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# DEFINING RELIGION FOR CONSTITUTIONAL PURPOSES: A NEW APPROACH BASED ON THE WRITINGS OF EMANUEL SWEDENBORG

Religion also is like a seed producing just and true desires, and judgments and acts therefrom, in spiritual things, and by means of these in moral things, and by means of both the latter and the former in civil things.\*

## INTRODUCTION

The Supreme Court has not defined “religion” under the Constitution. Religion is such a rich subject that it makes sense to look outside legal reasoning for its definition. Emanuel Swedenborg was a philosopher and theologian whose writings can assist the Court in this project.

Emanuel Swedenborg<sup>1</sup> was born on January 29, 1688, in Stockholm, Sweden.<sup>2</sup>

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\* EMANUEL SWEDENBORG, *The Coronis or Appendix to the True Christian Religion*, in 1 POSTHUMOUS THEOLOGICAL WORKS ¶ 40 (John Whitehead trans., Swedenborg Foundation 1996) (1771).

<sup>1</sup> There are several biographies of Swedenborg, some sympathetic, some critical. For a thorough listing see WILLIAM ROSS WOOFENDEN, SWEDENBORG EXPLORER’S GUIDEBOOK: A RESEARCH MANUAL 180-185 (Swedenborg Foundation 2002). The following are a few of the more important works: MARTIN LAMM, EMANUEL SWEDENBORG: THE DEVELOPMENT OF HIS THOUGHT (Tomas Spiers and Anders Hallengren trans., Swedenborg Foundation 2000) (1915) (of all the major biographies, this one gives the least attention to Swedenborg’s spiritual experiences); ERNST BENZ, EMANUEL SWEDENBORG: VISIONARY SAVANT IN THE AGE OF REASON (Nicholas Goodrick-Clarke trans., Swedenborg Foundation 2002) (1948) (This is “a thorough and scholarly work by a non-Swedenborgian.” WOOFENDEN, *supra*, at 181.); CYRIEL ODHNER SIGSTEDT, THE SWEDENBORG EPIC: THE LIFE AND WORKS OF EMANUEL SWEDENBORG (The Swedenborg Society 1981) (1952) (Hailed by WOOFENDEN, *supra*, at 183, as “the most complete, most thoroughly documented biography to date.”); ALFRED ACTON, THE LIFE OF EMANUEL SWEDENBORG: A STUDY OF THE DOCUMENTARY SOURCES OF HIS BIOGRAPHY, COVERING THE PERIOD OF HIS PREPARATION, 1688-1744 (Beryl G. Briscoe ed., Academy of the New Church 1958) (very comprehensive—based almost exclusively on original documents—but also extremely rare). For a very brief biography, in a one volume collection of diverse scholarly essays on many different aspects of Swedenborg’s works, see Jane K. Williams-Hogan, *Swedenborg: A Biography*, in SWEDENBORG AND HIS INFLUENCE 3 (Erland J. Brock et al. eds., The Academy of the New Church 1988).

Beginning when he was a young man, Swedenborg traveled Europe broadly, studying a multitude of subjects including mathematics, astronomy, chemistry, navigation, and mining.<sup>3</sup> In addition, he eventually joined Sweden's government, serving on the Board of Mines.<sup>4</sup> His long public career was respected and appreciated.<sup>5</sup>

When Swedenborg was 55, he began experiencing increasingly vivid dreams as well as waking visions.<sup>6</sup> Struggling to come to terms with what he considered spiritual experiences, he privately devoted himself to studying the Bible.<sup>7</sup> When the King offered him a promotion, he realized that he was too committed to his theological pursuits to continue working on anything else, so he resigned from government altogether.<sup>8</sup> Left to devote all his time to writing, Swedenborg

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<sup>2</sup> SIGSTEDT, *supra* note 1, at 1. The Swedberg family was ennobled on May 26, 1719, at which point they took on the surname Swedenborg. *Id.* at 58. Swedenborg's father was a Lutheran minister, who eventually became a bishop. BENZ, *supra* note 1, at 4.

<sup>3</sup> *See id.* at 18-25. His travels included England, Germany, Holland, and France. *See id.* at 18-29. Swedenborg eventually mastered "almost 40 skillful avocations," including watch making, bookbinding, furniture building, engraving, and drafting. John A. Eastman, *Swedenborg: Scientific Saint*, 85 *Christian Century* 156, 158 (1969).

<sup>4</sup> Swedenborg joined the Board in 1723 as an "Extraordinary Assessor (associate member)," a position for which he had fought since his initial appointment in 1716. SIGSTEDT, *supra* note 1, at 41, 92-93. Swedenborg dedicated himself to the position for 25 years. *Id.* at 213-214.

<sup>5</sup> *See generally id.*; BENZ, *supra* note 1, at 95-96. At the same time, this long employment provided Swedenborg with the stability to reflect on and study the philosophical question that most interested him—the connection between the created and the creator. *See generally* SIGSTEDT, *supra* note 1, at 133-140. During this period Swedenborg wrote several substantial works on science and philosophy, culminating in attempts to locate—physically—the human soul. *Id.* at 137 ("My object at present is especially to demonstrate, to the best of my ability, the nature and properties of the soul, and then to show from these endowments that it can never die without nature being annihilated."); *id.* at 139-140 ("All things concerning the animal body and soul should be proved by a first or metaphysical philosophy, by the analysis of natural things, by geometry and mechanism, by figures and calculus, by experiments, by the anatomy of the human body, by effects, by the passions of the body and mind, by the Sacred Scripture; in this manner this theory should be investigated."); *but see id.* at 175-177 ("Swedenborg now seems to have come to realize the limitations of the reasoning faculty. . . . Perhaps he felt that, in a certain sense, the soul had eluded him.").

<sup>6</sup> SIGSTEDT, *supra* note 1, at 174, 182-183.

<sup>7</sup> Swedenborg worked with Hebrew and Greek versions of the Bible. *Id.* at 203. *See generally id.* at 207-214.

<sup>8</sup> In 1747, the King had acted to promote Swedenborg to the position of "first Councillor" on the Board of Mines. *Id.* at 213-214. Swedenborg resigned because he did not believe he could meet the duties of this position and carry on his theological pursuits. *Id.* The King so appreciated Swedenborg's long service, that he granted him a pension—an essential support for Swedenborg's otherwise "non-profit" interests. *Id.* at 214.

produced over thirty volumes of religious works.<sup>9</sup> Before he died of a stroke on March 29, 1772,<sup>10</sup> he corresponded regularly with a large number of individuals, but there were none who had actually embraced his writings as a new religion.<sup>11</sup>

Swedenborg wrote that “it has pleased the Lord to manifest Himself to me and send me to teach the doctrines that will be doctrines of the New Church, the church meant by the New Jerusalem in the book of Revelation.”<sup>12</sup> He unapologetically identified himself as a revelator;<sup>13</sup> thus, some level of skepticism toward Swedenborg’s secular utility is understandable.

Fortunately, Swedenborg’s writings address “religion” in two modes. In what could be called the “ultimate mode,” “religion” means life according to the doctrine of the New Church—the doctrine revealed by Swedenborg, as a messenger of God. Simultaneously, in what might be called the “mediate mode,” Swedenborg addresses “religion” from the perspective of the universality of truth. In this mode,

<sup>9</sup> The first book of this period, *Arcana Coelestia* (Heavenly Secrets), was an impressive eight volumes, explaining the internal meaning of Genesis and most of Exodus through what Swedenborg termed “correspondences.” EMANUEL SWEDENBORG, *ARCANA COELESTIA* (John Elliott trans., Swedenborg Society 1983-1999) (1749-1756) [hereinafter *ARCANA COELESTIA*]; see Woofenden, *supra* note 1, at 77-82. He wrote a similar treatment of the book of Revelation called *Apocalypse Revealed*. EMANUEL SWEDENBORG, *APOCALYPSE REVEALED* (Frank Coulson trans., Swedenborg Society 1970) (1766) [hereinafter *APOCALYPSE REVEALED*]; see Woofenden, *supra* note 1, at 106-107. In *Divine Love and Wisdom* he explored the spiritual origins and ordering of the natural world. EMANUEL SWEDENBORG, *DIVINE LOVE AND WISDOM* (N. Bruce Rogers trans., General Church of the New Jerusalem 1995) (1763) [hereinafter *DIVINE LOVE AND WISDOM*]; see Woofenden, *supra* note 1, at 101. In *Divine Providence* he explained God’s invisible direction and protection of the world—and especially the human race. EMANUEL SWEDENBORG, *DIVINE PROVIDENCE* (Dick and Pulsford trans., Swedenborg Society 1949) (1764) [hereinafter *DIVINE PROVIDENCE*]; see Woofenden, *supra* note 1, at 105. In *Conjugal Love* he described the special and eternal love that can develop only between a husband and wife. EMANUEL SWEDENBORG, *CONJUGIAL LOVE* (Bruce Rogers trans., General Church of the New Jerusalem 1995) (1768) [hereinafter *CONJUGIAL LOVE*]; see Woofenden, *supra* note 1, at 111-112. Swedenborg intended his final work, *True Christian Religion*, to be the ultimate defense of the new Christianity he was describing, as well as the final explanation of why the Christianity of the Protestant and Catholic churches of his day should be abandoned. EMANUEL SWEDENBORG, *TRUE CHRISTIAN RELIGION*, (John Chadwick trans., Swedenborg Society 1988) (1771) [hereinafter *TRUE CHRISTIAN RELIGION*]; see Woofenden, *supra* note 1, at 121-122.

<sup>10</sup> Williams-Hogan, *supra* note 1, at 19; Sigstedt, *supra* note 1, at 432-433; Benz, *supra* note 1, at 517.

<sup>11</sup> See generally BENZ, *supra* note 1, at 487-491. The first Swedenborgian church started in England in 1778. See generally MARGUERITE BECK BLOCK, *THE NEW CHURCH IN THE NEW WORLD* 61-72 (Spec. ed., Swedenborg Publishing Association 1984) (1932).

<sup>12</sup> *CONJUGIAL LOVE*, *supra* note 9, at ¶ 1.

