

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

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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 of quite different positions on religious belief: Among other differences, slightly less than one-third identify as atheist or agnostic,⁵ 18% consider

¹ PEW RESEARCH CTR., “NONES” ON THE RISE 9–10 (2012), <http://www.pewforum.org/files/2012/10/NonesOnTheRise-full.pdf>.

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> (last updated Jan. 14, 2013). 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 (2015), http://www.pewforum.org/files/2015/11/201.11.03_RLS_II_full_report.pdf.

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: 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 (2015), <http://www.pewforum.org/files/2015/05/RLS-08-26-full-report.pdf> (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).

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, 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. 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 this category—“spiritual but not religious” belief systems (“SBNR”)⁸—constitutes a “religion” for purposes of legal protection, and legal scholars have largely overlooked it.

This omission becomes clear through an understanding of how the law treats different types of belief systems. Prototypical religions, like Christianity, receive broad protection regardless of whether they embrace 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.”⁹ 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 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,”¹⁰ and for purely secular claims of conscience.¹¹ Courts, too, have skipped over SBNR, according legal protection to belief systems that are arguably

⁶ PEW RESEARCH CTR., *supra* note 1, at 22.

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 One of the first uses of this acronym and first attempts at studying the 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”).

⁹ *Dettmer v. Landon*, 799 F.2d 929, 932 (4th Cir. 1986) (citing *Thomas v. Review Bd.*, 450 U.S. 707, 715–16 (1981)).

¹⁰ *See, e.g.*, Nelson Tebbe, *Nonbelievers*, 97 VA. L. REV. 1111, 1116, 1127–40 (2011).

¹¹ *See, e.g.*, Micah Schwartzman, *What If Religion is Not Special?*, 79 U. CHI. L. REV. 1351, 1355 (2012).

less religious. One court held that a petitioner’s beliefs were religious simply because he derived them from the Old Testament, even though they were not associated with any particular religion.¹² Similarly, the U.S. Supreme Court granted protection to a self-avowed nonreligious petitioner who was a conscientious objector to the military draft.¹³ And atheists have succeeded on Free Exercise and Establishment Clause claims.¹⁴ 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.¹⁵

The only federal appellate case involving an SBNR-like 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.¹⁶ 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.¹⁷ 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.¹⁸

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.”¹⁹ 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 . . . ”

¹² *Love v. Reed*, 216 F.3d 682, 687–88 (8th Cir. 2000).

¹³ *Welsh v. United States*, 398 U.S. 333, 335, 337 (1970).

¹⁴ *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).

¹⁵ *See, e.g., Morrison v. Garrahy*, 239 F.3d 648, 656–57 (4th Cir. 2001).

¹⁶ 708 F.3d 560, 564, 571 (4th Cir. 2013) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972)). 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).

¹⁷ *Moore-King v. Cty. of Chesterfield*, 708 F.3d 560, 563–64 (4th Cir. 2013).

¹⁸ *Id.* at 570 (citing 42 U.S.C. § 2000cc(a)(1) (2012)).

¹⁹ *Id.* at 564 (alteration in original) (quoting the plaintiff’s website and an affidavit she submitted to the district court).

[as well as] a strong belief in the “words and teachings of Jesus” . . . and a belief in “the New Age [spiritual] movement.”²⁰

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.”²¹ The Fourth Circuit affirmed, stating that there must be “some organizing principle or authority other than herself.”²² Moreover, the Fourth Circuit’s analysis is unusually clipped, evaluating the religious status of Psychic Sophie’s beliefs in a mere two pages²³ and ignoring its own relevant precedent on the topic.²⁴

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—experience a kind of “social subordination.”²⁵ This experience is matched, or perhaps even surpassed, by SBNR individuals, who embrace spirituality as an important part of their lives but are nonetheless rejected by the dominant religious majority. Through this exclusion, SBNR believers are denied the relief from spiritual harm that the Free Exercise Clause is meant to offer.²⁶

This reality 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.²⁷ 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 had on unpopular or emerging religious groups”²⁸ To the extent that current doctrine ignores this growing minority, it risks undermining religious protection writ large.

²⁰ *Id.* (quoting *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) and Joint Appendix 201).

²¹ *Moore-King*, 819 F. Supp. 2d at 622–23.

²² *See Moore-King*, 708 F.3d at 571.

²³ *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).

²⁴ *See Dettmer v. Landon*, 799 F.2d 929, 932 (4th Cir. 1986) (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”). The “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.” 708 F.3d at 564, 571.

²⁵ Tebbe, *supra* note 10, at 1117–22; *see also* *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.”). Pagan believers face a similar subordination. 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).

²⁶ *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”).

²⁷ *See* Christopher L. Eisgruber & Lawrence G. Sager, *Does It Matter What Religion Is?*, 84 NOTRE DAME L. REV. 807, 826–30 (2009); Tebbe, *supra* note 10, at 1122; Stewart, *supra* note 25, at 156.

²⁸ *Emp’t Div. v. Smith*, 494 U.S. 872, 902 (1990) (O’Connor, J., concurring in the judgment).

This Note uses *Moore-King* as a vehicle for highlighting this exclusionary problem. It argues that falling outside of organized religion should not render a spiritual belief system beyond the reach of the Religion Clauses. Part I begins by articulating how legal scholars and the Supreme Court have approached defining religion. The *Moore-King* court's narrow understanding can be traced in part to the ontological and 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, these belief systems share common characteristics and are a natural outgrowth of postmodern culture. It is unclear from the court opinions whether Psychic Sophie embraces this label, but because she embodies the characteristics of this group, this Note will treat her as an exemplar, regardless of whether she identifies as such.

