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MARRIAGE SOLEMNIZATION AND THE FIRST AMENDMENT’S NEUTRALITY PRINCIPLE: WHO MAY SOLEMNIZE A MARRIAGE?

CLAUDIA L. CORDES*


INTRODUCTION

The First Amendment’s Establishment Clause prohibits the government from establishing, endorsing, or favoring a religion.¹ The Establishment Clause’s most fundamental principle is government neutrality towards religion.² This principle of neutrality “is not merely a prohibition against the government’s differentiation among religious sects,” denomination, or beliefs.³ The principle of neutrality also requires that the government not prefer religion in general over nonreligion.⁴ By remaining neutral towards religion, the government is, however, not prohibited from accommodating religious practices—that is, exempting individuals and entities from government-imposed

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¹ U.S. CONST. amend. I.


³ Id. at 709-10.

regulations that burden the free exercise of religion.\(^5\) Religious accommodations, the United States Supreme Court has explained, are not inherently incompatible with the neutrality principle, as they seek neither to neither advance nor inhibit religion, but simply to “permit religious exercise to exist without sponsorship and without interference.”\(^6\) Indeed, “in order to guard against governmental intrusion into the religious lives of citizens,”\(^7\) the principle of neutrality may even require that the government accommodate religion.\(^8\) Notwithstanding the permissibility of religious accommodation, when the government accommodates religion, it must do so in a way that does not “devolve into an unlawful fostering of religion,”\(^9\) as that would run afoul of the neutrality principle and violate the Establishment Clause.

In *Center for Inquiry, Inc. v. Marion Circuit Court Clerk*, the United States Court of Appeals for the Seventh Circuit addressed Indiana’s Marriage Solemnization Statute’s compliance with the neutrality principle.\(^10\) The State of Indiana recognizes a marriage only after a state-authorized individual conducts a marriage ceremony and performs certain duties imposed by the state.\(^11\) This is known as marriage solemnization and its effect is to create a legally recognized

\(^6\) *Grumet*, 512 U.S. at 710; Amos, 483 U.S. at 334.
\(^7\) Williams, *supra* note 5, at 119.
\(^8\) *Id.*; *Amos*, 483 U.S. at 334.
\(^9\) *Amos*, 483 U.S. at 334-35 (internal quotation marks omitted) (citations omitted).
\(^10\) 758 F.3d 869 (7th Cir. 2014).
\(^11\) IND. CODE ANN. § 31-11-4-3, 16 (West 2014). For instance, the state-authorized individual must, within thirty days after the date of the marriage, file the marriage license the couple had to obtained prior to the marriage “with the clerk of the circuit court who issued” it. *Id.* at § 16 (a)(3).
civil marriage. 12 Indiana’s Marriage Solemnization Statute, aside from authorizing certain government officials to solemnize a civil marriage, conferred the authority to legalize a marriage—that is, solemnization authority—upon certain religious groups as well as upon members of the clergy, 13 as a form of religious accommodation. According to the State of Indiana, the Solemnization Statute accommodated members of the clergy who generally perform marriages under the commandments of their faiths as well as those religions that regard marriage as a fundamental tenet. 14 As a result, the marriage ceremonies of the accommodated religions under the Solemnization Statute resulted in the solemnization of a marriage, that is, a legal marriage. 15 The marriage ceremonies of those religions not accommodated under the Statute, in contrast, could not result in a legally valid marriage. 16 Therefore, the couple wishing to get married, in addition to having a religious ceremony had to appear before an individual with solemnization authority to have their marriage solemnized. 17 While members of the religions not included in the Solemnization Statute could still have their marriages solemnized, the Statute was an impediment to the members of those religions to have their marriage solemnized in ceremonies conducted by officials who share their fundamental beliefs, values, and traditions. 18

12 See Andrew C. Stevens, By the Power Vested in Me? Licensing Religious Officials to Solemnize Marriage in the Age of Same-Sex Marriage, 63 EMORY L.J. 979, 981 (2014).
13 IND. CODE § 31-11-6-1 held unconstitutional by Ctr. for Inquiry, Inc., 758 F.3d 869.
15 Provided that the religious official presiding over the ceremony complied with the requirements the state imposed on him. IND. CODE § 31-11-4-16.
16 See Ctr. for Inquiry, Inc., 758 F.3d at 872-73.
17 Brief of Appellants-Plaintiffs – Short Appendix at 10, Ctr. for Inquiry, Inc. v. Marion Cir. Ct. Clerk, 758 F.3d 869 (7th Cir. 2014) (No. 12-3751); Ctr. for Inquiry, Inc., 758 F.3d at 873.
18 See Ctr. for Inquiry, Inc., 758 F.3d at 873.
Had Indiana’s Solemnization Statute in *Center for Inquiry* been challenged by one of the religions not accommodated under the Statute, the question of whether the Statute complied with the neutrality principle would have been a straightforward one for the Seventh Circuit. The Supreme Court has repeatedly stated that “the clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” A religious accommodation thus violates the Establishment Clause if it “singles out a particular religious sect [or sects]” for the accommodation without a proper justification. The Solemnization Statute’s preference for certain religious creeds was immediately apparent. The Statute preferred religions in which members of the clergy perform the marriage ceremonies over religions in which non-clergy leaders conduct the marriage ceremonies. It also preferred religions that accord marriage a sacred status over religions that, although not attaching a sacred status to marriage, still celebrate marriage. Further, the Statute’s preference for certain religions was unwarranted as the value that it each religion attaches to marriage cannot be a proper justification for the differential treatment. The neutrality principle does not require that a religious accommodation be indiscriminately conferred upon all religions. For example, the neutrality principle does not require that an accommodation for observance of the Sabbath Day be extended to all religions as not all religions observe the Sabbath Day. However, whereas here, different religions share a practice—marriage—an accommodation may not be extended to some religions and not to others based on the value that each religion attaches to marriage. See generally Fowler v. R.I., 345 U.S. 67, 69-70 (1953); *Grumet*, 512 U.S. at 715-16 (the government may not penalize or discriminate against individuals or groups because they hold religious views the government does not regard as valuable or desirable). Accordingly, the analysis of this Note proceeds from the understanding that marriage is a practice shared by

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20 Id. at 706; Cutter v. Wilkinson, 544 U.S. 709, 724 (2005); see infra note 23.
21 Ctr. for Inquiry, Inc., 758 F.3d at 874.
22 Id. Buddhists, for example, could not have their marriage solemnized in their religious ceremonies as Buddhism does not have members of the clergy and the Statute did not identify Buddhism as an accommodated religion. See id.
23 The neutrality principle does not require that a religious accommodation be indiscriminately conferred upon all religions. For example, the neutrality principle does not require that an accommodation for observance of the Sabbath Day be extended to all religions as not all religions observe the Sabbath Day. However, whereas here, different religions share a practice—marriage—an accommodation may not be extended to some religions and not to others based on the value that each religion attaches to marriage. See generally Fowler v. R.I., 345 U.S. 67, 69-70 (1953); *Grumet*, 512 U.S. at 715-16 (the government may not penalize or discriminate against individuals or groups because they hold religious views the government does not regard as valuable or desirable). Accordingly, the analysis of this Note proceeds from the understanding that marriage is a practice shared by
challenge to the Solemnization Statute, however, was brought by Center for Inquiry, Inc. (“CFI”), a non-religious, secular entity which promotes ethical living without a belief in a Supreme Being and which teaches a set of human values “upon which its members are to base their lives, actions, relationships and decisions.” The system of beliefs of CFI is generally known as “secular humanism” and its main “commitment [is] to improve human welfare in the world.” Like religious organizations, CFI celebrates important life events, including marriages. CFI’s marriage ceremonies are designed to represent and celebrate CFI’s values and philosophies. Given, however, that the Solemnization Statute did not extend the authority to solemnize a marriage to CFI, its marriage ceremonies, just as those of the religions not accommodated under the Statute, could not result in a legal marriage. Thus, in Center for Inquiry, the Seventh Circuit faced the more difficult question of whether Indiana’s Solemnization Statute ran afoul of the neutrality principle by failing to confer solemnization authority upon CFI.

In holding that Indiana’s Solemnization Statute violated the neutrality principle by failing to extend the authority to solemnize a marriage to CFI, the Seventh Circuit had to address two main issues. First, the Seventh Circuit had to determine whether CFI’s beliefs qualified as “religious” for purposes of the First Amendment. Second, the Seventh Circuit had to address the well-accepted premise that states may, consistent with the neutrality principle, accommodate religious groups without having to extend similar accommodations to secular entities. In addressing these questions, the Seventh Circuit

various religions and from the premise that the value each religion attaches to marriage cannot be a proper justification for conferring solemnization authority only upon some religions.

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24 Brief of Appellants, supra note 17, at 5-6.
25 Id. at 6 (citations omitted).
26 Id. at 9.
27 Id.
28 Id. at 10.
had guidance from its own as well as Supreme Court precedent, but no conclusive answers. This Note posits that, in concluding that CFI’s beliefs were the equivalent of religion, the Seventh Circuit properly employed a broad definition of religion, which has strong roots in Supreme Court’s and Seventh Circuit’s jurisprudence. This Note also defends the Seventh Circuit’s omission of Supreme Court precedent that arguably supports a narrower definition of religion as even a reference to such precedent would have caused confusion as to what is generally regarded as the proper test for ascertaining what qualifies as a religion for purposes of First Amendment analysis. Moreover, the application of a narrower definition of religion would have threatened to leave many of the rich and diverse beliefs Americans see as their “religion” without protections under the First Amendment. Lastly, this Note discusses Supreme Court precedent not addressed by the Seventh Circuit that appeared to support Indiana’s contention that it was not obliged to include CFI in the Solemnization Statute to comply with the neutrality principle. This Note explains that such a precedent did not require a different result.

I. NEUTRALITY AND RELIGIOUS ACCOMMODATIONS

A. The Neutrality Principle

The First Amendment’s Establishment Clause states that “Congress shall make no law respecting an establishment of religion.”\(^\text{30}\) The “touchstone” of the Establishment Clause is “the principle that the First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion.”\(^\text{31}\) This principle, known as the neutrality principle, prohibits the government from treating people differently “based on

\(^{30}\text{U.S. Const. amend. I.}\)

\(^{31}\text{McCreary Cnty., Ky. v. ACLU of Ky., 545 U.S. 844, 860 (2005) (internal quotation marks omitted) (citations omitted); Everson v. Bd. of Ed. of Ewing Twp., 330 U.S. 1, 18 (1947).}\)
the Gods or gods they worship, or do not worship.” There are two fundamental dimensions to the neutrality principle. First, neutrality requires that the government “neither favor nor disfavor religion in general, as compared to nonreligion.” Consistent with this requirement, the government may not “pass laws or impose requirements which aid all religions as against non-believers.” Likewise, the government may not “act[] with the ostensible and predominant purpose of advancing [or inhibiting] religion” as there is “no neutrality when the government’s ostensible object is to take sides.” Second, the neutrality principle requires the government to treat religions equally, unless there is a secular justification for differential treatment.

