*, 799 F.2d 929, 932 (4th Cir. 1986) (citing *Thomas v. Review Bd.*, 450 U.S. 707, 715–16 (1981)).

¹² See, e.g., Caroline Mala Corbin, *Nonbelievers and Government Speech*, 97 *Iowa L. Rev.* 347, 378–400 (2012); Nelson Tebbe, *Nonbelievers*, 97 *Va. L. Rev.* 1111, 1116, 1127–40 (2011).

¹³ See, e.g., Micah Schwartzman, *What If Religion is Not Special?*, 79 *U. Chi. L. Rev.* 1351, 1355 (2012). Professors Gedicks and French acknowledge the changing composition of religious pluralism and practice in contemporary American society, and they reference the characteristics of SBNR in their discussions of postmodern spirituality and religious expression. See French, *supra* note 4, at 127–30; Frederick Mark Gedicks, *God of Our Fathers, Gods for Ourselves: Fundamentalism and Postmodern Belief*, 18 *Wm. & Mary Bill Rts. J.* 901, 902 (2010) [hereinafter Gedicks, *God of Our Fathers*]; Frederick Mark Gedicks, *Spirituality, Fundamentalism, Liberty: Religion at the End of Modernity*, 54 *DePaul L. Rev.* 1197, 1197–1208 (2005) [hereinafter Gedicks, *Spirituality*]. However, the authors do not carve out SBNR as a special and identifiable category of believers.

they were not associated with any particular religion.¹⁴ Similarly, the U.S. Supreme Court granted protection to a self-avowed nonreligious petitioner who was a conscientious objector to the military draft.¹⁵ And atheists have succeeded on Free Exercise and Establishment Clause claims.¹⁶ A similar impulse can be seen in the substantial deference accorded to “Native American spirituality” as a set of different kinds of spiritual beliefs and practices associated with a particular ethnic group.¹⁷

The only federal appellate case involving an SBNR claim is illustrative of this omission. In *Moore-King v. County of Chesterfield*, the U.S. Court of Appeals for the Fourth Circuit held that the spiritual beliefs of a self-described “spiritual counselor” were not “deep religious conviction[s], shared by an organized group” and were thus undeserving of legal protection.¹⁸ Under the county’s zoning and licensing ordinances, fortune tellers and other practitioners of “occult sciences” were regulated in ways that other businesses were not: through a higher license tax, a more rigorous licensing process, and a zoning ordinance that restricted such businesses away from the central part of town.¹⁹ Psychic Sophie, however, considered her spiritual counseling practice an expression of her deeply held spiritual beliefs, and thus sought an exemption from the regulatory scheme, arguing that it substantially burdened her religious exercise.²⁰

¹⁴ *Love v. Reed*, 216 F.3d 682, 687–88 (8th Cir. 2000).

¹⁵ *Welsh v. United States*, 398 U.S. 333, 335, 337 (1970).

¹⁶ See, e.g., *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948) (finding for plaintiffs on Establishment Clause grounds); *id.* at 234 (Jackson, J., concurring) (noting that the plaintiffs are atheists); *Kaufman v. McCaughtry*, 419 F.3d 678, 681 (7th Cir. 2005).

¹⁷ See, e.g., *Morrison v. Garraghty*, 239 F.3d 648, 656–57 (4th Cir. 2001); *Humphrey v. Lane*, 728 N.E.2d 1039, 1045 (Ohio 2000); see also *United States v. Antoine*, 318 F.3d 919, 920 (9th Cir. 2003) (referencing “Native spirituality”); *United States v. Hardman*, 622 F. Supp. 2d 1129, 1154–55 (D. Utah 2009) (similarly according religious protection to Native American beliefs but not using the term “Native American spirituality”); *Black Hawk v. Pennsylvania*, 225 F. Supp. 2d 465, 477–78 (M.D. Pa. 2002) (same). But see *Mitchell v. Angelone*, 82 F. Supp. 2d 485, 490 (E.D. Va. 1999) (dismissing claim as nonreligious because the Native American belief system did not satisfy the requirements set out by the Supreme Court in *United States v. Seeger*, 380 U.S. 163, 166 (1965)).

¹⁸ 708 F.3d 560, 564, 571 (4th Cir. 2013). The case also alleged a free speech violation, which largely failed on summary judgment. *Id.* at 566–67. For a detailed analysis and critique of the free speech issue in the case, see Nicole Brown Jones, Note, *Did Fortune Tellers See This Coming? Spiritual Counseling, Professional Speech, and the First Amendment*, 83 *Miss. L.J.* 639, 640–44 (2014).

¹⁹ *Moore-King*, 708 F.3d at 563–64.

²⁰ *Id.* at 570 (citing 42 U.S.C. § 2000cc(a)(1) (2012)).

Psychic Sophie was transparent about the fact that her beliefs did not fall within the confines of a traditional organized religion: “I am very spiritual in nature, yet I do not follow particular religions or practices, and ‘organized’ anything’s [sic] are not for me. I pretty much go with my inner flow, and that seems to work best.”²¹ Rather, she utilized a “diverse array” of spiritual tools and practices in both her counseling practice and her personal spiritual life:

“Spirituality, astrology, Reiki, natural healing, meditation, mind-body-soul-spirit-chakra study, metaphysics in general, new age philosophy, psychology, human behavior, quantum physics, ancient history, philosophy, Kabala/Kabbalah, writing, jewelry making, reading (Manly P. Hall, Madame P. Blavatsky, Alice Bailey, and James Hillman are of special appeal), music, music, music!, and creativity in all forms . . . ” [as well as] a strong belief in the “words and teachings of Jesus” . . . and a belief in “the New Age [spiritual] movement.”²²

The district court, however, dismissed her beliefs as nonreligious: “Such a panoramic potpourri of spiritual and secular interests . . . comprises an overall lifestyle, not a belief system parallel to that of God in a traditional religion.”²³ The Fourth Circuit affirmed, stating that there must be “some organizing principle or authority other than herself.”²⁴ Moreover, the Fourth Circuit’s analysis is unusually clipped, evaluating the religious status of Psychic Sophie’s beliefs in a mere two pages²⁵ and ignoring its own relevant precedent on the topic.²⁶

The *Moore-King* decision thus illustrates a burgeoning problem in modern jurisprudence: Current doctrine and legal scholarship largely ignore or dismiss SBNR. On relevant measures, SBNR is sufficiently similar to traditional religions to deserve legal protection, but owing in part

²¹ *Id.* at 564 (alteration in original) (quoting the plaintiff’s website and an affidavit she submitted to the district court).

²² *Id.* (quoting *Moore-King v. Cty. of Chesterfield*, 819 F. Supp. 2d 604, 622–23 (E.D. Va. 2011) and Joint Appendix 201).

²³ *Moore-King v. Cty. of Chesterfield*, 819 F. Supp. 2d 604, 622–23 (E.D. Va. 2011), *aff’d*, 708 F.3d 560 (4th Cir. 2013).

²⁴ See *Moore-King*, 708 F.3d at 571.

²⁵ Compare *id.* at 570–72 (less than 750 words), with *Africa v. Pennsylvania*, 662 F.2d 1025, 1031–36 (3d Cir. 1982) (roughly 2600 words analyzing whether the beliefs at issue were religious in nature).

²⁶ See *infra* notes 205–08 and accompanying text.

to a focus on the claims of secular nonbelievers, it has been glossed over in the academic literature and treated dismissively by the courts.

This trivializing and exclusionary message inflicts tangible harm on SBNR believers. Courts and scholars recognize that nonbelievers—people who reject a religious or spiritual worldview altogether—are alienated and stigmatized by society and experience a kind of “social subordination.”²⁷ This experience is matched, or perhaps even surpassed, by SBNR individuals, who embrace spirituality as an important part of their lives and are thus believers,²⁸ but are nonetheless rejected by the dominant religious majority. Through this exclusion, SBNR adherents are denied the relief from spiritual harm that the Free Exercise Clause is meant to offer.²⁹

This exclusion also threatens the Religion Clauses themselves. As part of the countermajoritarian Bill of Rights, the Clauses were meant to protect minority religions and prevent discrimination.³⁰ As Justice O’Connor noted: “[T]he First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility. The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has

²⁷ Tebbe, *supra* note 12, at 1117–22; see also Corbin, *supra* note 12, at 351 (“[G]overnment action can send unacceptable messages of inequality . . . [which] cause tangible harms . . . including the perpetuation of stereotypes that lead to discrimination and exclusion from the social and political community.”); *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1822 (2014) (“[E]ven seemingly general references to God or the Father might alienate nonbelievers or polytheists.”). Aside from general alienation, Corbin discusses how this disfavor can manifest in child custody disputes, where some courts favor the religious parent over the nonreligious one. Corbin, *supra* note 12, at 360–61; see also Bradford S. Stewart, Note, *Opening the Broom Closet: Recognizing the Religious Rights of Wiccans, Witches, and Other Neo-Pagans*, 32 N. Ill. U. L. Rev. 135, 161–91 (2011) (discussing similar implications for pagan believers).

²⁸ Professor Tebbe notes that it might be “difficult to separate out” spiritual seekers and nonbelievers but recognizes that they are analytically distinct: “I am interested here, however, in people who hold a noticeably skeptical attitude toward the existence of supernatural beings or forces and not in those who distance themselves from any recognizable religion but generally are happy to assent to the existence of otherworldly powers or persons.” Tebbe, *supra* note 12, at 1119 n.28.

²⁹ See *infra* Section IV.C; cf. *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) (noting that being forced to abandon one’s religious beliefs is “precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent”).

³⁰ See Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 Wash. U. L.Q. 919, 921–22 (2004); Christopher L. Eisgruber & Lawrence G. Sager, *Does It Matter What Religion Is?*, 84 Notre Dame L. Rev. 807, 826–30 (2009); Tebbe, *supra* note 12, at 1122; see also Stewart, *supra* note 27, at 156 (noting that the Religion Clauses were a response to the Framers’ perceived threat of “religious majoritarianism”).

had on unpopular or emerging religious groups”³¹ To the extent that current doctrine ignores this growing minority, it risks undermining religious protection writ large.

This Note uses *Moore-King* as a vehicle for highlighting this exclusionary problem and to make two related arguments. First, falling outside the confines of traditional, organized religion should not render a spiritual belief system beyond the reach of the Religion Clauses. Indeed, if Psychic Sophie were teaching her amalgamation of spiritual beliefs in a public school classroom, one would most certainly expect an Establishment Clause violation.³² Second, the absence of a clear and consistently applied definition of religion leaves too much discretion in the hands of judges and fails to adequately mitigate their biases toward traditional religions. Instead, judges need clear guidelines that structure their analysis and constrain their biases.³³ This Note does not seek to wade into the debate in a substantive way by designing a new legal definition of religion. Rather, it advocates uniformity across jurisdictions and chooses an existing approach—the factor test developed by Judge Clarence Brimmer, Jr. in *United States v. Meyers*³⁴—as having the greatest potential to identify belief systems deserving of religious protection.

Part I begins by laying out how legal scholars and the Supreme Court have approached the definitional task. The *Moore-King* court’s narrow and outdated understanding of religion can be traced in part to the jurisprudential difficulties at the heart of Religion Clause doctrine. Part II discusses the growing category of people who identify as SBNR. While particular beliefs vary from one individual to another, SBNR belief systems share common characteristics and are a natural outgrowth of post-modern culture. It is unclear from the court opinions whether Psychic

³¹ *Emp’t Div. v. Smith*, 494 U.S. 872, 902 (1990) (O’Connor, J., concurring in the judgment).

³² This raises another debate in the literature, which this Note will largely avoid: whether the definition of religion is the same under the Free Exercise and Establishment Clauses. Despite some courts’ adoption of the “dual definition” approach proposed by Professor Laurence Tribe, the consensus in the legal and scholarly literature is that religion is a unitary concept. See Kent Greenawalt, 1 *Religion and the Constitution: Free Exercise and Fairness* 143–44 (2006). The same definitional test for religion should apply whether a court is confronting a Free Exercise claim or an Establishment Clause claim. *Id.*; see, e.g., *Malnak v. Yogi*, 592 F.2d 197, 197–200 (3d Cir. 1979).

³³ See Eduardo Peñalver, Note, *The Concept of Religion*, 107 *Yale L.J.* 791, 814–16 (1997).

³⁴ 906 F. Supp. 1494, 1502–03 (D. Wyo. 1995), *aff’d*, 95 F.3d 1475 (10th Cir. 1996).

Sophie embraces this label, but she appears to embody the characteristics of this group. This Note will treat her as an exemplar of this group, regardless of whether she identifies as such.

Part III examines the responses of lower courts to the definitional task and elucidates why the *Meyers* test is the best available tool for determining whether a belief system is a religion for the purposes of the Religion Clauses. Finally, Part IV makes the case for including SBNR within the fold of religious protection. It argues that SBNR satisfies the *Meyers* test and that the objections offered by courts and commentators exhibit misunderstandings of either SBNR beliefs or the purposes of religious protection. Moreover, failing to protect SBNR conflicts with sociological and colloquial understandings of religion and spirituality and risks further discrimination against nontraditional believers.

I. DEFINING RELIGION IN THE LAW

Operationalizing a legal definition of religion is notoriously difficult. Not only should a definition track people's colloquial understanding of religion,³⁵ but it must also be susceptible to legal analysis. This Section examines legal approaches to defining religion, looking in particular at academic proposals and Supreme Court doctrine. In addition, this Section addresses the importance of an operational definition by discussing the way that other components of free exercise doctrine amplify the utility of being accorded religious status.

A. *The Ontological Problem*

Largely accepted in the academic literature is the notion that the search for a single, discrete definition of religion is an undertaking bound for failure.³⁶ Concepts, especially those as “fuzzy” as religion,

³⁵ See *infra* text accompanying notes 107–10.

³⁶ See, e.g., Laurence H. Tribe, *American Constitutional Law* 827–28 (1978) (arguing for a dual definition of religion hinging on the particular Religion Clause in order to circumvent the definitional dilemma); Eisgruber & Sager, *supra* note 30, at 823 (pointing out that the Court's “hands-off” doctrine must necessarily apply to the definitional task as well as assessments of religious doctrine); George C. Freeman, III, *The Misguided Search for the Constitutional Definition of “Religion,”* 71 *Geo. L.J.* 1519, 1549–59 (1983) (explaining that we should “abandon the search” for a definition of religion because concepts necessarily defy encapsulation through sets of necessary and sufficient conditions); Douglas Laycock, *Religious Liberty as Liberty*, 7 *J. Contemp. Legal Issues* 313, 329 (1996) (noting that “for constitutional purposes, any answer to religious questions is religion”). Even Supreme Court Justices have weighed in on this side of the debate. See *Bd. of Educ. v. Grumet*, 512 U.S. 687,

can rarely be distilled to a dictionary-style set of necessary and sufficient conditions.³⁷ Indeed, numerous “essentialist” proposals have been offered, all of which are either over- or under-inclusive.³⁸

The search for an operational definition has produced two alternatives to essentialist proposals. Functional approaches define religion according to the functional role of the belief system in the adherent’s life. The most well known of its kind is theologian Paul Tillich’s definition of religion as one’s “ultimate concern,” which is typically understood to reference the meaning of life or humankind’s role in the world.³⁹ As discussed in more detail below, current Supreme Court jurisprudence largely embodies a functional definition,⁴⁰ and many lower court decisions have incorporated the “ultimate concern” concept into their tests for religion.⁴¹ Nonetheless, purely functional approaches are inexorably

718 (1994) (O’Connor, J., concurring) (“It is always appealing to look for a single test, a Grand Unified Theory that would resolve all the cases that may arise under a particular Clause. . . . But the same constitutional principle may operate very differently in different contexts.”).

³⁷ Freeman, *supra* note 36, at 1549–59; Kent Greenawalt, Religion as a Concept in Constitutional Law, 72 Calif. L. Rev. 753, 753–54 (1984); Peñalver, *supra* note 33, at 814; cf. Brian J. Zinnbauer et al., Religion and Spirituality: Unfuzzifying the Fuzzy, 36 J. Sci. Study of Religion 549, 549 (1997) (suggesting points of convergence and divergence between how people define religiousness and spirituality).

³⁸ For various essentialist attempts, see William James, *The Varieties of Religious Experience: A Study in Human Nature* 31 (1902) (“the divine”); Jesse H. Choper, Defining “Religion” in the First Amendment, 1982 U. Ill. L. Rev. 579, 599 (“extratemporal consequences”); James M. Donovan, God Is as God Does: Law, Anthropology, and the Definition of “Religion,” 6 Seton Hall Const. L.J. 23, 95 (1995) (“belief[s] . . . which . . . alleviat[e] death anxiety”); Dmitry N. Feofanov, Defining Religion: An Immodest Proposal, 23 Hofstra L. Rev. 309, 385 (1994) (“manifestly non-rational . . . belief”); Stanley Ingber, Religion or Ideology: A Needed Clarification of the Religions Clauses, 41 Stan. L. Rev. 233, 286 (1989) (““otherworldly”” or “transcendent” duties); M. Elisabeth Bergeron, Note, “New Age” or New Testament?: Toward a More Faithful Interpretation of “Religion,” 65 St. John’s L. Rev. 365, 381–82 (1991) (“transcendence . . . of the empirically observable world”); Richard O. Frame, Note, Belief in a Nonmaterial Reality—A Proposed First Amendment Definition of Religion, 1992 U. Ill. L. Rev. 819, 821 (“belief in a nonmaterial reality”). For a critique of essentialist approaches generally, see Greenawalt, *supra* note 32, at 129–49.

³⁹ See Paul Tillich, Religion as a Dimension in Man’s Spiritual Life, in *Theology of Culture* 3, 7–8 (Robert C. Kimball ed., 1964) (“Religion, in the largest and most basic sense of the word, is ultimate concern.”); see also Note, Toward a Constitutional Definition of Religion, 91 Harv. L. Rev. 1056, 1066–67 (1978) (discussing Tillich’s “ultimate concern” proposition).

⁴⁰ See, e.g., *United States v. Seeger*, 380 U.S. 163, 165–66 (1965).