Part III makes the case for including SBNR within the fold of religious protection. It argues that SBNR meets the demands of the line-drawing exercise at the core of the definitional task. Moreover, the objections offered by courts and commentators exhibit misunderstandings of either SBNR beliefs or the purposes of religious protection.

I. DEFINING RELIGION IN THE LAW

Operationalizing a legal definition of religion is difficult. Not only should a definition track people's colloquial understanding of religion,²⁹ but it must also be susceptible to legal analysis. This Part examines legal approaches to defining religion, looking in particular at academic proposals and Supreme Court doctrine. It also discusses how 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.³⁰ Concepts, especially those as "fuzzy" as religion, can rarely be distilled to a dictionary-style set of necessary and sufficient conditions.³¹ Indeed, numerous "essentialist" proposals have been offered, all of which are either over- or under-inclusive.³²

The search for an operational definition has produced two alternatives to essentialist proposals. Functional approaches define religion accord-

²⁹ See *infra* text accompanying notes 88–92.

³⁰ See, e.g., 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).

³¹ *Id.*; Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753, 753–54 (1984); Eduardo Peñalver, Note, *The Concept of Religion*, 107 YALE L.J. 791, 814 (1997); cf. Brian J. Zinnbauer et al., *Religion and Spirituality: Unfuzzifying the Fuzzy*, 36 J. SCI. STUDY OF RELIGION 549, 549 (1997).

³² For a discussion and critique of essentialist approaches, see KENT GREENAWALT, 1 RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 129–49 (2006).

ing 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.³³ Current Supreme Court jurisprudence largely embodies a functional definition,³⁴ and many lower court decisions have incorporated the "ultimate concern" concept into their tests for religion.³⁵ Nonetheless, purely functional approaches are inexorably ambiguous. They merely relocate 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?³⁶ Another alternative is the analogic approach, whereby the belief system in question is compared to other belief systems already deemed "religions."³⁷ 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.³⁸

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.³⁹ 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,"⁴⁰ and the straightforward evidence that the Founders considered and rejected a conscience clause⁴¹ render such a broad approach out of reach.

Whatever the failings of the definitional task, then, the First Amendment currently necessitates a means by which to identify belief systems as religions. It marks "religion" as a category deserving of constitutional protection, and thus requires courts to make distinctions between religious and nonreligious claims.

³³ See Paul Tillich, *Religion as a Dimension in Man's Spiritual Life*, in THEOLOGY OF CULTURE 3, 7–8 (Robert C. Kimball ed., 1964).

³⁴ See, e.g., *United States v. Seeger*, 380 U.S. 163, 165–66 (1965).

³⁵ 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. See *Seeger*, 380 U.S. at 187.

³⁶ For a full discussion, see Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. Ill. L. Rev. 579, 594–97 (1982).

³⁷ Freeman, *supra* note 30, at 1529–30; Greenawalt, *supra* note 31, at 762–67; Peñalver, *supra* note 31, at 814–16.

³⁸ Peñalver, *supra* note 31, at 815–18.

³⁹ See BRIAN LEITER, *WHY TOLERATE RELIGION?* 26–53 (2013); Micah Schwartzman, *Religion as Legal Proxy*, 51 SAN DIEGO L. REV. 1085, 1087 (2014); Schwartzman, *supra* note 11, at 1355.

⁴⁰ 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 11, at 1352–53.

⁴¹ See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1488–1500 (1990).

B. Supreme Court Jurisprudence

The ontological problem described above is evident in the Supreme Court's jurisprudence on religion. The Court has yet to adopt a clear test or definition. Instead, its cases embody vague or inconsistent notions of what "religion" means, and reflect an evolving understanding.

In its first encounter with the Free Exercise Clause,⁴² the Supreme Court adopted a theistic definition of religion and embraced it until the middle of the twentieth century.⁴³ Pointing to Buddhism, Taoism, and Secular Humanism, *Torcaso v. Watkins* expressly expanded the Court's definition to include nontheistic belief systems, holding that the state cannot treat religions based on a belief in God differently than religions that do not embrace a belief in God.⁴⁴ 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."⁴⁵ Again, the Court retreated from an understanding that hinged 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."⁴⁶ Courts must determine whether the belief is religious in the petitioner's "own scheme of things,"⁴⁷ and thus, 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 later affirmed and expanded in another conscientious objector case, *Welsh v. United States*,⁴⁸ which some commentators interpret as broadening the legal definition of religion to encompass a duty of conscience.⁴⁹

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.⁵⁰ In *Wisconsin v. Yoder*, the Court decided that the State's compulsory education law violated the sincerely held beliefs of

⁴² *Reynolds v. United States*, 98 U.S. 145, 161 (1878).

⁴³ *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961).

⁴⁴ *Id.* at 495 n.11.

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

⁴⁶ *Id.* at 166.

⁴⁷ *Id.* at 185.

⁴⁸ 398 U.S. 333, 335 (1970) (holding that the petitioner's strongly held *moral* beliefs entitled him to the exemption).

⁴⁹ See Kent Greenawalt, *The Significance of Conscience*, 47 SAN DIEGO L. REV. 901, 910 (2010).