<sup>13</sup> SIGSTEDT, *supra* note 1, at 415 (A friend of Swedenborg’s wrote “It is unbelievable with what confidence the old gentleman speaks of his spirit kingdom, his angels and of God Himself.”).

any life system is a "religion," provided only that it meet certain fundamental criteria.<sup>14</sup>

Part I of this Note presents a definition of religion derived from the theology of Emanuel Swedenborg. Part II summarizes the Supreme Court's current lack of a definition of religion. Part III presents secular arguments supporting Swedenborg's definition of religion. Part IV defends the Swedenborgian definition as the best one for Constitutional purposes.

### I. SWEDENBORG'S DEFINITION OF RELIGION

Although virtually all of Swedenborg's writing during the last phase of his life was theological, he never specifically laid out a definition of religion. Nevertheless, he identified religion as the most important part of life on earth. According to him, religion is the "mediate cause" that links the human race (for whom God created the universe) and heaven (populated by the human race—the ultimate purpose of creation).<sup>15</sup> It follows that religion "is allotted the highest place in the human mind, and sees below it the social matters which concern the world . . . just as someone on a tower or a mountain has a view of the plains beneath."<sup>16</sup>

Swedenborg does not limit the use of this tower to members of any "one, true" religion. He explains that children receive religion from their parents as "a supreme predisposition."<sup>17</sup> It follows that "because the church varies and differs throughout the regions of the entire globe, therefore the souls of all human beings

<sup>14</sup> Swedenborg's theology is not as incoherent as this description implies. While he identifies the New Church—the religion of the ultimate mode—as the most true religion on earth, any religion—ultimate or mediate—is a means of salvation. Practitioners of mediate religions are saved because their religious life prepares them to accept the truth of the ultimate religion when they enter the next life. See *ARCANA COELESTIA*, *supra* note 9, at ¶ 8994:3 ("Furthermore those [people] who from their religion acknowledge God above all things, and from their religion do what charity requires them to do for their neighbor, on receiving instruction in the next life accept the truths of faith and are saved[.]"). At the same time, a person's religious culture continues to exist in heaven. See *TRUE CHRISTIAN RELIGION*, *supra* note 9, at ¶ 832 ("[Muslims], like all [who] acknowledge one God, love justice and do good for religious reasons, have their own heaven, but it lies outside the Christian one.").

<sup>15</sup> EMANUEL SWEDENBORG, *The Coranis or Appendix to the True Christian Religion*, in 1 *POSTHUMOUS THEOLOGICAL WORKS* ¶ 40 (John Whitehead trans., Swedenborg Foundation 1996) (1771) ("Who can deny that the universe was created for the sake of the human race, in order that from it an angelic heaven might be formed, wherein God might dwell in the dominion of His glory? To promote and accomplish this end, what mediate cause is there but religion?").

<sup>16</sup> *TRUE CHRISTIAN RELIGION*, *supra* note 9, at ¶ 601.

<sup>17</sup> *CONJUGIAL LOVE*, *supra* note 9, at ¶ 246 ("religion is implanted in souls, and it is transmitted through souls from parents to offspring as a supreme predisposition").

also vary and differ.”<sup>18</sup>

Swedenborg’s view of religion was also much more anthropological than many Protestant theologians of his day. For example, he wrote that unless a religion is adapted to a person’s experience of the world, that person will not accept that religion.<sup>19</sup> Further, “[e]verything that is contrary to a person’s religion is believed to be a sin because it is contrary to God; and conversely, everything that accords with religion is believed to be not a sin because it accords with God.”<sup>20</sup> Note that these passages do not qualify “religion” in any way. They address religion universally. To fulfill the ambitious descriptions made in these passages, we must identify the elements that comprise the phenomenon called “religion.”

Scattered in passages throughout his works, Swedenborg describes the content and limits of religion. Interpreting these passages as a whole, three requirements emerge. A life system is a religion only when:

1. It recognizes what is divine;
2. It includes rules governing behavior, traceable to what is divine, that do not contradict the “golden rule;” and
3. It calls on its participants to conform to the rules of the divine.

#### *A. First Prong: Recognizing What is Divine*

“The first and foremost element of every religion is recognition of what is Divine: a religion that does not recognize something Divine is not a religion.”<sup>21</sup> While Swedenborg repeats this requirement multiple times,<sup>22</sup> he is less than clear as

<sup>18</sup> *Id.*

<sup>19</sup> DIVINE PROVIDENCE, *supra* note 9, at ¶ 256 (“For example, a religion which ordains that it is not lawful to marry more than one wife is not received, but is rejected by those who for ages past have been polygamists. The same is true of other things ordained by the Christian religion.”).

<sup>20</sup> CONJUGIAL LOVE; *supra* note 9, at ¶ 348. *See also* ARCANA COELESTIA, *supra* note 9, at ¶ 3241:3 (“Everybody adheres to the teaching which his own Church upholds and calls it the truth. This is what gives rise to so many differences. . . . But although there are so many variations and differences in matters of doctrine, or so many derivatives, nevertheless they all together form one Church when everyone acknowledges charity to be the essential thing of the Church, or what amounts to the same, when everyone regards life as the end in view of doctrine—that is, when everyone asks, How does a member of the Church live? rather than, What does he think?”).

<sup>21</sup> EMANUEL SWEDENBORG, HEAVEN AND HELL ¶ 319 (George Dole trans., Swedenborg Foundation 1979) [hereinafter HEAVEN AND HELL]. *See also* EMANUEL SWEDENBORG, A BRIEF EXPOSITION OF THE DOCTRINE OF THE NEW CHURCH, SIGNIFIED BY THE NEW JERUSALEM IN REVELATION, ¶ 45 (Rupert Stanley trans., Swedenborg Society 1953) (1769) [hereinafter BRIEF EXPOSITION] (“[R]eligion consists in the acknowledgment of One God, and in the worship of Him from the faith of charity.”).

<sup>22</sup> DIVINE PROVIDENCE, *supra* note 9, at ¶¶ 253 (“all human beings who are born, . . . of whatever religion, can be saved if only they acknowledge God and live according to the precepts of the Decalogue”), 322 (“Of the Lord’s divine providence every nation has some

to the definition of “the Divine.” In addition, many of the passages that describe attributes of the divine appear to address religion in the ultimate mode.<sup>23</sup>

A sample of those passages that do indicate a mediate meaning suggests several principle aspects. “The Divine” is: “invariable and immutable,”<sup>24</sup> “everywhere the same,”<sup>25</sup> infinite,<sup>26</sup> supreme,<sup>27</sup> omnipotent,<sup>28</sup> “the source of everything,”<sup>29</sup> and “the All in all of the whole order of things . . . .”<sup>30</sup> The essential element of “the Divine” that all these aspects point to is its position as the nondependent origin of all things.<sup>31</sup> Thus, Swedenborg referred to the Divine as the ultimate “substance,” and wrote that “it is from [this substance] that everything comes which is in existence, has come into and is coming into being.”<sup>32</sup> Thus the divine is “the one and only absolute.”<sup>33</sup>

For Swedenborg, “religion” must include an acknowledgment of the divine because of God’s universal mercy. Since God desires everyone to join him in the blessedness of heaven, “He has provided a religion for everyone, *and by it an acknowledgment of the Divine[.]*”<sup>34</sup> Further, “the Lord’s Church is universal, and is

religion, and primary in every religion is the acknowledgement that God is, else it is not called a religion.”); DIVINE LOVE AND WISDOM, *supra* note 9, at ¶ 13 (“How important it is to have a right idea of God can be seen from the fact that the idea of God forms the inmost element of thought in all who have any religion, for all constituents of religion and all constituents of worship relate to God.”); TRUE CHRISTIAN RELIGION, *supra* note 9, at ¶ 113 (“For the idea of God enters into every part of religion, and it is this which establishes a link with God, and that link is the means of salvation.”).

<sup>23</sup> See, e.g., EMANUEL SWEDENBORG, APOCALYPSE EXPLAINED ¶ 684 (Isaiah Tansley trans., Swedenborg Society 1952) (1759) [hereinafter APOCALYPSE EXPLAINED] (“the Divine itself, which is called Jehovah”); ARCANA COELESTIA, *supra* note 9, at ¶ 2795 (“the Lord could not possibly be tempted when He was one with the Divine itself, for the Divine is infinitely above all temptation”).

<sup>24</sup> DIVINE LOVE AND WISDOM, *supra* note 9, at ¶ 77.

<sup>25</sup> DIVINE LOVE AND WISDOM, *supra* note 9, at ¶ 147.

<sup>26</sup> ARCANA COELESTIA, *supra* note 9, at ¶ 8760.

<sup>27</sup> ARCANA COELESTIA, *supra* note 9, at ¶ 8264.

<sup>28</sup> ARCANA COELESTIA, *supra* note 9, at ¶ 8265.

<sup>29</sup> ARCANA COELESTIA, *supra* note 9, at ¶ 5259.

<sup>30</sup> ARCANA COELESTIA, *supra* note 9, at ¶ 9568.

<sup>31</sup> *And see infra* notes 104-109 and accompanying text.

<sup>32</sup> TRUE CHRISTIAN RELIGION, *supra* note 9, at ¶ 53. Swedenborg used the word “substance” to describe what is immaterial—i.e. the spiritual substance that exists within all physical matter. See e.g. TRUE CHRISTIAN RELIGION, *supra* note 9, at ¶ 694 (“matter originates from substance”).

<sup>33</sup> DIVINE LOVE AND WISDOM, *supra* note 9, at ¶ 198.

<sup>34</sup> HEAVEN AND HELL, *supra* note 21, at ¶ 318 (emphasis added). This is circular only because it describes a cycle: God gives life so that something other than himself exists and can therefore return his love and enjoy heaven with him. In order to facilitate the progress of people’s journey to heaven he gives people religion. In religion therefore, people look to and love God.

with all who acknowledge the Divine and live in charity.”<sup>35</sup> Charity involves doing good (which implies refraining from doing evil). Distinguishing between good and evil requires a standard of judgment—in other words, a rule.

*B. Second Prong: The Inclusion of Rules Governing Behavior, Traceable to What is Divine, That Do Not Contradict the “Golden Rule”*

The rules that define the boundaries of a life system define good and evil in relation to that life system. Obeying the rules is good; disobeying the rules is evil. Swedenborg’s definition of religion requires a particular definition of good and evil.