⁴¹ See, e.g., *Int’l Soc’y for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 439–40 (2d Cir. 1981). Even the Supreme Court has nodded to the concept, albeit in dicta that likens “ultimate concern” to the Court’s chosen language. *Seeger*, 380 U.S. at 187.

ambiguous. They leave open the question of *how* we assess the functional role of the belief system, merely relocating the definitional problem to a different conceptual setting: How do we define “ultimate concern” or otherwise identify whether a belief system plays the same functional role in the life of the believer?⁴² More recent proposals involve an analogic approach, whereby the belief system in question is compared to other belief systems already deemed “religions.”⁴³ These approaches, too, suffer from conceptual difficulties, namely how to identify the baseline religions utilized as the comparison point and the variables along which comparisons are made.⁴⁴

Responding in part to this ontological complexity, some scholars advocate expanding the category of “religion” to include all claims of conscience, even those that arise from a secular sense of right and wrong rather than from a religious one.⁴⁵ The appeal of this proposal in skirting the definitional problem is robust, but it is outmatched by the unlikelihood of its adoption. The stronghold retained by originalist approaches to the Constitution, the textual presence of the word “religion,”⁴⁶ and the straightforward evidence that the Founders considered and rejected a conscience clause⁴⁷ render such a broad approach out of reach, at least for now.

Whatever the failings of the definitional task, then, the First Amendment currently necessitates a means by which to identify belief systems

⁴² For a full discussion, see Choper, *supra* note 38, at 594–97.

⁴³ Freeman, *supra* note 36, at 1529–30; Greenawalt, *supra* note 37, at 762–67; Peñalver, *supra* note 33, at 814–16.

⁴⁴ For a full discussion, see Peñalver, *supra* note 33, at 815–18. By combining the analogic and functional approaches, however, factor tests have the potential to operationalize a legal definition. See *infra* Section III.C.

⁴⁵ See Brian Leiter, *Why Tolerate Religion?* 26–53 (2013); Laycock, *supra* note 36, at 336; Micah Schwartzman, *Religion as Legal Proxy*, 51 *San Diego L. Rev.* 1085, 1087 (2014); Schwartzman, *supra* note 13, at 1355. This view found its way into a judicial opinion even before these scholars were writing on it. See *United States v. Kauten*, 133 F.2d 703, 708 (2d Cir. 1943) (equating the concepts of “conscience” and “God”).

⁴⁶ U.S. Const. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .”). The standard argument for why religion is “special” centers on its inclusion in the First Amendment, where it is simultaneously protected (via the Free Exercise Clause) and limited (via the Establishment Clause). See Schwartzman, *supra* note 13, at 1352–53. Professor Koppleman stakes out a similar, though distinct, position on the specialness of religion, conceptualizing religion as a proxy for values that the state wants to promote. See Andrew Koppleman, *Religion’s Specialized Specialness*, 79 *U. Chi. L. Rev. Dialogue* 71, 77–78 (2013).

⁴⁷ See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 *Harv. L. Rev.* 1409, 1488–1500 (1990).

as religions. It marks “religion” as a category deserving of constitutional protection, and thus requires judges to make distinctions between religious and nonreligious claims.⁴⁸

B. Supreme Court Jurisprudence

The following Section examines the current state of the law regarding the definition of religion. The focus here is descriptive rather than prescriptive. As will become apparent, the descriptive question is a complex topic in itself. The lack of clarity stems in part from the ontological problem described above, but it is also heavily rooted in the reality that the Supreme Court’s “guidance” on the topic is unclear and seemingly conflicted.

1. A Brief History

The Court’s first encounter with the definition of religion occurred with a Mormon objection to an anti-polygamy law.⁴⁹ A Mormon petitioner was denied a religious accommodation on the ground that the First Amendment deprives the state of “power over mere opinion” but allows the state “to reach actions which [are] in violation of social duties or subversive of good order.”⁵⁰ Basing its decision on its understanding of how religion functioned at the Founding, the Court in *Reynolds v. United States* accepted James Madison’s definition of religion as “the duty we owe the Creator.”⁵¹

The Court embraced a duty-based, theistic definition of religion until the middle of the twentieth century, when it held that the state cannot

⁴⁸ But see Eisgruber & Sager, *supra* note 30, at 830–32 (arguing that the Constitution merely requires us to avoid government favoritism or discrimination of religious practices, which obviates the need for categorizing belief systems as religious or secular).

⁴⁹ *Reynolds v. United States*, 98 U.S. 145, 161 (1878).

⁵⁰ *Id.* at 164.

⁵¹ *Id.* at 163 (quoting James Madison, A Memorial and Remonstrance Against Religious Assessment (1785), in Robert B. Semple, A History of the Rise and Progress of the Baptists in Virginia 442 app. (1810)). Although the Court quotes Madison as describing religion as “the duty we owe the Creator,” the actual definition given by Madison was “the duty which we owe to our Creator.” *Id.* The Court affirmed this duty-based, theistic understanding of religion after *Reynolds*. See *United States v. Macintosh*, 283 U.S. 605, 625 (1931) (“We are a Christian people according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience and the will of God.” (citation omitted)); *Davis v. Beason*, 133 U.S. 333, 342 (1890) (“The term ‘religion’ has reference to one’s views of his relations to his Creator, and to the obligations they impose . . .”).

treat religions based on a belief in God differently than religions that do not embrace a belief in God.⁵² Pointing to Buddhism, Taoism, and Secular Humanism, the Court's opinion in *Torcaso v. Watkins* expressly expanded the definition of religion to include nontheistic belief systems.⁵³ Beyond this minimal guidance, however, the opinion did not articulate a test for determining which belief systems count as religions.

A few years later, however, the Court adopted a functional test for defining religion. In a challenge to the constitutionality of the "conscientious objector" exemption from the draft, the Court held in *United States v. Seeger* that Congress intended that the exemption include all religions, even though the statutory language required a belief in a "Supreme Being."⁵⁴ Again, the Court retreated from a definition of religion hinging on a belief in a personified God, and instead stated that the test for religious belief "is whether a given belief . . . occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God."⁵⁵ According to the Court, "Supreme Being" referred not to the orthodox idea of God but to "the broader concept of a power or being, or a faith, to which all else is subordinate or upon which all else is ultimately dependent."⁵⁶ The task for courts under this test is to determine whether the belief is religious in the petitioner's "own scheme of things."⁵⁷ The test is a functional one: A belief is religious if it is functionally equivalent, according to the believer's own understanding, to a belief in an orthodox God.

This definition was affirmed and expanded in another conscientious objector case a few years later. In *Welsh v. United States*, the Court held that purely ethical and moral beliefs can satisfy the "parallel position" test articulated in *Seeger*.⁵⁸ Unlike the objectors in *Seeger*, the objector in *Welsh* expressly denied that his beliefs were religious, though he later stated that this denial was based on an assumption that the word "religious" was being used conventionally.⁵⁹ Despite the fact that the statute expressly prohibits an exemption for beliefs that are "essentially politi-

⁵² *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961).

⁵³ *Id.* at 495 n.11.

⁵⁴ 380 U.S. 163, 164–65 (1965) (citing 50 U.S.C. § 456(j) (1970) (repealed 1973)).

⁵⁵ *Id.* at 166.

⁵⁶ *Id.* at 174 (quoting Webster's New International Dictionary (2d ed. 1960)) (internal quotation marks omitted).

⁵⁷ *Id.* at 185.

⁵⁸ *Welsh v. United States*, 398 U.S. 333, 340 (1970).

⁵⁹ *Id.* at 341–42.

cal, sociological, or philosophical” or based on “a merely personal moral code,”⁶⁰ the *Welsh* Court held that the petitioner’s strongly held moral beliefs entitled him to the exemption.⁶¹ Despite not being traditionally religious, then, the objector’s beliefs were not characterized as merely philosophical or personal. This broad interpretation effectively expanded the legal definition of religion to encompass a duty of conscience.⁶²

Courts and scholars generally interpret the Court’s next encounter with a borderline religious belief as an attempt to walk back from this slippery slope and more clearly define the boundary between religion and conscience.⁶³ In *Wisconsin v. Yoder*, the Court decided that the State’s compulsory education law violated the sincerely held beliefs of the Amish petitioners and that those beliefs were indeed religious.⁶⁴ Retreating from a broad duty of conscience—“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”⁶⁵—the opinion attempted to differentiate between deeply held beliefs that are “purely secular” and those that are “rooted in religious belief.”⁶⁶ To illustrate this distinction, the Court referenced Henry David Thoreau, stating that his choice to reject majority values and “isolate[] himself at Walden Pond” was philosophical and personal, not religious.⁶⁷

Setting aside the strong possibility that the Court misunderstood the basis of Thoreau’s beliefs,⁶⁸ we can identify several characteristics that the majority thought were relevant to this distinction: Religious beliefs are deep convictions rather than personal preferences; they are shared by an organized group and do not involve isolation from society; and they are pervasive, influencing an adherent’s “entire way of life” and “inti-

⁶⁰ 50 U.S.C. § 456(j) (1970) (repealed 1973).

⁶¹ *Welsh*, 398 U.S. at 335.

⁶² See *id.* at 340; Kent Greenawalt, *The Significance of Conscience*, 47 *San Diego L. Rev.* 901, 910 (2010).

⁶³ See, e.g., *Malnak v. Yogi*, 592 F.2d 197, 204 (3d Cir. 1979) (Adams, J., concurring in the judgment); Peñalver, *supra* note 33, at 798; see also *Wisconsin v. Yoder*, 406 U.S. 205, 247–49 (1972) (Douglas, J., dissenting in part) (arguing that the majority’s distinction between philosophical and religious beliefs is a retreat from both *Seeger* and *Welsh*).

⁶⁴ 406 U.S. at 216, 219.

⁶⁵ *Id.* at 215–16.

⁶⁶ *Id.* at 215.

⁶⁷ *Id.* at 216.

⁶⁸ See Freeman, *supra* note 36, at 1559–60.

mately related to daily living.”⁶⁹ In addition, the Court refers to the level of historical constancy of the Amish faith, suggesting that it is less likely to consider newer belief systems religions.⁷⁰ While SBNR will be discussed in more detail below, it is worth noting here that, aside from the organized group aspect, SBNR shares these characteristics.

2. *The Puzzle of Modern Doctrine*

To date, *Yoder* is the Supreme Court’s last word on defining religion, and it has left the lower courts with a puzzle to disentangle. First, the opinion in *Yoder* does not explicitly overrule *Welsh* or *Seeger*. In fact, the majority completely avoids discussing or citing the draft cases in a substantive way.⁷¹ As previously mentioned, some commentators understand *Yoder* to be a clarification of *Welsh* and *Seeger*, which does not overrule them but attempts to limit their reach.⁷² Others point out that *Welsh* and *Seeger* deal with the statutory interpretation of Congress’s draft bill, rather than a constitutional question.⁷³ The Court may have felt obliged to honor Congress’s broad language in defining religion for the purposes of the draft but may prefer a narrower definition for the purposes of constitutional protection. Most courts do not see it this way, however, as the bulk of lower court decisions invoke (and attempt to reconcile) all three decisions in determining what counts as religion.

Second, in each decision the Court offers definitional guidelines but does not articulate a clear test for determining what counts as religion. These guidelines necessitate interpretation, and lower courts often either infuse them with a meaning different than the Court intended or focus on some guidelines to the detriment of others. For example, *Yoder* is largely cited for distinguishing between “a way of life” and a “religion.”⁷⁴ But the Court uses this phrase throughout its opinion to refer both to a secu-

⁶⁹ *Yoder*, 406 U.S. at 216.

⁷⁰ *Id.* at 216, 219.

⁷¹ The only reference in the majority opinion comes in a footnote that cites *Welsh* for the claim that defining religion is a “most delicate question.” *Id.* at 215 n.6. The dissent states that the decision clearly necessitates a “retreat” from both of the draft cases. *Id.* at 247–49 (Douglas, J., dissenting in part). In my view, *Yoder* can be reconciled with the language of *Seeger* but certainly involves a retreat from *Welsh*.

⁷² See *supra* note 63.

⁷³ See, e.g., *Malnak v. Yogi*, 592 F.2d 197, 204 (3d Cir. 1979) (Adams, J., concurring in the judgment). Justice Adams noted that these cases “remain constitutionally significant.” *Id.*

⁷⁴ See, e.g., *Moore-King*, 708 F.3d at 571.

lar “way of life” and the deeply religious “way of life” of the Amish.⁷⁵ Thus, because this oft-cited phrase does not provide any real means for distinguishing between a secular belief and a religious one, the use of the phrase by lower courts is uninformative and conclusory.

A third wrinkle is that the *Yoder* Court may have entirely misunderstood the nature of Thoreau’s beliefs. Making distinctions through illustration rather than definition is problematic because the distinction turns on both the speaker’s and the observer’s understanding of the thing being illustrated. This is the core dilemma with analogical approaches to defining concepts.⁷⁶ *Yoder* is especially problematic in this regard because it identifies only one belief system as illustrative of the distinction: The Amish beliefs in question are religious, but Thoreau’s beliefs are not.⁷⁷ More importantly, the particular analogy might very well have been flawed. Thoreau seems to have been deeply spiritual, believing in God as a force that transcends the material world and orienting his life around seeking this God in such an all-encompassing way that—not unlike some of the most deeply spiritual members of traditional religions—he removed himself from society.⁷⁸ In fact, Thoreau is considered by some to be an early adherent of SBNR beliefs.⁷⁹ The *Yoder* Court’s failed analogy, then, might have set up the lower courts for exactly the problem that this Note identifies.

In sum, the lack of jurisprudential clarity leaves substantial room for judicial bias in deciding whether an unfamiliar belief system constitutes a religion for the purposes of the Religion Clauses. That bias currently manifests in a way that excludes deeply and sincerely held beliefs that, though unassociated with an organized religion, are sufficiently analogous to religion to deserve legal protection.

⁷⁵ *Yoder*, 406 U.S. at 215–18.

⁷⁶ See Peñalver, *supra* note 33, at 814–16.

⁷⁷ Compare *Yoder*, 406 U.S. at 215–18 (distinguishing only the Amish and Thoreau), with *Seeger*, 380 U.S. at 173–75 (offering multiple examples of nontraditional beliefs that the Court understands as falling within the definition of religious belief).

⁷⁸ Freeman, *supra* note 36, at 1560 (“Although these views might not make Thoreau a paradigm of the religious believer, they do suggest that the courts made a serious mistake when they chose him as a paradigm of the secular believer.”); see also *Meyers*, 906 F. Supp. at 1500 (“Those familiar with Thoreau’s transcendental philosophy know that if anyone held ‘sincere and meaningful beliefs’ occupying a place in his life ‘parallel to that filled by the God’ of others, it was Thoreau.”).

⁷⁹ Fuller, *supra* note 9, at 23–30, 80.

*C. Why Defining Religion Matters*⁸⁰

Two other shifts in modern free exercise doctrine have raised the stakes for an operational definition of religion. Congress and the Court have expanded the availability of religious accommodations in two ways: by increasing the scope of accommodations and by adopting a “hands-off approach” to analyzing religious questions. The following Section discusses each doctrinal area and its importance for the definitional task.

1. From Religious Belief to Religious Practice

The Court’s murky jurisprudence might have been relatively unproblematic under a “low accommodations” regime like that of *Reynolds*, which understood the Religion Clauses to prohibit the government from infringing on religious *belief* but not behavior or action.⁸¹ The Court diverted from this understanding around the same time that the draft cases expanded the definition of religion, broadening the availability of religious accommodations by applying the compelling interest test to laws that burden religious exercise.⁸² This foray did not last long. In 1990, the Court in *Employment Division v. Smith* held that “generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling government interest.”⁸³ While the Court purported to carve out a space that preserved *Sherbert v. Verner*⁸⁴ and *Yoder*,⁸⁵ it substantially reduced the scope of those holdings and effectively returned to a low accommodations regime.

In response to *Smith*, however, groups with very different religious and political constituencies joined forces to lobby Congress to pass the

⁸⁰ This language references the idea posed by some commentators that defining religion does not matter. See Eisgruber & Sager, *supra* note 30, at 811 (entitled “Does It Matter What Religion Is?”).

⁸¹ See *Reynolds*, 98 U.S. at 164–66 (“Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.”).

⁸² See *Yoder*, 406 U.S. at 234–46; *Sherbert v. Verner*, 374 U.S. 398, 408–10 (1963); Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 *Mont. L. Rev.* 249, 263–64 (1995).

⁸³ 494 U.S. 872, 886 n.3 (1990).

⁸⁴ 374 U.S. 398.

⁸⁵ *Smith*, 494 U.S. at 881–83.

Religious Freedom Restoration Act (“RFRA”),⁸⁶ which “restor[ed] the high-water mark of free exercise accommodation established by” *Sherbert* and *Yoder*.⁸⁷ RFRA expressly incorporates the compelling interest test “as set forth in” these two decisions, thus requiring any law that substantially burdens religious exercise to be the least restrictive means for serving a compelling government interest.⁸⁸ The law was subsequently found to be unconstitutional as applied to the states,⁸⁹ but it remains effective as applied to federal laws. Congress further expanded the availability of accommodations by passing the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), which applies RFRA’s approach to prisons and to land use regulations.⁹⁰ Many states have followed suit, passing their own versions of RFRA that apply to state and local laws.⁹¹ In addition, the Court’s recent application of RFRA to closely held for-profit corporations has similarly broadened the availability of accommodations.⁹²

Thus, the current legal landscape is a “high accommodations” one. Religious practices, rather than merely religious beliefs, are protected, and any practice that is substantially burdened by a law will be accommodated unless that law satisfies the compelling interest test. Because each case involves an assessment of whether the petitioner’s *religious* exercise is substantially burdened, a high accommodations regime necessitates a workable definition of religion.

2. The “Hands-Off Approach”

A second trend in free exercise doctrine further heightens the importance of defining religion. The Supreme Court’s hands-off approach is a modern doctrine with roots dating back to the nineteenth century. In

⁸⁶ Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb et seq. (2012). For a detailed discussion, see James Ryan, Note, *Smith* and the Religious Freedom Restoration Act: An Iconoclastic Reassessment, 78 Va. L. Rev. 1407, 1437–41 (1992).

⁸⁷ Paulsen, *supra* note 82, at 256.

⁸⁸ 42 U.S.C. § 2000bb–1 (2012).