In its Establishment Clause jurisprudence, the Supreme Court has explained that the “clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”

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34 Conkle, supra note 33, at 8.
36 McCready Cnty., Ky, 545 U.S. at 860.
37 Grumet, 512 U.S. at 714.
38 Id. (internal quotation marks omitted) (citations omitted); Gillette v. U.S., 401 U.S. 437, 449 (1971) (“An attack founded on disparate treatment of ‘religious’ claims invokes what is perhaps the central purpose of the Establishment Clause—the purpose of ensuring government neutrality in matters of religion.”).
B. Religious Accommodations

The neutrality principle, however, does not forbid the government from accommodating religion. The Supreme Court “has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.” When the government accommodates a religious practice, it exempts a religious person or entity from government-imposed regulatory requirements that burden that person’s or entity’s exercise of religion. The government may, for instance, on the basis of religion, exempt individuals from participating in war; allow non-for-profit religious organizations to discriminate in certain employment practices; permit prison inmates to form religious study groups; grant property tax exemptions to religious entities; and allow religious organizations to solemnize their own marriages. At first sight, such accommodations may appear to run afoul of the neutrality principle as they may be seen as a government-conferred benefit on the religious, in the form of an exemption from compliance with a law. Religious accommodations,

40 Amos, 483 U.S. at 334 (internal quotations marks omitted) (citations omitted); Hobbie v. Unemployment Appeals Comm’n of Fla., 480 U.S. 136, 144-45 (1987).
43 Amos, 483 U.S. at 329-30.
44 Cutter, 544 U.S. 709; Kaufman v. McCaughtry, 419 F.3d 678 (7th Cir. 2005).
46 Ctr. for Inquiry, Inc. v. Marion Cir. Ct. Clerk, 758 F.3d 869 (7th Cir. 2014).
47 This Note does not address the controversy surrounding religious accommodations. For a discussion see Robin Fretwell Wilson, The Calculus of

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however, are not incompatible with the neutrality principle because their inherent objective is not to “advance[ ] religion nor . . . [to] inhibit[ ]” it, but simply to “lift[ ] a [government-placed] regulation that burdens the exercise of religion.”

Supreme Court jurisprudence explains the manner in which religious accommodations fit into the concept of neutrality. Together, the Religious Clauses of the First Amendment to the Constitution provide that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” The first clause, the Establishment Clause, prohibits the government from establishing, preferring, or endorsing a religion. The second clause, the Free Exercise Clause, prohibits the government from interfering with the practice of religious beliefs. The two clauses are in tension and “if expanded to a logical extreme, [each] would tend to clash with the other.” For example, “limits on governmental action that might make sense as a way to avoid establishment could . . . [nevertheless] limit freedom” of religion if governmental action is necessary to allow the

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48 Walz, 397 U.S. at 672.
49 Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 338 (1987).
50 U.S. CONST. amend. I.
51 McCreary Cnty., Ky. v. ACLU of Ky., 545 U.S. 844, 875 (2005) (explaining by way of illustration how “[t]he two clauses compete: spending government money on the clergy looks like establishing religion, but if the government cannot pay for military chaplains a good many soldiers and sailors would be kept from the opportunity to exercise their chosen religions”) (citations omitted). For a discussion that the clauses do not conflict, see Carl H. Esbeck, When Accommodations for Religion Violate the Establishment Clause: Regularizing the Supreme Court’s Analysis, 110 W. VA. L. REV. 359, 362-65 (2007).
52 Walz, 397 U.S. at 668-69.
free exercise thereof. However, the Supreme Court has explained that in between the “joints” of the Religious Clauses “there is ample room for play,” which “permit[s] religious exercise to exist without sponsorship and without interference.” That is to say, in between the Religious Clauses, there is “corridor” or “space . . . neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause,” in which the government may act to accommodate religious beliefs. When the government acts within that corridor, it operates with “benevolent neutrality,” which is tolerable and even desirable under the Establishment Clause.

In accommodating religion, the government does not, however, have carte blanche to accommodate religious individuals and entities to its liking. To the contrary, the government must ensure that religious accommodations do not “devolve into unlawful fostering” of religion in general or of a particular religious sect or denomination. At that point, the accommodation would no longer be benevolently neutral, but would violate the requirements of the neutrality principle and result in an impermissible establishment of religion. This was the precise issue the Seventh Circuit faced in Center for Inquiry. There, the court had to decide whether Indiana’s Marriage Solemnization Statute crossed the boundaries of benevolent neutrality by allowing only certain religious denominations to solemnize marriages.

53 McCreary Cnty., Ky., 545 U.S. at 875.
54 Id.
55 Walz, 397 U.S. at 669; Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 334 (1987).
56 Walz, 397 U.S. at 669.
58 Id. at 719.
59 Amos, 483 U.S. at 334 (internal quotation marks omitted) (citations omitted).
60 Id. at 334-35 (internal quotation marks omitted) (citations omitted).
61 See McConnell, supra note 41, at 686-88.
II. STATE REGULATION OF MARRIAGE AND SOLEMNIZATION STATUTES

A. State Regulation of Marriage

The regulation of marriage is “the province” of the states, rather than of the federal government. Accordingly, the states “prescribe the conditions upon which the marriage relation between its own citizens shall be created.” While the laws regulating marriage vary across the states, there are certain requisites for a valid marriage that the states share. Generally, states require individuals wishing to get married to apply for and obtain a marriage license from a designated government entity. The state’s issuance of the license, itself, does not ordinarily result in a legally binding marriage. In most states, marriage solemnization is required to create a legally recognized civil marriage. Marriage solemnization refers to a ceremony or a “ritual by which . . . [two individuals] take on their new status” as husband and wife. As a general rule, the solemnization of the marriage must be conducted by a state-authorized individual, who also performs certain duties (such as signing the marriage license) the state has

62 Loving v. Va., 388 U.S. 1, 7 (1967); Sosna v. Iowa, 419 U.S. 393, 404 (1975); Maynard v. Hill, 125 U.S. 190, 205 (1888).

63 Penoyer v. Neff, 95 U.S. 714, 734-35 (1878); Hill, 125 U.S. at 205 (stating that state legislatures “prescribe[ ] . . . the procedure or form essential to constitute marriage”).


65 Rains, supra note 64, at 838-39. See, e.g., GA. CODE ANN. § 19-3-30 (West 2010); NEV. REV. STAT. ANN. § 122.040 (West 2013).

66 Stevens, supra note 12, at 987.

67 Id. See, e.g., FLA. STAT. ANN. § 741.07 (West 2014); COLO. REV. STAT. ANN. § 14-2-109 (West 2012); MONT. CODE ANN. § 40-1-301 (West 2014).

68 Rains, supra note 64, at 839.
imposed on him in order for the marriage to be complete. In some states, it is a crime to solemnize a marriage without the state’s authority.

B. Solemnization Statutes and Religious Accommodations

Typically, states bestow the authority to solemnize a marriage in their solemnization statutes upon specific individuals or entities. Such statutes invariably confer the authority to solemnize a marriage upon certain government officials, such as judges and justices of the peace. At least thirteen states also permit public notaries, the couple aspiring to get married, or any person to solemnize a marriage. The solemnization statutes usually also authorize religious officials to solemnize marriages. The states’ decision to confer solemnization authority upon religious officials has gone unchallenged throughout the history of this country. Thus, courts have had no opportunity to address how religious solemnization of a civil marriage fits into the Religious Clauses and the principle of neutrality. Religious solemnization of marriages, however, has existed since colonial times and it, in the present day, may best be described as a permissible

69 Id. at 842-77. See, e.g., GA. CODE ANN. § 19-3-30; HAW. REV. STAT. § 572-13 (West 2014); Mich. Comp. Laws Ann. § 551.7 (West 2014).
70 Stevens, supra note 12, at 987.
71 See Rains, supra note 64, at 842-77. See, e.g., ALASKA STAT. ANN. § 25.05.261 (West 2014); Ark. Code Ann. § 9-11-213 (West 2007); Cal. Fam. Code § 400 (West 2013).
72 Stevens, supra note 12, at 987; supra note 55.
74 See, e.g., COLO. REV. STAT. ANN. § 14-2-109; MONT. CODE ANN. § 40-1-301; 23 PA. CONS. STAT. ANN. § 1502 (West 2014).
75 See, e.g., COLO. § 14-2-109; MONT. § 40-1-301; 23 PA. § 1502; N.Y. § 11(4).
76 Id.
77 Stevens, supra note 12, at 987-88.
accommodation of religion. Indeed, “long before marriage was a civil institution regulated by . . . [the states], it was a religious contract and commandment.” Given that “marriage as an institution owes its origins to religious roots, it is both natural and logical that when state government[s] regulate[ ] entry into marriage, [they] accommodate[ ]” religious traditions regarding marriage practices. In other words, since the requirement that a state-authorized official solemnize a marriage before it can be legal may interfere with the religious practices of individuals to have their marriage solemnized by a religious official of their faith, the states may justifiably lift such governmental interference by allowing religious officials to also solemnize a marriage.

C. Marriage Procedure in Indiana and the Marriage Solemnization Statute, Indiana Code §31-11-61

In the State of Indiana, individuals may be legally married only after obtaining a marriage license and having their marriage solemnized. The individuals aspiring to get married may obtain a marriage license from the clerk of the circuit court in which any of them resides or in the circuit in which the marriage will occur. The marriage license includes an original and a duplicate marriage certificate. After securing the marriage license and certificates, the

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78 See Ctr. for Inquiry, Inc. v. Marion Cir. Ct. Clerk, 758 F.3d 869, 872-74 (7th Cir. 2014); Woods-Bateman v. Hawai‘i, No. CIV.07-00119 HG LEK, 2008 WL 2051671, at *11 (D. Haw. May 13, 2008) (“In providing for the licensing of individuals to perform religious ceremonies, the State of Hawaii is accommodating the deeply held beliefs of many of its citizens who prefer the marriage be solemnized by a leader of their religion.”).
80 Id.
81 IND. CODE § 31-11-4-1, 3, 13.
82 Id. § 31–11–4–3.
83 Id. § 31–11–4–15.
couple to be married “must present . . . [the] license to an individual . . . authorized” under Indiana’s Solemnization Statute to solemnize a marriage.  

To solemnize a marriage, the state-authorized individual presides over a ceremony, in which the couple takes each other as husband and wife. In addition, the state-authorized individual, within 30 days of the ceremony, signs and files the license, along with the duplicate marriage certificate, with the clerk who issued the license. This completes the marriage solemnization process and creates a legally binding marriage.

Until July 2014, Indiana’s Solemnization Statute vested the authority to solemnize a marriage in the following individuals and entities:

1. A member of the clergy of a religious organization (even if the cleric does not perform religious functions for an individual congregation), such as a minister of the gospel, a priest, a bishop, an archbishop, or a rabbi.
2. A judge.
3. A mayor, within the mayor’s county.
4. A clerk or a clerk-treasurer of a city or town, within a county in which the city or town is located.
5. A clerk of the circuit court.
6. The Friends Church, in accordance with the rules of the Friends Church.
7. The German Baptists, in accordance with the rules of their society.
8. The Bahai faith, in accordance with the rules of the Bahai faith.
9. The Church of Jesus Christ of Latter Day Saints, in accordance with the rules of the Church of Jesus Christ of Latter Day Saints.

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85Rains, supra note 64, at 839.
86IND. CODE § 31–11–4–16.
(10) An imam of a masjid (mosque), in accordance with the rules of the religion of Islam.\textsuperscript{87}

Under Indiana’s Solemnization Statute, anyone who solemnized a marriage ceremony without the authority of the state committed a Class B misdemeanor.\textsuperscript{88}

III. CENTER FOR INQUIRY, INC. v. MARION CIRCUIT COURT CLERK

On June 11, 2012, the Indiana branch of CFI, sought a temporary and permanent injunction in the United States District Court for the Southern District of Indiana “to bar . . . the Clerk of the Marion Circuit Court . . . and the Marion County Prosecutor . . . from enforcing Indiana’s Solemnization Statute.”\textsuperscript{89} CFI asserted, \textit{inter alia},\textsuperscript{90} that the Solemnization Statute was facially unconstitutional because it created a preference for religion over nonreligion, in violation of the Establishment Clause.\textsuperscript{91} More specifically, CFI contended that the Solemnization Statute ran afoul of the neutrality principle because it preferred religion over nonreligion by extending the authority to solemnize marriages only to certain religious organizations.\textsuperscript{92}

\begin{footnotesize}
\textsuperscript{87} Id. § 31–11–6–1.
\textsuperscript{88} Id.
\textsuperscript{89} Ctr. for Inquiry, Inc., 2012 WL 5997721, at *1.
\textsuperscript{90} In addition to the First Amendment claim, CFI alleged that Indiana’s Solemnization Statute was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment because it extended the authority to solemnize a marriage to religious leader and thus, allowed religious persons to be married by religious leaders of their choice while denying the same rights to non-religious persons. \textit{Id.} at *5 (citations omitted). The Equal Protection claim is beyond the subject of this Note. The Seventh Circuit addressed the Equal Protection claim only briefly and concluded that the Solemnization Statute was also unconstitutional under the Equal Protection Clause because it discriminated arbitrarily among religious and secular ethical beliefs. Ctr. for Inquiry, Inc. v. Marion Cir. Ct. Clerk, 758 F.3d 869, 875 (7th Cir. 2014).
\textsuperscript{91} Ctr. for Inquiry, Inc., 2012 WL 5997721, at *5.
\textsuperscript{92} Id.
\end{footnotesize}
A. Center for Inquiry, Inc. and its Secular Marriage Celebrations

CFI is an international not-for-profit organization with approximately 24,000 members and nineteen branches in the United States, including one in Indiana. CFI “describes itself as a humanist group that promotes ethical living without a belief in a deity.” Its mission is to promote a purely secular society based on science by advocating that it is “possible to have strong ethical values based on critical reason and scientific inquiry rather than theism and faith.” Accordingly, CFI rejects blind faith and promotes the use of scientific methods instead. CFI believes that “integrity, trustworthiness, benevolence, and fairness are the core values of effective morality and a model for living a good life.” Based on these values, CFI “maintain[s] and teaches a set of beliefs upon which its members are to base their lives, actions, relationships and decisions.” This system of beliefs is usually denominated “secular humanism” and it “play[s] the same role in . . . [CFI] members’ lives as religious methods and values play in the lives of adherents.”