⁵⁰ See *Malnak v. Yogi*, 592 F.2d 197, 204 (3d Cir. 1979) (Adams, J., concurring in the judgment); Peñalver, *supra* note 31, 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*).

the Amish petitioners and that those beliefs were indeed religious.⁵¹ Retreating from a broad duty of conscience, the opinion attempted to differentiate between deeply-held beliefs that are “purely secular” and those that are “rooted in religious belief.”⁵² 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; and contrasted this with the idea that the “deep religious conviction” of the Amish is “shared by an organized group.”⁵³

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.⁵⁴ Some commentators understand *Yoder* to be a clarification of *Welsh* and *Seeger*, attempting to limit their reach without overruling them.⁵⁵ Others point out that *Welsh* and *Seeger* deal with the statutory interpretation of Congress’s draft bill, rather than a constitutional question.⁵⁶ 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 additional meaning 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.”⁵⁷ But the Court uses this phrase throughout its opinion to refer to both a secular “way of life” and the deeply religious “way of life” of the Amish.⁵⁸ 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.⁵⁹ 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

⁵¹ 406 U.S. at 216, 219.

⁵² *Id.* at 215.

⁵³ *Id.* at 216.

⁵⁴ 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.

⁵⁵ See *supra* note 50.

⁵⁶ 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.*

⁵⁷ See, e.g., *Moore-King*, 708 F.3d at 563–64.

⁵⁸ *Yoder*, 406 U.S. at 215–18.

⁵⁹ See Freeman, *supra* note 30, at 1559–60.

defining concepts.⁶⁰ *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.⁶¹ 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 spiritual members of traditional religions—he removed himself from society.⁶² In fact, Thoreau is considered by some to be an early adherent of SBNR beliefs.⁶³ The *Yoder* Court's failed analogy, then, might have teed up lower courts for exactly the problem that this Note identifies.

In sum, current doctrine on defining religion elides jurisprudential clarity. As illustrated in *Moore-King*, this murkiness leaves substantial room for judicial bias, as courts are apt to use Western religions and their most identifiable characteristics as comparison points, skewing legal analysis toward traditional notions.⁶⁴

C. Why Defining Religion Matters⁶⁵

Two other shifts in modern free exercise doctrine have raised the stakes for a legal 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.⁶⁶ The Court diverted from this understanding around the same time that the draft cases expanded the definition of religion, broadening the availability of reli-

⁶⁰ See Peñalver, *supra* note 31, at 814–16.

⁶¹ 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).

⁶² Freeman, *supra* note 30, 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 *United States v. Meyers*, 906 F. Supp. 1494, 1500 (D. Wyo. 1995), *aff'd*, 95 F.3d 1475 (10th Cir. 1996) (“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.”).

⁶³ FULLER, *supra* note 8, at 23–30, 80.

⁶⁴ Cf. Mark Tushnet, *Religion and the Roberts Court: The Limits of Religious Pluralism in Constitutional Law*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 465, 466 (Micah Schwartzman et al., eds., 2016) (arguing that the Roberts Court uses Christianity as its default conception of religion).

⁶⁵ This language references the idea posed by some commentators that defining religion does not matter. See Eisgruber & Sager, *supra* note 27, at 811.

⁶⁶ See *Reynolds v. United States*, 98 U.S. 145, 164–66 (1878).

gious accommodations by applying the compelling interest test to laws that burden religious exercise.⁶⁷ 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.”⁶⁸

In response to *Smith*, groups with different religious and political constituencies lobbied Congress to pass the Religious Freedom Restoration Act (“RFRA”),⁶⁹ which “restor[ed] the high-water mark of free exercise accommodation established by” *Sherbert* and *Yoder*.⁷⁰ 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.⁷¹ The law was subsequently found to be unconstitutional as applied to the states,⁷² 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.⁷³ Many states have followed suit, passing their own versions of RFRA that apply to state and local laws.⁷⁴ In addition, the Court’s recent application of RFRA to closely held for-profit corporations has similarly broadened the availability of accommodations.⁷⁵

Thus, the current legal landscape is a “high accommodations” one. Religious practices, rather than merely beliefs, are protected, and any such 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 rooted in a principle that the judiciary must avoid the “for-

⁶⁷ See *Wisconsin v. Yoder*, 406 U.S. 205, 234–46 (1972); *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).

⁶⁸ 494 U.S. 872, 886 n.3 (1990).

⁶⁹ 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).

⁷⁰ Paulsen, *supra* note 67, at 256.

⁷¹ 42 U.S.C. § 2000bb–1 (2012).

⁷² *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

⁷³ Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc et seq. (2012). The constitutionality of RLUIPA was upheld in *Cutter v. Wilkinson*, 544 U.S. 709, 725 (2005).

⁷⁴ See Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466, 467 (2010).

⁷⁵ See *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751, 2785 (2014).

bidden domain” of evaluating the truth or falsity of religious beliefs.⁷⁶ Under this doctrine, 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.⁷⁷

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.⁷⁸ 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.⁷⁹ “[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.”⁸⁰ Moreover, “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”⁸¹

Another case decided a few years later affirmed and expanded the hands-off approach. *Frazee 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 religion—but the petitioner did not assert a particular religious denomination, merely stating that he was Christian.⁸² 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.”⁸³ “[M]embership in an organized religious denomination,” while informative on the issue of sincerity, is not required for religious protection.⁸⁴ 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 re-

⁷⁶ *United States v. Ballard*, 322 U.S. 78, 87 (1944).

⁷⁷ *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 party has the correct interpretation of the Amish faith).

⁷⁸ 450 U.S. at 709.

⁷⁹ *Id.* at 711, 715–16.

⁸⁰ *Id.* at 716.

⁸¹ *Id.* at 714.

⁸² 489 U.S. at 830–31, 834.