⁸⁹ *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

⁹⁰ Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc et seq. (2012). For a detailed discussion, see James D. Nelson, Incarceration, Accommodation, and Strict Scrutiny, 95 Va. L. Rev. 2053, 2053–66 (2009). The constitutionality of RLUIPA was upheld in *Cutter v. Wilkinson*, 544 U.S. 709, 725 (2005).

⁹¹ See Christopher C. Lund, Religious Liberty After *Gonzales*: A Look at State RFRA’s, 55 S.D. L. Rev. 466, 467 (2010).

⁹² See *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751, 2785 (2014).

disputes over church property ownership, the Court held that the judiciary lacks the expertise to adjudicate the content of religious doctrine and should thus defer to the authority structure within the church⁹³ or to neutral principles of law adopted by the state.⁹⁴ The Court later applied this principle outside the realm of church property, requiring all cases involving religious questions to avoid the “forbidden domain” of evaluating the truth or falsity of religious beliefs.⁹⁵

The hands-off approach itself is a more recent invention, however. Through it, the Supreme Court expanded this principle to cases wherein the burdened belief was idiosyncratic and not clearly grounded in the religious doctrine asserted by the petitioner.⁹⁶ In *Thomas v. Review Board*, for example, a Jehovah’s Witness who was transferred by his employer to a factory that produced weapon mounts for military tanks alleged that contributing to the production of such materials was a violation of his religious beliefs.⁹⁷ Despite the fact that another Jehovah’s Witness worked at the factory and did not see his work as spiritually problematic, the Court agreed that the petitioner quit his job based on religious convictions.⁹⁸ “[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith.”⁹⁹ Moreover, “religious beliefs need not be acceptable, logical, consistent, or compre-

⁹³ See, e.g., *Presbyterian Church v. Hull Church*, 393 U.S. 440, 451–52 (1969); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1871).

⁹⁴ *Jones v. Wolf*, 443 U.S. 595, 602–04 (1979). For discussion of church property cases and the origins of the hands-off approach, see Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts of Religious Property*, 98 *Colum. L. Rev.* 1843, 1847–55 (1998); Samuel J. Levine, *Rethinking the Supreme Court’s Hands-off Approach to Questions of Religious Practice and Belief*, 25 *Fordham Urb. L.J.* 85, 88–90 (1997).

⁹⁵ *United States v. Ballard*, 322 U.S. 78, 87 (1944).

⁹⁶ *Frazee v. Ill. Dep’t of Emp’t Sec.*, 489 U.S. 829, 834 (1989); *Thomas v. Rev. Bd.*, 450 U.S. 707, 715–16 (1981); see also *United States v. Lee*, 455 U.S. 252, 257 (1982) (observing that it is outside of the Court’s competence to determine which side—the government or appellee—had the correct interpretation of the Amish faith); *Eisgruber & Sager*, *supra* note 30, at 812 (describing the hands-off approach as the development of the disestablishment norm that courts “have no business adjudicating disputes about the content of religious doctrine”); Samuel J. Levine, *The Supreme Court’s Hands Off Approach to Religious Doctrine: An Introduction*, 84 *Notre Dame L. Rev.* 793, 795 (2009) (“[T]here is ample Supreme Court case law supporting the proposition that the Court generally eschews decisionmaking that requires adjudication of religious doctrine.”).

⁹⁷ 450 U.S. at 709.

⁹⁸ *Id.* at 711, 715–16.

⁹⁹ *Id.* at 716.

hensible to others in order to merit First Amendment protection.”¹⁰⁰ Thus, courts refuse to address which beliefs are sufficiently grounded in religious doctrine to deserve protection. If a petitioner claims that her belief is religious and the court deems that it is sincerely held, then the court cannot inquire any further; it must defer to the petitioner on the substance of the belief.

Another case decided a few years later affirmed and expanded the hands-off approach. *Frazer v. Illinois Department of Employment Security* involved similar facts—an allegation that an employer’s requirement to work on Sundays violated the petitioner’s religious beliefs and a lack of consensus among other members of the petitioner’s stated religion—but the petitioner did not assert a particular religious denomination, merely stating that he was Christian.¹⁰¹ Nonetheless, his beliefs received similar deference from the Court. A unanimous opinion confirmed that sincerity of belief is the only appropriate inquiry and “reject[ed] the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization.”¹⁰² “[M]embership in an organized religious denomination,” while informative on the issue of sincerity, is not required for religious protection.¹⁰³ This language not only affirms *Thomas*, but also strongly supports the argument at the core of this Note—that religious protection is not limited to members of organized religions and should thus extend to adherents of SBNR.

As Professors Eisgruber and Sager note, taken to its logical end, the hands-off approach requires courts to refrain from passing judgment on whether or not a given belief system constitutes a religion, and thus requires abandoning the search for a legal definition.¹⁰⁴ Otherwise, government “will be put in the position of choosing—and so by implication favoring, and . . . valorizing—some values and commitments over others.”¹⁰⁵

Yet this is exactly how current religious protection doctrine operates. Merely holding up the banner of a recognized religion yields deference that the asserted belief is religious, but a similarly situated belief does

¹⁰⁰ Id. at 714.

¹⁰¹ 489 U.S. at 830–31, 834.

¹⁰² Id. at 834.

¹⁰³ Id.

¹⁰⁴ Eisgruber & Sagar, *supra* note 30, at 824–25.

¹⁰⁵ Id. at 824.

not receive deference if the petitioner asserts it under an as-yet-unrecognized belief system. In other words, counter to the logic underpinning the hands-off doctrine, courts continue to determine whether an unrecognized belief system is or is not religious. Claims like Psychic Sophie's are dismissed as nonreligious, though if the exact same burden were asserted under the banner of Christianity, courts would be required to provide deference to the stated belief and only inquire as to the sincerity with which it is held.¹⁰⁶

In sum, while defining religion might seem a mere academic problem, it has considerable purchase under a high-accommodations, hands-off regime. Courts continue to draw lines between religious and nonreligious belief systems; and because religious belief systems are protected in substantial ways, the side of the line on which a belief system falls is important, as it determines whether the belief system will be accorded protection. Unless and until religious protection becomes a broad right to conscience, then, defining religion certainly matters.

II. RELIGION AND SPIRITUALITY: A SOCIOLOGICAL ANALYSIS

The line-drawing problem motivating the search for a legal definition raises the question of where that line is appropriately drawn. A purely sociological definition of religion is likely insufficient for identifying a legal line, because it does not incorporate ideas about "what courts ought to protect."¹⁰⁷ Nonetheless, the legal line should correspond fairly closely with our colloquial understanding of religion. Religion is a social construct. As such, "it would be unfortunate if the law's idea of religion dif-

¹⁰⁶ One district court recognized this reality with some absurdity:

If Meyers had linked his beliefs to Christianity, the Court could not have inquired into the orthodoxy or propriety of his beliefs, no matter how foreign they might be to the Christian tradition. Had [he] sincerely made such a connection, he would have been able to purchase 'religious' status for his beliefs by coattailing on Christianity.

Meyers, 906 F. Supp. at 1508 (citations omitted).

Of course, the claim would have to satisfy the compelling interest test. See, e.g., *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). Prior to the hands-off doctrine, courts avoided this problem by requiring a showing that the belief was "grounded" in the religion. *State v. Brashear*, 593 P.2d 63, 66 (N.M. Ct. App. 1979); see also *United States v. Kuch*, 288 F. Supp. 439, 444 (D.D.C. 1968) (requiring a "common religious concern").

¹⁰⁷ *Tebbe*, supra note 12, at 1135. But see *Donovan*, supra note 38, at 91 (arguing that the social sciences might be better able to "articulate an intellectually acceptable definition which is also methodologically operationalizable").

ferred greatly from ideas of religion outside the law.”¹⁰⁸ The law is “meant to guide ordinary people, not only experts.”¹⁰⁹ A significant discrepancy between legal and colloquial understandings of religion would not only fail to provide that guidance, but would also convey a discriminatory message to certain believers and undermine the purposes of legal protection.¹¹⁰ Moreover, the history of the Court’s jurisprudence evinces an evolving understanding of religion,¹¹¹ further supporting the notion that the legal line should roughly track a colloquial one.

Providing a sociological analysis of SBNR also helps to situate such individuals within the spectrum of believers. Despite their idiosyncratic features, these belief systems do share a set of common characteristics. Examining such belief systems and identifying their attributes challenges the descriptive assumptions of courts like *Moore-King* and lays the groundwork for the normative claim that they should be included within the fold of religious protection.

The task of defining religion has also proved difficult in the social sciences, however, and varying conceptions abound.¹¹² Rather than provide a survey of these definitions, Section II.A focuses on differentiating religion and spirituality generally. Section II.B pinpoints the particular characteristics of SBNR and addresses the key critiques that have been levied against it. Section II.C summarizes themes and discusses implications.

A. On Religion and Spirituality

The distinction between religion and spirituality is a relatively new dichotomy in the sociological literature, and the use of the term spirituality has generated criticism within the field.¹¹³ Lack of discipline in oper-

¹⁰⁸ Greenawalt, *supra* note 32, at 143; see also Donovan, *supra* note 38, at 25, 90–91 (arguing that a legal definition of religion should “acknowledge identifiable referents in the real world” and be “compatible with common sense expectations”); Movsesian, *supra* note 2, at 12 (stating that a legal definition of religion should be consistent with the “ordinary social meaning of the term”).

¹⁰⁹ Movsesian, *supra* note 2, at 12.

¹¹⁰ See *supra* text accompanying notes 29–31.

¹¹¹ See *supra* Subsection I.B.1.

¹¹² Donovan, *supra* note 38, at 70–91.

¹¹³ See e.g., Huss, *supra* note 9, at 52; Matthew Wood, *The Sociology of Spirituality: Reflections on a Problematic Endeavor*, in *The New Blackwell Companion to the Sociology of Religion* 267, 267–73, 276–81 (Bryan S. Turner ed., 2010); Zimbauer et al., *supra* note 37, at 550.

ationalizing a clear definition has produced inconsistency and conceptual “fuzz[iness].”¹¹⁴ For example, some researchers might unintentionally focus on certain characteristics of spirituality to the detriment of others, artificially limiting the concept.¹¹⁵ Nonetheless, religion and spirituality increasingly embody distinct and identifiable meanings, both in the sociological literature and colloquially. Cultural changes in the last half century have caused “a major discursive shift” in the meaning of the term: While spirituality and religion are both juxtaposed with the secular, a new dichotomy has emerged—one that instead pits religion and spirituality against one another.¹¹⁶

One study encapsulates the difference this way: “In general, *religion* is viewed as ‘an organized system of practices, beliefs and rituals, designed to facilitate the relationship with the sacred or transcendent’ whereas *spirituality* is viewed as a more personal and experiential connection.”¹¹⁷ In other words, spirituality is the “felt” dimension of one’s relationship to the divine, while religion is a prepackaged bundle of tools that can help one access and foster that relationship. Religion is understood as essentially institutionalized—a given religion has a name, an identifiable group of believers, a physical nexus, and a shared set of beliefs or dogma—while spirituality might occur within or outside of an institutional framework.¹¹⁸

The dichotomy is mirrored in conventional usage. It largely corresponds to self-reported descriptions of religion and spirituality.¹¹⁹ Some studies have found that the concepts are connected to stable personality characteristics, leading people of different dispositions to be drawn towards religious versus spiritual orientations.¹²⁰ Even Wikipedia’s defini-

¹¹⁴ Zinnbauer et al., *supra* note 37, at 549–50, 563.

¹¹⁵ Wood, *supra* note 113, at 281.

¹¹⁶ Huss, *supra* note 9, at 47.

¹¹⁷ Pninit Russo-Netzer & Ofra Mayseless, *Spiritual Identity Outside Institutional Religion: A Phenomenological Exploration*, 14 *Identity* 19, 19 (2014) (citations omitted) (quoting Harold G. Koenig et al., *Handbook of Religion and Health* 18 (2001)); see also Fuller, *supra* note 9, at 76 (characterizing spirituality as a “sensibility”—a particular way of being in the world as opposed to a “set of creeds”); Gerard Saucier & Katarzyna Skrzypińska, *Spiritual But Not Religious? Evidence for Two Independent Dispositions*, 74 *J. Personality* 1257, 1259–60 (2006) (discussing the subjective or experiential aspect of spirituality).

¹¹⁸ See Fuller, *supra* note 9, at 9; Wade Clark Roof, *Spiritual Marketplace: Baby Boomers and the Remaking of American Religion* 33–34 (1999); Zinnbauer et al., *supra* note 37, at 551, 557.

¹¹⁹ Zinnbauer et al., *supra* note 37, at 557, 562.

¹²⁰ Saucier & Skrzypińska, *supra* note 117, at 1281–82, 1285–86.

tion of spirituality emphasizes the “felt” dimension of spirituality and its difference from religion: “the praxis and process of personal transformation, either in accordance with traditional religious ideals, or, increasingly, oriented on subjective experience and psychological growth independently of any specific religious context.”¹²¹ Moreover, the recent Pew study indicates that people are becoming less religious though more spiritual,¹²² a finding that distinguishes the concepts. And the conclusion that spirituality is on the rise is drawn, in part, from the fact that the percentage of adults who reported regularly experiencing a deep sense of spiritual peace and well-being increased over the prior seven years.¹²³ This finding highlights the experiential nature of spirituality.

Despite being distinct, however, the concepts are not wholly independent. Most survey respondents in one study integrated both spirituality and religion in their lives.¹²⁴ In another, 19% of respondents identified as “spiritual but not religious” and 4% identified as “religious but not spiritual”; but the rest (77%) either embraced or rejected both concepts.¹²⁵ And the Pew study found an increase in spirituality among both religious and nonreligious respondents.¹²⁶ Similarly, some sociologists refer to spirituality as “lived religion,” emphasizing both the experiential quality of spirituality and the strong overlap between the concepts.¹²⁷ Others advocate rejecting a distinction, arguing either that spirituality is an aspect or type of religion¹²⁸ or that the concepts are so similar that “spirituality . . . should have a home within a broadband conceptualization of religion.”¹²⁹ Likewise, in his examination of historical manifesta-

¹²¹ Spirituality, Wikipedia, <https://web.archive.org/web/20150423130213/http://en.wikipedia.org/wiki/Spirituality> [<https://perma.cc/4JBD-D7C2>] (last visited Apr. 23, 2015). Since Wikipedia is open source and frequently updated, it can function as a better barometer of public sentiment or conventional usage than institutional dictionaries. In keeping with the open source format, the Wikipedia page no longer included this particular definition at the time of publication. However, it did contain a section on “spiritual but not religious” that reflected the dichotomy in a similar way. Spirituality, Wikipedia, <http://en.wikipedia.org/wiki/Spirituality> [<https://perma.cc/9KSN-4YEM>] (last visited Apr. 8, 2016).

¹²² Pew Research Ctr., *supra* note 3, at 26.

¹²³ *Id.* at 27.

¹²⁴ Zinnbauer et al., *supra* note 37, at 561; see also Wood, *supra* note 113, at 272 (reporting studies that indicate that “spirituality and religion are inextricably linked” for most people).

¹²⁵ Zinnbauer et al., *supra* note 37, at 555.

¹²⁶ Pew Research Ctr., *supra* note 3, at 27 (showing eight-point and five-point increases, respectively).

¹²⁷ See, e.g., Roof, *supra* note 118, at 33, 41.

¹²⁸ Wood, *supra* note 113, at 281.

¹²⁹ Zinnbauer et al., *supra* note 37, at 563.

tions of religion and its relation to the law, Professor Gedicks calls spirituality “the quintessentially postmodern expression of belief.”¹³⁰

One sociologist provides a useful typology that illustrates the relationship between the concepts. He posits that religion and spirituality are separate axes that create a grid with four regions.¹³¹ People who are religious *and* spiritual fall in one quadrant—Christian mystics or Evangelicals, for example.¹³² These individuals embrace organized religion and largely adhere to their particular religion’s dogma; but they also have a rich spiritual life, deeply experiencing their connection to the divine. Another quadrant consists of people who adopt an institutionalized belief system but lack the personal, “felt” connection. Religious fundamentalists, for example, are believers who can adhere so rigidly to dogma and tradition that they experience a “spiritual drought,” according to one commentator.¹³³ Of course, people can also be neither spiritual nor religious—atheists or other secularists, for example.¹³⁴ And the final quadrant is the group with which this Note is concerned—people who are spiritual but not religious.¹³⁵

B. SBNR Belief Systems

Turning to the SBNR category, different researchers attach different labels to its members: “metaphysical believers,”¹³⁶ “unchurched people,”¹³⁷ “spiritual seekers.”¹³⁸ As *Moore-King* illustrates, the concept overlaps significantly with New Age spirituality, so some researchers use the term “New Age.”¹³⁹ Part of the reason for the inconsistent termi-

¹³⁰ Gedicks, *Spirituality*, supra note 13, at 1234.

¹³¹ Roof, supra note 118, at 178.

¹³² *Id.*

¹³³ *Id.* at 175–76, 178.

¹³⁴ *Id.* at 178.

¹³⁵ *Id.*

¹³⁶ See *id.* at 178.

¹³⁷ Fuller, supra note 9, at 4.

¹³⁸ Roof, supra note 118, at 8; see also Richard Cimino & Don Lattin, *Shopping for Faith: American Religion in the New Millennium* 11 (1998) (using “seekers”); Robert Wuthnow, *After Heaven: Spirituality in America Since the 1950s*, at 15, 73 (1998) (using “seeker-oriented spirituality” and “seekers”).

¹³⁹ See Michael D’Antonio, *Heaven on Earth: Dispatches from America’s Spiritual Frontier* 20 (1992); Fuller, supra note 9, at 98–99; Wood, supra note 113, at 274 (discussing sociology’s embrace of the term to identify spiritual belief systems that reject institutional affiliation); Huss, supra note 9, at 49–51; Russo-Netzer & Mayseless, supra note 117, at 20 (understanding New Age as an “umbrella term” for nontraditional approaches to spirituality).

nology is the novelty of the research; but much of it is owed to the fact that, in their rejection of institutionalism, SBNR individuals are wary of adopting labels.¹⁴⁰ While the appeal of SBNR for its adherents is its individually tailored nature, similarities can be identified across the spectrum of believers. Moreover, these belief systems have deep historical roots and are linked to social and cultural forces.¹⁴¹ The following Section provides a description of SBNR and its origins. While many substantive beliefs are shared across adherents, this Section—in accordance with Supreme Court doctrine—focuses on the functional and structural characteristics of SBNR.