To provide its members with ceremonies that express their philosophies and values, CFI conducts “secular celebrations.” These

93 Id. at *2.
95 Ctr. for Inquiry, Inc., 758 F.3d at 871.
96 Ctr. for Inquiry, Inc., 2012 WL 5997721, at *2 (citations omitted).
97 Ctr. for Inquiry, Inc., 758 F.3d at 871.
99 Ctr. for Inquiry, Inc., 2012 WL 5997721, at *3 (citations omitted).
100 Id.
101 Brief of Appellants, supra note 17, at 6.
103 Ctr. for Inquiry, Inc., 758 F.3d at 871.
secular celebrations usually mark important life events\(^{105}\) such as funerals, memorials, and marriages.\(^{106}\) Since 2009, when CFI began its secular celebrations, certified CFI members, also known as secular celebrants, preside over these ceremonies.\(^{107}\) In Indiana, Reba Boyd Wooden, a certified secular celebrant and the leader of CFI’s Indiana branch, conducted marriage ceremonies for CFI members, but was unable to solemnize their marriages because CFI was not included in Indiana’s Solemnization Statute.\(^{108}\) Although the Solemnization Statute vested solemnization authority on members of the clergy, Ms. Wooden could still not solemnize a marriage, as Indiana does not recognize CFI’s leaders as clergy because CFI is not a religious organization.\(^{109}\) CFI was, however, unwilling to declare itself a religious organization and get its leaders clergy credential in order to be able to solemnize marriages.\(^{110}\) And, while in other states, CFI’s leaders may solemnize a marriage under the title of public notaries,\(^{111}\) Indiana’s Solemnization Statute also did not confer solemnization authority upon notaries. After Ms. Wooden was unable to solemnize the marriage of her longtime friends and mentees,\(^{112}\) Ms. Wooden, her friends and mentees,\(^{113}\) and CFI challenged the Solemnization Statute on the grounds that it violated the neutrality principle as it preferred religion over nonreligion by extending solemnization authority only to religious

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\(^{106}\) Ctr. for Inquiry, Inc., 2012 WL 5997721, at *3.

\(^{107}\) Id. at *4.

\(^{108}\) Id. at *3-4.

\(^{109}\) Ctr. for Inquiry, Inc. v. Marion Cir. Ct. Clerk, 758 F.3d 869, 872 (7th Cir. 2014).

\(^{110}\) Id. at 871.

\(^{111}\) Center for Inquiry, CFI Celebrant Certification, http://www.centerforinquiry.net/education/celebrant_certification/ (last visited Nov. 17, 2014); Ctr. for Inquiry, Inc., 758 F.3d at 871.

\(^{112}\) Ctr. for Inquiry, Inc., 2012 WL 5997721, at *3.

\(^{113}\) In October 2012, while the lawsuit was still pending in the district court, Ms. Wooden’s friends and mentees had their marriage solemnized by a state-approved individual and, consequently, withdrew as parties in the lawsuit. Id.
groups. CFI asked that the District Court for the Southern District of Indiana enter a preliminary and permanent injunction to prevent the Clerk of the Marion Circuit Court and the Marion County Prosecutor from enforcing the Statute against them.

B. The Decision of the District Court

On November 30, 2012, the district court denied CFI’s request for injunctive relief and entered judgment in favor of the Clerk of the Marion Circuit Court and the Marion County Prosecutor. In its opinion, the district court covered constitutional ground that is beyond the scope of this Note. Relevant to the subject of this Note, the court explained that Indiana could place reasonable regulations on marriage, designating the procedures by which a marriage becomes legally effective as well as the persons authorized to solemnize a marriage. Given that marriage has deep religious roots, the court explained, it was “both natural and logical” for Indiana to “accommodate[ ] those deep religious traditions.” The Solemnization Statute, the district court continued, simply accommodates religions that regard marriage as a fundamental tenet, allowing those religions “to place their ‘stamp of approval’ on marriages” and preserving their “ability . . . to . . .

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114 Id. at *5.
115 Id. at *1.
116 Id. at *14.
117 Although CFI challenged Indiana’s Solemnization Statute under the Establishment Clause, the district court also assessed the constitutionality of the Statute under the Free Exercise Clause, expressing doubt that CFI’s claim fell within Establishment Clause jurisprudence. Id. at *8-10. This Note does not address whether CFI’s claim fell within the purview of the Establishment Clause or the Free Exercise Clause. For a discussion of which of the two Clauses should guide the analysis in claims of the nature brought by CFI, see the concurring and dissenting opinions in Welsh v. U.S. and majority and concurring opinions in Cutter v. Wilkinson.
118 Id. at *10.
119 Id.
120 Id.
carry out their religious missions.”

Finding that CFI was not a religion and that CFI had no stance on marriage, the court concluded that CFI was, therefore, not entitled to a similar accommodation. The district court further stated that CFI could not characterize its beliefs as a religion simply to avoid the inconveniences of marriage regulation. The district court then explained that in Wisconsin v. Yoder, a religious accommodation case, the Supreme Court had stated that “the very concept or ordered liberty precludes allowing [everyone] to make . . . [their] own standards” to trigger the protection of the Religious Clauses and avoid state regulation. Thus, the district court stated that it could not “commandeer the Indiana legislature” to include CFI in the Solemnization Statute simply because CFI preferred to solemnize its own marriages. Members of CFI, after all, the court explained, had “numerous avenues through which they . . . [could] legally wed.” They could continue with their secular celebrations and then have their marriage solemnized by, for example, a judge as the Solemnization Statute only prohibited CFI and others “from signing marriage certificates.” In short, the court held that the Statute could not amount to an establishment of religion as it only had the “legitimate purpose of alleviating significant governmental interference with pre-existing religious beliefs about marriage.”

C. The Appeal to the Seventh Circuit

CFI appealed the decision of the district court to the Seventh Circuit. Before the Seventh Circuit, CFI argued that CFI’s beliefs were

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121 Id.
122 Id. at *7, 10.
123 Id. at *9 (citations omitted).
124 Id.
125 Id.
126 Id.
127 Id. at *12.
“equivalent to a religion”\textsuperscript{128} because CFI’s beliefs are sincere and
“address[ ] matters of ‘ultimate concern’ that occupy a ‘place parallel
to that filled by . . . God in traditionally religious persons.’”\textsuperscript{129} Because
CFI had to be “deemed to be analogous to a religion, its exclusion
from the benefits bestowed by the Solemnization Statute represent[ed]
a preference for particular sects or creeds.”\textsuperscript{130} CFI further argued that
Indiana’s defense that it excluded CFI from the Solemnization Statute
because CFI takes no stance on religion was simply a pretext to avoid
the Establishment Clause claim. Given that Indiana was willing to
allow CFI’s secular celebrants to solemnize marriages if CFI declared
itself a religious organization, thereby rendering its leaders clergy, it
was apparent, CFI argued, that Indiana excluded CFI not because of
CFI’s stand on marriage, but because it was not a religious entity.\textsuperscript{131}
Regardless of CFI’s position on marriage, however, CFI argued that
CFI members, like adherents of traditional religions, “desire to have
their wedding ceremonies reflect their values and beliefs.”\textsuperscript{132} For CFI
members, as for members of religions, “it is important to have
someone perform the [solemnization] ceremony who shares their
ethics and beliefs and who is able to assist them in structuring a
ceremony in a way that affirms their philosophy.”\textsuperscript{133}

In defending the constitutionality of the Solemnization Statute,
Indiana reiterated the holding of the district court that the
Solemnization Statute was a religious accommodation under which
CFI could not be included because CFI could not be said to be a
religion.\textsuperscript{134} Indiana further argued that states may constitutionally
accommodate religious beliefs without having to extend the same or
substantially similar accommodations to non-religious groups.

\textsuperscript{128} Reply Brief of Appellants-Plaintiffs, Ctr. for Inquiry, Inc. v. Marion Cir. Ct.
Clerk, 758 F.3d 869 (7th Cir. 2014) (No. 12-3751), 2013 WL 1208815, at *9.
\textsuperscript{129} Id. at *10-11 (citations omitted).
\textsuperscript{130} Id. at *14.
\textsuperscript{131} Id. at *7, 8, 14.
\textsuperscript{132} Id. at *17.
\textsuperscript{133} Brief of Appellants, supra note 17, at 9.
\textsuperscript{134} Brief of Appellees, supra note 14, at *14-5.
Quoting to Supreme Court precedent specifically addressing religious accommodations and their relation to the neutrality principle, Indiana pointed out that the Supreme Court had already stated that religious accommodations need not to “come packaged with benefits to secular entities” in order to comply with the Establishment Clause. Relying on *Marsh v. Chambers*, a case in which the Supreme Court upheld the opening of legislative sessions with Christian prayer, Indiana explained that “[j]ust as legislative bodies may,” under *Marsh*, “invite clergy to give a prayer without also inviting secular humanists to give non-religious speeches, so may states continue to delegate to religious clergy . . . the function of solemnizing marriages without also delegating that function to other” non-religious groups.

The Seventh Circuit was thus not asked to determine whether conferring solemnization authority to religious groups may accommodate religious marriage practices. The parties did not dispute that the Solemnization Statute qualified as a religious accommodation. Rather, the court was left with the question of whether the neutrality principle required that CFI be included in the Solemnization Statute.

IV. THE SUPREME COURT’S AND SEVENTH’S CIRCUIT JURISPRUDENCE ON RELIGIOUS ACCOMMODATIONS AND THE NEUTRALITY PRINCIPLE

The Supreme Court has long recognized that religious accommodations are permissible, and sometimes even required, under the Establishment Clause. In stating that religious accommodations are not inherently incompatible with the Establishment Clause, the Supreme Court has explained that “[t]he course of constitutional neutrality . . . cannot be an absolutely straight line.” Instead, the

135 See id. at *43.
136 Id. at *22-23.
principle of neutrality provides a corridor in which the government has room to act to ensure that the objectives of both Religious Clauses are fulfilled—those objectives being the guarantee to free exercise of religion without state interference and without sponsorship. Indeed, in the absence of religious accommodations, the basic purposes of the Religious Clauses could be frustrated as rigid government regulation (that, which would allow for no accommodations on the basis of religion) could interfere with the practice of religion and, thereby, inhibit neutrality towards religion. However, the Supreme Court has also stated that religious accommodations are constitutional under the Establishment Clause only if they comply with the principle of neutrality, preferring neither religion over nonreligion nor any particular religious beliefs.