⁸³ *Id.* at 834.

⁸⁴ *Id.*

quires abandoning the search for a legal definition.⁸⁵ Otherwise, courts “will be put in the position of choosing—and so by implication favoring, and . . . valorizing—some values and commitments over others.”⁸⁶

Yet this is exactly how current religious protection doctrine operates. Holding up the banner of a recognized religion yields deference that the asserted belief is religious, but a similarly situated belief does 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.⁸⁷

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

At its core, the definitional task is a legal line-drawing problem. 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.”⁸⁸ But religion is a social construct. As such, “it would be unfortunate if the law’s idea of religion differed greatly from ideas of religion outside the law.”⁸⁹ The law is “meant to guide ordinary people, not only experts.”⁹⁰ A significant discrepancy between legal and colloquial understandings of religion would not only fail to provide that

⁸⁵ Eisgruber & Sager, *supra* note 27, at 824–25.

⁸⁶ *Id.* at 824.

⁸⁷ 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.

United States v. Meyers, 906 F. Supp. 1494, 1508 (D. Wyo. 1995), *aff’d*, 95 F.3d 1475 (10th Cir. 1996) (citations omitted).

⁸⁸ Tebbe, *supra* note 10, at 1135. *But see* James M. Donovan, *God Is as God Does: Law, Anthropology, and the Definition of “Religion”*, 6 SETON HALL CONST. L.J. 23, 91 (1995) (arguing that the social sciences might be better able to “articulate an intellectually acceptable definition which is also methodologically operationalizable”).

⁸⁹ GREENAWALT, *supra* note 32, at 143; *see also* Donovan, *supra* note 88, 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”).

⁹⁰ Movsesian, *supra* note 2, at 12.

guidance, but would also convey a discriminatory message to certain believers and undermine the purposes of legal protection.⁹¹ Indeed, the history of the Court’s jurisprudence evinces an evolving understanding of religion,⁹² further supporting the notion that the legal line should correspond fairly closely with the colloquial one. A sociological analysis of spirituality and religion can help articulate our colloquial understanding. And an examination of SBNR situates such individuals within the spectrum of believers.

The task of defining religion has also proved difficult in the social sciences, however, and varying conceptions abound.⁹³ 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 one in the sociological literature, and the use of the term spirituality has generated criticism within the field.⁹⁴ Nonetheless, religion and spirituality increasingly embody distinct and identifiable meanings. 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 pits religion and spirituality against one another.⁹⁵

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.”⁹⁶ 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

⁹¹ See *supra* text accompanying notes 25–28.

⁹² See *supra* Subsection I.B.

⁹³ Donovan, *supra* note 88, at 70–91.

⁹⁴ See, e.g., 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); Zinnbauer et al., *supra* note 31, at 549–50, 563.

⁹⁵ Huss, *supra* note 8, at 47.

⁹⁶ 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 8, 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).

beliefs or dogma—while spirituality might occur within or outside of an institutional framework.⁹⁷

This dichotomy is mirrored in conventional usage. It largely corresponds to self-reported descriptions of religion and spirituality.⁹⁸ 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.⁹⁹ And the recent Pew study indicates that people are becoming less religious though more spiritual,¹⁰⁰ a finding that distinguishes the concepts. Moreover, the study's 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 years¹⁰¹—a finding that highlights the experiential nature of spirituality.

Despite being distinct, however, the concepts are not wholly independent. The Pew study found an increase in spirituality among both religious and nonreligious respondents.¹⁰² In a different study, most survey respondents integrated both spirituality and religion in their lives.¹⁰³ And 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.¹⁰⁴ Similarly, some sociologists refer to spirituality as “lived religion,” emphasizing both the experiential quality of spirituality and the strong overlap between the concepts.¹⁰⁵ Others advocate rejecting a distinction, arguing either that spirituality is an aspect or type of religion¹⁰⁶ or that the concepts are so similar that “spirituality . . . should have a home within a broadband conceptualization of religion.”¹⁰⁷ A version of this argument is present even in legal scholarship: In his examination of historical manifestations of religion and its relation to the law, Professor Gedicks calls spirituality “the quintessentially postmodern expression of belief.”¹⁰⁸

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.¹⁰⁹ People who are religious *and* spiritual fall in one quadrant—Christian mystics or Evangelicals, for example.¹¹⁰ These individuals embrace organized religion and

⁹⁷ See FULLER, *supra* note 8, at 9; WADE CLARK ROOF, *SPIRITUAL MARKETPLACE: BABY BOOMERS AND THE REMAKING OF AMERICAN RELIGION* 33–34 (1999); Zinnbauer et al., *supra* note 31, at 551, 557.

⁹⁸ Zinnbauer et al., *supra* note 31, at 557, 562.

⁹⁹ Saucier & Skrzypińska, *supra* note 96, at 1281–82, 1285–86.

¹⁰⁰ PEW RESEARCH CTR., *supra* note 3, at 26.

¹⁰¹ *Id.* at 27.

¹⁰² *Id.* (showing eight-point and five-point increases, respectively).

¹⁰³ Zinnbauer et al., *supra* note 31, at 561; see also Wood, *supra* note 94, at 272 (reporting studies that indicate that “spirituality and religion are inextricably linked” for most people).

¹⁰⁴ Zinnbauer et al., *supra* note 31, at 555.

¹⁰⁵ See, e.g., ROOF, *supra* note 97, at 33, 41.

¹⁰⁶ Wood, *supra* note 94, at 281.

¹⁰⁷ Zinnbauer et al., *supra* note 31, at 563.