To begin with the most axiomatic characteristic, SBNR individuals resist organized religion.¹⁴² The counterculture movement of the 1960s perpetuated a distrust of institutions generally,¹⁴³ and events over the last decade—the wars in Iraq and Afghanistan, the Great Recession, and congressional gridlock—have further eroded Americans’ confidence in most major institutions.¹⁴⁴ Regarding religious institutions in particular, a recent Gallup poll reported the lowest ever confidence rating for organized religion,¹⁴⁵ and a strong majority of unaffiliated people believe that religious institutions are overly concerned with money, power, and politics.¹⁴⁶ Moreover, broader cultural forces have highlighted the contingent or subjective nature of knowledge, causing people to challenge absolutes and accept uncertainty and relativism.¹⁴⁷ In other words, the universal

Because the label has acquired a derogatory connotation and is associated with a broader cultural movement, this Note uses the more generic acronym SBNR instead.

¹⁴⁰ Cf. Pew Research Ctr., *supra* note 3, at 25 (suggesting that the growth of the Nones results in part from “relabeling,” whereby people who might have claimed a loose religious affiliation before now reject a label). Nonetheless, a small number of respondents in the Pew Study self-identified as “New Age” (0.4%). PewResearch: Religion & Public Life Project, Affiliations, <http://religions.pewforum.org/affiliations> [<https://perma.cc/PY4C-CPL7>]. This number is not insignificant. It is comparable to (though somewhat less than) the percentage of Hindus (0.7%) and greater than the percentage of Americans who practice a Native American religion (<0.3%). *Id.*

¹⁴¹ For a fuller discussion, see generally Fuller, *supra* note 9, at 13–74 (discussing the historical manifestations of “unchurched” spirituality as the ancestors of SBNR).

¹⁴² See *id.* at 76.

¹⁴³ Roof, *supra* note 118, at 47, 51.

¹⁴⁴ Jeffrey M. Jones, Confidence in U.S. Institutions Still Below Historical Norms, Gallup (June 15, 2015), <http://www.gallup.com/poll/183593/confidence-institutions-below-historical-norms.aspx> [<https://perma.cc/EXF9-E8YM>].

¹⁴⁵ *Id.*

¹⁴⁶ Pew Research Ctr., *supra* note 3, at 30–31. Over 40% of religiously affiliated people adopt these beliefs as well. *Id.* at 95 chart.

¹⁴⁷ Roof, *supra* note 118, at 8, 61; Gedicks, Spirituality, *supra* note 13, at 1205–06.

truth trumpeted by organized religions does not resonate with the post-modern mind-set.¹⁴⁸ Instead, this mind-set is more comfortable exploring possibilities than answering ultimate questions with a wholehearted embrace or rejection of institutionalized faith.¹⁴⁹

At the same time, people who adopt SBNR are disenchanted with secular alternatives. Purely rational or scientific worldviews—atheism, agnosticism, or humanism, for example—fail to provide a spiritual framework that imbues life with meaning and direction.¹⁵⁰ SBNR individuals thus desire a worldview that “demonstrate[s] the existence of something beyond physical reality.”¹⁵¹ Such adherents have strong “metaphysical conviction[s],” believing that a spiritual force underlies the physical world.¹⁵² Restricted and unfulfilled by a “one-size-fits-all faith,” and yet hungering for a cosmology that extends beyond the scientific, these believers opt instead for an eclectic and self-directed approach to spiritual connection.¹⁵³ Eschewing the dogma of an existing religion, they “pick and choose” particular beliefs and practices that enrich and give meaning to their lives.¹⁵⁴

Other cultural changes have affected the American experience of spirituality and religion. First, increased immigration, travel, and technology provide exposure to a wide diversity of religious and spiritual beliefs and practices.¹⁵⁵ As a result, religious symbols and practices have become “disembedded” from their original cultural settings, resulting in “pastiche, collage, religious pluralism *within* the individual, bricolage, mixing of codes, religion *à la carte*.”¹⁵⁶ Once disaggregated, beliefs and practices are ripe for individual reassembly, producing the eclecticism that is characteristic of SBNR. Second, the satisfaction of material needs opens up the possibility for a wider embrace of SBNR worldviews.

¹⁴⁸ Gedicks, *Spirituality*, supra note 13, at 1206.

¹⁴⁹ Roof, supra note 118, at 47–48. For a similar pop culture example of this approach, see David Eagleman’s philosophy, Possibilianism. David Eagleman, *Sum: Forty Tales from the Afterlife* (2009); Possibilian, <http://www.possibilian.com> [<https://perma.cc/ZG2T-GN3W>].

¹⁵⁰ See Fuller, supra note 9, at 45; Roof, supra note 118, at 19, 35.

¹⁵¹ Fuller, supra note 9, at 45.

¹⁵² *Id.* at 76–77.

¹⁵³ *Id.* at 155; Roof, supra note 118, at 57; Meredith B. McGuire, *Mapping Contemporary American Spirituality: A Sociological Perspective*, *Christian Spirituality Bull.*, Spring 1997, at 4.

¹⁵⁴ Fuller, supra note 9, at 155; French, supra note 4, at 128; Gedicks, *Spirituality*, supra note 13, at 1218.

¹⁵⁵ Roof, supra note 118, at 61, 70–73; French, supra note 4, at 127, 145.

¹⁵⁶ Roof, supra note 118, at 73.

When material needs are met, different values become important: quality of life, well-being, self-expression, and personal autonomy.¹⁵⁷ These values embolden individuals to “cobble together a religious world from available images, symbols, moral codes, and doctrines, thereby exercising considerable agency in defining and shaping what is considered to be religiously meaningful.”¹⁵⁸ Thus, more people not only have access to a range of spiritual ideas and practices; they have the time and energy to forgo “prepackaged expressions” and essentially create their own religions.¹⁵⁹

At least two additional characteristics arise out of this eclecticism. First, it yields a tolerance of all spiritual and religious persuasions, and sometimes even an acceptance of multiple belief systems. Each person is free to create his or her own system of life-enriching and spiritually fulfilling beliefs, which can be drawn from any available source. Thus, Psychic Sophie not only references the New Age movement and various occult practices, but also draws from both Christianity and Kabbalah, an ancient form of Jewish mysticism.¹⁶⁰ Under this framework, religions are not mutually exclusive. They coexist within society and even within individual believers.

Second, eclecticism arises from examining one’s personal experience and experimenting to see what works and what falls flat, generating an inward focus on SBNR beliefs and practices.¹⁶¹ Rather than look outward—to texts, dogma, leaders, other believers, or to an external God—these individuals turn their focus inward to divine spiritual truth. By “re-orient[ing] notions about religious and spiritual strength[] away from custom, institution, or doctrinal formulation,” SBNR moves “toward greater focus on the inner life and its cultivation.”¹⁶²

These characteristics give rise to common critiques of SBNR. One critique is that its inherent eclecticism produces a scattershot of personal

¹⁵⁷ Id. at 49, 58; see also French, *supra* note 4, at 163 (discussing the cultural shift toward self-realization and identity formation).

¹⁵⁸ Roof, *supra* note 118, at 75.

¹⁵⁹ Contra Cimino & Lattin, *supra* note 138, at 26 (“Most people, however, don’t have the time and fortitude to construct their own religion from scratch, so they rely on ‘prepackaged’ expressions . . .”). Despite this claim, the authors observe a “tendency [by SBNRs] to mix elements of different traditions into new hybrid forms.” Id.

¹⁶⁰ *Moore-King*, 708 F.3d at 564.

¹⁶¹ See Fuller, *supra* note 9, at 75–76; Roof, *supra* note 118, at 7.

¹⁶² Roof, *supra* note 118, at 310; see also Gedicks, *Spirituality*, *supra* note 13, at 1216–18 (noting that even those who retain a denominational affiliation are shifting towards personal spirituality).

preferences that lacks a coherent structure or integrity.¹⁶³ The *Moore-King* court embodies this critique in its claim that there must be “some organizing principle or authority other than herself.”¹⁶⁴ The concern here is that SBNR practitioners are not truly committed to a set of principles and can simply alter the components of their ideology according to the situation at hand.¹⁶⁵

Most SBNR adherents, however, are quite committed to their spirituality. One researcher notes that they put a significant amount of time and energy into the practice and development of their spiritual beliefs, they remain committed over time, and their belief systems are central to their personal narratives.¹⁶⁶ Another notes that the “reason for picking and choosing” might be that these believers “have more thoroughly considered the philosophical complexities of belief,”¹⁶⁷ again suggesting a high level of engagement and commitment. The eclecticism is grounded in a belief in the “individual’s right, even duty, to establish his or her own criteria for belief”¹⁶⁸ and exists alongside a duty to abide by the beliefs and morals she has established.¹⁶⁹ The fact that these belief systems are self-created, then, does not dilute their integrity. Compared with accepting religious dogma “wholesale,” establishing one’s own criteria is thought to strengthen the integrity of one’s beliefs.¹⁷⁰

Another critique focuses on the personal nature and inner focus of SBNR practice. The book *Habits of the Heart*, for example, relates the story of a woman named Sheila who, when asked to describe her faith, labels it “Sheilaism.”¹⁷¹ Resembling Psychic Sophie, Sheila describes her faith as “just my own little voice” and emphasizes the inward reflection at the core of her concept of religion.¹⁷² The authors express concern that this “radical individualism . . . elevate[s] the self to a cosmic princi-

¹⁶³ Fuller, *supra* note 9, at 161.

¹⁶⁴ *Moore-King*, 708 F.3d at 571.

¹⁶⁵ See Fuller, *supra* note 9, at 161; McGuire, *supra* note 153, at 4.

¹⁶⁶ McGuire, *supra* note 153, at 4–5; see also Gedicks, *Spirituality*, *supra* note 13, at 1218–19 (noting that they “may take their beliefs very seriously”).

¹⁶⁷ Fuller, *supra* note 9, at 163 (drawing this inference by reference to “cafeteria Catholics”).

¹⁶⁸ *Id.* at 75; see also *id.* at 156 (stating that many individuals can feel organized religions’ beliefs constrain their freedom to choose).

¹⁶⁹ See Wood, *supra* note 113, at 272.

¹⁷⁰ See Fuller, *supra* note 9, at 156.

¹⁷¹ Robert N. Bellah et al., *Habits of the Heart: Individualism and Commitment in American Life* 221 (2008).

¹⁷² *Id.*

ple.”¹⁷³ On this view, SBNR practitioners do not have a relationship with a higher power. Their belief systems are merely mechanisms of self-absorption, allowing people to focus on their own personal happiness and call it religion.¹⁷⁴ This self-absorption fosters an ignorance of broader social problems and encourages the isolation and lack of connection to a larger community that is emblematic of contemporary American society.¹⁷⁵

This critique misunderstands the nature of SBNR belief and practice, however. While SBNR emphasizes personal growth and authenticity, the spiritual process also involves “a sense of surrender or devotion to processes that are not controlled by the self.”¹⁷⁶ In other words, an inward focus does not yield an abiding commitment to whatever one’s *self* wants to do. Instead, attention inward is the access point for transcendence, allowing expansion beyond the self to connect with something deeper.¹⁷⁷ Far from being a mechanism for self-absorption then, the inward focus of SBNR is a means for connecting with the spiritual force that underlies all creation, including human consciousness.¹⁷⁸

Moreover, SBNR believers are not necessarily antisocial or isolated.¹⁷⁹ Studies show that they have strong social identities, often considering themselves communal.¹⁸⁰ While their spiritual practices tend to be privatized, some people do practice collectively or join groups to gain spiritual support.¹⁸¹ For example, Richard Cimino and Don Lattin tell the story of the Techno Cosmic Mass, a form of community worship open to

¹⁷³ *Id.* at 236.

¹⁷⁴ Fuller, *supra* note 9, at 159.

¹⁷⁵ See Bellah et al., *supra* note 171, at 236; Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* 72–74 (2000); Movsesian, *supra* note 2, at 12–15.

¹⁷⁶ Russo-Netzer & Maysesless, *supra* note 117, at 28; see also Roof, *supra* note 118, at 35 (noting the simultaneous presence of a focus on personal growth and surrender to forces outside of one’s control).

¹⁷⁷ McGuire, *supra* note 153, at 3, 6.

¹⁷⁸ Cf. Fuller, *supra* note 9, at 161–62 (suggesting that SBNR might “promote psychological health” by allowing people “who find it difficult to relate to more traditional understandings of God” to connect with a higher power); *id.* at 55–56 (discussing the observations of William James—an early forebear of SBNR—that “the visible world is part of a more spiritual universe”).

¹⁷⁹ See Wood, *supra* note 113, at 276, 279 (criticizing sociology for its description of the group as inherently private or nonsocial). But see Fuller, *supra* note 9, at 159 (discussing criticism of SBNRs as isolated).

¹⁸⁰ For a summary, see Wood, *supra* note 113, at 277–78.

¹⁸¹ McGuire, *supra* note 153, at 5.

people of any traditional faith or nontraditional belief system that “blends Western liturgical tradition with ecstatic music and dance, urban shamanism . . . and Eastern and indigenous spiritual elements.”¹⁸² Individuals might also join meditation groups, book clubs, or yoga retreats in order to connect to others and foster their spiritual lives. Moreover, researchers note that spiritual maturity often requires aligning oneself with social causes and engaging with the outside world.¹⁸³ Both activism and shared practice, then, are part of the spiritual path of some SBNR practitioners.

C. Themes and Implications

This examination illustrates that, despite the idiosyncratic nature of SBNR, at least four broad characteristics can be identified. First, SBNR is inherently eclectic: Each individual has considerable agency to “pick and choose” particular beliefs and practices that resonate with him or her. Second, this eclecticism produces an openness and tolerance that render traditional religious beliefs and spiritual beliefs compatible, or non-exclusive. Third, because subjective, “felt” experience is at the core of spirituality, SBNR practices tend to have a private or inward focus, though they might be shared communally. And fourth, SBNR is metaphysical to its core: The beliefs and practices embraced by adherents are attempts to both understand and connect with a realm beyond the physical.

Moreover, the primary difference between spirituality and religion is that spirituality emphasizes one’s subjective, “felt” relationship with a higher power, whereas religion delineates a set of beliefs, rules, and rituals that are designed to foster that relationship. The fact that SBNR believers are “not religious” merely reflects a letting go of the institutional aspects of religion and a realization that a deep spiritual connection can exist with or without them.

Importantly for the purposes of legal line drawing, these characteristics—and the historical and cultural forces that produce them—are evident even in contemporary expressions of organized religion. The rise of televangelists and Protestant megachurches highlight the postmodern

¹⁸² Cimino & Lattin, *supra* note 138, at 25.

¹⁸³ Roof, *supra* note 118, at 125–26; see also McGuire, *supra* note 153, at 6 (mentioning that activism is “utterly integral” to some individuals’ spirituality).

consumerism of organized religion,¹⁸⁴ as does the increased variety of programming options available at a given place of worship.¹⁸⁵ Moreover, some churchgoers report incorporating practices like yoga or astrology into their faith,¹⁸⁶ lending a touch of eclecticism and nonexclusivity to traditional religion. And the Evangelical movement in particular embodies the concept that inward focus can generate deep spiritual experiences.¹⁸⁷

In addition, churchgoers are increasingly adopting a preference for personal choice over strict dogmatic adherence. “In the contemporary church . . . individuals judge their religion on the basis of whether it helps them to understand and discover themselves . . . rather than whether its teachings and doctrines conform to an external and ultimate divine reality.”¹⁸⁸ One researcher tells the story of a former nun who practices “selective Catholicism,” considering herself “deeply committed” to the Catholic faith but embracing only the aspects of the faith that she considers “true.”¹⁸⁹ This trend is perhaps most apparent in the rejection of the Vatican’s birth control doctrine by 98% of sexually active Catholic women,¹⁹⁰ and in the complaint that some Christians cherry-pick the Bible.¹⁹¹

Given its roots in historical and cultural forces, SBNR is somewhat inevitable. Gedicks’s claim that spirituality is “quintessentially post-modern” also imparts a predestined quality to some people’s attraction to SBNR: “[P]ostmodernism is not an ideology to which one is persuaded . . . it is a *condition*—like gravity or the weather.”¹⁹² Moreover, the

¹⁸⁴ French, *supra* note 4, at 183.

¹⁸⁵ Roof, *supra* note 118, at 93–96; French, *supra* note 4, at 140.

¹⁸⁶ See McGuire, *supra* note 153, at 4; Pew Research Ctr., *supra* note 1, at 53 fig. This was also the case at the Founding, where occult practices were employed alongside and as complementary to the dominant faith tradition, Christianity. Fuller, *supra* note 9, at 17.

¹⁸⁷ Roof, *supra* note 118, at 149.

¹⁸⁸ Gedicks, *Spirituality*, *supra* note 13, at 1218.

¹⁸⁹ McGuire, *supra* note 153, at 6.

¹⁹⁰ See Becky Bowers, Keeping Facts Straight on 98% of Catholic Women, *PolitiFact.com* (Feb. 17, 2012, 12:09 PM), <http://www.politifact.com/truth-o-meter/article/2012/feb/17/keeping-facts-straight-98-catholic-women/> [<https://perma.cc/HX76-XU7D>].

¹⁹¹ For an illustrative graphic, see Scott Bateman, Are You Against Gay Marriage Because: The Bible?, *The Nib* (Apr. 30, 2015), <https://thenib.com/are-you-against-gay-marriage-because-the-bible-f67c2d12231c> [<https://perma.cc/V7UP-LBJ5>]; see also Cafeteria Christianity, *Wikipedia*, https://en.wikipedia.org/wiki/Cafeteria_Christianity [<https://perma.cc/2J95-WQDX>] (last visited Jan. 25, 2016) (calling the tendency to cherry-pick “Cafeteria Christianity” and connecting it to postmodernism).

¹⁹² Gedicks, *Spirituality*, *supra* note 13, at 1234; Gedicks, *God of Our Fathers*, *supra* note 13, at 904 (emphasis omitted). For discussions of how postmodernism has impacted the legal

identification of common themes across individual belief systems confers integrity to SBNR. And the fact that these themes penetrate organized religion without delegitimizing it in the eyes of the law should lend legitimacy to SBNR as well. Aside from its increased individualism and the absence of an institutionalized structure, SBNR largely resembles traditional religion. The end goal, after all, is the same: to connect with the sacred.