As with the first requirement, the second also turns on the idea that God’s mercy is universal, for “[o]nce a religion is established in a nation the Lord leads that nation according to the precepts and tenets of its own religion, and he has provided that there should be precepts in every religion *like* those in the Decalogue . . . .”<sup>36</sup> It would be disingenuous to claim that every religion in the world literally espoused *ten commandments*. However, most of the established religions of the world do share principles in line with Ten Commandments,<sup>37</sup> even if they are not codified in the same manner.<sup>38</sup> But just how much like the Ten Commandments must a life system’s principles be to satisfy the requirement? The answer lies in the relationship of the Ten Commandments to a broader moral imperative.

According to Swedenborg, the last six of the Ten Commandments illustrate morality and charity because they address the individual’s treatment of other individuals and groups of individuals.<sup>39</sup> The ultimate law of charity, which Jesus

<sup>35</sup> *Id.* at ¶ 308.

<sup>36</sup> DIVINE PROVIDENCE, *supra* note 9, at ¶ 254:3 (emphasis added).

<sup>37</sup> WORLD SCRIPTURE: A COMPARATIVE ANTHOLOGY OF SACRED TEXTS 110-115, 329-356 (Andrew Wilson et al. eds., Paragon House 1991).

<sup>38</sup> *See Id.* at 110 (“Just as the Decalogue, or Ten Commandments, is the basis of Jewish and Christian ethical values, similar lists of ethical principles may be found in one form or another in the scriptures of most religions.”); Roger Syn, *Copyright God: Enforcement of Copyright in the Bible and Religious Works*, 14 REGENT U.L. REV. 1, 16 n.88 (2001-2002) (“All civilizations share a common moral thread. . . . [T]here is at least a core of universally accepted ‘thou shalt not.’”). For a popular treatment of the correlation *see* RAY SILVERMAN AND STAR SILVERMAN, *RISE ABOVE IT: SPIRITUAL DEVELOPMENT THROUGH THE TEN COMMANDMENTS* (Mark Pendleton ed., Touchstone Seminars 2000) (exploring a program for life enrichment using Christianity’s ten commandments, accompanied by parallel principles from Swedenborgianism, Islam, Hinduism, Judaism, and Buddhism).

<sup>39</sup> TRUE CHRISTIAN RELIGION, *supra* note 9, at ¶ 444 (“[I]t would take a great many pages to list all charitable deeds and compare them with the deeds prescribed by a moral life, so [the last six of the] Ten Commandments can serve as an illustration. . . . Charity fulfils all these commandments, as is clear from the following passage of Paul: ‘Love one another, for he who loves another has fulfilled the law. For the [last six of the Ten] [C]ommandments . . . , and any other commandment there may be, these are all summed up in this phrase: You are to love your neighbor as yourself. Charity does not do evil to the neighbor; it is the fulfillment of the law.’” (quoting *Romans* 13:8-10)).

appropriately said incorporated all “the law and the prophets,” is one single law: “whatever you want [people] to do to you, do also to them . . . .”<sup>40</sup> This “golden rule” acts as a check on the content of life systems that may be religions. In other words, if a life system maintains a rule that requires a practitioner to violate the golden rule, that life system cannot be a religion—even if it meets the first and third requirements, and even, presumably, if it has ten “commandments.”<sup>41</sup>

### *C. Third Prong: Calling on Participants to Conform to the Rules of the Divine*

The third requirement proposed here is that for a life system to be a religion, it must call on its practitioners to obey the rules prescribed by the divine. According to Swedenborg, religion and life are inseparable. For example, he writes that “[a]ll religion is of life, and the life of religion is to do good.”<sup>42</sup> Swedenborg repeats this statement several times in various permutations.<sup>43</sup> For example, he writes that “religion belongs to life, and life is to shun evils and do goods”<sup>44</sup>—in other words, truly living means obeying God’s rules. Ultimately this is because a person’s condition in the afterlife depends on her conduct in this life.<sup>45</sup> If that conduct accords with the divine’s rules, then the person receives heaven after death; if that

<sup>40</sup> *Matthew* 7:12 (New King James).

<sup>41</sup> For a full discussion of the golden rule see *infra* Part III, notes 120-151 and accompanying text.

<sup>42</sup> EMANUEL SWEDENBORG, *Doctrine of Faith, in THE FOUR DOCTRINES* ¶ 1 (John Faulkner Potts trans., Swedenborg Foundation 1904) (1763) (A more recent version renders it “[a]ll religion has relation to life, and the life of religion is to do good.” EMANUEL SWEDENBORG, *Doctrine of Faith, in THE FOUR DOCTRINES* ¶ 1 (William C. Dick trans., Swedenborg Society 1954) (1763)).

<sup>43</sup> APOCALYPSE EXPLAINED, *supra* note 23, at ¶¶ 452 (“no one, whether within the church where the Word is, or out of that church, who lives a good life according to his religion, is condemned”), 847 (“all religion has life as its end; for it teaches what evils are to be shunned, and what goods that are to be done. A religion that has not life as its end cannot be called a religion”); APOCALYPSE REVEALED, *supra* note 9, at ¶ 923 (“where there is doctrine and not life there cannot be said to be either the Church or religion”); EMANUEL SWEDENBORG, *CHARITY* ¶ 212 (Frank Coulson, trans., Swedenborg Society 1947) (1766) (“religion is religion from a life in accordance with doctrine”).

<sup>44</sup> BRIEF EXPOSITION, *supra* note 21, at ¶ 44 (The actual passage refers to God and the Devil as the sources of good and evil, but the passage can be applied to any religion on the principle that true religion is adapted to the people who follow it. See *DIVINE PROVIDENCE*, *supra* note 9, at ¶ 256).

<sup>45</sup> HEAVEN AND HELL, *supra* note 21, at ¶ 425 (“A person has heaven within himself, then, to the extent that true elements belonging to his discernment are bonded to good elements belonging to his intention—that is, to the extent that he intends true things and therefore does them—because the bonding of what is good and what is true is heaven, as stated above. Conversely, a person has hell within himself to the extent that false elements belonging to his discernment are bonded to evil elements belonging to his intention, because the bonding of what is false and what is evil is hell.”).

conduct contradicts those rules, then the person receives hell.<sup>46</sup> More immediately, “religion” requires a life according to the divine’s rules because God wants everyone to have peace now (i.e., on earth), and the best vehicle for peace is respect for each other and for order.

In summary, Swedenborg’s definition of religion has several interacting requirements. To be a “religion,” a life system must recognize the existence of a nondependent fundamental force—“the Divine.” Every life system that is a “religion” must incorporate imperatives traceable to the divine, and these imperatives must not contradict the golden rule. Finally, all religions must require that their practitioners abide by the divine’s imperatives. This is how Swedenborg, as a revelator, defines religion. The next section investigates how the Supreme Court has defined religion.

## II. THE SUPREME COURT’S DEFINITION OF RELIGION

The First Amendment to the United States Constitution states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .”<sup>47</sup> There is ample evidence that religious freedom was especially important to the first United States citizens.<sup>48</sup> For James Madison, for example, “religious freedom was the crux of the struggle for freedom in general.”<sup>49</sup> Nevertheless, the Supreme Court did not address the definition of the word “religion” until almost 90 years after the clause’s ratification.

In the famous polygamy cases, *Reynolds v. United States*<sup>50</sup> and *Davis v. Beason*,<sup>51</sup> the Supreme Court announced a content-based, theistic definition of religion.<sup>52</sup> In both cases the Court did not actually need to define religion, but did

<sup>46</sup> EMANUEL SWEDENBORG, *DOCTRINE OF LIFE* ¶ 8 (William C. Dick trans. Swedenborg Society 1954) (1763) [hereinafter *DOCTRINE OF LIFE*]. The doctrine is less cold than this short treatment makes it sound. The individual’s external acts that violate the laws of the religion are always disorderly and harmful, but they are only evil—or sufficient to orient a person towards hell—if the individual embraces that disorder internally. See *CONJUGIAL LOVE*, *supra* note 9, at ¶ 527; *ARCANA COELESTIA*, *supra* note 9, at ¶ 1327 (“The situation is similar with someone who does evil but does not have evil in mind. The evil he does cannot be attributed to him any more than to someone who does not deliberately intend evil, or to anyone devoid of rationality.”).

<sup>47</sup> U.S. CONST. amend. I.

<sup>48</sup> See, e.g., Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1476-1483.

<sup>49</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1, 34 (1947) (Rutledge, J., dissenting) (citing ¶ 15 of Madison’s *Memorial and Remonstrance* attached to *Everson* as an appendix at 330 U.S. 63-73). See also 2 THE WRITINGS OF JAMES MADISON 190-191 (Gerald Hunt ed. 1901).

<sup>50</sup> 98 U.S. 145 (1878).

<sup>51</sup> 133 U.S. 333 (1890).

<sup>52</sup> See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §14-6, 1180 (2nd ed. 1988); Jeffrey L. Oldham, Note, *Constitutional “Religion” A Survey of First Amendment Definitions of Religion*, 6 TEX. FORUM CIV. LIB. & CIV. R. 117, 156 (2001).

so in its analysis of the amendment. The *Davis* Court held that: “[t]he term ‘religion’ has reference to one’s views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.”<sup>53</sup> In neither case did the Court question classifying Mormonism as a religion. Yet both cases ruled against polygamists, relying on the argument that the Religion Clauses did not prevent the federal government from prohibiting “overt acts against peace and good order.”<sup>54</sup> The *Davis* court explained that it “was never intended or supposed that the [first] amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order, and morals of society.”<sup>55</sup>

This theistic definition of religion remained undisturbed for decades. The first glimmer of a change came in *United States v. Macintosh*.<sup>56</sup> Writing in dissent,<sup>57</sup> Justice Hughes returned to *Davis*’ definition of religion, and then added his own theory for religious liberty:

One cannot speak of religious liberty, with proper appreciation of its essential and historic significance, without assuming the existence of a belief in supreme allegiance to the will of God. . . . And, putting aside dogmas with their particular conceptions of deity, freedom of conscience itself implies respect for an innate conviction of paramount duty.<sup>58</sup>

Hughes simultaneously affirmed the theistic definition, while introducing the role of conscience and varying “conceptions of deity.”<sup>59</sup>

The next step toward acknowledging non-theistic content in religious beliefs came in *United States v. Ballard*.<sup>60</sup> In this case, a family had allegedly used the mail to commit fraud.<sup>61</sup> They had established a sizable following of religious

<sup>53</sup> *Davis*, 133 U.S. at 342.