¹⁰⁸ Frederick Mark Gedicks, *Spirituality, Fundamentalism, Liberty: Religion at the End of Modernity*, 54 DEPAUL L. REV. 1197, 1234 (2005).

¹⁰⁹ ROOF, *supra* note 97, at 178.

¹¹⁰ *Id.*

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.¹¹¹ Of course, people can also be neither spiritual nor religious—atheists or other secularists, for example.¹¹² And the final quadrant is the group with which this Note is concerned—people who are spiritual but not religious.¹¹³

B. SBNR Belief Systems

Turning to the SBNR category, different researchers attach different labels to its members: “metaphysical believers,”¹¹⁴ “unchurched people,”¹¹⁵ “spiritual seekers.”¹¹⁶ The concept overlaps significantly with New Age spirituality, so some researchers use the term “New Age.”¹¹⁷ Part of the reason for the inconsistent terminology is the novelty of the research; but much of it owes to the fact that, in their rejection of institutionalism, SBNR individuals are wary of adopting labels.¹¹⁸ Rather than use each researcher’s chosen label, this Note discusses the group as SBNR. The following Section provides a description of SBNR and its historical and cultural roots.¹¹⁹ origins. While even many substantive beliefs are shared across adherents, the focal point here—in accordance with Supreme Court doctrine—is SBNR’s functional and structural characteristics.

To begin with the most axiomatic, SBNR individuals resist organized religion.¹²⁰ The counterculture movement of the 1960s perpetuated a distrust of institutions generally,¹²¹ and events over the last decade—the

¹¹¹ *Id.* at 175–76, 178.

¹¹² *Id.* at 178.

¹¹³ *Id.*

¹¹⁴ *See id.*

¹¹⁵ FULLER, *supra* note 8, at 4.

¹¹⁶ ROOF, *supra* note 97, 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 15, 73 (1998) (using “seeker-oriented spirituality” and “seekers”).

¹¹⁷ *See, e.g.,* MICHAEL D’ANTONIO, HEAVEN ON EARTH: DISPATCHES FROM AMERICA’S SPIRITUAL FRONTIER 20 (1992). 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.

¹¹⁸ *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%). *Religious Landscape Study*, PEW RESEARCH CTR. (last visited June 25, 2016), <http://religions.pewforum.org/affiliations>. 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.*

¹¹⁹ *See generally* FULLER, *supra* note 8, at 13–74 (discussing the historical manifestations of “unchurched” spirituality as the ancestors of SBNR).

¹²⁰ *See id.* at 76.

¹²¹ ROOF, *supra* note 97, at 47, 51.

wars in Iraq and Afghanistan, the Great Recession, and congressional gridlock—have further eroded Americans’ confidence in most major institutions.¹²² Regarding religious institutions in particular, a recent Gallup poll reported the lowest ever confidence rating for organized religion,¹²³ and a strong majority of unaffiliated people believe that religious institutions are overly concerned with money, power, and politics.¹²⁴ Moreover, broader cultural forces have highlighted the contingent or subjective nature of knowledge, causing people to challenge absolutes and accept uncertainty and relativism.¹²⁵ In other words, the universal truth trumpeted by organized religions does not resonate with the post-modern mind-set.¹²⁶ Instead, this mind-set is more comfortable exploring possibilities than answering ultimate questions with a wholehearted embrace or rejection of institutionalized faith.¹²⁷

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.¹²⁸ SBNR individuals thus desire a worldview that “demonstrate[s] the existence of something beyond physical reality.”¹²⁹ Such adherents have strong “metaphysical conviction[s],” believing that a spiritual force underlies the physical world.¹³⁰ Restricted and unfulfilled by a “one-size-fits-all faith” and yet hungering for a cosmology that extends beyond the scientific, these believers opt for an eclectic and self-directed approach to spiritual connection.¹³¹ They “pick and choose” particular beliefs and practices that enrich and give meaning to their lives.¹³²

This eclecticism is rooted in historical and cultural forces as well. For example, increased immigration, travel, and technology provide exposure to a wide diversity of religious and spiritual beliefs and practices.¹³³ Religious symbols and practices have resultantly become “disembedded” from their original cultural settings, resulting in “pastiche, collage . . . religion á la carte.”¹³⁴ Once disaggregated, these beliefs and practices are ripe for individual reassembly. On a different note, the satisfaction

¹²² 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>.

¹²³ *Id.*

¹²⁴ PEW RESEARCH CTR., *supra* note 3, at 30–31. Over 40% of religiously affiliated people adopt these beliefs as well. *Id.* at 95 (chart).

¹²⁵ ROOF, *supra* note 97, at 8, 61; Gedicks, *supra* note 108, at 1205–06.

¹²⁶ Gedicks, *supra* note 108, at 1206.

¹²⁷ ROOF, *supra* note 97, 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> (last visited June 25, 2016).

¹²⁸ See FULLER, *supra* note 8, at 45; ROOF, *supra* note 97, at 19, 35.

¹²⁹ FULLER, *supra* note 8, at 45.

¹³⁰ *Id.* at 76–77.

¹³¹ *Id.* at 155; ROOF, *supra* note 97, at 57; Meredith B. McGuire, *Mapping Contemporary American Spirituality: A Sociological Perspective*, CHRISTIAN SPIRITUALITY BULL., Spring 1997, at 4.

¹³² FULLER, *supra* note 8, at 155; French, *supra* note 4, at 128; Gedicks, *supra* note 108, at 1218.