III. LOWER COURT RESPONSES

When courts are confronted with novel claims—belief systems that have not yet been recognized as religions—they have considerable latitude in interpreting Supreme Court doctrine. As discussed above, the doctrine does not articulate a clear test for identifying the line between religious and nonreligious belief systems, and the guidance it provides is bare.¹⁹³ The difficulty in reconciling the relevant jurisprudence provides ample room for bias and has resulted in the exclusion of SBNR from religious protection.

Lower courts deal with the definitional problem in a few ways. Occasionally, courts take an “ostrich” approach, burying their head in the sand when confronted with the definitional task and forging ahead to the merits.¹⁹⁴ In most of these cases, the court “assume[s], without deciding” that a given belief system is religious.¹⁹⁵ Only if the claim passes on the merits does the court tackle the definitional task. If it fails on the merits,

understanding of religion, see French, *supra* note 4, at 127–30; Rebecca Redwood French, *From Yoder to Yoda: Models of Traditional, Modern, and Postmodern Religion in U.S. Constitutional Law*, 41 *Ariz. L. Rev.* 49, 49–55 (1999); Gedicks, *God of Our Fathers*, *supra* note 13, 909–12; Gedicks, *Spirituality*, *supra* note 13, at 1208. For a less gracious discussion, see Matthew McNeil, Note, *The First Amendment Out on Highway 61: Bob Dylan, RLUIPA, and the Problem with Emerging Postmodern Religion Clause Jurisprudence*, 65 *Ohio St. L.J.* 1021, 1022–24 (2004).

¹⁹³ See *supra* Subsection I.B.2.

¹⁹⁴ See, e.g., *Maetrem of Cybele, Magna Mater, Inc. v. McCoy*, 975 N.Y.S.2d 251, 253–54 (N.Y. App. Div. 2013) (mentioning a broad range of characteristics in determining that the property was used for religious purposes).

¹⁹⁵ See, e.g., *United States v. Rush*, 738 F.2d 497, 511–12 (1st Cir. 1984); accord *United States v. Middleton*, 690 F.2d 820, 824 (11th Cir. 1982); *In re Application of Kooiman*, 45 Va. Cir. 503, 505 (Va. Cir. Ct. 1998); see also Meyers, 95 F.3d at 1491 (Brorby, J., dissenting) (“It seems to me the better practice is not to engage in any type of an attempt to define religion and instead to assume, without deciding, the validity of an individual’s sincerely held religious beliefs for purposes of constitutional protection.”); *Alliance for Bio-Integrity v. Shalala*, 116 F. Supp. 2d 166, 180 (D.D.C. 2000) (using different language but taking the same approach).

the court has avoided unnecessarily classifying a novel belief system as religious or nonreligious. Given the difficulty of the definitional question and its impact, this approach might be preferable, but it reveals little about how lower courts handle the puzzle of Supreme Court doctrine. Accordingly, this Note sets aside the “ostrich” courts.

When courts do engage with the definitional task, this Note groups their approaches into three broad categories. In the “literalist” approach, courts confine themselves narrowly to Supreme Court doctrine, focusing their analysis on specific language in the relevant opinions (for example, “way of life” in *Wisconsin v. Yoder*,¹⁹⁶ “parallel position” in *United States v. Seeger*).¹⁹⁷ Courts in the “artisan” category, by contrast, appeal to criteria other than those strictly identified by the Supreme Court in an effort to fill in the gaps and resolve the inconsistencies of existing doctrine. But they do so in an unsystematic way, penning one-of-a-kind decisions that speak to the particular belief system at issue instead of developing standardized rules that can be applied across belief systems.¹⁹⁸ Significant bias creeps in under either of these strategies—through the newly chosen criteria in the latter and through the interpretation of the doctrine in the former.

¹⁹⁶ 406 U.S. 205 (1972).

¹⁹⁷ 380 U.S. 163 (1965). See, e.g., *Dettmer v. Landon*, 799 F.2d 929, 931–32 (4th Cir. 1986) (finding that prisoner’s Wiccan beliefs satisfy the *Seeger* test); *Am. Humanist Ass’n v. United States*, 63 F. Supp. 3d 1274, 1283 (D. Or. 2014) (relying solely on a footnote in *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961), which references Secular Humanism as a religion); *Moore-King v. Cty. of Chesterfield*, 819 F. Supp. 2d 604, 621–22 (E.D. Va. 2011); *Harrison v. Watts*, 609 F. Supp. 2d 561, 572–74 (E.D. Va. 2009) (prisoner’s beliefs self-admittedly comprise a “way of life” and not a religion); *Therault v. Silber*, 453 F. Supp. 254, 261 (W.D. Tex. 1978) (prisoner’s Eclatarian beliefs are “essentially political, sociological, and philosophical,” not religious).

¹⁹⁸ See, e.g., *Kaufman v. McCaughtry*, 419 F.3d 678, 681–82 (7th Cir. 2005) (confining its analysis largely to Supreme Court doctrine but holding ultimately that atheism is a religion because it is “a school of thought that takes a position on religion”); *Reed v. Great Lakes Cos.*, 330 F.3d 931, 934 (7th Cir. 2003) (“If we think of religion as taking a position on divinity, then atheism is indeed a form of religion.”); *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 58–59, 77–78 (2d Cir. 2001) (examining the Earth Day program in detail and determining that it did not endorse Gaia or another higher power); *Int’l Soc. for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 440 (2d Cir. 1981) (fleshing out *Seeger*’s parallel place rule as one’s “ultimate concern”); *Sherr v. Northport-East Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 92–94 (E.D.N.Y. 1987) (closely examining plaintiff’s testimony and referencing a wide array of the scholarly and legal literature); *Loney v. Scurr*, 474 F. Supp. 1186, 1193–94 (S.D. Iowa 1979) (referencing not only the Supreme Court doctrine but also evidence of a formal structure and several definitions of religion provided through expert testimony).

To address this bias, and for ease of implementation, this Note advocates another strategy: the “architect” approach. Under this approach, courts develop or adopt systematized factor tests that remain true to the design plans of the Court’s doctrine but flesh out those designs in productive ways.¹⁹⁹ Providing a concrete and identifiable structure in which to analyze the concept of religion has the best chance at curbing judicial bias and adequately handling the definitional problem.²⁰⁰

A. *The Literalist Approach*

The literalist approach is perhaps best illustrated by the *Moore-King* opinion, as the Fourth Circuit limits its inquiry to Supreme Court precedent. It cites *Seeger’s* “parallel place” language and discusses the *Yoder* Court’s insistence that protected beliefs “amount to a religious faith as opposed to a way of life.”²⁰¹ Once cited, though, the Fourth Circuit never returns to the parallel place concept. Moreover, it interpreted *Yoder* as constraining the parallelism to only those beliefs that are “deep religious convictions shared by an organized group,” and not “personal” choices like those of Thoreau.²⁰²

Thus, *Moore-King* treated the *Yoder* Court’s “organized group” language as a dispositive characteristic whose absence definitively marks a belief system as nonreligious. But this interpretation is questionable. Instead, the *Yoder* Court’s reference to organized groups can—and should—be interpreted as evidence that the petitioner’s belief system is bona fide, rather than as a characteristic of religious belief systems. First, some philosophical belief systems are shared by organized groups (for example, Marxism, humanism, rationalism) so this characteristic does not demarcate a clear line. Second, according legal protection only to beliefs that are shared by an organized group is largely precluded by the hands-off doctrine, an aspect of precedent that *Moore-King* ne-

¹⁹⁹ See, e.g., *United States v. Quaintance*, 608 F.3d 717, 718 (10th Cir. 2010); *Meyers*, 95 F.3d at 1483–84; *Alvarado v. City of San Jose*, 94 F.3d 1223, 1227 (9th Cir. 1996); *Africa v. Pennsylvania*, 662 F.2d 1025, 1031–32 (3d Cir. 1981); *Versatile v. Johnson*, No. 3:09CV120, 2011 WL 5119259, at *5–6 (E.D. Va. Oct. 27, 2011), *aff’d*, 474 F. App’x 385 (4th Cir. 2012) (*per curiam*); *Johnson v. Pa. Bureau of Corr.*, 661 F. Supp. 425, 436 (W.D. Pa. 1987); *Church of the Chosen People v. United States*, 548 F. Supp. 1247, 1252–53 (D. Minn. 1982); *Friedman v. S. Cal. Permanente Med. Grp.*, 125 Cal. Rptr. 2d 663, 682–83 (Cal. Ct. App. 2002); *State v. Cordingley*, 302 P.3d 730, 738 (Idaho Ct. App. 2013).

²⁰⁰ Peñalver, *supra* note 33, at 793–95.

²⁰¹ *Moore-King*, 708 F.3d at 571.

²⁰² *Id.*

glects.²⁰³ Under this doctrine, beliefs can be religious even when not shared by other members of the professed religion, when not grounded in a particular tenet of the professed religion, and when the adherent is not a member of a particular religious sect.²⁰⁴ These decisions suggest that the *Yoder* opinion's reference to the Amish as an organized group is used merely as evidence that the religious nature of the belief was not fabricated rather than as a dispositive factor in determining whether a belief system is religious. *Moore-King* not only ignores an analysis of the hands-off doctrine, then, but arguably misinterprets *Yoder*.

Another problematic aspect of *Moore-King* is that the court fails to grapple with its own relevant precedent.²⁰⁵ In *Dettmer v. Landon*, the Fourth Circuit refused to allow a prisoner certain contraband for his witchcraft practices, on the ground that prison officials reasonably denied access to these items in pursuit of prison safety.²⁰⁶ However, it held that the prisoner's Wiccan beliefs were indeed religious, rejecting the government's argument that "the Church of Wicca is not a religion because it is a 'conglomeration' of various aspects of the occult."²⁰⁷ The government's "conglomeration" argument essentially amounts to the reasoning adopted in *Moore-King*—that Psychic Sophie's beliefs are not religious because they draw "from a diverse array of sources."²⁰⁸ But the *Moore-King* court ignores this similarity, embracing an argument akin to the one it rejected in *Dettmer*. This failure to reconcile its reasoning with *Dettmer* raises an inference that the *Moore-King* court simply could not distinguish it in a meaningful way.

²⁰³ The Fourth Circuit opinion fails to cite *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829 (1989) at all and quotes *Thomas v. Review Board*, 450 U.S. 707 (1981) for a different proposition. *Moore-King*, 708 F.3d at 571.

²⁰⁴ See supra notes 96–103 and accompanying text.

²⁰⁵ See *Dettmer v. Landon*, 799 F.2d 929, 931–32 (4th Cir. 1986). *Moore-King* cites *Dettmer* for *Seeger's* "parallel position" proposition, 708 F.3d at 571, but does not examine the case with an eye towards its own holding. In addition, *Moore-King* fails to cite a recent RLUIPA prisoner case that applied a hybrid version of the factor tests from *Meyers* and *Africa v. Pennsylvania*, 662 F.2d 1025 (3d Cir. 1981). *Versatile v. Johnson*, 474 F. App'x 385, 385 (4th Cir. 2012) (per curiam) (affirming the district court's application of *Africa* and *Meyers*). While the opinion was unpublished and thus not binding, the Fourth Circuit could have used it as persuasive authority for adopting some version of the *Africa* or *Meyers* tests that other circuits have adopted.

²⁰⁶ *Dettmer*, 799 F.2d at 934.

²⁰⁷ *Id.* at 932.

²⁰⁸ *Moore-King*, 708 F.3d at 564, 571.

Moore-King thus illustrates both the myopic methodology of the literalist approach to the definitional task and the interpretational quandary of the Supreme Court's jurisprudence. The failure to incorporate the hands-off doctrine, the misplaced focus on the "organized group" language of *Yoder*, and the choice not to address its own precedent suggest that the *Moore-King* court might have been biased against Psychic Sophie's beliefs. The vague and conflicting doctrinal formulations in the Supreme Court's jurisprudence require lower courts to fill in gaps and resolve contradictions. But by relying solely on specific language contained in certain opinions, the literalist approach does not explain how it reconciles or fleshes out the doctrine. Instead, courts often fall back on their own implicit understandings of religion and exclude nontraditional beliefs like Psychic Sophie's from religious protection.

B. The Artisan Approach

In contrast to the literalist approach, the "artisan" approach expressly appeals to other criteria to fill in the gaps of Supreme Court jurisprudence. However, rather than construct a systematized test, these courts design rules that speak to the particular facts at issue, a strategy that engenders a similar potential for bias. For example, in examining a belief system common in prisons—the Church of the New Song—one court cited *Welsh v. United States* and *Seeger* and discussed several characteristics which, in its estimation, resembled recognized religions: a formal structure, "a system of beliefs and announced tenets," and the fact that it "fills a [similar] need" by instilling "a sense of self-worth and inspir[ing] a sense of community."²⁰⁹ It then relied on the fact that two of the three expert witnesses concluded that the Church was a religion under their proffered definitions.²¹⁰ But rather than organizing these characteristics and definitions into a comprehensive test, the court appealed to them in a kind of gestalt fashion, failing to clarify which criteria it felt were dispositive and leaving another court to do the work of constructing something that can be more systematically applied.

The artisan approach is a big tent. Another prisoner case illustrates a slightly different method of analysis. *Kaufman v. McCaughtry* dealt with an alleged violation of a prisoner's free exercise rights when officials re-

²⁰⁹ *Loney v. Scurr*, 474 F. Supp. 1186, 1193 (S.D. Iowa 1979).

²¹⁰ *Id.* at 1194–95.

fused to allow him to start an atheist group.²¹¹ Though it referenced *Seeger* and *Yoder*, the Seventh Circuit appealed to other precedent which dealt specifically with atheism and then essentially wrote its own rule: “Atheism is, among other things, a school of thought that takes a position on religion, the existence and importance of a supreme being, and a code of ethics. As such, we are satisfied that it qualifies as Kaufman’s religion for purposes of [his] First Amendment claims”²¹² *Kaufman* thus differs from the *Church of the New Song* case, in that it fashions a clear rule instead of loosely referencing several criteria. But the rule is nonetheless one-of-a-kind and nongeneralizable. It does not provide a foundation for determinations about other belief systems.

The artisan strategy embodies a level of candidness that the literalist approach lacks, but it does not develop a comprehensive and systematic test that can apply to any belief system. Though this approach fills in the gaps of Supreme Court doctrine, the possibility of judicial bias remains, as does the concern that the decisions were developed in an ad hoc fashion to shoehorn novel belief systems into existing doctrine. To see the problem from another angle, note that running the facts of *Kaufman* through the analysis of *Moore-King* might very well produce the opposite outcome: Atheism is a philosophy that, while shared by others, is not shared by an organized group and lacks an organizing principle other than the rejection of the existence of a higher power. Under the logic of *Moore-King*, then, atheism would likely not be considered a religion.

C. The Architect Approach: Factor Tests

To mitigate the potential for incompatible outcomes like this, some courts act like architects rather than artisans. They design and build (or sometimes just apply) a framework for examining belief systems more systematically, thereby narrowing the space through which judicial bias can enter. The framework is a factor test that is constructed by comparing religious and nonreligious belief systems and identifying the variables along which they differ. Architect courts then apply these factors to novel belief systems in order to determine religious status for the purposes of the Religion Clauses.

²¹¹ 419 F.3d 678, 680–81 (7th Cir. 2005).

²¹² *Id.* at 682.

Judge Arlin Adams was the first to develop a factor test for religion.²¹³ In his well-known concurring opinion in *Malnak v. Yogi*, he elucidated three factors to be used in grounding a court's analogical reasoning and stressed that while a flexible approach is necessary, "it is important to have some objective guidelines in order to avoid *ad hoc* justice."²¹⁴ A few years later, the test was officially adopted by the Third Circuit when Adams wrote the majority opinion in *Africa v. Pennsylvania*, giving the test its moniker: the *Africa* test.²¹⁵ Three other circuits have since adopted a version of the test,²¹⁶ and district courts in the Fourth Circuit have cited it with approval.²¹⁷ The Fourth Circuit itself affirmed a district court judgment that explicitly adopted a modified form of the *Africa* test, but both the district and circuit court opinions are unpublished and thus not binding.²¹⁸

The *Africa* test grounds the Supreme Court's doctrine in three factors for comparison of a given belief system with traditional or accepted religions.²¹⁹ The first factor is whether the belief system addresses "fundamental and ultimate questions having to do with deep and imponderable matters."²²⁰ Such questions involve "life and death, right and wrong, and good and evil."²²¹ The second factor is whether the belief system is comprehensive: Religions are not limited to a single question or teaching, and they "consist of something more than a number of isolated, unconnected ideas."²²² The third and final factor is the presence of struc-

²¹³ *Malnak v. Yogi*, 592 F.2d 197, 207–08 (3d Cir. 1979) (Adams, J., concurring in the judgment). Adams thought of the modern Supreme Court doctrine as "a definition by analogy," *id.* at 207, though its strong functional language might more accurately be characterized as a hybrid approach. For a historical discussion of the test and a comparison of the test to other analogic approaches, see Sarah Barringer Gordon, *Malnak v. Yogi: The New Age and the New Law*, in *Law & Religion: Cases in Context* 11 (Leslie C. Griffin ed., 2010).

²¹⁴ *Malnak*, 592 F.2d at 207–10 (Adams, J., concurring in the judgment).

²¹⁵ 662 F.2d 1025, 1032 (3d Cir. 1982).

²¹⁶ *Love v. Reed*, 216 F.3d 682, 687 (8th Cir. 2000); *Alvarado v. City of San Jose*, 94 F.3d 1223, 1228–29 (9th Cir. 1996); see also *Meyers*, 906 F. Supp. at 1502–03 (using *Africa* as a foundation to create its own factor test).

²¹⁷ *Dettmer*, 799 F.2d at 932; *Versatile v. Johnson*, No. 3:09CV120, 2011 WL 5119259, at *5–6 (E.D. Va. Oct. 27, 2011), *aff'd*, 474 F. App'x 385 (4th Cir. 2012) (*per curiam*); *Harrison v. Watts*, 609 F. Supp. 2d 561, 566 (E.D. Va. 2009); *Mitchell v. Angelone*, 82 F. Supp. 2d 485, 490 (E.D. Va. 1999).