A. The Supreme Court’s Definition of Religion

In assessing the compliance of a religious accommodation under the neutrality principle, an initial challenge may be to determine whether the beliefs allegedly excluded from a given accommodation can be deemed to be a “religion.” This was one of the very challenges the Seventh Circuit faced in Center for Inquiry. The United States Constitution does not define religion and the Supreme Court has never adopted or announced a constitutional definition of religion. Nonetheless, the Court has provided ample guidance on what may constitute religion for purposes of the First Amendment. Far from exhibiting a static conception of the meaning of religion, the Court’s understanding of religion has, for the most part, evolved with time.

At the beginning of the Supreme Court’s jurisprudence on the meaning of religion, the Court followed the traditional view that religion necessarily requires a belief in a deity. In Davis v. Beason, for example, the Court stated that “the term ‘religion’ has reference to
one’s views of his relation to his Creator.”\textsuperscript{143} However, the Court’s view of religion evolved with the passing of time. In \textit{Torcaso v. Watkins}, the Court explained that the term “religion” needs not to be based on a belief in the existence of God to get First Amendment protections.\textsuperscript{144} In stating so, the Court acknowledged the religious diversity that existed in the country at the time, explaining in a footnote that Americans were practicing religions that did not, in a general sense, teach a belief in the existence of God, among them “Buddhism, Taoism, Ethical Culture, [and] Secular Humanism.”\textsuperscript{145}

In two subsequent cases of remarkable importance in the jurisprudence of the meaning of religion, \textit{United States v. Seeger}\textsuperscript{146} and \textit{Welsh v. United States},\textsuperscript{147} the Supreme Court dramatically expanded the definition of religion. \textit{Seeger} and \textit{Welsh} called the Court to interpret the meaning of “religious training and belief” in a statute that exempted conscientious objectors from participating in war.\textsuperscript{148} Pursuant to the statute, an individual could claim conscientious objector status if “by reason of religious training and belief . . . [the individual was] conscientiously opposed to participation in war in any form.”\textsuperscript{149} The statute defined “religious training and belief” as “an individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but did not include essentially political, sociological, or philosophical views or a merely personal moral code.”\textsuperscript{150}

To avoid rendering the statute unconstitutional by limiting its reach to only those religious beliefs rooted in a belief in a Supreme

\textsuperscript{143} 133 U.S. 333, 342 (1890) \textit{abrogated on other grounds} by \textit{Romer v. Evans}, 517 U.S. 620 (1996).
\textsuperscript{144} 367 U.S. 488, 495 (1961).
\textsuperscript{145} \textit{Id.} at 495 n.11.
\textsuperscript{146} 380 U.S. 163 (1965).
\textsuperscript{147} 398 U.S. 333 (1970).
\textsuperscript{148} \textit{Seeger}, 380 U.S. at 165; \textit{Welsh}, 398 U.S. at 346.
\textsuperscript{149} \textit{Welsh}, 398 U.S. at 335 (internal quotation marks omitted) (citations omitted).
\textsuperscript{150} \textit{Id.} at 337. (internal quotation marks omitted) (citations omitted).
Being, the Court interpreted “religious training and belief” in *Seeger* to mean “a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God.”¹⁵¹ Five years later, in *Welsh*, the Court expanded the definition of religion even further. There, to avoid rendering the statute unconstitutional by limiting its reach to only religious beliefs, the Court read “religious training and belief” to include “deeply and sincerely h[e]ld beliefs that are purely ethical or moral in source and content but that nevertheless impose upon . . . [an individual] a duty of conscience to refrain from participating in any war at any time.”¹⁵²

The broad and liberal definition of religion the Court reached in *Seeger* and, later, in *Welsh* is not, however, without any boundaries. In *Wisconsin v. Yoder*,¹⁵³ the Supreme Court discussed some limits on what may be deemed a religion under the First Amendment. There, the Court stated that “philosophical and personal” beliefs do not trigger the protections of the Religion Clauses.¹⁵⁴ Thus, “[a] way of life, however virtuous and admirable,” the Court explained, does not constitute religion, and “may not be interposed as a barrier to reasonable state regulation.”¹⁵⁵ In *Yoder*, the Court exempted from compliance with Wisconsin’s compulsory school attendance law Amish individuals who, for religious reasons, refused to send their children to school past the eighth grade.¹⁵⁶ In allowing the religious exemption, the Court explained that “if the Amish had asserted their claims [against compulsory education] because of their subjective evaluation and rejection of the . . . secular values accepted by the majority, their claims would” not have been entitled to an accommodation.¹⁵⁷ Instead, the Court noted, “the record . . . support[ed],” that the Amish’s reasons for refusing to send their

¹⁵¹ *Seeger*, 380 U.S. at 176.
¹⁵⁴ *Id.* at 216.
¹⁵⁵ *Id.* at 215.
¹⁵⁶ *Id.* at 206.
¹⁵⁷ *Id.* at 216.
children to school past the eighth grade were “not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living.”

In Yoder, the Supreme Court thus clarified that personal philosophies and “ways of life” do not amount to religious beliefs under the First Amendment, perhaps to limit a broad reading of Welsh that would have permitted such a result. The Court also appeared to stay that “one essential characteristic of religion is that it comprises an ‘organized’ community practicing a distinct way of life which is in turned based on its particular values.” Given, however, that none of the individuals challenging the constitutionality of the statute in Seeger and Welsh claimed to be to be part of an organized religious group, it is unlikely that Yoder makes affiliation with a religious group a requirement of religion. A better reading of Yoder is that the Court considers affiliation with an organized religious group mere evidence of religion. Importantly, Yoder “seems to leave intact” Seeger’s and Welsh’s holding that sincerely held “beliefs [that] function in a position parallel to that of traditional religious beliefs” are the equivalent of religion for First Amendment purposes. Hence, Welsh, Seeger, and Yoder, taken together, establish that secular beliefs that are sincerely held and that occupy a place in the life of an individual similar to that of religion may be regarded as religious and thus, be entitled to a

158 Id.
160 Smith, supra note 159, at 97.
161 John C. Knechtle, If We Don’t Know What It Is, How Do We Know If It’s Established?, 41 BRANDEIS L.J. 521, 526 (2003); Mason v. Gen. Brown Cent. Sch. Dist., 851 F.2d 47, 54 (2nd Cir. 1988) (stating that exemptions on the basis of sincere religious beliefs are permitted without regard to church affiliation); Hanna v. Sec’y of the Army, 513 F.3d 4, 15 (1st Cir. 2008).
162 Hayes, supra note 159, at 361.
religious accommodation. A way of life and personal philosophies, in contrast, are not entitled to religious protections under the First Amendment.

B. The Seventh Circuit’s Definition of Religion

The Supreme Court has not been alone in determining what beliefs may qualify as religious for purposes of the First Amendment. The Seventh Circuit has also had opportunity to address the definition of religion. In Kaufman v. McCaughtry,163 for example, the Seventh Circuit provided a test for determining what constitutes a religion for First Amendment analysis. There, the Seventh Circuit explained that whether a set of beliefs “is a ‘religion’ for First Amendment purposes is a somewhat different question than whether its adherents believe in a supreme being, or attend regular devotional services, or have a sacred Scripture.”164 For First Amendment analysis, the Seventh Circuit continued, the beliefs of a person represent that person’s religion if the person “sincerely holds” those beliefs and such beliefs deal “with issues of ‘ultimate concern’ that . . . occupy a ‘place parallel to that filled by . . . God in traditionally religious persons.”165 Citing to Torcaso, Welsh, and Seeger, the Seventh Circuit explained that its definition of religion was consistent with the Supreme Court’s “broad definition of ‘religion,’” which includes theistic, atheistic and non-theistic beliefs.166

C. The Supreme Court’s Jurisprudence on Religious Accommodations and the Neutrality Principle

As previously discussed, neutrality does not prevent the government from accommodating religion. But, it does forbid the government from deviating from the corridor in between the two

163 419 F.3d 678 (7th Cir. 2005).
164 Id. at 681.
165 Id. (internal citations omitted).
166 Id. at 682.
Religious Clauses, in which permissible religious accommodations may exist. Since neutrality is a principle, and not a rule or a test, there are no factors or prongs to determine when the deviation from that corridor has been enough to turn an otherwise valid religious accommodation into an impermissible advancement or establishment of religion. Recognizing the lack of factors or prongs, the Supreme Court has aptly stated that “[a]t some point, [an] accommodation may devolve into ‘an unlawful fostering of religion.’” The lack of set rules does not mean, however, that there are no parameters that help establish that an accommodation violates the neutrality principle. To the contrary, it is well settled that an accommodation that has the intention or effect of preferring one religion over another or religion in general over nonreligion is outside of the boundaries of benevolent neutrality permitted by the Establishment Clause. In deciding whether an accommodation prefers certain religious denominations or religion in general over nonreligion, the best guidance is provided in judicial precedent that has applied the principle of neutrality, even if not explicitly, to contested religious accommodations. The following Supreme Court cases illustrate the demands of the neutrality principle on religious accommodations and help understand the holding of the Seventh Circuit in *Center for Inquiry*.

1. *United States v. Seeger*

*United States v. Seeger* represents one of the best examples in Supreme Court jurisprudence on the requirement that the government stays neutral towards religion when accommodating religion. *Seeger* is of particular importance to this Note because it also involved a challenge to a religious accommodation by individuals, who, similar to CFI members, held, at best, untraditional religious beliefs. There, three conscientious objectors challenged section 6(j) of the Universal

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167 Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 334-35 (1987) (internal citations omitted) (emphasis added).
Military Training and Service Act of 1948 under, *inter alia*, the Establishment Clause. Section 6(j), the conscientious objector statute, "exempt[d] from combatant training and service in the armed forces . . . those persons who by reason of their religious training and belief [we]re conscientiously opposed to participation in war in any form" as a form of religious accommodation. For purposes of the statute, "religious training and belief," was defined as “an individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but (not including) essentially political, sociological, or philosophical views or a merely personal moral code.” According to the conscientious objectors, the statute violated the Establishment Clause because the definition of “religious training and belief” preferred religion over nonreligion as well as certain religions over others.

The three objectors had applied and failed to qualify for the conscientious objector exemption. In their application for the exemption, they stated that they were conscientiously opposed to participation in war on reason of “religious belief and training,” but defined their religious beliefs in non-traditional ways. One of the objectors, for example, "submitted a long memorandum . . . in which he defined religion as the ‘sum and essence of one’s basic attitudes to the fundamental problems of human existence.’"

Most importantly, the objectors could not say that they held their beliefs in relation to a

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170 Id. at 164-65.
171 Id. at 165 (internal quotations omitted).
172 Id.; see Brian A. Freeman, *Expiating the Sins of Yoder and Smith: Toward A Unified Theory of First Amendment Exemptions from Neutral Laws of General Applicability*, 66 Mo. L. Rev. 9, 35 (2001) (explaining that section 6(j) “[n]ot only . . . den[jed] conscientious objector status to those whose objection was not grounded on religious belief, but also . . . den[jed] that status . . . to those whose objection was grounded on religious belief, if they were not members of a denomination possessing an article of faith opposing war”).
173 Id. at 166-69.
174 Id. at 166-69, 186.
175 Id. at 168 (internal citations omitted).
Supreme Being, namely an orthodox God.\textsuperscript{176} Seeger, one of the objectors, for instance, had expressed “'skepticism or disbelief in the existence of God'”\textsuperscript{177} and, explained, instead that he believed in “devotion to goodness and virtue for their own sakes . . . [as well as] in a purely ethical creed.”\textsuperscript{178} Thus, the \textit{Seeger} Court had to determine whether the beliefs of the three objectors fell within the statute’s definition of “religious training and belief.” To do so, the Court had to interpret the meaning of “religious training and belief.”\textsuperscript{179}

The Court first noted that the statute defined “religious training and belief” restrictively, requiring that a person hold beliefs involving a relationship with a traditionally conceived Supreme Being, before the person could be exempted from participating in war. The objectors’ convictions, though sincere and fundamental in their lives, did not conform to this notion of religion.\textsuperscript{180} After engaging in statutory interpretation, the Court concluded, however, that Congress could not have meant to restrict the exemption only to those who believed in a traditional Supreme Being, that is, a God. In the statute’s legislative history, the Court found evidence that Congress was aware of the myriad of conceptions that individuals have of a Supreme Being.\textsuperscript{181} As the Court explained, “[s]ome believe in a purely personal God, some in a supernatural deity; others think of religion as a way of life envisioning as its ultimate goal the day when all men can live together in perfect understanding and peace.”\textsuperscript{182} Congress, the Court reasoned, must have chosen the word “Supreme Being” rather than God in order to include all these conceptions of a Supreme Being and “keep[ ] with its long-established policy of not picking and choosing among religious beliefs.”\textsuperscript{183} Thus, “religious training and belief,” the Court

\begin{footnotes}
\item[176] \textit{Id.} at 166-69.
\item[177] \textit{Id.} at 166 (internal citations omitted).
\item[178] \textit{Id.}
\item[179] \textit{Id.} at 173.
\item[180] \textit{Id.} at 166-69.
\item[181] \textit{Id.} at 174-85.
\item[182] \textit{Id.} at 174.
\item[183] \textit{Id.} at 175.
\end{footnotes}
ultimately decided, meant “a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God.” Pursuant to this definition, the objectors’ beliefs qualified as “religious.”