¹³³ ROOF, *supra* note 97, at 61, 70–73.

¹³⁴ *Id.* at 73.

of material needs opens up the possibility for a wider embrace of SBNR worldviews. When material needs are met, different values become important: quality of life, well-being, self-expression, and personal autonomy.¹³⁵ These values embolden individuals to “cobble together a religious world from available images, symbols, moral codes, and doctrines.”¹³⁶ Thus, more people not only have access to a range of spiritual ideas and practices; they have the time and energy to forgo “pre-packaged expressions” and essentially create their own religions.¹³⁷ In a sense, then, these historical and cultural forces render SBNR somewhat inevitable. An understanding of spirituality as “quintessentially post-modern” imparts a predestined quality to SBNR: “[P]ostmodernism is not an ideology to which one is persuaded . . . it is a *condition*—like gravity or the weather.”¹³⁸

At least two additional characteristics arise out of the eclectic nature of SBNR. First, eclecticism 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.¹³⁹ 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.¹⁴⁰ 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 “reorient[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.”¹⁴¹

These characteristics give rise to common critiques of SBNR. One critique is that its inherent eclecticism produces a scattershot of personal preferences that lacks a coherent structure or integrity.¹⁴² The *Moore-King* court embodies this critique in its claim that there must be “some organizing principle or authority other than herself.”¹⁴³ The concern here is that SBNR practitioners are not truly committed to a set of principles

¹³⁵ *Id.* at 49, 58; see also French, *supra* note 4, at 163 (discussing the cultural shift toward self-realization and identity formation).

¹³⁶ ROOF, *supra* note 97, at 75.

¹³⁷ *Contra* CIMINO & LATTIN, *supra* note 116, 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.*

¹³⁸ Gedicks, *supra* note 108, at 1234; Frederick Mark Gedicks, *God of Our Fathers, Gods for Ourselves: Fundamentalism and Postmodern Belief*, 18 WM. & MARY BILL RTS. J. 901, 904 (2010) (emphasis omitted).

¹³⁹ *Moore-King*, 708 F.3d at 563–64.

¹⁴⁰ See FULLER, *supra* note 8, at 75–76; ROOF, *supra* note 97, at 7.

¹⁴¹ ROOF, *supra* note 97, at 310.

¹⁴² FULLER, *supra* note 8, at 161.

¹⁴³ *Moore-King*, 708 F.3d at 571.

and can simply alter the components of their ideology according to the situation at hand.¹⁴⁴

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.¹⁴⁵ Another notes that the “reason for picking and choosing” might be that these believers “have more thoroughly considered the philosophical complexities of belief,”¹⁴⁶ 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”¹⁴⁷ and exists alongside a duty to abide by the beliefs and morals she has established.¹⁴⁸ 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.¹⁴⁹

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.”¹⁵⁰ 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.¹⁵¹ The authors express concern that this “radical individualism . . . elevate[s] the self to a cosmic principle.”¹⁵² 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.¹⁵³ This self-absorption, according to the authors, 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.¹⁵⁴

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.”¹⁵⁵ In other words, an in-

¹⁴⁴ See FULLER, *supra* note 8, at 161; McGuire, *supra* note 131, at 4.

¹⁴⁵ McGuire, *supra* note 131, at 4–5; see also Gedicks, *supra* note 108, at 1218–19 (noting that they “may take their beliefs very seriously”).

¹⁴⁶ FULLER, *supra* note 8, at 163.

¹⁴⁷ *Id.* at 75, 156.

¹⁴⁸ See Wood, *supra* note 97, at 272.

¹⁴⁹ See FULLER, *supra* note 8, at 156.

¹⁵⁰ ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 221 (2008).

¹⁵¹ *Id.*

¹⁵² *Id.* at 236.

¹⁵³ FULLER, *supra* note 8, at 159.

¹⁵⁴ See BELLAH ET AL., *supra* note 150, at 236; ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 72–74 (2000); Movsesian, *supra* note 2, at 12–15.

¹⁵⁵ Russo-Netzer & Mayseless, *supra* note 96, at 28; see also ROOF, *supra* note 97, at 35 (noting the simultaneous presence of a focus on personal growth and surrender to forces outside of one’s control).

ward 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.¹⁵⁶ 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.¹⁵⁷

Moreover, SBNR believers are not necessarily antisocial or isolated.¹⁵⁸ Studies show that they have strong social identities, often considering themselves communal.¹⁵⁹ While their spiritual practices tend to be privatized, some people do practice collectively or join groups to gain spiritual support.¹⁶⁰ For example, Richard Cimino and Don Lattin tell the story of the Techno Cosmic Mass, a form of community worship open to 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.”¹⁶¹ 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.¹⁶² Both activism and shared practice, then, are part of the spiritual path of some SBNR practitioners.

C. Themes and Implications

The above analysis illustrates that while SBNR belief systems are individually tailored, similarities can be identified across the spectrum of believers. 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, these characteristics amplify the analysis in Section II.A, which illustrates that the primary difference between spirituality and re-

¹⁵⁶ McGuire, *supra* note 131, at 3, 6.

¹⁵⁷ Cf. FULLER, *supra* note 8, 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”).

¹⁵⁸ See Wood, *supra* note 97, at 276, 279 (criticizing sociology for its description of the group as inherently private or nonsocial). *But see* FULLER, *supra* note 8, at 159 (discussing criticism of SBNRs as isolated).

¹⁵⁹ For a summary, see Wood, *supra* note 97, at 277–78.

¹⁶⁰ McGuire, *supra* note 131, at 5.