²¹⁸ *Versatile*, 2011 WL 5119259, at *5–6.

²¹⁹ See *Malnak*, 592 F.2d at 207–08 (Adams, J., concurring in the judgment).

²²⁰ *Africa*, 662 F.2d at 1032.

²²¹ *Id.* at 1033.

²²² *Id.* at 1035.

tural characteristics: “formal, external, or surface signs,” like services, ceremonies, clergy, documents or texts, holidays, organization, and “other similar manifestations associated with the traditional religions.”²²³ In his *Malnak* opinion, Adams noted that the absence of structural characteristics is not dispositive.²²⁴ His attempt to thread the needle of *Seeger*, *Welsh*, and *Yoder* left him cautioning that religious claims have been protected when they lack “any formal, ceremonial organizational trappings,” as in the draft cases; but he nonetheless admitted that it is possible, in light of *Yoder*, that “formal and organizational signs may prove to be more important in defining religion than the conscientious objector cases would suggest.”²²⁵

Cautionary language of this kind is conspicuously absent from his decision in *Africa*. Not only does Adams avoid citing to this part of *Malnak*, but his decision that the belief system at issue is not a religion also seems heavily rooted in the fact that it “lacks almost all of the formal identifying characteristics common to most recognized religions.”²²⁶ Perhaps Adams had a change of heart in the intervening years; or perhaps when faced with a Free Exercise claim (*Malnak* invoked the Establishment Clause²²⁷), he embraced these formal characteristics as a backstop for counterfeit claims. Whatever the reason, this aspect of the *Africa* test, as well as the outcome of the case, has been heavily criticized.²²⁸ Nonetheless, the test as a whole has received significant praise, having been adopted by many courts.²²⁹

For nearly two decades, the *Africa* test was the only systematic test for determining whether belief systems are religious. In *United States v. Meyers*, however—an opinion at least as well analyzed and thoroughly researched as Judge Adams’s—Judge Clarence Brimmer, Jr. developed another test.²³⁰ The *Meyers* test draws heavily on *Africa* and amounts to an expanded version that breaks the analysis into five factors.²³¹ It keeps

²²³ *Id.*

²²⁴ *Malnak*, 592 F.2d at 209 (Adams, J., concurring in the judgment) (“Of course, a religion may exist without any of these signs, so they are not determinative, at least by their absence, in resolving a question of definition.” (footnote omitted)).

²²⁵ *Id.* at 209 n.43.

²²⁶ *Africa*, 662 F.2d at 1036.

²²⁷ *Malnak*, 592 F.2d at 198.

²²⁸ See, e.g., Gordon, *supra* note 213, at 21–24; Peñalver, *supra* note 33, at 818–20.

²²⁹ See *supra* notes 216–18.

²³⁰ 906 F. Supp. 1494 (D. Wyo. 1995), *aff’d*, 95 F.3d 1475 (10th Cir. 1996).

²³¹ *Id.* at 1500, 1502–03.

two of the three *Africa* factors relatively intact—comprehensiveness and structural characteristics—though it expands the structural factor by concretely identifying ten formal characteristics, or “accoutrements of religion.”²³²

The two tests diverge, however, through *Meyers*’s other three factors. *Meyers* splits the first *Africa* factor—fundamental and ultimate questions—into two discrete factors: “ultimate ideas” and a “moral or ethical system.”²³³ In describing “ultimate ideas,” the opinion cites *Africa* for its “deep and imponderable matters” language.²³⁴ But it characterizes the idea that religious beliefs “often prescribe a . . . way of life” as a separate consideration, connected to moral and ethical duties that are “often imposed by some higher power, force, or spirit [and] require the believer to abnegate elemental self-interest.”²³⁵ Each of these is a separate factor to be considered by the court in determining a belief system’s religious status.

The most striking difference between the two tests is the final *Meyers* factor: “metaphysical beliefs.”²³⁶ This factor marks belief systems that speak to the sacred or transcendent—the realm beyond the physical and sensory world—as more likely to be religions.²³⁷ The *Africa* test, by contrast, does not implicate any notion of the sacred, transcendent, or metaphysical. As factor tests, no single factor is dispositive, but the inclusion of “metaphysical beliefs” as a *Meyers* factor counsels against characterizing belief systems that are grounded in the physical, rational world—secular humanism or atheism, for example—as religions for legal purposes.²³⁸

D. Choosing a Uniform Approach

As previously discussed, current doctrine necessitates the “maintenance of a boundary between” religious and nonreligious claims²³⁹ and

²³² Id. at 1502–03.

²³³ Id. at 1502.

²³⁴ Id.

²³⁵ Id. (emphasis added).

²³⁶ Id.

²³⁷ Id.; see also Bergeron, *supra* note 38, at 381–82 (grounding a legal definition of religion in the concept of transcendence).

²³⁸ See *Meyers*, 906 F. Supp. at 1503–04. Indeed, the opinion specifically includes humanism as an example of belief systems that would likely *not* satisfy the test. Id. at 1504. Atheism is not addressed by the court. See *id.*

²³⁹ Gedicks, *God of Our Fathers*, *supra* note 13, at 910.

thus tasks courts with excluding two kinds of claims from religious protection. The most troubling involves “sham religions,” belief systems that appear to be created merely for the purpose of skirting the law. The second involves belief systems that are not opportunistic but involve deeply held secular beliefs rather than religious ones. An effective approach to the definitional task will draw a line that demarcates belief systems such that both types are excluded. Moreover, the chosen line should track the sociological and colloquial understandings of religion to ensure that the purposes of legal protection are being effectuated.²⁴⁰ Lastly, all courts should use the same test. A belief system’s religious status is a conceptual issue that should not vary by jurisdiction. Variability results in the absurdity that the same belief system might be considered a religion in Iowa but not in Texas.²⁴¹

This Section argues that the *Meyers* test is the best available line-drawing tool and advocates its uniform adoption across jurisdictions. It begins by articulating the theoretical benefits of the architect approach and of *Meyers* in particular. It then surveys existing case law to illustrate that the *Meyers* test is an effective line-drawing tool—it excludes both sham religions and deeply held secular beliefs from legal protection.

1. *The Theoretical Argument for the Meyers Test*

Judge Adams himself noted that factor tests are not perfect,²⁴² but they are based on the most sustained analysis of—and constitute the most comprehensive approach to—the definitional problem. Factor tests provide a concrete, methodological structure to judicial analysis that is lacking in both Supreme Court doctrine and the literalist and artisan approaches discussed above. This structure constrains courts’ analyses in a way that reduces the risk that religion will “acquire different meanings

²⁴⁰ See *supra* text accompanying notes 107–11.

²⁴¹ Compare *Loney v. Scurr*, 474 F. Supp. 1186, 1192–94 (S.D. Iowa 1979) (looking at multiple definitions and deciding that the Church of the New Song is a religion), with *Therault v. Silber*, 391 F. Supp. 578, 582 (W.D. Tex. 1975) (concluding that the Church of the New Song is not a religion).

²⁴² *Malnak* 592 F.2d at 210 (Adams, J., concurring in the judgment). Indeed, some questionable decisions have been wrought through the use of the *Africa* test, including *Africa* itself. See *Africa*, 662 F.2d at 1025; *Alvarado v. City of San Jose*, 94 F.3d 1223, 1229–30 (9th Cir. 1996); *PLANS, Inc. v. Sacramento City Unified Sch. Dist.*, 752 F. Supp. 2d 1136, 1142 (E.D. Cal. 2010). For an analysis of how the belief system at issue in *Africa* might justifiably be considered a religion, see Peñalver, *supra* note 33, at 818–20.

depending on the predilections of a particular court.”²⁴³ As Dean Eduardo Peñalver articulated in a Note written when he was a law student, courts need both a broad baseline of accepted religions as comparison points and clear guidance regarding the kinds of comparisons that are valid.²⁴⁴ Without this, legal analysis is ripe for judicial bias, as judges are apt to use Western religions and their most identifiable characteristics as comparison points, skewing results toward traditional conceptions.²⁴⁵ The *Yoder* Court’s comparison of the Amish and Thoreau and the *Moore-King* court’s interpretation of that comparison are emblematic of this bias.²⁴⁶ By providing clear guidelines and a concrete structure for judicial analysis, the architect approach is the best available method for determining whether a belief system is a religion for legal purposes.

Within the architect approach, the *Meyers* test is more useful than the *Africa* test in accurately distinguishing between religious and nonreligious belief systems. First, it embodies Dean Peñalver’s suggestion that an analogical approach should identify a broad baseline of comparison points, naming two dozen belief systems or groups that the court presumes are religious and another nine that are presumed to be secular.²⁴⁷ Second, *Meyers* emphasizes that the analysis should be used to include rather than exclude belief systems, referencing its test as a “low-threshold ‘inclusion test.’”²⁴⁸ By telling judges to err on the side of inclusion, *Meyers* further curbs judicial bias and reflects the purpose of the Religion Clauses to provide protection to a wide array of belief systems. Finally, the “metaphysical beliefs” factor in *Meyers* elucidates a clear boundary between religious and nonreligious belief systems that corresponds to the sociological literature discussed in Part II. While religion and spirituality differ according to the individual practitioner’s felt experience, both incorporate some notion of a realm beyond the physical, typically discussed as the sacred, transcendent, or divine.²⁴⁹ Because a reference to metaphysical beliefs better tracks the sociological understanding of religion, and because its other characteristics mitigate judi-

²⁴³ *Meyers*, 906 F. Supp. at 1501.

²⁴⁴ Peñalver, *supra* note 33, at 814–21.

²⁴⁵ *Id.* at 813–14. Cf. Tushnet, *supra* note 10, at 466 (arguing that the Roberts Court uses Christianity as its default conception of religion).

²⁴⁶ See *supra* notes 77–78, 201–02 and accompanying text.

²⁴⁷ *Meyers*, 906 F. Supp. at 1503–04; Peñalver, *supra* note 33, at 815–18.

²⁴⁸ *Meyers*, 906 F. Supp. at 1503.

²⁴⁹ See *supra* Section II.A.

cial bias, the *Meyers* test provides a solid basis for distinguishing belief systems.

2. Excluding Opportunistic “Sham Religions”

The preceding section illustrates the theoretical advantages of the *Meyers* test over other approaches. Existing case law provides a means for assessing the test’s practical utility. A survey of the case law that uses the architect approach, in particular the *Meyers* test, indicates that it successfully manages the line-drawing exercise at the core of the definitional task by excluding both sham religions and deeply held secular beliefs.

Sham religions present courts with a particularly thorny problem: They bear many or most of the characteristics of a religion, but they seem to be created for the purpose of skirting the law. Many prisoner cases raise this concern, as prisoners seek benefits like group association, access to otherwise prohibited items, and dietary accommodations under Free Exercise claims.²⁵⁰ This problem also arises in the property context, as organizations seek tax or zoning exemptions for their self-created religions.²⁵¹ The classic illustration, however, involves attempts to overturn drug convictions, most notably convictions for the possession of marijuana.²⁵²

Meyers itself was one of these cases. Contesting a conviction for possession of marijuana with the intent to distribute, the plaintiff asserted a RFRA claim on the basis of his adherence to the boldly named Church

²⁵⁰ See, e.g., *Therault v. Silber*, 547 F.2d 1279, 1279 (5th Cir. 1977) (Church of the New Song); *Harrison v. Watts*, 609 F. Supp. 2d 561, 564–65 (E.D. Va. 2009) (Nation of Gods and Earths); *Johnson v. Pa. Bureau of Corr.*, 661 F. Supp. 425, 428–29, 435–36 (W.D. Pa. 1987) (Spiritual Order of Universal Being); *Jacques v. Hilton*, 569 F. Supp. 730, 731–32 (D.N.J. 1983) (Church of Saint Dennis); see also *Africa*, 662 F.2d at 1025 (holding that the MOVE organization is not a religion, though the prisoner had formed the MOVE organization prior to his prison sentence).

²⁵¹ See, e.g., *Church of Universal Love & Music v. Fayette Cty.*, No. 06-872, 2008 WL 4006690, at *1, *4 (W.D. Pa. Aug. 26, 2008) (zoning); *Church of the Chosen People v. United States*, 548 F. Supp. 1247, 1248 (D. Minn. 1982) (tax).

²⁵² See, e.g., *United States v. Quaintance*, 608 F.3d 717, 718 (10th Cir. 2010); *Meyers*, 95 F.3d at 1479–80; *United States v. Rush*, 738 F.2d 497, 511–12 (1st Cir. 1984); *United States v. Middleton*, 690 F.2d 820, 822 (11th Cir. 1982); *Oklevueha Native Am. Church of Haw. v. Holder*, No. 09–00336, 2013 WL 6892914, at *1 (D. Haw. Dec. 31, 2013); *United States v. Kuch*, 288 F. Supp. 439, 442 (D.D.C. 1968); *State v. Cordingley*, 302 P.3d 730, 731 (Idaho Ct. App. 2013); *State v. White*, 271 P.3d 1217, 1218–19 (Idaho Ct. App. 2011); *State v. Pedersen*, 679 N.W.2d 368, 372 (Minn. Ct. App. 2004); *State v. Brashear*, 593 P.2d 63, 65 (N.M. Ct. App. 1979).

of Marijuana.²⁵³ The Tenth Circuit upheld the district court's evaluation that the Church of Marijuana was not a religion and affirmed the use of its factor test.²⁵⁴ The district court proceeded fairly methodically through the five factors of its test—ultimate ideas, metaphysical beliefs, moral or ethical system, comprehensiveness, and accoutrements of religion—and it found certain characteristics dispositive. First, rather than being comprehensive, the belief system was highly focused on one activity: smoking marijuana.²⁵⁵ The stated purpose of the Church was to “use, possess, grow and distribute marijuana for the good of mankind and the planet earth.”²⁵⁶ The defendant himself explained that the plant is “the center of attention,” and he could articulate only one moral tenet: to help people kick their bad habits.²⁵⁷ The court noted that “it would be difficult to conceive of a more monofaceted ‘religion.’”²⁵⁸

Second, there was nothing metaphysical about the defendant's beliefs. In fact, they seemed purely physical: They involved the physical act of smoking a physical plant, producing a peaceful state that court characterized as a “psycho-pharmacological effect[.]”²⁵⁹ Unlike other religions that utilize mind-altering plants in the pursuit of spiritual awakening, the defendant did not “equate[] marijuana smoking with a spiritual dimension, mystical plane, or transcendent reality.”²⁶⁰ He did not claim that it provided him with guidance or addressed ultimate questions like the meaning of human existence or the purpose of life.²⁶¹ Rather than using the plant to achieve a spiritual goal, the court noted, “the end appears to be smoking marijuana.”²⁶²

Through a thorough analysis of all five factors, the court concluded that the beliefs were more aptly characterized as “medical, therapeutic, and social,” as the defendant repeatedly discussed marijuana's curative effects.²⁶³ Though the court noted that such secular beliefs often overlap with spiritual ones and should not be disposed of merely for that reason,

²⁵³ *Meyers*, 95 F.3d at 1479.

²⁵⁴ *Id.* at 1481–84.

²⁵⁵ *Meyers*, 906 F. Supp. at 1506.

²⁵⁶ *Meyers*, 95 F.3d at 1479.

²⁵⁷ *Meyers*, 906 F. Supp. at 1506 (quoting defendant).

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 1505.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.* at 1508.

in this case, the “secular and religious beliefs overlap only in the sense that Meyers . . . believes in [his secular beliefs] so deeply that he has transformed them into a ‘religion.’”²⁶⁴

The conclusion here likely corresponds to our colloquial understanding of religion, as the Church of Marijuana strongly suggests opportunism. The court itself noted that the defendant’s beliefs have “an ad hoc quality that neatly justify [the] desire to smoke marijuana.”²⁶⁵ The defendant was also the self-proclaimed founder of the Church.²⁶⁶ And the formal accoutrements seem to have been thrown together haphazardly in an effort to resemble recognized religions.²⁶⁷ Moreover, the purported religion’s chosen name did not ease suspicion.

Defendants in other marijuana cases have chosen less transparent names for their purported religions: the Church of Cognitive Therapy and the Church of Cognizance.²⁶⁸ Courts have had more difficulty dismissing these claims, in part because defendants have more adequately addressed the metaphysical or spiritual nature of their beliefs. The defendant in *State v. Cordingley*, for example, stated that the goal of smoking marijuana is to attain enlightenment and that, as a “sacrament,” marijuana use is a form of prayer that allows one to communicate with a higher power.²⁶⁹ Similarly, the defendant in *United States v. Quaintance* testified that, as both a deity and a sacrament, marijuana is a “spiritual force” that “teaches ‘the agenda of the divine mind.’”²⁷⁰ Nonetheless, these claims also failed the *Meyers* test. The courts described the belief systems as “singularly focused on the consumption of marijuana”²⁷¹ and thus either not comprehensive²⁷² or insincere.²⁷³

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 1509.

²⁶⁶ *Id.* at 1506.

²⁶⁷ *Id.* at 1506–08.

²⁶⁸ *United States v. Quaintance*, 608 F.3d 717, 718 (10th Cir. 2010); *State v. Cordingley*, 302 P.3d 730, 738 (Idaho Ct. App. 2013).

²⁶⁹ *Cordingley*, 302 P.3d at 734, 740.

²⁷⁰ *United States v. Quaintance*, 471 F. Supp. 2d 1153, 1159 (D.N.M. 2006), *aff’d*, 608 F.3d 717 (10th Cir. 2010).

²⁷¹ *Cordingley*, 302 P.3d at 741.

²⁷² *Quaintance*, 471 F. Supp. 2d at 1163; *Cordingley*, 302 P.3d at 734, 741; see also *Church of the Chosen People v. United States*, 548 F. Supp. 1247, 1249–50, 1253 (D. Minn. 1982) (similarly dismissing a claim that an organization devoted to encouraging gay relationships in order to “ensure the survival of the human species . . . [through] the control of ‘overbreeding’ or population growth” was a religion).

²⁷³ *Quaintance*, 608 F.3d at 722–23.

The *Meyers* test is thus an effective tool for disposing of sham religions. It provides a structure to ensure consistency in the court's analysis, but retains enough flexibility that courts can dismiss claims that appear to have been created opportunistically to circumvent the strictures of the law.