<sup>54</sup> *Reynolds*, 98 U.S. at 163 (quoting from the preamble to Jefferson and Madison’s religious freedom bill introduced in Virginia, 12 Hening’s Stat. 84) (internal quotes omitted).

<sup>55</sup> *Davis*, 133 U.S. at 343.

<sup>56</sup> 283 U.S. 605 (1931).

<sup>57</sup> The issue in the case was whether an immigrant could be naturalized despite his unwillingness, on religious grounds, to *unconditionally* pledge to defend the country by serving in the military. The majority overcame the country’s tradition of “according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God,” with the nation’s “duty to survive.” *Id.* at 625. The Court explained that:

[The] government must go forward upon the assumption, and safely can proceed upon no other, that unqualified allegiance to the nation and submission and obedience to the laws of the land, as well those made for war as those made for peace, are not inconsistent with the will of God.

*Id.* Justice Hughes could not agree. See *id.* at 627-635 (Hughes, C.J., with Holmes, Brandeis, and Stone, JJ., dissenting).

<sup>58</sup> *Id.* at 634 (Hughes, C.J., dissenting).

<sup>59</sup> *Id.*

<sup>60</sup> 322 U.S. 78 (1944).

<sup>61</sup> *Id.* at 79.

believers in their "I Am" movement, and they used the mail to collect donations.<sup>62</sup> This case does not actually repudiate the theistic definition of religion. Rather, it implicitly embraces this definition by explaining that the First Amendment removed "[m]an's relation to his God" from the State's concerns.<sup>63</sup> However, Justice Douglas argued that the First Amendment granted a man "the right to worship as he pleased and to answer to no man for the verity of his religious views"—regardless of whether those views were predominant or "preposterous."<sup>64</sup>

The Supreme Court finally abandoned its theistic definition in *Torcaso v. Watkins*.<sup>65</sup> This easy case involved the section of Maryland's Constitution that required public office holders to profess a belief in the existence of God.<sup>66</sup> A unanimous Court explained that the Establishment Clause did not allow either a state or the federal government to "aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."<sup>67</sup> Justice Black further noted that "[a]mong religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism, and others."<sup>68</sup>

Eleven years later, Chief Justice Burger's majority in *Wisconsin v. Yoder*<sup>69</sup> tiptoed past defining "religion," calling it "a most delicate question."<sup>70</sup> The opinion did further clarify what is *not* religion, explaining that a "way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation . . . if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief."<sup>71</sup> For example, Thoreau's beliefs<sup>72</sup> could not have received constitutional protection because his "choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses."<sup>73</sup>

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<sup>62</sup> *Id.* at 79-80; see Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1062 n.43.

<sup>63</sup> *Ballard*, 322 U.S. at 87.

<sup>64</sup> *Id.* It is difficult to reconcile Douglas' reference to religion in theistic terms with his bar on inquiries as to religious veracity. The implication is that regardless of the content, if it calls itself a religion, it is one. Future courts (and future academicians) took his statement closer to its logical conclusion. For example, three years later Justice Rutledge described religious people as those who "express their feeling toward ultimate issues of existence in [a] creedal form[.]" *Everson v. Board of Education*, 330 U.S. 1, 45 (1947) (Rutledge, J., dissenting), implying that all content was irrelevant as long as the form was intact.

<sup>65</sup> 367 U.S. 488 (1961).

<sup>66</sup> *Id.* at 489.

<sup>67</sup> *Id.* at 495.

<sup>68</sup> *Id.* at 495 n.11.

<sup>69</sup> 406 U.S. 205 (1972).

<sup>70</sup> *Id.* at 215.

<sup>71</sup> *Id.*

<sup>72</sup> The Chief Justice explained that Thoreau rejected "the social values of his time," choosing to live in isolation at Walden Pond. *Id.* at 216.

<sup>73</sup> *Id.* (Justice Douglas, in dissent, strongly criticized this distinction. Quoting from both

Justice Douglas and at least one commentator have criticized Burger's substantial dicta regarding the long history, peaceable reputation, and idyllic aspirations of the Amish as irrelevant to the First Amendment inquiry.<sup>74</sup> But this was dicta, as the Court specifically rejected the task of defining "religion." Burger's praise for the Amish is at most a testament to the ease of finding "religion" in cases that involve established, respected sects.<sup>75</sup>

Burger also delivered the Court's opinion in *Thomas v. Review Board of the Indiana Employment Security Division*.<sup>76</sup> The case arose when a Jehovah's Witness sought protection under the Religion Clauses.<sup>77</sup> Burger took a somewhat more direct stance in this case as compared to *Yoder*, writing that defining religion is "more often than not a delicate task."<sup>78</sup> He continued, however, to explain that the question's "resolution . . . is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."<sup>79</sup> While this statement broadly forbids inquiry into the consistency of religious beliefs, it necessarily does not abandon *Yoder's* requirement that those beliefs be religious.

The Court reaffirmed both *Yoder* and *Thomas* in *Frazee v. Illinois Department of Employment Security*.<sup>80</sup> The plaintiff in that case refused to accept available employment because it involved working on Sunday. He was subsequently denied unemployment compensation on the grounds that "religious convictions" are not sufficient to warrant such coverage unless those convictions are supported by "some tenets or dogma accepted by the individual of some church, sect, or denomination."<sup>81</sup> In overturning this ruling, the Court reiterated that only religious beliefs would receive the protection of the Religion Clauses,<sup>82</sup> but rejected "the notion that to claim the protection of the Free Exercise Clause, one must be

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*United States v. Seeger*, 380 U.S. 163 (1965), and *Welsh v. United States*, 398 U.S. 333 (1970), he argued that the great diversity of religions in America calls for the broad definition of religion in those cases. See *Yoder*, 406 U.S. at 247-249 (Douglas, J., dissenting).

<sup>74</sup> See, e.g., *id.* at 246-247; TRIBE, *supra* note 52, at §14-6, 1181 n.21.

<sup>75</sup> It is worth noting that the Amish are a theistic sect. One wonders what the opinion would look like if the case involved a less well known religious group.

<sup>76</sup> 450 U.S. 707 (1981).

<sup>77</sup> *Id.* at 707. The case arose when a Jehovah's Witness quit his job at a foundry because the company was shifting all of its production to supply the military. *Id.* at 709-711. The State of Indiana then refused to grant the employee unemployment benefits because his "termination was not based upon a 'good cause [arising] in connection with [his] work'" as the statute required. *Id.* at 711-712. The Supreme Court ruled that the employee "cannot be denied the benefits due him . . ." *Id.* at 720.

<sup>78</sup> *Id.* at 714 (emphasis added).

<sup>79</sup> *Thomas*, 450 U.S. at 714.

<sup>80</sup> 489 U.S. 829 (1989).

<sup>81</sup> *Id.* at 830.

<sup>82</sup> *Id.* at 833.

responding to the commands of a particular religious organization.”<sup>83</sup>

These cases leave the Court with much less than a definition of religion.<sup>84</sup> *Davis* and *Torcaso* sketch a picture of religion that involves a belief in a god or gods, but includes more than that. *Yoder* frames the scene by excluding secular or merely personal beliefs. *Frazee* adds some color by separating religion from religious institutions. Casting a haze over it all, *Thomas* and *Ballard* disallow evaluating the logic or veracity of a religion. As the following sections show, Emanuel Swedenborg’s definition of religion meets all of these requirements, while resolving much of the confusion.

### III. SECULAR ARGUMENTS IN DEFENSE OF THE SWEDENBORGIAN DEFINITION

#### *A. Why a Life System that is a “Religion” Must Recognize the Divine*

As discussed above, the Supreme Court has embraced the idea that a life system does not need to be theistic to be a “religion.” However, the Court has not yet commented on whether or not the First Amendment requires “religion” to include something “divine.”

Some authors have confused this issue by discussing the Supreme Court’s conscientious objector cases as if they involved the definition of “religion” in the First Amendment.<sup>85</sup> In fact, those cases address only the definition of “religion” in a narrow statutory context.<sup>86</sup> In *United States v. Seeger*,<sup>87</sup> the Court interpreted a section of the Universal Military Training and Services Act, which created an exemption from military “training and service” for any individual “who, by reason of religious training and belief, is conscientiously opposed to participation in war in

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<sup>83</sup> *Id.* at 834.

<sup>84</sup> Reviewing the Court’s encounters with defining religion, it is interesting to note that most of the cases involved practitioners of long-established religious institutions. In the one exception, *Ballard*, the Court did not appear troubled by the sect at issue (this is perhaps due to the fact that the Ballards called on Christian imagery, and maintained that their faith involved a traditionally accepted effect of religious faith: miraculous healing. *Ballard*, 322 U.S. at 79-80).

<sup>85</sup> Oldham, *supra* note 52, at 130-131 (“Seeger deals almost exclusively with the definition of religion problem.”); Note, *supra* note 62, at 1063 (“[Seeger] and [Welsh] were the occasions for the most detailed consideration of the definition of religion yet given by the Supreme Court.”).

<sup>86</sup> See *TRIBE*, *supra* note 52, at §14-6, 1183; Spencer E. Davis, Jr., *Constitutional Right or Legislative Grace? The Status of Conscientious Objection Exemptions*, 19 *FLA. ST. U. L. REV.* 191, 203 (1991) (“Welsh was decided strictly on the basis of statutory construction and never even mentioned a free exercise issue.”); Note, *Constitutional Law – Nonestablishment of Religion – Military Selective Service Act of 1967 Unconstitutionally Denies Exemption to Nonreligious Conscientious Objector to Combat Service in Vietnam*, 83 *HARV. L. REV.* 453, 456 (1969) (“The Seeger Court was construing a statute rather than the Constitution.”).