¹⁶¹ CIMINO & LATTIN, *supra* note 116, at 25.

¹⁶² ROOF, *supra* note 97, at 125–26; see also McGuire, *supra* note 131, at 6 (mentioning that activism is “utterly integral” to some individuals’ spirituality).

ligion is the emphasis on one's "felt" relationship with a higher power versus the set of beliefs, rules, and rituals that are designed to foster that relationship. They suggest that the fact that SBNR believers are "not religious" merely reflects a letting go of the institutional aspects of religion and a belief 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 consumerism of organized religion,¹⁶³ as does the increased variety of programming options available at a given place of worship.¹⁶⁴ Moreover, some churchgoers report incorporating practices like yoga or astrology into their faith,¹⁶⁵ 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.¹⁶⁶

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."¹⁶⁷ 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."¹⁶⁸ This trend is perhaps most apparent in the rejection of the Vatican's birth control doctrine by 98% of sexually active Catholic women.¹⁶⁹

Despite the idiosyncratic nature of SBNR, then, such belief systems do share a set of common characteristics. Identifying these attributes challenges the descriptive assumptions of courts like *Moore-King*, confers integrity on SBNR, and lays the groundwork for the normative claim that SBNR should be included within the fold of religious protection. Moreover, 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.

¹⁶³ French, *supra* note 4, at 183.

¹⁶⁴ ROOF, *supra* note 97, at 93–96; French, *supra* note 4, at 140.

¹⁶⁵ See McGuire, *supra* note 131, 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 8, at 17.

¹⁶⁶ ROOF, *supra* note 97, at 149.

¹⁶⁷ Gedicks, *supra* note 108, at 1218.

¹⁶⁸ McGuire, *supra* note 131, at 6.

¹⁶⁹ See Becky Bowers, *Keeping Facts Straight on 98% of Catholic Women*, POLITIFACT (Feb. 17, 2012, 12:09 PM), <http://www.politifact.com/truth-o-meter/article/2012/feb/17/keeping-facts-straight-98-catholic-women/>.

III. THE CASE FOR PROTECTING SBNR

As previously mentioned, the definitional task amounts to a line-drawing exercise. Modern free exercise doctrine necessitates the “maintenance of a boundary between” religious and nonreligious claims¹⁷⁰ and thus tasks courts with excluding two kinds of claims from religious protection. One involves “sham religions,” belief systems that are created for the purpose of skirting the law. The other involves belief systems that are not opportunistic but involve deeply-held secular beliefs rather than religious ones. Moreover, as discussed above, the chosen line should track our colloquial understanding of religion to ensure that the purposes of legal protection are effectuated.¹⁷¹

The final Part of this Note argues 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 satisfies the demands of the line-drawing exercise and should thus be considered a religion for purposes of the Religion Clauses. Nonetheless, courts and scholars argue that including SBNR conflicts with the underlying purposes of the Religion Clauses. The second Section discusses these objections and their misconceptions.

A. The Affirmative Case

First, SBNR is 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.¹⁷² 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. *Moore-King* embodies this contention in its conclusion that Psychic Sophie’s beliefs “more closely resemble personal and philosophical choices . . . not deep religious convictions.”¹⁷³ This concern is mirrored in the scholarly literature, as part of a broader narrative about the secularization of society and of religion.¹⁷⁴ 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 long-

¹⁷⁰ Gedicks, *supra* note 138, at 910.

¹⁷¹ See *supra* text accompanying notes 88–92.

¹⁷² 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 at 563–64; *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).

¹⁷³ *Moore-King*, 708 F.3d at 571.

¹⁷⁴ See, e.g., Huss, *supra* note 8, at 55–57; see also 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, 1041–43, 1051–53 (2004).

er 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.¹⁷⁵

This point is well taken. Some people do not participate in natively spiritual activities like yoga and meditation with spiritual goals in mind.¹⁷⁶ But this critique does not apply to SBNR believers as a group. Unlike some yoga or meditation practitioners, SBNR adherents typically do not engage with these or other practices from a secular standpoint. Many are “almost incurably metaphysical.”¹⁷⁷ Psychic Sophie’s use of such practices and tools, for example, 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.¹⁷⁸ Rather than divide the world into two distinct realms, many SBNR individuals believe that spiritual energy underlies and transcends the physical world.¹⁷⁹ 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.”¹⁸⁰ But challenging this dichotomy does not render SBNR secular.

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.”¹⁸¹ To a critic, this characterization might support the idea that SBNR has a secular focus, but this is a misunderstanding. While SBNR does seek to uncover the reality of the temporal self, doing so also serves the purpose of connecting one with a deeper reality.¹⁸² 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.

¹⁷⁵ Steve Bruce, *Secularization and the Impotence of Individualized Religion*, 8 HEDGEHOG REV., Spring & Summer 2006, at 35, 44.

¹⁷⁶ 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.”).

¹⁷⁷ FULLER, *supra* note 8, at 76–77.

¹⁷⁸ Cf. Huss, *supra* note 8, at 50–52.

¹⁷⁹ FULLER, *supra* note 8, at 76–77.

¹⁸⁰ 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)).

¹⁸¹ Gedicks, *supra* note 108, at 1219.

¹⁸² See *supra* text accompanying notes 155–57.

Such belief systems “address a reality which transcends the physical and immediately apparent world”¹⁸³ and are inherently metaphysical.