3. Excluding Deeply Held Secular Beliefs

Case law also indicates that the *Meyers* test can successfully distinguish between deeply held secular beliefs and bona fide religions. Many claims are so clearly secular that they are often dismissed through common sense reasoning.²⁷⁴ For example, the government does not establish a religion of "nuclearism" simply by promoting pronuclear policies or seeking to protect nuclear armaments from vandalism.²⁷⁵ Nor does the state requirement to teach evolution, a scientific theory, amount to an establishment of religion, simply because the petitioner calls it "evolutionism."²⁷⁶

Nonetheless, at least one court has taken an apparently secular claim seriously enough to apply the *Africa* test. In *Friedman v. Southern California Permanente Medical Group*, the plaintiff asserted a religion-based employment discrimination claim, alleging that he was denied employment due to his refusal to submit to a vaccination.²⁷⁷ Because the vaccine was grown in chicken embryos, the requirement violated his vegan beliefs, which the plaintiff claimed constituted a religion deserving of protection against employment discrimination.²⁷⁸ In applying the *Africa* test, the court noted that veganism consists of a single moral and ethical tenet wherein animal life is highly valued.²⁷⁹ While the plaintiff oriented his life and a wide range of choices (in food, clothing, products) around this philosophy, the court held that veganism itself is not comprehensive, does not address ultimate concerns, and has none of the formal signs typically associated with religion.²⁸⁰ Though deeply and

²⁷⁴ See, e.g., *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 520–21 (9th Cir. 1994) (evolutionism); *United States v. Allen*, 760 F.2d 447, 450 (2d Cir. 1985) (nuclearism); see also *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 79 (2d Cir. 2001) (holding that celebrating Earth Day does not amount to the worship of Earth or Gaia as a religion).

²⁷⁵ *Allen*, 760 F.2d at 451–52.

²⁷⁶ *Peloza*, 37 F.3d at 521 ("To say red is green or black is white does not make it so.").

²⁷⁷ 125 Cal. Rptr. 2d 663, 665–66 (Cal. Ct. App. 2002).

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 685.

²⁸⁰ *Id.* at 685–86.

sincerely held by the plaintiff, veganism amounts to “a personal philosophy,” rather than a religion.²⁸¹

The *Africa* test led the court to the correct decision in this case. Bona fide religions might require vegan diets, but veganism alone—unconnected to a religious belief system—is not understood colloquially as a religion. Analyzing this claim under the *Meyers* test would have resulted in the same conclusion and perhaps more readily than the *Africa* analysis. Veganism is not comprehensive, does not address ultimate ideas in a significant way, and lacks the “accoutrements of religion.” While it embraces particular ethical beliefs, its focus on the relationship between humans and animals does not amount to a moral or ethical system. Moreover, nothing in the record indicated that the plaintiff’s veganism included any notion of the spiritual or transcendent. Accordingly, *Meyers*’s “metaphysical belief” factor would provide an additional reason to reject veganism as a religion.

Factor tests certainly are not perfect line-drawing tools, but this Section illustrates that they do well to exclude sham religions and deeply held secular beliefs from religious protection. Through its “metaphysical beliefs” factor, *Meyers* highlights the importance of beliefs that are not rationally derived, and thus readily distinguishes deeply held secular beliefs. Moreover, even when questionable belief systems incorporate notions of the sacred, the test has enough flexibility that courts can distinguish sham claims.

IV. THE CASE FOR PROTECTING SBNR

The final Part of this Note assimilates the relevant case law and the sociological research to argue that SBNR is sufficiently analogous to recognized religions to warrant equivalent legal protection. The first Section articulates the affirmative case for inclusion. It argues that SBNR is neither a sham religion nor a set of deeply held secular beliefs; and it demonstrates that application of the *Meyers* test yields the conclusion that SBNR is a religion for purposes of the Religion Clauses.

Nonetheless, courts and scholars argue that including SBNR within the reach of the First Amendment conflicts with the underlying purposes of the Religion Clauses. The second Section discusses these objections and their misconceptions. The third Section identifies a tendency by lower courts to highlight the core characteristics of SBNR in dismissing

²⁸¹ Id. at 686.

other belief systems as nonreligious. This pattern is troubling because it portends future discrimination against SBNR and other nontraditional belief systems. The final Section hypothesizes a more subtle reason for the skepticism toward SBNR: the fact that it lacks a formal name.

A. The Affirmative Case

This Section makes the affirmative case for protecting SBNR by illustrating that such belief systems are neither shams nor deeply held secular beliefs, and that the *Meyers* test provides an adequate framework for reaching this conclusion. Contrary to the assertions of *Moore-King*, SBNR “comprises . . . a belief system parallel to that of God in a traditional religion.”²⁸²

1. Addressing the Line-Drawing Concern

As a preliminary matter, SBNR is clearly not a sham. It has deep historical roots, its adoption can be traced to broader cultural forces, and very few SBNR adherents bring legal claims.²⁸³ Since courts have not yet recognized SBNR as a religion, such belief systems cannot be used as vehicles for skirting the law. These characteristics lend legitimacy to SBNR and dispel any notion that opportunism is at play. Individuals might assert insincere claims, but this is true of any religion and does not speak to the validity of the belief system as a whole.

The more cogent concern is that SBNR amounts to a set of deeply held secular beliefs, like veganism. *Moore-King* embodies this contention in its conclusion that Psychic Sophie’s beliefs “more closely resemble personal and philosophical choices . . . not deep religious convictions.”²⁸⁴ This concern is mirrored in the scholarly literature, as part of a broader narrative about the secularization of society and of religion.²⁸⁵

²⁸² *Contra Moore-King v. Cty. of Chesterfield*, 819 F. Supp. 2d 604, 622–23 (E.D. Va. 2011) (invoking *Seeger*).

²⁸³ A survey of the case law found only three cases in which plaintiffs asserted something akin to an SBNR claim. See *Moore-King*, 708 F.3d 560; *Caviezel v. Great Neck Pub. Schs.*, 500 F. App’x. 16 (2d Cir. 2012); *Sherr v. Northport-East Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 92–94 (E.D.N.Y. 1987).

²⁸⁴ *Moore-King*, 708 F.3d at 571.

²⁸⁵ See, e.g., Huss, *supra* note 9, at 55–57; see also McNeil, *supra* note 192, at 1041–43, 1051–53 (describing how the postmodern view of individualism and subjective truth affect the understanding of religion and the Free Exercise Clause).

Discussing aspects of “New Age spirituality” in Britain, one researcher states:

In its original context, *feng shui* is a serious matter of relating to the spirits of the dead. In Britain, it is a decorating style. Yoga is no longer a spiritual discipline; it is an exercise program. Meditation is not about attaining enlightenment; it is about relaxing. And *ayur vedic* medicine is just another cosmetics line from the Body Shop chain.²⁸⁶

This point is well taken. Some people do not participate in natively spiritual activities like yoga and meditation with spiritual goals in mind.²⁸⁷ But this critique does not apply to SBNR believers as a group. Unlike some yoga or meditation practitioners, SBNR adherents do not engage with these or other practices from a secular standpoint. Many are “almost incurably metaphysical.”²⁸⁸ Psychic Sophie’s use of such practices and tools is so connected to the sacred that she considers herself a spiritual counselor. Her life is infused with spiritual meaning; she has simply created her own collage of beliefs, rituals, and practices to access it.

Thus, the secular objection represents a factual misunderstanding. SBNR certainly challenges the dichotomy between the religious and the secular.²⁸⁹ Rather than divide the world into two distinct realms, many SBNR individuals believe that spiritual energy underlies and transcends the physical world.²⁹⁰ Indeed, the trend toward SBNR might be seen as “the triumph of pantheism,” confirming Tocqueville’s prediction that “egalitarian culture . . . eventually fastens on pantheism, which teaches that everyone, without distinction, shares in the divine force that moves the universe.”²⁹¹ But challenging this dichotomy does not render SBNR secular.

²⁸⁶ Steve Bruce, *Secularization and the Impotence of Individualized Religion*, 8 *Hedgehog Rev.*, Spring & Summer 2006, at 35, 44.

²⁸⁷ Cf. *Sedlock v. Baird*, 185 Cal. Rptr. 3d 739, 753 (Cal. Ct. App. filed Apr. 3, 2015) (“We are similarly not persuaded by the Sedlocks’ contention that the fact that students in the District’s yoga program perform poses that *some* individuals perform for religious purposes demonstrates that the District’s yoga program is religious.”).

²⁸⁸ Fuller, *supra* note 9, at 76–77.

²⁸⁹ Cf. Huss, *supra* note 9, at 50–52 (describing how contemporary views of spirituality can incorporate the secular and corporeal/material realm).

²⁹⁰ Fuller, *supra* note 9, at 76–77.

²⁹¹ Movsesian, *supra* note 2, at 8 (citing Alexis de Tocqueville, *Democracy in America* 425–26 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1835)).

A distinction by Professor Gedicks illustrates this point well. Discussing what he calls “postmodern spirituality”—a concept similar to SBNR—he states: “[Postmodern spirituality] is about revelation of the immanent, rather than the transcendent. Whereas the focus of religion has historically been its revelation of the reality beyond the temporal self, spirituality is centered on uncovering the reality of that very self.”²⁹² To a critic, this characterization might support the idea that SBNR has a secular focus, but this is a misunderstanding. To a certain extent, SBNR seeks to uncover the reality of the temporal self; but turning inward also serves the purpose of connecting one with a deeper reality.²⁹³ In other words, rather than an either/or dichotomy, revelation of the transcendent occurs *through* revelation of the immanent.

Thus, the primary objection to according SBNR religious status—the contention that it is comprised of secular beliefs—is a misconception. Such belief systems “address a reality which transcends the physical and immediately apparent world”²⁹⁴ and are inherently metaphysical. Since SBNR is neither a sham religion nor a deeply held secular belief system, it satisfies the basic demands of the line-drawing task.

2. *Applying the Meyers Test*

Application of the *Meyers* test confirms this conclusion. The sociological literature presents strong evidence in support of most of the *Meyers* factors and illustrates that SBNR should be considered a religion for the purposes of the Religion Clauses.

First, the response to the secularity misconception above illustrates that SBNR satisfies the “metaphysical beliefs” factor of the test. Second, this metaphysical nature illustrates that SBNR involves “ultimate ideas”: Practitioners explore the “deep and imponderable matters” of both the temporal self and the transcendental reality beyond it. They use SBNR to derive meaning and direction in life, to understand their place in the universe, and to contemplate the meaning of life. Third, SBNR is “comprehensive,” permeating all aspects of life rather than focusing on a single tenet or practice.

Fourth, though largely accomplished on an individual level, each SBNR practitioner amasses a wide array of beliefs that likely amount to

²⁹² Gedicks, *Spirituality*, supra note 13, at 1219.

²⁹³ See supra text accompanying notes 176–78.

²⁹⁴ *Meyers*, 906 F. Supp. at 1502.

a “moral or ethical system.” As this Note has steered away from analysis of the substantive beliefs of SBNR, a thorough assessment of this factor is not possible here.²⁹⁵ Given that idiosyncratic versions of traditional religions are protected through the hands-off doctrine, however, the individual nature of SBNR moral systems should not cut against them under this factor.

The only factor that likely lacks support is the presence of the formal “accoutrements of religion.” Many SBNR adherents will be able to point to important writings, gathering places, and rituals; taken in aggregate, though, SBNR lacks official leadership, an organized structure, and other commonalities. However, even the complete absence of formal characteristics should not outweigh the strength of the other four factors; the *Meyers* court emphasized that no single factor is dispositive.²⁹⁶ In addition, the societal trend away from organized or institutional religion provides reason to drop formal characteristics from the analysis or at least use them only as a check against the possibility that a belief system is a sham. Under the *Meyers* analysis, then, SBNR is likely a religion.

B. Countering Purpose-Based Objections

Other objections to categorizing SBNR as a religion stem less from the line-drawing problem. Instead, they are grounded in a belief that some characteristic of SBNR renders its inclusion inconsistent with the purposes of the Religion Clauses. This Section addresses two such purpose-based objections: that SBNR does not involve a duty to alternate sovereigns and that SBNR fails to instill community values through communal worship. It also highlights that protecting SBNR is consistent with the dominant purposes of the Religion Clauses.

1. Avoiding Conflict Between Alternate Sovereigns

One of the primary purposes of the Free Exercise Clause is to alleviate the conflict that arises “between earthly and spiritual sovereigns.”²⁹⁷ When a law clashes with a religious belief, the Framers believed that the duty to the spiritual sovereign trumps the duty to manmade law²⁹⁸: “[T]he obligations entailed by religion transcend the individual and are

²⁹⁵ Indeed, the hands-off doctrine allows courts to proceed only so far into this inquiry.

²⁹⁶ See *Meyers*, 906 F. Supp. at 1503.

²⁹⁷ McConnell, *supra* note 47, at 1496, 1512.

²⁹⁸ *Id.* at 1497.

outside the individual's control."²⁹⁹ On this logic, religious protection does not encompass secular claims of conscience, because such duties are not derived from an alternate sovereign; their source is the self. One scholar has levied the same logic against postmodern forms of religion, like SBNR:

[Postmodernity] requires that individuals choose their own religions, contradicting the Modern view that individuals were duty bound to comply with the mandates of God Religion as viewed by Post-modernism, rather than being a part of the search for truth, becomes just another expression of individual belief entitled to no more protection than any other secularized expression of belief.³⁰⁰

The implication here is that SBNR does not meet the purpose of religious protection, because such believers do not experience a duty to alternate sovereigns. Since SBNR involves individual choice, its adherents can simply pick and choose beliefs that do not conflict with the law.

A similar notion has been expressed by courts. In one of the only cases that appears to involve an SBNR claim, the court in *Caviezel v. Great Neck Public Schools* held that the parents' opposition to vaccinating their child was not religious in nature.³⁰¹ The opinion reproduces an unusual amount of the mother's testimony, wherein she states that she is not a member of any formal religious group and describes her spiritual beliefs in a way that resonates strongly with the SBNR literature.³⁰² The court, however, noted that the mother gave several nonreligious reasons for opposing vaccinations: a concern about injecting disease into the body, a reluctance to place unnecessary marks on the body, and a fear that the vaccination would cause autism.³⁰³

When cross-examined during trial about the secular nature of these reasons, the mother affirmed that her belief was spiritual: "[O]ne day I read an article about, yes, you should immunize; and then the next day I read an article about, no, you shouldn't immunize. Ultimately, all I can go back to is if I believe in that [sic] we are divine in our design, im-

²⁹⁹ Id.

³⁰⁰ McNeil, *supra* note 192, at 1042–43 (emphasis added).

³⁰¹ 701 F. Supp. 2d 414, 429 (E.D.N.Y. 2010), *aff'd*, 500 F. App'x. 16 (2d Cir. 2012).

³⁰² Id. at 417–20. For example, when pressed by the court for a label, she says: "If I were to explain my religion, I probably would say I'm a Pantheist," and describes pantheism as "you see God in everything." Id. at 418.

³⁰³ Id. at 429–30.

munizations are not necessary.”³⁰⁴ In dismissing the anti-vaccination belief as nonreligious, the court essentially collapsed the plaintiffs’ spiritual views into other health-related concerns. In one sense, the court’s reasoning is a form of the secularity concern: SBNR beliefs are secular, or health-related, not religious.³⁰⁵ But another interpretation is that because the plaintiffs’ opposition to vaccination was health-related, it was not mandated by an alternate sovereign and thus did not involve conflicting duties.³⁰⁶

Moore-King can be read as expressing a similar idea: Since Psychic Sophie picks and chooses her spiritual beliefs and practices, she does not experience a duty to alternate sovereigns. The court states that she “must offer some organizing principle or authority *other than herself that prescribes* her religious convictions.”³⁰⁷ The fact that her “inner flow” guides her choices is problematic for the court,³⁰⁸ yet the opinion fails to explain why. It relies on the “organized group” language of *Wisconsin v. Yoder*, the problems with which have been discussed.³⁰⁹ But the leap from *Yoder* to the need for an external authority is conclusory rather than supported with justifications.³¹⁰ Perhaps the unexpressed claim is that Psychic Sophie was not duty-bound to comply with an alternate sovereign; the source of her beliefs was herself rather than a higher power.

Note first that the appeal to an external authority conflicts with the doctrinal requirement that nontheistic belief systems be accorded religious protection.³¹¹ If a belief in God is no longer a prerequisite for religious status, how can courts require that an external authority prescribe one’s beliefs?

More broadly, however, the idea that SBNR fails to engender a conflict between alternate sovereigns misunderstands its nature. As previously discussed, SBNR does not yield a “freewheeling, anything goes”

³⁰⁴ Id. at 422.

³⁰⁵ There is some indication that the court doubted the sincerity of the plaintiffs’ spiritual belief, pointing out that the mother vaccinated her three older children and pierced the non-vaccinated child’s ears. Id. at 430. Nonetheless, the actual holding rests on a characterization of her desire not to vaccinate as “more in the nature of a secular philosophy rather than a religious belief.” Id.

³⁰⁶ See id. at 427–29.

³⁰⁷ *Moore-King*, 708 F.3d at 571 (emphasis added).

³⁰⁸ Id.

³⁰⁹ See supra text accompanying notes 202–04.

³¹⁰ See *Moore-King*, 708 F.3d at 571–72.

³¹¹ See supra text accompanying notes 52–53.

philosophy motivated by self-interest; and the fact that SBNR individuals turn inward to form an eclectic system of beliefs does not dilute their duty to cultivate and adhere to their spiritual values.³¹² Turning inward simply allows access to a deeper spiritual force. Rather than fruits of one's conscience, then, SBNR beliefs and practices are divined from spiritual knowledge and experience. In this sense, SBNR can certainly produce a "conflict between earthly and *spiritual* sovereigns."³¹³ Contrary to *Caviezel*, an overlap with secular concerns does not negate the spiritual duty to comply with them. In fact, that quality renders them just like the beliefs of recognized religions.³¹⁴

2. *The Importance of Communal Worship*

Another objection levied at SBNR is based on a different purported purpose of religious protection. Professor Mark Movsesian argues that one of the core aspects of religion is its traditionally communal form.³¹⁵ Throughout history, people have worshiped in groups; and because SBNR practitioners are "quintessential religious loners," granting them religious protection would render the legal definition of religion inconsistent with our colloquial understanding.³¹⁶ In addition, doing so "would fail to capture [the] benefits" that religious groups provide the liberal state.³¹⁷ Voluntary associations are important because they instill values that balance the radical individualism at the heart of liberal democracy.³¹⁸ They "encourage people to look beyond themselves and see one another as laborers in a common cause, . . . teach the habits of reciprocity and fellowship, . . . [and] mitigate the tyranny of the majority."³¹⁹ Similar to the discussion of "Sheilaism" above, Movsesian's concern is that SBNR perpetuates social isolation.