<sup>87</sup> 380 U.S. 163 (1965).

any form . . . .”<sup>88</sup> The section included an important definition:

Religious training and belief in this connection means an individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.<sup>89</sup>

The Court, substantially ignoring the text,<sup>90</sup> defined “religion” as a “sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by [the familiar religious concept of] God . . . .”<sup>91</sup> In *Welsh v. United States*,<sup>92</sup> the Court, addressing a modified version of the same statute,<sup>93</sup> soundly reaffirmed and even extended *Seeger*. The Court construed the statute to “[exempt] from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war.”<sup>94</sup>

The historical context of these cases is instructive. Both involved special pressures on the Court. On one hand, a strict reading of the statute in *Seeger* would require distinguishing between theistic and non-theistic life systems, providing conscientious objector status only to members of the former.<sup>95</sup> On the other hand, *Torcaso* held that “religion” was not limited to theism.<sup>96</sup> A strict construction of the statute, excluding members of non-theistic life systems from being able to obtain conscientious objector exemptions, would obviously have been unconstitutional.<sup>97</sup> But if the Court struck down the statute there would be no conscientious objector provision, opening the system to a free exercise assault.<sup>98</sup> In

<sup>88</sup> *Id.* at 173-174. See also *Welsh v. United States*, 398 U.S. 333, 336 (1970), quoting the relevant section in full.

<sup>89</sup> 62 Stat. 612 (1948) (repealed 1967).

<sup>90</sup> See Note, *supra* note 62, at 1064; Note, *The Supreme Court, 1969 Term, III. Federal Statutes and Government Regulation, E. Selective Service System, 3. Right to Conscientious Objection Classification for Ethical Opposition to War*, 84 HARV. L. REV. 230, 233 (1970) (“the tortured construction of the statute . . . at variance with the language and legislative history”).

<sup>91</sup> *Seeger*, 380 U.S. at 176 (in support of this proposition the Court cites, among others, Dr. Paul Tillich, *id.* at 180).

<sup>92</sup> 398 U.S. 333 (1970).

<sup>93</sup> Congress had amended the statute in 1967, removing all reference to a “Supreme Being.” The altered sentence read: “the term ‘religious training and belief’ does not include essentially political, sociological, or philosophical views or a merely personal moral code.” 81 Stat. 104 (1967).

<sup>94</sup> *Welsh*, 398 U.S. at 344.

<sup>95</sup> *Id.* at 348 (Harlan, J., concurring).

<sup>96</sup> *Torcaso v. Watkins*, 367 U.S. 488 (1961). See *supra* Section II, notes 65-68 and accompanying text.

<sup>97</sup> Note, *The Supreme Court, 1964 Term, II. Armed Forces, Conscientious Objectors*, 79 HARV. L. REV. 113, 115 (1965) (“the Court protected the conscientious objector provision from a constitutional crossfire”).

<sup>98</sup> *Welsh*, 398 U.S. at 370-372 (White, J., dissenting).

addition, the Court was surely aware of the political disruption such a decision would cause (not to mention the probable harm done to those with conscientious objections). These pressures help explain why the Court arrived at the anomalous construction that it did.<sup>99</sup>

The reasons not to apply these broad statutory definitions to “religion” in the First Amendment are clear. Understood most broadly, *Seeger* and *Welsh* present a definition of religion that “tends to be all-inclusive and uninformative,” providing “no identifiable elements by which a religious claim can be evaluated.”<sup>100</sup> They contribute nothing to the task of distinguishing religion from non-religion.<sup>101</sup> This is a fatal flaw, for the clause explicitly addresses only “religion.”<sup>102</sup>

Surely the *simplest* way to determine if a life system is a religion is by identifying whether or not the life system in question includes the recognition of some divine force or being. It is also a *reliable* method of finding religion.<sup>103</sup> According to Prof. Roy Clouser, “all religious traditions seem to center around whatever they believe to be divine, but they disagree widely on how that is to be thought of.”<sup>104</sup>

Just as Swedenborg’s writings distinguish between an ultimate mode and a mediate mode, Clouser suggests that we differentiate between “what it is that has the office or status of being divine” and “that status[,] irrespective of who or what is believed to have it.”<sup>105</sup> As described in Part I, *supra*, Swedenborg identifies many aspects of the divine. The most basic aspect of “the Divine” is that it is a “substance” that depends on nothing, and on which everything else depends—“the one and only absolute.”<sup>106</sup> After distinguishing between the “office-holder” and the “office of” the Divine, Clouser arrives at the same definition:

[T]he meaning of the divine status is one thing [that all the major religions] agree upon! They all hold in common that *the Divine is whatever does not*

<sup>99</sup> See MICHAEL W. MCCONNELL ET AL., *RELIGION AND THE CONSTITUTION* 886 (2002).

<sup>100</sup> Steven D. Collier, Comment, *Beyond Seeger/Welsh: Redefining Religion Under the Constitution*, 31 EMORY L.J. 973, 989 (1982).

<sup>101</sup> *Id.*

<sup>102</sup> TRIBE, *supra* note 52, at §14-6, 1181 n.13 (citing John H. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CAL. L. REV. 847, 851 (1984) (“An alternative [to *Seeger*’s test] is to consider religious only those beliefs that affirm the existence of a spiritual reality. If this definition excludes some philosophies, that, it may be said, is exactly what the Constitution intended.”)).

<sup>103</sup> WORLD SCRIPTURE, *supra* note 37, at 1 (“It is now widely recognized that humanity’s search for God, or for the Ultimate Reality, called by whatever name, is at the root of all religions.”). And see *infra* note 104, and accompanying text.

<sup>104</sup> ROY A. CLOUSER, *THE MYTH OF RELIGIOUS NEUTRALITY: AN ESSAY ON THE HIDDEN ROLE OF RELIGIOUS BELIEFS IN THEORIES* 16 (1991).

<sup>105</sup> *Id.*

<sup>106</sup> DIVINE LOVE AND WISDOM, *supra* note 9, at ¶ 198.

*depend on anything else for its existence*, so all that is not divine depends for its existence on the Divine.<sup>107</sup>

This definition is easy both to grasp and to administer. All a court must do is inquire into whether the individual sincerely believes in something that fits this definition of "Divine."<sup>108</sup>

Incorporating "the Divine" also cuts through the Court's "mono-poly-quasi-theistic" confusion. "The Divine" can be monotheistic, it can be polytheistic, and it can be something else entirely. As Clouser suggests, "the Divine . . . is variously believed to be one supreme creator, two ever-opposing forces, a realm populated by many gods, being-itself, nothing, etc."<sup>109</sup>

In sum, the Court and the Constitution only extend the protections of the religion clauses to religion. Belief is one essential element in religion. But as *Seeger* and *Welsh* illustrate, belief on its own is not enough to define religion. The first step in religion is believing in something that does not depend on anything else, and upon which everything else depends. This belief in the divine is the heart of religion; the second prong, discussed in the following section, is the body.

*B. Why a Life System that is a "Religion" Must Include Rules from the Divine that Don't Contradict the "Golden Rule"*

Requiring a religion to have rules guarantees that the religion actually needs constitutional protection. After all, governmental *establishment* of a life system that makes no substantive demands on anyone would not threaten any liberties. Nor would the *free exercise* of a life style that did not require its practitioners to behave in a specific way ever need special constitutional coverage—the other basic civil liberties specifically address all of the important forms of expression and human dignity and would continue to operate without the help of overarching religion clauses.<sup>110</sup>

Additionally, it is worth noting that all of the world's major religions have rules.<sup>111</sup> The most familiar example of religious rules in western experience is the

<sup>107</sup> CLOUSER, *supra* note 104, at 19 ("This is true, for example, of the Tao of Taoism, of Yahweh in Judaism and Christianity (Allah in Islam), of Brahman-Atman in Hinduism, and of the Dharmakaya, Void, Nirvana, or Suchness in various branches of Buddhism. . . . In fact, I have not yet found any religion . . . which does not explicitly or implicitly share the same idea of the status of divinity. They all believe that the divine is whatever is 'just there,' and that all that is not divine depends on the divine in the sense that the divine can exist without the nondivine, but the nondivine cannot exist without the divine.").

<sup>108</sup> It is possible that a court might find it helpful to spend some time analyzing the individual's sincerity. For instance, the court could require that a psychologist testify that the individual is capable of believing that something is Divine. While this is possible, and clearly raises additional questions, these are beyond the scope of this note.

<sup>109</sup> *Id.* at 16.

<sup>110</sup> See *infra* note 177, and accompanying text.

<sup>111</sup> WORLD SCRIPTURE, *supra* note 37, at 97 ("All religions recognize a transcendent Law, Truth, or Principle which governs the universe and human affairs.").

Decalogue of Judaism and Christianity.<sup>112</sup> Islam contains several similar lists,<sup>113</sup> and Hinduism, Buddhism, and Jainism all have lists of ten “precepts.”<sup>114</sup>

It is unnecessary to burden the word “rules” with a strict philosophical and logical definition.<sup>115</sup> It is equally unnecessary to strain over whether or not the rules come from the divine. In most religious traditions there is a sacred scripture or narrative from which the rules are drawn.<sup>116</sup> For purposes of the Swedenborgian definition of religion, it is enough to require that a life system’s rules proceed from

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<sup>112</sup> “I am the lord your God who brought you out of the land of Egypt, out of the house of bondage. You shall have no other gods before me. You shall not make for yourself a graven image . . . . You shall not take the name of the Lord your God in vain . . . . Remember the Sabbath day, to keep it holy . . . . Honor your father and your mother . . . . You shall not kill. You shall not commit adultery. You shall not steal. You shall not bear false witness against your neighbor. You shall not covet your neighbor’s house; you shall not covet your neighbor’s wife, or his manservant, or his maidservant, or his ox, or his ass, or anything that is your neighbor’s.” WORLD SCRIPTURE, *supra* note 37, at 110 (quoting *Exodus* 20:1-17). “Just as the Decalogue, or Ten Commandments, is the basis of Jewish and Christian ethical values, similar lists of ethical principles may be found in one form or another in the scriptures of most religions.” *Id.*

<sup>113</sup> WORLD SCRIPTURE, *supra* note 37, at 110-111 (including, *inter alia*, “command[s]” to treat parents well, take care of children, avoid “lewd behavior,” not murder, not steal, and not lie).