Moreover, the fact that SBNR embraces a metaphysical worldview suggests that, colloquially, it resembles religion more than it does secular belief systems. If Psychic Sophie were teaching her amalgamation of spiritual beliefs in a public school classroom, one would certainly anticipate an Establishment Clause violation. Indeed, non-SBNR parties to lawsuits have raised Title VII and Establishment Clause challenges against nontraditional belief systems that they label “New Age,”¹⁸⁴ indicating that they perceive such belief systems as akin to religions.

Since SBNR is neither a sham religion nor a deeply-held secular belief system, and since including it within the protection of the Religion Clauses tracks our colloquial understanding, it satisfies the demands of the line-drawing task.

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 a particular 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. 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.”¹⁸⁵ When a law clashes with a religious belief, the Framers believed that the duty to the spiritual sovereign trumps the duty to manmade law¹⁸⁶: “[T]he obligations entailed by religion transcend the individual and are outside the individual’s control.”¹⁸⁷ 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 Postmodernism, rather than being a part of the search for truth, becomes

¹⁸³ *United States v. Meyers*, 906 F. Supp. 1494, 1502 (D. Wyo. 1995), *aff’d*, 95 F.3d 1475 (10th Cir. 1996).

¹⁸⁴ *See, e.g., Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49 (2d Cir. 2001); *Alvarado v. City of San Jose*, 94 F.3d 1223 (9th Cir. 1996); *Beasley v. Health Care Serv. Corp.*, 940 F.2d 1085 (7th Cir. 1991).

¹⁸⁵ *McConnell*, *supra* note 41, at 1496, 1512.

¹⁸⁶ *Id.* at 1497.

¹⁸⁷ *Id.*

just another expression of individual belief entitled to no more protection than any other secularized expression of belief.¹⁸⁸

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 should 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.¹⁸⁹ 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.¹⁹⁰ 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 make unnecessary marks on the body, and a fear that the vaccination would cause autism.¹⁹¹

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, immunizations are not necessary."¹⁹² In dismissing the anti-vaccination belief as nonreligious, the court essentially collapsed the plaintiffs' spiritual views into her health-related concerns. In one sense, the court's reasoning is a form of the secularity concern: These beliefs are health-related and thus secular, not religious. 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.¹⁹³

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."¹⁹⁴ The fact that her "inner flow" guides her choices is problematic for the court,¹⁹⁵ yet the opinion fails to explain why. It relies on the "organized group" language of *Wisconsin v. Yoder*, but the leap from *Yoder* to the need for an external authority is conclusory rather than supported with justifications.¹⁹⁶ Perhaps the un-

¹⁸⁸ McNeil, *supra* note 174, at 1042–43 (emphasis added).

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

¹⁹⁰ *Id.* at 417–20. For example, when pressed by the court for a label, she said: "If I were to explain my religion, I probably would say I'm a Pantheist," and described pantheism as "you see God in everything." *Id.* at 418.

¹⁹¹ *Id.* at 429–30.

¹⁹² *Id.* at 422.

¹⁹³ *See id.* at 427–29.

¹⁹⁴ *Moore-King*, 708 F.3d at 571 (emphases added).

¹⁹⁵ *Id.*

¹⁹⁶ *See id.* at 571–72.

expressed 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.¹⁹⁷ 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 miscomprehends its nature. As previously discussed, SBNR does not yield a "freewheeling, anything goes" philosophy motivated by self-interest; and the fact that SBNR individuals create an eclectic system of beliefs does not dilute their duty to cultivate and adhere to their spiritual values. 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."¹⁹⁸ 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.¹⁹⁹

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.²⁰⁰ 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.²⁰¹ In addition, doing so "would fail to capture [the] benefits" that religious groups provide the liberal state.²⁰² Drawing on Tocqueville, Movsesian explains that voluntary associations are important because they instill values that balance the radical individualism at the heart of liberal democracy. 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."²⁰³ Similar to the discussion of "Sheilaism" above, Movsesian's concern is that SBNR perpetuates social isolation.

¹⁹⁷ See *supra* text accompanying notes 43–44.

¹⁹⁸ See McConnell, *supra* note 41, at 1496 (emphasis added).

¹⁹⁹ 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.

²⁰⁰ Movsesian, *supra* note 2, at 12–15.

²⁰¹ *Id.* at 12–14.

²⁰² *Id.* at 14.

²⁰³ *Id.*

This argument, however, embodies several mistakes. First, from a factual standpoint, SBNR is not inherently solitary. 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.²⁰⁴ If *Yoder* requires that religious status be reserved 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, legal doctrine can and should evolve such that communal worship and organization are not prerequisites 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.²⁰⁵ While these benefits speak to the importance of fostering community, several other purposes are traditionally ascribed to the Religion Clauses: state neutrality, nondiscrimination against minorities, and preventing harm to individual believers.²⁰⁶ Moreover, as Movsesian concedes, each of these purposes counsels in favor of including SBNR.²⁰⁷ So too does the objective to avoid forcing believers into a conflict between alternative sovereigns. Thus, the 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.

CONCLUSION

The foregoing discussion illustrates that current Religion Clause doctrine is operating in an underinclusive way. Instead, courts should apply it in a way that embraces 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 new. While the text of the First Amendment references "religion," it might well signify an intention to protect the underlying spiritual connection, not 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

²⁰⁴ See *supra* Subsection I.B.

²⁰⁵ Movsesian, *supra* note 2, at 13–14.

²⁰⁶ *Id.* at 10–12.

²⁰⁷ *Id.*; see *supra* text accompanying notes 25–28.

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 individualized or otherwise lacking the characteristics of organized religion. Instead, they should include SBNR within the protection of the First Amendment.