While the Court’s interpretation of “religious training and belief” resulted in a remarkably strained reading of the statute—one which the legislative history questionably supported—the Court saw its interpretation as necessary to save the statute’s constitutionality. Construing the statute in this way, the Court explained, “avoid[ed] imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and . . . [was] in accord with the well-established congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets.” Although the Court did not explicitly refer to the neutrality principle, its interpretation of “religious training and belief” clearly alludes to the constitutional requirement that the government remain neutral in its accommodation of religious beliefs. As the Court stated, Congress could not have intended to include some religious beliefs while excluding others, as that would have been prohibited by the Constitution. Indeed, commentators have argued that the Seeger Court turned the statute’s intent “upside-down” as to eliminate its preferentialism for religion and ensure that the statute conformed with the requirement of neutrality. Moreover, by defining religion to

184 Id.
185 Id.
186 Id. at 188. (Douglas, J., concurring) (“The legislative history of this Act leaves much in the dark. But it is, in my opinion, not a tour de force if we construe the words ‘Supreme Being’ to include the cosmos, as well as an anthropomorphic entity. If it is a tour de force so to hold, it is no more so than other instances where we have gone to extremes to construe an Act of Congress to save it from demise on constitutional grounds. In a more extreme case than the present one we said that the words of a statute may be strained ‘in the candid service of avoiding a serious constitutional doubt.’”) (internal citations omitted).
187 Id. at 176.
188 Id.
189 See, e.g., Freeman, supra note 172, at 35-36.
include beliefs not founded in a belief in a god, the Court was already hinting to the fact that the government cannot, consistent with the neutrality principle, accommodate religious beliefs, but not systems of belief that are comparable to religion. In a later decision, *Welsh v. United States*, the Supreme Court, came to that exact conclusion.

2. Welsh v. United States

In *Welsh v. United States*, the Supreme Court was again called to interpret the definition of “religious training and belief” for purposes of the same conscientious objector statute that had been at issue in *Seeger*. *Welsh* involved another conscientious objector, Welsh, who also sought exemption from the Selective Service pursuant to the conscientious objector statute. While *Seeger* and *Welsh* were almost factually identical, there was a fundamental difference between the two cases. In *Seeger*, the government had denied the conscientious objectors’ claims because the conscientious objectors could not say that they held their *religious beliefs* in relation to a traditionally conceived Supreme Being. In *Welsh*, in contrast, the government had denied Welsh’s claim because the government “‘could find no religious basis for . . . [Welsh’s] beliefs, opinions, and convictions.’” Welsh had insisted that his beliefs, which prohibited him from taking a human life, were *not religious*, but ethical and moral and that he held his beliefs “‘with the strength of . . . religious convictions.’” Thus, the Court in *Welsh* was “faced [with] the more serious problem of determining which beliefs were ‘religious’ within the meaning of the statute.”

Once again, to avoid rendering the statute unconstitutional, the Court interpreted “religious training and belief” to include beliefs not

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191 *Id.* at 335.
192 *Id.* at 337-38.
193 *Id.* (internal citations omitted).
194 *Id.* at 343.
195 *Id.* at 338.
rooted in religion, but that, nevertheless, “occupy in the life of . . . [an] individual a place parallel to that filled by . . . God” in religious adherents.\textsuperscript{196} Accordingly, the Court held that “if an individual deeply and sincerely holds beliefs which are purely ethical or moral in source and content but which nevertheless impose upon him duty of conscience to refrain from participating in any war at any time, such individual is entitled to conscientious objector exemption,”\textsuperscript{197} as those beliefs are his religion.\textsuperscript{198} Welsh was thus entitled to the exemption.\textsuperscript{199} In arriving at the conclusion that the exemption extended to non-religious beliefs parallel to religion, the Court reiterated most of its analysis and rationale in \textit{Seeger}.\textsuperscript{200} Although, the Court did not explicitly mention the neutrality principle, its opinion restated \textit{Seeger}’s overriding principle that the government may not make distinctions among beliefs.\textsuperscript{201} Based on the premise that the government must remain neutral towards religion, and relying on its analysis of the legislative history of the statute in \textit{Seeger}, the Court then concluded that Congress could not have meant to exclude parallel religious beliefs from the purview of the statute, as that would have been clearly unconstitutional.\textsuperscript{202}

Justice Harlan concurred with the result achieved by the majority,\textsuperscript{203} but disagreed that the majority’s opinion could be justified in the name of the doctrine of construing legislative enactments in a way that would avoid rendering them unconstitutional.\textsuperscript{204} The doctrine, he explained, permits the Court to salvage statutes when

\begin{itemize}
\item \textsuperscript{196} Id. at 340.
\item \textsuperscript{197} Id.
\item \textsuperscript{198} Id.
\item \textsuperscript{199} Id.
\item \textsuperscript{200} Id. at 339-40.
\item \textsuperscript{201} Id. at 340-41.
\item \textsuperscript{202} Id. at 339-40.
\item \textsuperscript{203} Id. at 362. Because the majority interpreted the conscientious objector statute to include non-religious beliefs, Welsh’s conviction for failing to submit to induction into the Armed Forces was reversed. Id. at 344.
\item \textsuperscript{204} Id. at 345 (Harlan, J., concurring).
\end{itemize}
there is “reason to believe that Congress did not intend to legislate
consequences that are unconstitutional,”\textsuperscript{205} but not to usurp
congressional authority to evade an important constitutional issue.\textsuperscript{206}
According to Harlan, the legislative history of the conscientious
objector statute unequivocally demonstrated that Congress intended to
limit the exemption only to religious individuals.\textsuperscript{207} Thus, the Court
could not “as matter of statutory construction . . . conclude that any
asserted and strongly held belief satisfie[d] . . . [the exemption’s]
requirements.”\textsuperscript{208} The pressing constitutional issue, Harlan stated, was
whether the conscientious objector statute was compatible with the
Establishment Clause.\textsuperscript{209} The First Amendment, he explained,
incorporates a neutrality principle, which requires that “legislation
must, at the very least, be neutral.”\textsuperscript{210} Congress was under no
obligation to create a conscientious objector exemption.\textsuperscript{211} Having
decided to create an exemption, however, Harlan explained, Congress
could not “draw the line between theistic or nontheistic religious
beliefs on the one hand and secular beliefs on the other.”\textsuperscript{212} The
conscientious objector statute, he explained, “created a religious
benefit” by “exempting individuals whose beliefs were identical in all
respects to those held by [Welsh] except that they derived from a
religious source.”\textsuperscript{213} Such favoritism, he stated, is not permitted under
the Establishment Clause."\textsuperscript{214}

Harlan’s concurrence is particularly illustrative of the demands of
the neutrality principle on religious accommodations as it speaks
directly of the principle and explains that the Establishment Clause

\textsuperscript{205} Id. at 354.
\textsuperscript{206} Id. at 354-55.
\textsuperscript{207} Id. at 351-54.
\textsuperscript{208} Id. at 352.
\textsuperscript{209} Id. at 356.
\textsuperscript{210} Id. at 361.
\textsuperscript{211} Id. at 356.
\textsuperscript{212} Id.
\textsuperscript{213} Id. at 362.
\textsuperscript{214} Id. at 356.
does not tolerate distinctions between religion and parallel secular beliefs. More importantly, by discussing the constitutional infirmities from which the conscientious objector statute suffered, Harlan’s concurrence reveals the constitutional considerations that likely drove the decision of the majority to interpret religion broadly in order to prevent the conscientious objector statute from making unlawful distinctions between religious and equivalent religious beliefs. In this sense, Welsh, though a statutory interpretation case, becomes important to the resolution of challenges to religious accommodations in cases, like Center for Inquiry, Inc., that arise under the Constitution.

3. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos

In Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, the Supreme Court spoke directly and explicitly about the relationship between religious accommodations and the neutrality principle. There, the Court upheld an exemption to Title VII of the Civil Rights Act that allowed not-for profit religious organizations to discriminate in hiring for any position on religious grounds. Congress had enacted Title VII to prohibit employment discrimination based on race, color, religion, sex and national origin. As originally enacted in 1964, Title VII had an exemption that allowed religious not-for profit employers to discriminate on religious grounds in hiring for religious jobs only. As amended in 1972, the exemption, Section 702 of the Title, allowed religious not-for profit employers to discriminate on religious grounds in hiring for any job, as form of religious accommodation.

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216 Id. at 339.
218 Amos, 483 U.S. at 329.
219 Id.
In *Amos*, the Church of Jesus Christ of Latter-Day Saints owned and operated a gymnasium that was open to the public. Arthur Frank Mayson worked for the gymnasium as an engineer. After sixteen years of employment, the Church discharged him when “he failed to qualify for . . . a certificate that he . . . [was a] member of the Church and eligible to attend its temples.” The Church justified its actions under Section 702, as amended. Mayson, along with a class of plaintiffs, challenged the constitutionality of Section 702, alleging that, as applied to secular activity, it violated the neutrality principle because it resulted in state sponsorship of religion by granting religious organizations benefits in employment practices that were not extended to secular entities.

The Supreme Court unanimously held that Section 702, as amended, did not violate the principle of neutrality. Under the Establishment Clause, the Court explained, “there is ample room . . . for ‘benevolent neutrality which will permit religious exercise to exist without [government] sponsorship.’” In enacting Section 702, the Court explained, Congress was not abandoning neutrality, but furthering it by “alleviat[ing] significant governmental interference with the ability of not-for profit religious organizations to define and carry out their religious missions.” More succinctly, the exemption simply removed the burden of government regulation over employment decisions that Title VII, as originally enacted in 1964, had

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220 *Id.* at 330.
221 *Id.*
222 *Id.*
223 *Id.* at 331.
224 *Id.*
225 *Id.* at 339-40. The Supreme Court analyzed Section 702’s compliance with the neutrality principle under the framework of the Lemon Test. *Id.* at 335-39. The Lemon Test is a three-pronged test to evaluate the constitutionality of a law under the Establishment Clause. See *Lemon v. Kurtzman*, 411 U.S. 192 (1973). The applicability of the Lemon Test to religious accommodations is beyond the subject of this Note.
226 *Amos*, 483 U.S. at 334 (citations omitted).
227 *Id.* at 339.
placed on religious organizations. Where the “government acts with the proper purpose of lifting a regulation that burdens the exercise of religion,” the Court continued, there is “no reason to require that the exemption comes packaged with benefits to secular entities” to be in compliance with the neutrality principle.