<sup>114</sup> *Id.* at 112, second footnote. For example, Hinduism has five precepts for the laity (“[n]onviolence, truthfulness, not stealing, purity, control of the senses”), as well as “the tenfold law” for ascetics (“[c]ontentment, forgiveness, self-control, not appropriating anything unrighteously, purification, coercion of the organs, wisdom, knowledge of the Supreme, truthfulness, and abstention from anger”). *Id.* Buddhism has “ten white paths of action” (“[n]ot killing, no longer stealing, forsaking the wives of others, refraining completely from false, divisive, harsh and senseless speech, forsaking covetousness, harmful intent and the views of Nihilists . . . .” *Id.*), but it also has the Ten Charges that are observed by monks (“The charge to avoid the taking of life. The charge to avoid taking what is not given. The charge to avoid unchastity. The charge to avoid falsehood. The charge to avoid [alcoholic drink]. The charge to avoid unseasonable meals. The charge to avoid dancing, song, playing music, and seeing shows. The charge to avoid the use of flowers, scents, and unguents, wearing ornaments and decorations. The charge to avoid the use of raised beds, of wide beds. The charge to avoid the accepting of gold and silver.” *Id.* at 111). Jainism’s “ten duties” of the laity are: “[f]orgiveness, humility, straightforwardness, purity, truthfulness, self-restraint, austerity, renunciation, non-attachment and chastity . . . .” WORLD SCRIPTURE, *supra* note 37, at 112. Jainism also has five great vows for its ascetics: not to kill, not to lie, not to steal, to avoid all sexual pleasure, and to accept poverty. *Id.*

<sup>115</sup> For the purposes of this definition of “religion,” it is enough to define “rule” according to the common core element: an imperative directed at the practitioner that the practitioner either can comply with or must continually strive to comply with. Compare “Rule,” BLACK’S LAW DICTIONARY 1331 (7th ed. 1999), which explains that the general definition of “rule” is “an established standard or principle; a general norm mandating or guiding conduct or action in a given type of situation.” *Id.*

<sup>116</sup> WORLD SCRIPTURE, *supra* note 37, at xiii (“All the great religions of the world revere sacred scripture.”).

the divine in some way that is analogous to those of the major religions.

Beyond finding the divine's rules, this second prong of the definition includes two elements that require defending. First, the implication that it is permissible to examine and evaluate the *content* of the rules. And second, the implication that the "golden rule" is the best standard for this evaluation.

### 1. Does this Definition Require a Court Impermissibly to Examine and Evaluate a Religion's Content?

Can the Court examine or evaluate the content of a religion's rules? At first blush, it appears that such a mission is clearly illegal. *Ballard* holds that individuals "may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs."<sup>117</sup> *Thomas* also explains that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others . . ."<sup>118</sup> The bedrock principle underlying both these holdings is that since two conflicting religious beliefs cannot reasonably both be true, a finding by the court as to the verity of any religious belief would come very close to establishing a religion. Furthermore, it is repugnant to think that someone could use the law to identify heresy or "support dogma."<sup>119</sup>

Yet this is not actually the issue here. This prong does not require a practitioner to "prove" that some subjective element of her faith is true. Rather, this test assesses the rules of a life system against an independent third principle. This third principle is a gatekeeper, "letting in" only life systems with compatible rules and "keeping out" life systems with incompatible rules. This sort of analysis frequently arises under current First Amendment law. For instance, the Courts routinely employ a similar gatekeeper where they examine the criminality of the allegedly religious behavior at issue. If the behavior is criminal, then it might as well not be religious, because it will receive no protection.<sup>120</sup> Under Swedeborg's definition of "religion," the golden rule serves as a similar gatekeeper.<sup>121</sup>

<sup>117</sup> *United States v. Ballard*, 322 U.S. 78, 86 (1944). See *supra* notes 60-64 and accompanying text.

<sup>118</sup> *Thomas v. Rev. Bd. of the Ind. Emp't. Sec. Div.*, 450 U.S. 707, 714 (1981). See *supra* notes 76-79 and accompanying text.

<sup>119</sup> *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) quoted in *Ballard*, 322 U.S. at 86.

<sup>120</sup> See *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 885 (1990) ("The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'" (quoting *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988))).

<sup>121</sup> Obviously this gatekeeper does not supercede the criminality gatekeeper—rather it precedes it. For example, if the Court had applied this test to the Native American Church in *Employment Division v. Smith*, and even if it were determined to be a religion under this definition, the Court could still dismiss their argument on the criminality issue. And see discussion *infra*, note 166.

## 2. Why the Golden Rule is the Best Standard for Evaluating a Religion's Content

The golden rule generally proceeds thus: "Do to others as you want others to do to you."<sup>122</sup> This rule has an impressive history.<sup>123</sup> According to at least one scholar, the rule appears in history's oldest book: the epic of Gilgamesh (2300 BCE).<sup>124</sup> Confucius (551-479 BCE) used the rule.<sup>125</sup> In Greece, the rule first appears in the *Odyssey*, when Calypso promises not to hurt Odysseus after letting him go: "No, I mean what I say; I will be as careful for you as I should be for myself in the same need."<sup>126</sup> In Jewish teaching, Rabbi Hillel said that "What is hateful to you, do not do to your neighbor: that is the whole Torah, while the rest is commentary thereon . . . ."<sup>127</sup> This is similar to the way Jesus presented the rule in the New Testament: "Therefore, whatever you want men to do to you, do also to them, for this is the Law and the Prophets."<sup>128</sup> The golden rule also appears—in varying forms—in Islam, Jainism, Hinduism, Buddhism, and Zoroastrianism, and in traditional African and Native American religions.<sup>129</sup>

<sup>122</sup> JEFFREY WATTLES, *THE GOLDEN RULE* 3 (1996).

<sup>123</sup> See generally *id.*, chapters two through twelve (describing the rule's first appearance in Confucius' writings, and proceeding through, *inter alia*, the history of the rule in Greek, Jewish, Early Christian, Medieval Christian, and finally 20th century religious and philosophical systems).

<sup>124</sup> *Id.* at 43 n.5 (citing LEONIDAS JOHANNES PHILIPPIDIS, *RELIGIONSWISSENSCHAFTLICHE FORSCHUNGSBERICHTE ÜBER DIE "GOLDENE REGEL"* 33 (Athens, 1933) ("Before they depart on a dangerous venture, the queen, the mother of Gilgamesh, gives Enkidu[, the friend of Gilgamesh,] instructions, including the line 'You shall love him as yourself' . . . . I have been unable to confirm this in the English translations I have checked.")).

<sup>125</sup> *Id.* at 16. Wattles identifies Confucius' *Analects* as "[t]he most ancient source for the golden rule." He quotes this dialogue from *Analects*: "Tzu-kung asked, 'Is there single word (sic) which can serve as the guiding principle for conduct throughout one's life?' Confucius said, 'It is the word 'consideration' [*shu*]. Do not impose on others what you do not desire others to impose upon you.'" *Id.* (citing CONFUCIUS, *THE ANALECTS* 15.23 (D. C. Lau, trans. 1979), but quoting the translation from WING-TSIT CHAN, *A SOURCE BOOK ON CHINESE PHILOSOPHY* 44 (1963) (noting that "the numbering of [THE ANALECTS] varies slightly from one translation to another"))).

<sup>126</sup> WATTLES, *supra* note 122, at 28 (quoting HOMER, *ODYSSEY* BOOK V, verses 184-91, p. 62 (W. H. D. Rouse trans., New American Library, 1949)).

<sup>127</sup> *Id.* at 48 (quoting *Shabbath* 31a).

<sup>128</sup> *Matthew* 7:12; see also WATTLES, *supra* note 122, at 54-57.

<sup>129</sup> See WORLD SCRIPTURE, *supra* note 37, at 114-115 ("The Golden Rule or the ethic of reciprocity is found in the scriptures of nearly every religion. It is often regarded as the most concise and general principle of ethics."). Islam: "Not one of you is a believer until he loves for his brother what he loves for himself." *Id.* Jainism: "A man should wander about treating all creatures as he himself would be treated." *Id.* Hinduism: "One should not behave towards others in a way which is disagreeable to oneself. This is the essence of morality." *Id.* Buddhism: "Comparing oneself to others in such terms as 'Just as I am so are they, just as they are so am I,' he should neither kill nor cause others to kill." *Id.* Zoroastrianism: "That nature alone is good which refrains from doing unto another whatsoever is not good for itself." Theodore P. Seto, *The Morality of Terrorism*, 35 *Loy.*

No one called the rule "golden" until the 17th century in England.<sup>130</sup> It was during this period that philosophers first attacked the assumption that the rule was as self-evident as theologians claimed.<sup>131</sup> Not all philosophers have rejected the rule however, and it is clear that many philosophical systems can embrace it.<sup>132</sup> Jeffrey Wattles points out that "countless people think of the rule without any religious associations at all."<sup>133</sup>

Nor is the rule unfamiliar to the courts. For example, until recently, the Louisiana Civil Code explicitly incorporated the golden rule in a statute defining "equity" for the purposes of good faith inquiries.<sup>134</sup> The state courts had little trouble applying the statute.<sup>135</sup> For example, in *National Safe Corp. v. Benedict & Myrick, Inc.*,<sup>136</sup> a contract dispute, the court found for Benedict & Myrick because National Safe had failed "to do to Benedict & Myrick that which it would wish

L.A. L. Rev. 1227, 1252 n.60 (2002). Traditional African religions: "One going to take a pointed stick to pinch a baby bird should first try it on himself to feel how it hurts." WATTLES, *supra* note 122, at 9, n.11. And: "If your neighbor's jackal escapes into your garden, you should return the animal to its owner; this is how you would want your neighbor to treat you . . ." *Id.* Native American: "Great Spirit, grant that I may not criticize my neighbor until I have walked a mile in his moccasins." *Id.* at 9.

<sup>130</sup> WATTLES, *supra* note 122, at 78.

<sup>131</sup> *Id.* at 81.