³¹² See *supra* text accompanying notes 166–170, 176–80.

³¹³ See McConnell, *supra* note 47, at 1496 (emphasis added).

³¹⁴ For example, courts have protected the religious beliefs of conscientious objectors to the military draft, see, e.g., *United States v. Seeger*, 380 U.S. 163, 166 (1965), even though these plaintiffs undoubtedly feared death alongside holding a belief in pacifism. Likewise, the *Caviezel* plaintiff's fear of autism should not negate her spiritual belief in the divine design of each human body.

³¹⁵ Movsesian, *supra* note 2, at 12–15.

³¹⁶ *Id.* at 12–14.

³¹⁷ *Id.* at 14.

³¹⁸ Tocqueville, *supra* note 289, at 482–84.

³¹⁹ Movsesian, *supra* note 2, at 14.

This argument, however, embodies several mistakes. First, from a factual standpoint, SBNR is not inherently solitary.³²⁰ While it is certainly true that some SBNR believers do not practice with others, this is also true of some members of organized religions. The law lacks a requirement that Jews, Christians, or other recognized believers prove that they worship communally in order to receive religious protection. A different standard should not apply to SBNR.

Second, it is not clear that communal worship is necessary to instill communal values. Reciprocity, fellowship, and the other values Movsesian mentions can arise from spiritual understanding, regardless of whether one's spiritual practices take place alone or with others. Moreover, Religion Clause jurisprudence evinces a tendency to evolve with our colloquial understanding of religion.³²¹ The fact that communal worship was historically prevalent does not mean it must remain so. If *Yoder* requires that religious status be reserved only for organized groups, this aspect of the decision should be clarified or overturned. Just as the Court has rejected monotheism as a defining feature of religion and now includes even nontheistic belief systems,³²² legal doctrine can and should evolve such that communal worship is not a prerequisite for legal protection.

Finally, Professor Movsesian's community-building rationale is based on Tocqueville's theory about the social benefits that religion provides the liberal state.³²³ While these benefits speak to the importance of fostering community, Movsesian notes that several other purposes are traditionally ascribed to the Religion Clauses: state neutrality, nondiscrimination against minorities, and preventing harm to individual believers.³²⁴ Moreover, as Movsesian concedes, each of these purposes counsels in favor of *including* SBNR.³²⁵ So too does the objective to avoid forcing believers into a conflict between alternative sovereigns.³²⁶ Thus, the factually questionable allegation that SBNR fails to foster community should not outweigh the fact that its protection is consistent with the dominant purposes of the Religion Clauses.

³²⁰ See *supra* text accompanying notes 179–83.

³²¹ See *supra* Subsection I.B.1.

³²² See text accompanying *supra* note 53.

³²³ Movsesian, *supra* note 2, at 13–14.

³²⁴ *Id.* at 10–12.

³²⁵ *Id.*; see also *supra* text accompanying notes 28–30.

³²⁶ See *supra* Subsection IV.B.1.

C. Skepticism of the Characteristics of SBNR

Although few cases have dealt with SBNR, a troubling pattern emerges from cases that examine other novel belief systems, those that do not appear to be SBNR but whose religious status is also unclear. In dismissing such belief systems as nonreligious, courts often highlight the very characteristics that the sociological literature identifies as constitutive of SBNR: eclecticism, inward focus, and non-exclusivity.³²⁷ This pattern displays a fundamental skepticism toward SBNR and suggests that, like *Moore-King*, other courts will exclude SBNR claims from religious protection.

In finding that Psychic Sophie's beliefs were not religious, the district court in *Moore-King* expressly appealed to the eclecticism of Psychic Sophie's beliefs³²⁸ and the Fourth Circuit appealed to their inward nature.³²⁹ But *Moore-King* is not an anomaly in this regard. One court dismissed anthroposophy—the spiritual philosophy that gave rise to Waldorf schools—as nonreligious, partly because the practice encourages people to personally seek answers to questions of ultimate concern instead of supplying a dogma.³³⁰ And several cases involving prisoner claims exhibit similar reasoning. For example, concerned with a lack of uniformity within the United Church of St. Dennis, one court stated: “Self-determination of one's beliefs on an individual basis can scarcely be considered a religion.”³³¹ Another held that the Spiritual Order of Universal Beings is not a religion because its “self-defining approach” allows members to “pick and choose” their beliefs.³³² Multiple courts, then, have relied on the fact that belief systems are eclectic and inwardly focused—two of the primary characteristics of SBNR—to find those belief systems nonreligious.

³²⁷ See *supra* Section II.C.

³²⁸ *Moore-King v. Cty. of Chesterfield*, 819 F. Supp. 2d 604, 622–23 (E.D. Va. 2011) (“Such a panoramic potpourri of spiritual and secular interests does not appear to add up to a religion . . . This eclectic mix comprises an overall lifestyle, not a belief system parallel to that of God in a traditional religion.”).

³²⁹ See *Moore-King*, 708 F.3d at 571–72 (stating that Psychic Sophie “must offer some organizing principle or authority *other than herself* that prescribes her religious convictions”).

³³⁰ *PLANS, Inc. v. Sacramento City Unified Sch. Dist.*, 752 F. Supp. 2d 1136, 1144 (E.D. Cal. 2010).

³³¹ *Jacques v. Hilton*, 569 F. Supp 730, 734 (D.N.J. 1983).

³³² *Johnson v. Pa. Bureau of Corr.*, 661 F. Supp. 425, 437 (W.D. Pa. 1987) (quoting *Africa v. Pennsylvania*, 662 F.2d 1025, 1035 (3d Cir. 1981)).

Courts have also displayed skepticism when belief systems are non-exclusive, another core characteristic of SBNR. The only case to decide whether New Age is a religion, for example, held that the plaintiffs were not entitled to relief, in part, because adherents did not have to let go of other religious beliefs.³³³ “In other words,” stated the court, “anyone’s in and ‘anything goes.’”³³⁴ Similarly, the court that rejected anthroposophy was heavily swayed by the fact that the belief system allowed members to celebrate other religious holidays.³³⁵ Declining to find an Establishment Clause violation, it characterized anthroposophy as a “method of learning which is available to anyone regardless of their religious or philosophical persuasion.”³³⁶

The nonexclusivity objection has been raised in the prisoner context as well. One case noted that “a common belief in the worth of all beliefs, while certainly an admirable philosophy, cannot be said to provide a common spiritual ground.”³³⁷ Similarly, the court in one of the marijuana cases considered testimony that the belief system was “a ‘companion’ to the individual faith structures of each member” to buttress the conclusion that the church was insufficiently comprehensive to constitute a religion.³³⁸ Operating in the other direction, but on point here, one of the few cases to grant religious status to a belief system that exists almost solely in prisons did so largely on the testimony that the belief system is incongruous with other religions.³³⁹ Thus, courts fault non-SBNR belief systems for allowing membership in, or accepting parts of, other religions.

Skepticism of SBNR’s core characteristics reflects an anxiety about nontraditional belief systems. Courts view looking inward, picking and choosing one’s beliefs, and allowing adherence to other religions as exercises in self-interest in the guise of religion.³⁴⁰ This Note has already addressed the misconceptions of SBNR at the heart of this view. But

³³³ *Alvarado v. City of San Jose*, 94 F.3d 1223, 1230 (9th Cir. 1996).

³³⁴ *Id.*

³³⁵ *PLANS*, 752 F. Supp. 2d at 1144–45.

³³⁶ *Id.* at 1142.

³³⁷ *Jacques v. Hilton*, 569 F. Supp 730, 735 (D.N.J. 1983).

³³⁸ *State v. Cordingley*, 302 P.3d 730, 741 (Idaho Ct. App. 2013).

³³⁹ *Marria v. Broaddus*, No. 97 Civ.8297 NRB, 2003 WL 21782633, at *11 (S.D.N.Y. July 31, 2003).

³⁴⁰ See, e.g., *Theriat v. Silber*, 391 F. Supp. 578, 582 (W.D. Tex. 1975), vacated, 547 F.2d 1279 (5th Cir. 1977) (holding that the Church of the New Song is not a religion, in part because it “appears to encourage a . . . do-as-you-please philosophy”).

whether or not the aforementioned non-SBNR claims were rightly decided, this skepticism is additionally troubling because it also forebodes the possibility of further discrimination against nontraditional believers of all stripes.³⁴¹ If SBNR should be included within the fold of the Religion Clauses, its core characteristics should not be used to delegitimize other belief systems. That courts look skeptically upon these characteristics underscores the importance of adopting a systematized test for religion that highlights the functional and structural qualities of religious belief systems. In the absence of such a test, courts will continue to appeal to features of belief systems that do not bear on their religious nature, risking the possibility of additional discrimination.

*D. “What’s in a Name?”*³⁴²

As a final consideration, it is difficult to shake the sense that the *Moore-King* court is dubious of Psychic Sophie’s beliefs merely because they lack an identifiable name. Her list of spiritual sources is classic of SBNR; she mentions the New Age movement, and she even claims that she draws inspiration from the teachings of Jesus.³⁴³ If she had stated that she was a Christian and *also* drew inspiration from astrology, Tarot, and dancing, the hands-off doctrine would essentially require that her beliefs be designated as religious.³⁴⁴

Indeed, Wicca and other neo-pagan religions involve a “conglomeration” of beliefs and practices³⁴⁵ and overlap considerably with Psychic Sophie’s. But because these claimants assert a familiar name with their beliefs, rather than merely listing the varied sources, courts often recognize these belief systems as religious.³⁴⁶ Courts give even more defer-

³⁴¹ Pointing this out is not meant to argue that these other belief systems should be considered religions. It is meant to highlight the themes at the core of this Note.

³⁴² William Shakespeare, *Romeo and Juliet*, act 2, sc. 2, line 43, in *The Tragedies of William Shakespeare* 319 (Oxford Univ. Press 1912).

³⁴³ See *supra* note 22 and accompanying text.

³⁴⁴ See *supra* Subsection I.C.2.

³⁴⁵ See *supra* note 207 and accompanying text.

³⁴⁶ See, e.g., *Dettmer v. Landon*, 799 F.2d 929, 932 (4th Cir. 1986); *Maetrem of Cybele, Magna Mater, Inc. v. McCoy*, 975 N.Y.S.2d 251, 252, 254 (N.Y. App. Div. 2013); see also *Cutter v. Wilkinson*, 544 U.S. 709, 712–14 (2005) (recognizing Free Exercise claims of petitioners that included Satanists and Wiccans); *Kay v. Bemis*, 500 F.3d 1214, 1218–20 (10th Cir. 2007) (recognizing claims of an adherent of Wicca who sought to use tarot cards and incense in prison); *O’Bryan v. Bureau of Prisons*, 349 F.3d 399, 400–01 (7th Cir. 2003) (discussing and recognizing Wicca as a polytheistic faith); *Rouser v. White*, 630 F. Supp. 2d

ence (though arguably for different reasons) to the broad category of spiritual beliefs embraced by different Native American tribes, labeling them “Native American spirituality” without inquiry into their particular beliefs or organizational structures.³⁴⁷

Similarly, SBNR substantially overlaps with “New Age spirituality” and is sometimes considered synonymous with it.³⁴⁸ A few courts have suggested in passing that New Age might be a religion. One case mentioned “New Age religions” in a footnote discussing the religious nature of particular symbols.³⁴⁹ Another court noted that the government introduced evidence pertaining to “modern ‘eclectic’ approaches to religion . . . often identified as ‘New Age,’”³⁵⁰ suggesting that the government (and perhaps the court) considered New Age an “approach to religion” if not a religion in itself.³⁵¹ Even the Supreme Court expressed that the inclusion of “a New Age religious group” was “particularly interesting and relevant to the issue” of whether a school district had opened its property to religious use.³⁵² Given the overlap between New Age and SBNR, the fact that courts are amenable to considering New Age a religion suggests that SBNR is resisted largely because it lacks an identifiable name.

Moreover, non-SBNR parties to lawsuits have characterized certain nontraditional belief systems as religions by calling them “New Age.” Several Title VII cases have implicated “New Age” belief systems as conflicting with a party’s Christian religion.³⁵³ And plaintiffs have as-

1165, 1172–73 (E.D. Cal. 2009) (discussing and impliedly recognizing the plaintiff’s Wiccan faith).

³⁴⁷ See supra note 17.

³⁴⁸ See supra notes 139–40 and accompanying text.

³⁴⁹ *Sumnum v. City of Ogden*, 297 F.3d 995, 997–98, 998 n.1 (10th Cir. 2002).

³⁵⁰ *United States v. Wilgus*, 638 F.3d 1274, 1282 (10th Cir. 2011) (“The government also put forward evidence that modern ‘eclectic’ approaches to religion have led many adherents to adopt aspects of Native American religion into a broader patois of spiritual beliefs, often identified as ‘New Age.’”).

³⁵¹ Professor Laycock’s answer to the definitional task would equate “any answer to religious questions” with “religion,” for constitutional purposes. See Laycock, supra note 36.

³⁵² *Lamb’s Chapel v. Cent. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 391 n.5 (1993).

³⁵³ Some of these cases involve Christian plaintiffs who allege that New Age beliefs conflict with their religion. See, e.g., *Beasley v. Health Care Serv. Corp.*, 940 F.2d 1085, 1086–88 (7th Cir. 1991); *Hiatt v. Walker Chevrolet Co.*, 837 P.2d 618, 619–20 (Wash. 1992); see also *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 605 (9th Cir. 2004) (involving a discrimination claim that does not allege a conflict with a New Age belief, but wherein plaintiff defends his failure to remove homophobic scriptural passages from his cubical by mentioning another employee’s “New Age pictures of whales”). Others involve claims that an em-

served Establishment Clause violations for both an Earth Day program that allegedly promoted “New Age spirituality”³⁵⁴ and a statue that allegedly represented “New Age” beliefs.³⁵⁵ While these claims were dismissed, they indicate that people perceive the underlying belief systems as religions and assert legal claims by calling them “New Age.”

Psychic Sophie, by contrast, pointed to the New Age movement as a source of her beliefs but did not label her beliefs “New Age.” Given SBNR individuals’ distaste for labels and other institutional characteristics, this is no surprise. But religious protection should not “turn on mere semantic distinctions.”³⁵⁶ To paraphrase Shakespeare, what—really—is in a name?³⁵⁷ For courts, a name serves as a signal. It legitimizes the belief system by marking it as an identifiable thing, embraced by the individual and shared by others. But names are often chosen, and as the marijuana cases show, they can be counterfeit.³⁵⁸ Here, Psychic Sophie’s beliefs “smell as sweet”³⁵⁹ as other religions recognized by the courts. If courts need a name, they have one: “spiritual but not religious.”

CONCLUSION

The foregoing discussion illustrates several problems with current Religion Clause doctrine. The vague and confusing guidance provided by the Supreme Court yields different approaches to defining religion. Such fundamental, conceptual questions should not vary across (or within) jurisdictions. In addition, more recent doctrine has created a high accommodations, hands-off regime, which lends considerable purchase to the categorization of belief systems as religious or nonreligious. Moreover,

ployer perceives the plaintiff’s beliefs as New Age. See, e.g., *Cowan v. Strafford R-VI Sch. Dist.*, 140 F.3d 1153, 1156, 1158 (8th Cir. 1998) (finding that there was sufficient evidence from which the jury could conclude that the school principal was motivated by religious concerns about the dissemination of New Ageism in firing a teacher for encouraging magical thinking through a letter about a magic rock); *EEOC v. Preferred Mgmt. Corp.*, 216 F. Supp. 2d 763, 793 (S.D. Ind. 2002) (discussing claim that an employer characterized the employee-plaintiff’s beliefs as “new age thinking” and prohibited their expression at work).

³⁵⁴ *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 56, 77 (2d Cir. 2001) (quoting Amended and Supplemental Complaint ¶ 18(a), *Altman v. Bedford Cent. Sch. Dist.*, 45 F. Supp. 2d 368 (S.D.N.Y. 1999) (No. 63)) (internal quotation marks omitted).

³⁵⁵ *Alvarado v. City of San Jose*, 94 F.3d 1223, 1226 (9th Cir. 1996).

³⁵⁶ *Marria v. Broaddus*, No. 97 Civ.8297 NRB, 2003 WL 21782633, at *11 (S.D.N.Y. July 31, 2003).

³⁵⁷ See Shakespeare, *supra* note 342, at line 43.

³⁵⁸ See *supra* notes 267–68 and accompanying text.

³⁵⁹ See Shakespeare, *supra* note 342, at line 44.

the doctrine is operating in a way that is underinclusive. It adequately blocks sham religions and deeply held secular belief systems, but it incorrectly excludes SBNR from legal protection.

Religion Clause doctrine could certainly be altered to rectify this exclusionary issue. But this Note makes a much narrower argument. Assuming that courts and legislatures want to continue to operate within the current doctrinal landscape, the doctrine must be applied both consistently and in a way that minimizes bias against nontraditional religious and spiritual belief systems. Psychic Sophie's beliefs are emblematic of a growing trend in American culture that is sufficiently comparable to traditional religion to deserve the same protection. Indeed, understanding religion and spirituality as distinct concepts is relatively recent. While the text of the First Amendment references "religion," it might well signify an intention to protect the underlying spiritual connection, not merely the institutional aspects of religion. This interpretation finds support in the Supreme Court's focus on the functional role of a given belief system and in the purpose of the Free Exercise Clause to prevent conflicts between alternate sovereigns. To avoid the exclusionary problem and the spiritual harm it generates, courts must refrain from faulting spiritual belief systems for being highly individualized or otherwise lacking the characteristics of organized religion. Instead, they should adopt the factor test of *Meyers* and incorporate SBNR into the protection of the First Amendment.