4. Cutter v. Wilkinson

In Cutter v. Wilkinson, the Supreme Court further elaborated on the role of neutrality in religious accommodations. There, the Court addressed the constitutionality of Section Three of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) under the Establishment Clause. Section Three of RLUIPA provides, in pertinent part, that “[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution,” unless the burden furthers “a compelling governmental interest,” by “the least restrictive means.” RLUIPA defines “religious exercise” to include “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” In Cutter, prison inmates sued the Ohio Department of Rehabilitation and Correction, alleging that Ohio prison officials, in violation of RLUIPA, had burdened their exercise of “‘nonmainstream’ religions: the Satanist, Wicca, and Asatru . . . and the Church of Jesus Christ Christian.” Specifically, the inmates alleged that the prison officials had denied them, inter alia, “‘access to religious literature . . . opportunities for group worship that . . . [were] granted to adherents of mainstream religions . . . [and access to] a chaplain trained in their

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228 Id. at 335-36.
229 Id. at 338.
231 Id. at 709.
233 Id. § 2000cc-5(7)(A).
234 Cutter, 544 U.S. at 712.
faith. In response, the prison officials challenged RLUIPA’s constitutionality under the Establishment Clause as an improper advancement of religion.

The Supreme Court unanimously held that Section Three of RLUIPA, on its face, is an accommodation of religion permissible under the Establishment Clause. The Court explained that Section Three qualifies as a religious accommodation because it “alleviates exceptional government-created burdens on private religious exercise” in “state-run institutions.” Where the government acts to remove “government-imposed burdens on religious exercise,” the removal “is more likely to be perceived ‘as an accommodation of the exercise of religion rather than as . . . [an advancement] of religion.’” Section Three of RLUIPA, the Court continued, does not advance or establish religion simply because it does not similarly accommodate the other constitutional rights of the inmates, which may also be subject to governmental burdens. Citing to Amos, the Court reiterated that religious accommodations “need not come packaged with benefits for secular entities” in order to comply with the neutrality principle. Just as the government may exempt religious organizations from regulations that burden the exercise of religion without having to also exempt secular entities, the government may choose to accommodate the free exercise of religion of inmates without having to also accommodate the inmates’ free speech or right to assemble in order to comply with the Establishment Clause.

Lastly, the Court pointed out that Section Three complied with the Establishment Clause because it did not single out any religion for a particular treatment. RLUIPA, the Court stated, “confers no privileged status on any particular religious sect, and singles out no bona fide

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235 Id. (internal quotation marks omitted).
236 Id.
237 Id. at 720.
238 Id. at 720-21.
239 Id. at 720 (citations omitted).
240 Id. at 724 (internal quotation marks omitted) (internal citations omitted).
faith for disadvantageous treatment.” Given that “RLUIPA does not differentiate among bona fide faiths,” the Court held that it complied with the neutrality principle.

D. The Seventh Circuit’s Jurisprudence on Religious Accommodations and the Neutrality Principle

The Seventh Circuit has also spoken about the relationship between religious accommodations and the neutrality principle. A very illustrative case is Kaufman. There, Wisconsin inmate James Kaufman filed a First Amendment claim against prison officials after they “refused to allow him to create an inmate group to study and discuss atheism.” Notwithstanding the officials’ refusal to allow Kaufman to start an atheist study group, the prison officials allowed the gatherings of Christian, Muslims, Buddhist and other inmates to study their respective religions. Among other things, Kaufman alleged that the prison officials’ actions in accommodating only certain religious beliefs violated the Establishment Clause. The prison officials, however, maintained that no religious accommodation was warranted for Kaufman’s beliefs because atheism, as Kaufman himself insisted, is not a religion.

The Seventh Circuit disagreed and held that the prison officials’ actions violated the Establishment Clause as they failed to comply with the neutrality principle. The court began its analysis by first concluding that Kaufman’s atheist beliefs constituted a religion for

241 Id.
242 Id. at 723.
243 419 F.3d 678 (2005).
244 Id. at 680.
245 Id. at 684.
246 Id. at 680-81.
247 Id.
248 Id. at 683-84. In concluding that the prison officials’ actions violated the First Amendment, the Seventh Circuit applied the Lemon Test. See supra note 225 for an explanation of the Lemon Test.
purposes of the First Amendment because they “play[ed] a central role in his life”\(^{249}\) and it was undisputed that Kaufman deeply and sincerely held those beliefs. \(^{250}\) The court then proceeded to explain that under the Establishment Clause “the government may not aid one religion, aid all religions or favor one religion over another.”\(^{251}\) The First Amendment, the court explained, simply “does not allow a state to make it easier for adherents of one faith to practice their religion than for adherents of another faith to practice their religion, unless there is a secular justification for the difference in treatment.”\(^{252}\) The prison officials, however, could not advance a secular reason that would support that “meeting[s] of atheist inmates would pose a greater security risk [to the prison] than meetings of inmates of other faiths.”\(^{253}\) While the Seventh Circuit recognized that Cutter had held that religious accommodations need not to extend to non-religious practices in order to be permissible, the court explained that Cutter did not resolve the neutrality principle issue in the instant case.\(^{254}\) While religious accommodations may be reserved only for religious groups, it does not follow that set of secular beliefs that qualify as religious for First Amendment purposes may be permissibly excluded from religious accommodations.\(^{255}\) The court concluded that by accommodating some religious beliefs, but not Kaufman’s beliefs, the prison officials were “promoting” and favoring certain religions, in violation of the Establishment Clause.”\(^{256}\)

\(^{249}\) Id. at 682.

\(^{250}\) Id. See supra Section IV B, for a discussion of the test the Seventh Circuit employed to determine whether atheism qualified as a religion for First Amendment purposes.

\(^{251}\) Id. at 683 (citing to Berger v. Rensselaer Cent. Sch. Corp., 982 F.2d 1160, 1168-69 (7th Cir.1993)).

\(^{252}\) Id. (citing to Metzl v. Leininger, 57 F.3d 618, 621 (7th Cir.1995)).

\(^{253}\) Id. at 684.

\(^{254}\) Id.

\(^{255}\) Id.

\(^{256}\) Id.
V. ANALYSIS: THE SEVENTH CIRCUIT DECISION IN CENTER FOR INQUIRY

A. The Seventh Circuit’s Holding

On July 14, 2014, in a unanimous opinion authored by Judge Frank H. Easterbrook, the Seventh Circuit unanimously held that Indiana’s Solemnization Statute violated the principle of neutrality. Although the court recognized that religious accommodations inherently treat the accommodated religion differently, it stated that such an explanation could “not be a complete answer” to CFI’s claims that the Solemnization Statute preferred religion over comparable secular beliefs. Given that “[n]eutrality is essential to the validity of an accommodation,” religious accommodations, the court explained, may neither treat religion favorably over parallel non-religious beliefs nor confer special benefits on certain religious sects. Indiana’s Solemnization Statute suffered from both defects. The Statute conferred the authority to solemnize a marriage only to certain religious organizations and it also withheld such authority from individuals holding secular beliefs parallel to religion.

B. CFI’s Beliefs are the Equivalent of Religion for First Amendment Purposes

To reach its holding, the Seventh Circuit first had to determine whether CFI’s beliefs qualified as a “religion” under the First Amendment. The State of Indiana extensively argued and, the

257 Ctr. for Inquiry, Inc. v. Marion Cir. Ct. Clerk, 758 F.3d 869 (7th Cir. 2014).
258 Id. at 872.
259 Id.
260 Id. at 872-73.
261 Id. at 872-74.
262 Id. at 871.
district court opined,\(^{263}\) that CFI could not be treated as a religion because CFI, itself, insisted that it was not a religion. CFI, however, maintained that its beliefs, even if not religious in a conventional sense, were the equivalent of religion because they occupy a place parallel to religion in the lives of its members.\(^{264}\) Relying on its own as well as Supreme Court precedent on the meaning of religion, the Seventh Circuit properly determined that CFI’s beliefs were the equivalent of religion for purposes of the First Amendment.

The court began its analysis by stating that under *Seeger* and *Welsh* a “serious and sincerely held moral system” that occupies a place in the life of an individual parallel to that of religion must be treated the same as religion.\(^{265}\) The court did not have to pause to examine the sincerity with which members of CFI held their beliefs, as that was never contested. In determining that CFI’s beliefs qualified as a moral set of beliefs, the court deferred to CFI’s uncontroverted assertion that its beliefs rest on “strong ethical values based on critical reason and scientific inquiry.”\(^{266}\) The court showed the same deference towards CFI’s uncontested assertion that “its methods and values play the same role in its members’ lives as religious methods and values play in the lives of adherents.”\(^{267}\) Any further analysis under *Seeger* and *Welsh* would have been unnecessary. In *Seeger*, the Supreme Court had clearly stated that “a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by God” is a person’s religion.\(^{268}\) CFI’s beliefs squarely fell within that definition. Moreover, it was clear that CFI’s beliefs were not different to those of Welsh, who had also explained his beliefs as ethical and


\(^{264}\) Reply Brief of Appellants, supra note 128, at *9-11.

\(^{265}\) *Ctr. for Inquiry, Inc.*, 758 F.3d at 873.

\(^{266}\) *Id.* at 871.

\(^{267}\) *Id.*

moral and had maintained that it held such beliefs “‘with the strength of . . . traditional religious convictions.’”\footnote{Welsh v. U.S., 398 U.S. 333, 343 (1970) (citations omitted).}

Given, however, that \textit{Seeger} and \textit{Welsh} defined religion under a statute rather than under the Constitution, the Seventh Circuit’s analysis necessarily had to go further. Indeed, \textit{Seeger} and \textit{Welsh} defined religion for purposes of the conscientious objector statute, but, as the Seventh Circuit explained, the Supreme Court interpreted religion broadly as to allow the statute to pass constitutional muster.\footnote{\textit{Welsh}, 398 U.S. at 354-59 (Harlan, J., concurring).} Justice Harlan’s concurrence in \textit{Welsh} emphatically stated that the conscientious objector statute had the fatal defect of preferring religion over nonreligion and that without the majority’s contortionism to read religion to include parallel moral and ethical beliefs, the statute would have been helplessly unconstitutional.\footnote{Jeffrey L. Oldham, \textit{Constitutional “Religion” A Survey of First Amendment Definitions of Religion}, 6 \textit{Tex. F. on C.L. & C.R.} 117, 130 (2001); Donovan, supra note 159, at 52 (“[M]ost agree that we can expect the \textit{Seeger-Welsh} reading, or some form thereof, to apply to the constitutional use of “religion.”). See also Kaufman v. McCaughtry, 419 F.3d 678, 681-82 (7th Cir. 2005) (citing and using \textit{Welsh’s} and \textit{Seeger’s} definition of religion as the definition that governs First Amendment constitutional analysis); Ben Clements, \textit{Defining “Religion” in the First Amendment: A Functional Approach}, 74 \textit{Cornell L. Rev.} 532, 538-39 (1989) (“[C]ourts and commentators have generally interpreted \textit{Seeger} as signaling a broad concept of religion for First Amendment purposes.”); Greenawalt, \textit{Religion as a Concept in Constitutional Law}, 72 \textit{Cal. L. Rev.} 753, 760-61 (1984) (“[T]he Supreme Court’s broad statutory construction of religion [in \textit{Seeger} and \textit{Welsh}] . . . has led other courts and scholars to assume that the constitutional definition of religion is now much more extensive than it once appeared to be.”).} Thus, the fact that the Supreme Court defined religion broadly in \textit{Seeger} and \textit{Welsh} to avoid rendering the statute unconstitutional, “implie[s] that the constitutional definition of religion also should be construed as broadly.”\footnote{Welsh, 398 U.S. at 354-59 (Harlan, J., concurring).} In fact, in constitutional cases, the Supreme Court has also appeared to lean towards a broad definition of religion.