<sup>132</sup> See generally *id.* at 86-89, 165-181. For example, Mill's utilitarian system explicitly incorporated the rule, calling it "the complete spirit of the ethics of utility." *Id.* at 86 (quoting JOHN S. MILL AND JEREMY BENTHAM, UTILITARIANISM AND OTHER ESSAYS 288 (Alan Ryan, ed. 1987)). See also Edward B. Foley, *Tillich and Camus, Talking Politics*, 92 COLUM. L. REV. 954, 962 (1992) (reviewing MICHAEL J. PERRY, LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS (Oxford University Press 1991)) (Arguing "in favor of a certain welfare policy by invoking the biblical Golden Rule . . . does not necessarily entail any religious faith, and might be uttered by an irreligious follower of Camus . . .").

<sup>133</sup> WATTLES, *supra* note 122, at 4.

<sup>134</sup> "The equity intended by this rule is founded in the Christian (sic) principle not to do unto others that which we would not wish others should do unto us; and on the moral maxim of the law that no one ought to enrich himself at the expense of another. When the law of the land, and that which the parties have made for themselves by their contract, are silent, courts must apply these principles to determine what ought to be incidents to a contract, which are required by equity." *Cook & Nichol, Inc. v. Plimsoll Club*, 451 F.2d 505, 509 n.12 (5th Cir. 1971) (quoting LA. CIV. CODE ANN. art. 1965 (West 1977)) ("Apparently Article 1965 of the Louisiana Civil Code is intended to be nothing less than a modern codification of the Biblical Golden Rule . . .").

<sup>135</sup> The statute has since been rewritten—with the stated intention of retaining its substance—without reference to the golden rule. See *American Bank & Trust of Coushatta v. Federal Deposit Ins. Corp.*, 49 F.3d 1064, 1067 (5th Cir. 1995). The statute was also renumbered. LA. CIV. CODE ANN. art. 2055 (West 1987) ("Equity . . . is based on the principles that no one is allowed to take unfair advantage of another and that no one is allowed to enrich himself unjustly at the expense of another.").

<sup>136</sup> 371 So. 2d 792 (La. 1979).

Benedict & Myrick to do to it . . . .”<sup>137</sup> Similarly, in the 3rd Circuit, the rule guides the doctrine of comity.<sup>138</sup> In North Carolina state courts, “[t]he doctrine of equitable estoppel is based on an application of the golden rule to the everyday affairs of men.”<sup>139</sup> *United States v. Quinones*<sup>140</sup> contains a particularly striking example of a court applying the rule to facts. There, when discussing Congress’ motivations, the court generously argued that the legislature would approach criminal laws with the golden rule in mind. This led to the following calculation: “Are you prepared to apply to yourself a legal process that would execute you for a crime you never committed before you were able to finally prove your innocence?”<sup>141</sup> These cases all show that the golden rule is not difficult to apply. They also show that it does not require a religious frame-of-reference.<sup>142</sup> By application through analogy, the golden rule can meet almost any set of facts.<sup>143</sup>

Swedenborg justifies using the golden rule as a gate-keeper with the theological argument that this rule is the core imperative in interpersonal relationships, and consequently in the relationship between God and humans.<sup>144</sup> In his scheme the rule does not, and “cannot[,] operate in a value vacuum,”<sup>145</sup> but at the same time it

<sup>137</sup> *Id.* at 795 (quoted in *American Bank & Trust of Coughatta*, 49 F.3d at 1067).

<sup>138</sup> *Republic of the Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 75 (3d Cir.1994) (quoting *Lafontant v. Aristide*, 844 F.Supp. 128, 132 (S.D.N.Y. 1994)). Applying the golden rule in an international choice of forum dispute led to this reasoning: “Thus, it may be permissible to prescribe and enforce rules of law in a foreign country, but unreasonable to do so in a particular manner because of the intrusiveness of a particular type of sanction.” *Republic of the Philippines*, 43 F.3d at 75.

<sup>139</sup> *Walker Mfg. Co. v. Dickerson, Inc.*, 560 F.2d 1184, 1187 (4th Cir. 1977) (quoting *Nowell v. Great Atlantic & Pacific Tea Co.*, 108 S.E.2d 889, 891 (N.C. 1959) (quoting *McNeely v. Walters*, 189 S.E. 114, 115 (N.C. 1937) (“It requires that one should do unto others as, in equity and good conscience, he would have them do unto him, if their positions were reversed.”))).

<sup>140</sup> 205 F.Supp.2d 256 (S.D.N.Y. 2002).

<sup>141</sup> *Id.* at 260 n.4.

<sup>142</sup> See also WATTLES, *supra* note 122, at 188 (“Much of the meaning of the rule can be put into practice without any religious commitment, since it is a nontheologic principle that neither mentions God nor is necessarily identified with the scriptures or doctrines of any one religion. The rule is an expression of human kinship, the most fundamental truth underlying morality.”).

<sup>143</sup> See WATTLES, *supra* note 122, at 120-121 (“Imagination makes difference understandable. Not that the mystery of the personality we recognize is reduced to something we can define or fathom intellectually. Not that the fluid, growing, changing individual can be pinned down by knowledge. But mind can understand mind; imagination, here, is not a playful departure from the actual, but an approach to understanding.”).

<sup>144</sup> See *supra* notes 39-41 and accompanying text. See also WATTLES, *supra* note 122, at 171 (“the rule is primarily designed for relationships”).

<sup>145</sup> WATTLES, *supra* note 122, at 166 (“Notice that our sense of what is [appropriate treatment of another person] represents an estimation of *value*, an estimate that is adjusted in the process of thinking over the parity of self and other that is the primal assumption of the rule.”). Wattles does not address Swedenborg’s analysis of the rule.

can protect itself from abuse.<sup>146</sup> A classic attack on the rule is the sadomasochist “who could logically go on a rampage of abuse” within the boundaries of the rule.<sup>147</sup> The problem with this example is that it depends on an extremely facile analysis of the rule.<sup>148</sup> A more nuanced evaluation of the rule would require a sadomasochist to begin by asking what kind of treatment the stranger prefers, since that is what the sadomasochist would hope the stranger would begin with.<sup>149</sup> The good faith implicit in the project might require the sadomasochist actually to discover whether the stranger enjoys sadomasochism. Courts, which presume to employ a highly refined analysis, should have no problem applying the golden rule.

In sum, this second prong requires two things: first, to find a “religion” the court must find rules that come from the divine; second, the court must be certain that those rules do not contradict the golden rule. The court’s inquiry would look like this: “Would an individual who strictly observed the rules imposed by this life system ever be unable to obey the golden rule?”<sup>150</sup> If the answer were yes, then the court should not consider the life system in question “religion” for purposes of the Constitution. If the answer were no, then the court would proceed to the third prong, discussed in the following section, and determine whether or not the life style in question was actually committed to these rules.<sup>151</sup>

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<sup>146</sup> *Id.* at 177 (“[T]he golden rule can protect itself, since it contains within itself the seed of its own self-correction: any vulnerable interpretation may be challenged: ‘Would you want to be treated according to a rule construed in this way?’”). Wattles also notes that even though some people might apply the rule with a deficient moral sensibility, such attempts “still deserve[] respect,” despite the fact that in extreme cases society may need to restrain the actor. This is in essence the well-established “peace and good order” exception to the free exercise clause. See *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

<sup>147</sup> WATTLES, *supra* note 122, at 177.

<sup>148</sup> *Id.* at 179 (“In sum, the [sadomasochist] counterexample provides an occasion for recognizing that, in order for the golden rule to work reliably, one must assume that the agent has normal capacity for sympathetic consideration for others’ feelings and a reasonable sense of personal dignity.”). Maturity here is not a substantive “ought” (i.e. a separate rule to complement the golden rule), it is merely a posture that “enables one to play the game of moral thinking . . .” *Id.* at 166. For a discussion of moral thinking and maturity in general see *id.* at 166-171.

<sup>149</sup> See WATTLES, *supra* note 122, at 170 (“How would I want to be treated in this situation, where I must decide to treat others?”).

<sup>150</sup> “[In] order for the golden rule to work reliably, [a judge] must assume that the agent has a normal capacity for sympathetic consideration for others’ feelings and a reasonable sense of personal dignity.” *Id.* at 179. This assumption does not contradict the inquiry at all, since the state already has the prerogative to ignore the needs of even genuine religious concerns where community interests preempt them, or where they are invalid due to their criminality.

<sup>151</sup> The significance of commitment is discussed *infra* in Part IV.

C. Why a Life System that is a “Religion” Must Call on its Practitioners to Abide By its Rules

Assuming that the life system in question passes the second prong, the third and final prong asks a further question involving the life system’s rules. In fact, the second prong’s analysis lays the groundwork for this last prong, since, by definition, “rules” are things that are to be followed. However, it is important that the court inquire explicitly into whether or not, in practice, the life system requires that practitioners obey the rules.<sup>152</sup>

The inquiry in this prong of the definition is actually very similar to the sincerity inquiry that courts currently perform when assessing an *individual’s* religious burden. By investigating whether a religion asks its practitioners to obey its rules, a court would determine whether the *religion* (not the individual believer) is a sincere one. This question initially appears to be outside the court’s purview.

In the church property cases, the Supreme Court held that civil courts should abstain from interpreting “particular church doctrines [or determining] the importance of those doctrines to the religion.”<sup>153</sup> This ruling was based on the perceived danger that the courts would take over the responsibility of construing a religion’s laws in order to settle intra-church disputes.<sup>154</sup> Obviously, however, this concern will not arise in every First Amendment case.<sup>155</sup> It will only become an issue where there is a risk of entangling the court “in essentially religious controversies” or where the court would be required to “intervene on behalf of groups espousing particular doctrinal beliefs.”<sup>156</sup>

These risks are not present in the third prong’s inquiry. Here, the court need go no further than determining whether the life system asks its practitioners to obey its rules. To determine the answer, a court does not need to advocate doctrine, nor does it need to take sides. All a court needs to know is whether the religion actually wants its rules followed—something analogous to the non-controversial threshold issue (admitting that there is church law on point) in all of the church property cases.<sup>157</sup> This threshold is as far as this prong asks a court to look.<sup>158</sup>

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<sup>152</sup> Although, at this point in the analysis, the risk of fraud *must* be miniscule, this does serve as a final filter for non-religious claims. However, there are more significant reasons to include this prong in the test, as the text explains.