Accordingly, and continuing with its analysis of whether CFI’s beliefs qualified as religious, the Seventh Circuit cited to \textit{Torcaso}, a
constitutional case, and explained that in that case the Supreme Court explained in a footnote that “secular humanism must be treated the same as religion.” The Seventh Circuit’s reference to *Torcaso* was of particular importance to the resolution of whether CFI’s beliefs were religious because CFI’s beliefs are commonly known as secular humanism and courts have consistently opined that secular humanism is a religion under the First Amendment. And, while the footnote in *Torcaso* may arguably be dicta, the footnote “trenchantly illustrated the Court’s . . . [understanding] that nontheistic systems of belief can be labeled ‘religion.’” The Seventh Circuit, however, justifiably explained that, given that *Torcaso* “might be characterized as dicta,” it could not rely on *Torcaso* to conclusively determine whether CFI’s beliefs were religious. But, even when *Torcaso* may not be conclusive to whether CFI qualified as a religion, the Seventh Circuit stated that it needed to go no further than its decision in *Kaufman* to hold that CFI’s beliefs qualified as a religion.

*Kaufman*, the Seventh Circuit continued, was a constitutional case, in which the Seventh Circuit had held that atheism qualified as a religion for purposes of the First Amendment because atheism “occup[ies] a ‘place parallel to that filled by . . . God in traditionally religious persons.’” “What is true of atheism,” the Seventh Circuit continued, “is equally true of secular humanism, and as true in daily

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273 *Ctr. for Inquiry, Inc.*, 758 F.3d at 873.
276 *Ctr. for Inquiry, Inc.*, 758 F.3d at 873.
277 *Id.* (citing to *Kaufman*, 419 F.3d at 681).
life as in prison.”

That CFI refuses to call itself a religious organization and that its members insist that they are not religious, the Seventh Circuit continued, is irrelevant to the question of whether CFI is entitled to the protections of the First Amendment. In this regard, the court explained, CFI is no different to the plaintiff in Kaufman who also insisted that atheism was not a religion, but who, nevertheless was entitled to the protections of the First Amendment because his atheist beliefs occupied a place in his life comparable to religion.\(^2\) CFI embraces a secular moral system of beliefs, the court concluded, that is equivalent to religion except for the belief in a god and, as such, CFI is entitled to the protections of the First Amendment.\(^2\)

\section{The Seventh Circuit’s Omission of Yoder}

In concluding that CFI’s beliefs were equivalent to religion, the Seventh Circuit relied on Seeger, Welsh and Torcaso, to the complete exclusion of Yoder. At first sight, the Seventh Circuit’s omission of any reference to Yoder and its readiness to proceed with its analysis under Seeger and Welsh, while relying on Torcaso, hardly seems neutral to the positions of the parties. Seeger’s and Welsh’s interpretation of “religious belief and training” represents the Supreme Court’s most expansive and liberal definition of religion.\(^2\) The Court’s conception of religion in Torcaso, as already explained, is also broad. Yoder, on the other hand, appears to be an effort by the Supreme Court to return to a more traditional definition of religion.\(^2\)

\begin{itemize}
  \item \(^2\) Id.
  \item \(^2\) Id.
  \item \(^2\) Id.
  \item \(^2\) Id.
  \item \(^2\) See Oldham, supra note 272, at 134; Donovan, supra note 159, at 52; Stanley Ingber, Religion or Ideology: A Needed Clarification of the Religion Clauses, 41 STAN. L. REV. 233, 267 (1989); Smith, supra note 159, at 95.
  \item \(^2\) Ctr. for Inquiry, Inc., 758 F.3d at 873. It is not, of course, that the Seventh Circuit regarded the prison context as immaterial, but for purposes of deciding what constitutes a religion (and whether an accommodation complies with the neutrality

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Thus, those beliefs that may qualify as religious under *Seeger* and *Welsh* may not necessarily also be religious under *Yoder*.

Notwithstanding *Yoder*, commentators and courts agree that *Welsh* and *Seeger* are the measure of what constitutes a religion for First Amendment purposes. Even after *Yoder*, the Supreme Court, itself, continued to adhere to a view of religion that is congruent with its broad definition of religion in *Seeger* and *Welsh*. The Seventh Circuit had also previously explained that the Supreme Court embraces a broad definition of religion. In *Kaufman*, for example, the Seventh Circuit stated that its expansive definition of religion was crafted to be consistent with the Supreme Court’s broad conception of religion. Given that *Seeger* and *Welsh* are consistently regarded as the measure of what qualifies as a religious belief under the First Amendment, it is justifiable and unsurprising that the Seventh Circuit principle), the walls of a prison do not change the analysis of whether a set of secular beliefs occupies a place parallel to that of religion in the life of an individual.

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284 See Donovan, supra note 159, at 52.

285 See, e.g., Kaufman v. McCAughtry, 419 F.3d 678, 681-82 (7th Cir. 2005); Bronx Household of Faith v. Bd. of Educ. of City of N.Y., 492 F.3d 89, 126 (2d Cir. 2007); Wallace v. Jaffree, 472 U.S. 38, 52-3 (1985) (adhering to a broad definition of religion and acknowledging that religion under the First Amendment includes more than just traditional religious beliefs).

286 See Oldham, supra note 272, at 134; Clements, supra note 272, at 539 (“Although . . . [Yoder] seemed to cast doubt on the viability of the *Seeger* approach as a constitutional test for religion, it is unclear how much weight *Yoder* carries in determining the scope of “religion.” Since the state did not dispute the religious nature of the Amish practices, the definition of religion was not at issue, and the . . . [Court’s statements on religion are] dicta. As a result, *Yoder* should not necessarily be read as a rejection of the *Seeger* approach in constitutional cases.); Ingber, supra note 134, at 263. (“[T]he *Yoder* opinion made no effort to define religion.”); Smith, supra note 159, at 97 (stating that even when *Yoder* may have suggested an attempt by the Supreme Court to “commence the task of formulating a conservative content-based definition of it . . . *Yoder* has remained an island unto itself”). See also Wallace, 472 U.S. at 52-3 (speaking of religion in broad terms, acknowledging that religion encompasses more than just beliefs in relationship to a god); Cutter v. Wilkinson, 544 U.S. 709, 725 n.13 (2005) (explaining in dicta that *Seeger* is the governing framework to determine whether a particular belief is religious under the First Amendment).

287 *Kaufman*, 419 F.3d at 682.
did not even mention *Yoder*. *Yoder* would not have changed the result the Seventh Circuit reached as CFI’s beliefs are not a mere way of living or a simple philosophy and, the fact that CFI is an organized group would have provided any evidence of religious affiliation that *Yoder* may require. An application of *Yoder*, however, would have resulted in confusion as to what the Seventh Circuit and the Supreme Court regard as the appropriate test to determine what qualifies as a religious belief. Specifically, an application of *Yoder* would have mistakenly signaled a judicial attempt to return to a more traditional definition of religion when, in fact, the Supreme Court’s and the Seventh Circuit’s jurisprudence on religion have, for the most part, moved towards a broad and liberal definition of religion. The Supreme Court and the Seventh Circuit have interpreted religion broadly to recognize the rich and diverse beliefs that citizens in this country regard as their “religion.” An adoption of the narrower definition of religion of *Yoder* could potentially leave many beliefs that are the equivalent of religion unprotected under the Religious Clauses and, in turn, hinder the continued existence of religious exercise without government interference.

Nonetheless, a mention to *Yoder* for the discrete purpose of refuting the district court’s suggestion that CFI’s only purpose in asserting that its beliefs were equivalent to religion was to avoid the inconveniences of marriage regulation would have been justified. In *Yoder*, the Supreme Court warned that mere philosophies and “ways of living” could not trigger the protection of the Religious Clauses and thus, allow individuals to escape proper state regulation. Hence, the Court explained that had the Amish expressed their objections to compulsory education in terms of a subjective evaluation of the value of such education or a belief that there were better or alternative ways to live one’s life, the Amish would not have been entitled to a religious exemption. Just as that was not the case of the Amish, it was also

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290 Id. at 216.
not the case of CFI. First, CFI’s system of beliefs is not a philosophy or way of living. CFI embraces a set of moral and ethical beliefs, which in turn, direct and guide the lives of its members in the same way religion governs the lives of adherents. Second, and most importantly, CFI did not challenge the Solemnization Statute based on a subjective evaluation of state regulation of marriage. Instead, CFI challenged the Solemnization Statute on the grounds that the Statute prevented CFI members from having a “ceremony solemnized by someone who share[d] the[ ] [very] ethics and beliefs”\textsuperscript{291} that guide their lives. That CFI does not have a doctrinal stance on marriage, as some traditional religions do, does not mean that CFI members do not regard “having a ceremony solemnized by someone who shares their ethics and beliefs as extremely important and necessary . . . way of expressing their values.”\textsuperscript{292} In fact, the very reason why the state of Indiana had decided to accommodate traditional religions was to honor the “preferences . . . [of members of those religions] not to become legally . . . [married] until the moment when . . . [their marriage was] also consecrated by a religious ceremony” that celebrated their values.\textsuperscript{293}

Related to this point, the Seventh Circuit regarded as meritless Indiana’s assertion that members of CFI were not excluded from the Solemnization Statute because they could “first get a license, then have a . . . [CFI secular] celebrant perform a public ceremony appropriate to their beliefs, and finally have a court clerk or similar functionary solemnize the marriage.”\textsuperscript{294} That assertion, the Seventh Circuit stated, only “restate[d] the discrimination” that the CFI was suffering at the hands of the State of Indiana.\textsuperscript{295} CFI’s “ability to carry out a sham ceremony, with the real business done in a back of office,” the Seventh Circuit stated, does not address the fact that CFI is parallel

\textsuperscript{291} Reply Brief of Appellants, \textit{supra} note 128, at *7.
\textsuperscript{292} \textit{Id.}
\textsuperscript{293} Brief of Appellees, \textit{supra} note 14, at *23-24.
\textsuperscript{294} Ctr. for Inquiry, Inc. v. Marion Cir. Ct. Clerk, 758 F.3d 869, 873 (7th Cir. 2014).
\textsuperscript{295} \textit{Id.}
to religion for purposes of the Solemnization Statute and that it thus
should be treated the same way as religion. By condemning
Indiana’s suggestion that CFI could simply resort to sham ceremonies,
the Seventh Circuit exalted the importance of respecting the diversity
of religious beliefs and the premise that the Establishment class
protects traditional religious beliefs as well as all other beliefs that
citizens may sincerely regard as the equivalent of religion in their
lives.

C. Indiana’s Solemnization Statute Violates
the Neutrality Principle

Once the Seventh Circuit determined that CFI’s beliefs were the
equivalent of religion, it proceeded to an analysis of the Solemnization
Statute under the neutrality principle. The Seventh Circuit began by
stating that under Supreme Court and Seventh Circuit precedent
“neutrality is essential to the validity of an accommodation.” Thus,
when the state accommodates religion, it cannot choose favorites —
that is, it cannot draw distinctions between religious denominations
and “religious and secular beliefs that hold the same place in
adherents’ lives.” Indiana’s Solemnization Statute, the court stated,
made those very distinctions by granting the authority to solemnize
marriages only to certain religious sects, while excluding certain other
denominations as well groups that hold beliefs equivalent to religion,
even though all of them celebrate marriage.

296 Id.
297 Id.
298 Id.
299 Id. at 873.
300 Id. at 872-74.
1. Neutrality towards Secular Beliefs that are the Equivalent of Religion

The Seventh Circuit first noted that the Solemnization Statute failed to comply with the neutrality principle because it “favored religions over non-theistic groups that have moral stances that are equivalent to theistic ones.”\(^{301}\) The court explained that the Solemnization Statute favored religion over equivalent secular beliefs by extending the authority to solemnize a civil marriage only to religious groups. Those who embrace those equivalent belief systems, the court explained, “want their own views to be expressed by celebrants at marriages,” and “the state must treat them the same way it treats religion.”\(^{302}\) Thus, given that the state of Indiana chose to accommodate the marriage ceremonies of traditional religions, it was required to also accommodate the marriage celebrations of CFI.\(^ {303}\)

Indiana’s argument, the court continued, that, under *Marsh v. Chambers*, Indiana may permissibly accommodate religious groups without extending the accommodation to parallel non-religious groups was meritless.\(^ {304}\) In *Marsh*, the Supreme Court upheld the constitutionality of opening state legislative sessions with non-sectarian, Judeo-Christian prayer by a clergyman.\(^ {305}\) In upholding the prayer, the Supreme Court stated that, notwithstanding that the prayer was based in the Judeo-Christian tradition and conducted by a clergyman from only one denomination, the prayer was not an establishment of religion.\(^ {306}\) Instead, the Court explained, the prayer was “simply a tolerable acknowledgement”\(^ {307}\) of the long and widely held practice in this country of opening legislative sessions with prayer.

\(^{301}\) Id. at 873.
\(^{302}\) Id.
\(^{303}\) Id.
\(^{304}\) Id. at 874.
\(^{305}\) 463 U.S. 783, 792-95 (1983).
\(^{306}\) Id.
\(^{307}\) Id. at 792.
by a chaplain. Stretching the holding of *Marsh* from its unique application to legislative prayer, Indiana had argued that *Marsh* allows governments to permissibly—that is, consistent with the neutrality principle—accommodate religion without having to extend the accommodation to non-religious groups. More specifically, Indiana argued, that “[j]ust as legislative bodies may invite clergy to give a prayer without also inviting secular humanists to give non-religious speeches, so may states . . . delegate to religious clergy . . . the function of solemnizing marriages without also delegating that function to other” non-religious groups.

The Seventh Circuit properly found *Marsh* inapplicable. *Marsh*, the Seventh Circuit explained, concerned the long-held practice of opening legislative sessions with non-denominational prayer. Thus, *Marsh* dealt with “the government’s own operations;” not with the government’s regulation of private conduct. This was an important distinction as an inherent characteristic of a religious accommodation is that it lifts regulatory burdens the government has previously placed on the exercise of religion of private individuals and entities. All *Marsh* establishes, the Seventh Circuit continued, is “that a government may, consistent with the First Amendment, open legislative sessions with Christian prayers while not inviting leaders of

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308 *Id.* at 792, 786.
309 See, e.g., Snyder v. Murray City Corp., 159 F.3d 1227, 1232 (10th Cir. 1998) (“[T]he evolution of the Establishment Clause jurisprudence indicates that the constitutionality of legislative prayers is a *sui generis* legal question.”); Cammack v. Waihee, 932 F. 2d 765, 772 (9th Cir. 1991) (refusing to apply *Marsh* outside of the context of legislative prayer based on “reluctan[ce] to extend a ruling explicitly based upon the ‘unique history’ surrounding legislative prayer” to different contexts.); Weisman v. Lee, 728 F. Supp. 68, 74 (D.R.I.) *aff’d*, 908 F.2d 1090 (1st Cir. 1990) *aff’d*, 505 U.S. 577, (1992) (“The *Marsh* holding was narrowly limited to the unique situation of legislative prayer.”).
310 *Id.* at *22-25.
311 *Id.* at *22-23.
312 Ctr. for Inquiry, Inc. v. Marion Cir. Ct. Clerk, 758 F.3d 869, 874 (7th Cir. 2014).
313 *Id.*
314 *Id.*
other religions.”  

Marsh, however, “do[es] not begin to suggest that a state could limit the solemnization of weddings” to certain religious groups.  

While the Seventh Circuit correctly explained that Marsh did not establish that states may accommodate religious beliefs while excluding parallel secular beliefs, the Seventh Circuit did not address how Amos and Cutter do not support such a conclusion. Both, Amos and Cutter addressed religious accommodations and stated that “religious accommodations need not come packaged with benefits for secular entities” to comply with the neutrality principle.  

At first sight, Amos and Cutter may appear to support Indiana’s argument that it needed not to accommodate the beliefs of CFI in the Solemnization Statute to comply with the Establishment Clause. A closer look, however, reveals that Amos and Cutter cannot be taken to hold that the government may, consistent with the neutrality principle, accommodate only individuals or organizations that embrace traditional religious beliefs while denying the same accommodation to groups that have a belief system that is comparable to religion.  

The Seventh Circuit likely recognized this at the beginning of the opinion by stating that while Amos and other Supreme Court cases explain that “accommodations, by definition, treat the accommodated religion differently from one or more secular groups,” that could not be “a complete answer” to the fact that Indiana’s Solemnization Statute distinguished between religion and comparable secular beliefs.  

Indeed, Amos and Cutter could not be an answer to the distinctions the Solemnization Statute made as those cases more likely

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315 Id.
316 Id.
318 See, e.g., Douglas Laycock, Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause, 81 Notre Dame L. Rev. 1793, 1841 (2006) (discussing Amos and stating that under Amos “exemptions are invalid if they . . . are confined to a single sect, or to a single religious practice in a context where other religious practices are equally relevant to the exemption”).
319 Ctr. for Inquiry, Inc., 758 F.3d at 872.
stand for the more general proposition that the government does not violate the neutrality principle simply when, with the purpose of accommodating religion, it lifts government-imposed regulations from religious organizations, without also lifting the regulation from the rest of society. Such a conclusion is warranted given that Amos and Cutter, in contrast to Seeger and Welsh, did not address challenges to the accommodations at issue by groups claiming that their religious or comparable religious beliefs had been excluded from the accommodations. Instead, Amos and Cutter addressed challenges to the accommodations by groups who, far from claiming a religious entitlement to the accommodations, simply argued that the exemptions or “benefits” the accommodations conferred on religious groups had to be extended to all groups in order for the accommodations to be constitutional. For example, in Amos the Court only addressed the validity of Section 702 of Title VII in general, concluding that it did not violate the neutrality principle because it is simply sought to lift regulatory burdens the state had placed on the exercise of religion of religious entities. Given these distinctions, Amos and Cutter are better read as simply “creat[ing] a zone of [constitutionally] permissible accommodation of religion.”\textsuperscript{320} It does not follow, however, that Amos’s and Cutter’s recognition that the government may accommodate religion, that an accommodation may constitutionally be limited to religious beliefs to the exclusion of equivalent beliefs.\textsuperscript{321} In fact, the opposite is true. In Cutter, for instance, the Supreme Court specifically explained that RLUIPA was facially constitutional because

\textsuperscript{320} See Shivakumar, supra note 33, at 543; Timothy J. Aspinwall, Religious Exemptions to Childhood Immunization Statutes: Reaching for A More Optimal Balance Between Religious Freedom and Public Health, 29 LOY. U. CHI. L.J. 109, 127 (1997) (“Though Amos is significant because it upholds an exemption permitted exclusively for religion, it should not be read to indicate unrestrained Establishment Clause permissiveness.”).

\textsuperscript{321} McConnell, supra note 41, at 706 (“Although . . . Amos . . . [does not] allude[ ] to the issue, the logic of the Religion Clauses requires that accommodations be extended to all comparable religious practices.”).
it did not suffer from the fatal defect of discriminating among “bona-fide faiths.”\(^{322}\)

An argument that by “bona-fide faith” the Supreme Court was referring only to sincerely held religious beliefs, but not sincerely held equivalent beliefs, is possible, but highly questionable, as that would have contradicted the Court’s long-standing jurisprudence on the meaning of religion. Given the Supreme Court’s history of defining religion broadly, it is unlikely that Amos and Cutter controverted the Court’s holding in Seeger and Welsh that religious accommodations must extend to secular systems of belief which are the equivalent of religion. The Seventh Circuit’s discussion of Seeger, Welsh and Torcasso in determining that CFI’s beliefs were equivalent to religion stresses this point. Under those cases, the Seventh Circuit explained, the state must treat secular systems that are equivalent to religion “the same way it treats religion.”\(^{323}\) Thus, while Amos and Cutter allow the government to accommodate religion, the authority to accommodate, as the Seventh Circuit properly pointed out, “does not imply an ability to favor religions over non-theistic groups that have moral stances that are equivalent to theistic ones except for non-belief in God or unwillingness to call themselves religions.”\(^ {324}\)

The fact that CFI refused to call itself a religion colored the entire opinion of the Seventh Circuit. In analyzing the compliance of the Solemnization Statute with the neutrality principle, the Seventh Circuit could have simply referred to CFI as just another religious denomination, instead of referring to it as the equivalent of religion (or parallel to religion), and dispose of the issue that way. Such a course of action would have made the analysis more straightforward as the Establishment Clause does not tolerate distinctions between religions. The court chose, however, not to carry the analysis in that manner probably out of respect for CFI’s insistence that it refutes theism and that it is far and foremost not a religious organization. Moreover, the court probably decided not to label CFI as a religion in order to

\(^{323}\) Ctr. for Inquiry, Inc., 758 F.3d at 873.
\(^{324}\) Id.
promote the acceptance of the rich and diverse beliefs that Americans now embrace as their “religion.” If the Supreme Court and the Seventh Circuit have defined religion so broadly has been precisely to avoid distinctions among beliefs and to afford citizens the free exercise of their “religion” without sponsorship and without interference. In this respect, the Seventh Circuit had strong words for the State of Indiana, which had attempted to diminish CFI’s claims by stating that all CFI needed to do to come within the purview of the Solemnization Statute was to declare itself a religious organization and its leaders members of the clergy.325 Indiana’s willingness, the court stated, “to recognize marriages performed by hypocrites,”326 only served to show that, in fact, the Solemnization Statute preferred religion over nonreligious parallel beliefs.327 The Solemnization Statute’s preference for religion over comparable secular beliefs, the Seventh Circuit thus concluded, violated the neutrality principle.328

2. Neutrality between Religions

Moreover, the Seventh Circuit continued, Indiana’s Solemnization Statute violated the neutrality principle because it also preferred certain religions. As an initial matter, the Seventh Circuit stated that the Solemnization Statute ran afoul of the neutrality principle because it purported to prefer religions that have clergy as opposed to those with a different organizational structure as well as religions that accord “a sacred status to marriage” as opposed to those that see marriage as a celebration of their values.329 Those distinctions, the Seventh Circuit explained, are flatly prohibited by the Establishment Clause, which “clearest command . . . is that one religious denomination cannot be officially preferred over another.”330 Worse still, deeper analysis of the

325 Id. at 872
326 Id. at 874
327 Id. at 873-74.
328 Id.
329 Id.
330 Id. (citations omitted).
Solemnization Statute, the court explained, showed that the Solemnization Statute was more than an attempt to accommodate religions having clergy and a commitment to marriage. The Statute picked and chose favorites. Quakers, for example, could solemnize civil marriages in their own marriage ceremonies by virtue of being listed in subsection (6) of the Statute, even though they do not have clergy and “do not treat marriage as a sacrament.”331 This kind of favoritism, the court rightfully concluded, added to the problem that that Solemnization Statute already violated the neutrality principle by preferring religion over parallel secular beliefs.

The Seventh Circuit thus reversed the judgment of the district court and “remanded with instructions to issue an injunction” allowing CFI’s secular celebrants “to solemnize marriages in Indiana—to do this with legal effect, and without risk of criminal penalties.”332

CONCLUSION

In holding that Indiana’s Solemnization Statute violated the neutrality principle, the Seventh Circuit properly relied on its own as well as Supreme Court precedent that supports a broad definition of religion. Given the long standing jurisprudence of the Supreme Court in defining religion broadly, the Seventh Circuit was correct in omitting a discussion of precedent that arguably calls for a narrower definition of religion as that would have threatened to cause confusion as to the proper test for determining what qualifies as religion for purposes of First Amendment analysis. In a society that is diversely rich in religious beliefs, a narrower definition would have put in jeopardy the religious exercise of many Americans, in turn, threatening the requirement that the government remains neutral towards religion. Although the Seventh Circuit also did not discuss a line of Supreme Court cases that appeared to support the state of Indiana’s argument that the authority to solemnize a marriage needed not to be extended to secular entities to comply with the principle of

331 Id.
332 Id. at 875.
neutrality, those cases did not require a different result. While the Supreme Court has indeed stated that religious accommodations are reserved for religious entities and practices, it does not follow that once a secular set of beliefs qualifies as a religion under the First Amendment, it can, nevertheless, be denied the accommodation a government bestows upon traditional religious groups. CFI was thus entitled to an accommodation under Indiana’s Marriage Solemnization Statute.