<sup>153</sup> *Presbyterian Church v. Hull Church*, 393 U.S. 440, 450 (1969).

<sup>154</sup> *Watson v. Jones*, 13 Wall. 679, 733-744 (1872) (cited in *Serbian Eastern Orthodox Diocese for the United States and Canada v. Milivojevich*, 426 U.S. 696, 714 (1976)).

<sup>155</sup> *Presbyterian Church*, 393 U.S. at 449 (“It is obvious, however, that not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment.”).

<sup>156</sup> *United Methodist Council v. Superior Court*, 439 U.S. 1355, 1373 (1978).

<sup>157</sup> See, e.g., *Serbian Eastern Orthodox Diocese*, 426 U.S. at 699 (“The Church’s highest executive body, the Holy Synod of Bishops, is composed of the Patriarch and four Diocesan Bishops selected by the Holy Assembly. The Holy Synod and the Holy Assembly have the exclusive power to remove, suspend, defrock, or appoint Diocesan Bishops. The Mother Church is governed according to the Holy Scriptures, Holy Tradition, Rules of the

Thus, this final element of the test does not require very much work on the part of the courts. It is simple, but it is not unimportant. Many individuals can demonstrate their sincere religious beliefs very easily—but this does not mean a court does not need to ask. The situation is the same where a court needs to know whether or not a religion is sincere.

#### D. Conclusion

This section has argued that the Swedenborgian definition of religion does not conflict with present First Amendment jurisprudence. The definition does require some basic religious content but doesn't force religion into any "-ism." It correctly relies on faith, but avoids the quagmire of a faith without an absolute object. It does ask all religion to complement a universal moral baseline, but it does not require the religion to "make sense" or be objectively true. Finally, it does require that the religion impose rules on its practitioners, but it does not require a religion to have an organization associated with it. The following section builds on this foundation, offering a positive reason why this definition is preferable over any other.

#### IV. WHY THE SWEDENBORGIAN DEFINITION OF RELIGION IS THE BEST ONE FOR CONSTITUTIONAL PURPOSES

The Swedenborgian definition of religion is the best one for constitutional purposes because it is based upon the very reasoning that motivated the Religion Clauses in the first place. In 1785, James Madison explained the need for religious freedom this way:

Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign.<sup>159</sup>

There are myriad ways to lead your life, but if your life system does not involve a "reservation" of duty to a "Governor of the Universe," then it does not need the same protection as a system that does.

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Ecumenical Councils, the Hole Apostles, the Holy Faiths of the Church, the Mother Church Constitution adopted 1931, and a 'penal code' adopted in 1961. These sources of law are sometimes ambiguous and seemingly inconsistent.").

<sup>158</sup> Note also that Justice Black felt comfortable declaring a list of non-theistic religions; it is no different to identify a religion as one that does require its rules to be followed. See *supra* note 68, and accompanying text.

<sup>159</sup> Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1497 (1990) (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments*, in 2 THE WRITINGS OF JAMES MADISON 183, 185 (Gerald Hunt ed., 1901)).

When an individual sincerely feels bound by a duty to the divine, the individual's "obligations entailed by religion transcend the individual and are outside the individual's control."<sup>160</sup> Of course, this would not even be an issue were it not for the fact that the Constitution cannot but threaten—to the point of destruction—any system of norms that conflicts with it.<sup>161</sup>

Robert Cover wrote that "[s]ectarian communities differ from most—but not all—other communities in the degree to which they establish a *nomos* of their own. . . . [I]mportantly, they identify their own paradigms for lawful behavior and reduce the state to just one element, albeit an important one, in the normative environment."<sup>162</sup> Cover uses the word *nomos* to mean a "normative universe."<sup>163</sup> A *nomos* has three elements: a norm, narratives,<sup>164</sup> and commitment.<sup>165</sup>

Cover's model unpacks Madison's argument. It demonstrates that an individual's commitment to the demands of his or her religious belief is an un-self-conscious, fundamental part of the normative world in which that individual lives. That person has a right to have that world be respected, and thus religious freedom is unalienable.<sup>166</sup>

<sup>160</sup> *Id.*

<sup>161</sup> Robert M. Cover, *The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role* 20 GA. L. REV. 815, 816 ("[Kenneth] Burke . . . posited that constitutions not only are agonistic but . . . they establish a normative world on the basis of their opposition to other worlds." Citing KENNETH BURKE, *A GRAMMAR OF MOTIVES* 357-358 (rev. ed. 1969)).

<sup>162</sup> Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 33 (1983)

<sup>163</sup> *Id.* at 4 ("a world of right and wrong, or lawful and unlawful, of valid and void").

<sup>164</sup> *Id.* ("No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue (sic) a scripture."). The norm and the narrative are by their nature inseparable: "Every prescription is insistent in its demand to be located in discourse—to be supplied with history and destiny, beginning and end, explanation and purpose." *Id.* at 5.

<sup>165</sup> *Id.* at 7 (Commitment is very important, for the "normative universe is held together by the force of interpretive commitments—some small and private, others immense and public. These commitments . . . determine what law means and what law shall be.").

<sup>166</sup> See Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 30-31 (2000). McConnell argues that "those who do not believe in the existence of God, but who recognize that many of their fellow citizens do" should not allow the state to interfere with the beliefs of their fellows. *Id.* at 30. He draws a powerful analogy to international relations and parenting:

When a citizen of another nation is in our midst, we go out of our way to avoid putting him into a position of conflict between our ways and loyalty to his own country, not because we agree with his assessment of the virtues of his own land, but rather, because we recognize the virtue of patriotism even in a person whose patria we do not admire. Similarly, if the children of other parents are in our home, we attempt to avoid situations in which the teachings of their parents are challenged by the practices of our home. We do not show movies their parents would disapprove of (even if we disagree), or serve foods they would not be permitted to eat at home (even if we think the restrictions are pointless). We give respect to the obligations of others to carry out duties to the authorities in their lives, even when we ourselves do not recognize or agree with those authorities. On this ground, even

The Swedenborgian definition of religion complements this picture of a *nomos* because its three prongs are directly analogous to the three elements. The first prong, requiring that a religion recognize the divine, is akin to the norm, because it is the orienting point at the center of the “world.” Obeying the divine is the core norm of religion.

A religion’s rules, which proceed from the divine, are similar to the narratives that flesh out the norms in Cover’s trine.<sup>167</sup> Specific rules fill in the gaps in a broad norm. For example, the Ten Commandments closely describe all the different ways one is to obey God.

Finally, this definition’s third prong, which asks whether or not the religion requires its practitioners to live according to the rules, is exactly what Cover describes as commitment. It is the effort to manifest the norm (the divine) by participating in the narratives (by following the rules).<sup>168</sup> “To inhabit a *nomos* is to know how to *live* in it.”<sup>169</sup> Thus, to practice a religion is to live under an independent world of law. This is an anthropological explanation for why a just, mature government should defend religious liberty.<sup>170</sup>

those who do not recognize the existence or authority of a God may well believe that the nation should guarantee the free exercise of religion.

*Id.* at 30-31. And see *infra*, notes 173-177, and accompanying text. In post-September 11th, 2001 America, it is interesting to note that no matter how patriotic a terrorist felt while carrying out an attack, we would not respect his feelings. His feelings are not invalid, but our commitment to our civil order requires us to stop him. Similarly, nothing suggests that I should not feed my child’s friend because the friend’s parents prefer to starve him. These are examples of a criminality or “peace and good order” exception, see *Reynolds*, 98 U.S. at 164, to what might as well be an unqualified free exercise rule. As discussed above, see *supra* notes 120-121, in this definition of religion the golden rule performs a similar function as to an unqualified definition of religion. Just as the integrity of society requires one exception, the integrity of religion requires the other.

<sup>167</sup> Cover, *supra* note 162, at 9 (“A legal tradition . . . includes not only a corpus juris, but also a language and a mythos—narratives in which the corpus juris is located by those whose will act upon it.”).

<sup>168</sup> *Id.* at 4-5 (“Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.”). See also *id.* at 45 (“The transformation of interpretation into legal meaning begins when someone accepts the demands of interpretation and, through the personal act of commitment, affirms the position taken.”).

<sup>169</sup> *Id.* at 6. Cover explicitly meant to describe more than life in the civil state: “[I]t is the thesis of this Foreword that the creation of legal meaning—‘jurisgenesis’—takes place always through an essentially cultural medium.” *Id.* at 11. The state takes the most obvious law-making position only because, through its imperfect monopoly over violence, it is able to best express its commitment to its law. *Id.* at 11 n.30.

<sup>170</sup> The three prongs of the Swedenborgian definition of religion also mirror the three things that Swedenborg explained make up life: love (the core of the *Divine*), wisdom (which is a higher mode of truth, from which *rules* derive), and usefulness (the application of the rules, and the resulting *life according to them*). DIVINE LOVE AND WISDOM, *supra* note 9, at ¶ 239 (“Since there are in man three degrees of love and wisdom, and therefore of use, it

In *Reynolds v. United States*, Chief Justice Waite expressed the concern that religious exemptions from general laws “would permit every citizen to become a law unto himself.”<sup>171</sup> However, when the state is actually dealing with religion, this is a false concern. As Perry Dane has noted, religious exemptions to the civil laws would merely “recognize that religious persons might, sometimes, legitimately be governed by a law other than the law of the state.”<sup>172</sup> A person does not need to be religious to see that this is fair treatment.

Many of the men who drafted and enacted the First Amendment were not religious—but that did not stop them from accepting that reasonable people could believe in the divine.<sup>173</sup> Given this acceptance, they easily understood that the state had no role in the religious life of the country.<sup>174</sup> The state should respect all religion just as individuals who disagree about who or what holds the status of the divine should respect each other.<sup>175</sup>

Individuals who do not believe in God should “recognize that many of their fellow citizens do, [and should] refrain from using the power of the state to create conflicts with what are perceived (even if incorrectly) as divine commands.”<sup>176</sup> But this is not a one way street. Religious individuals should also respect the non-

follows that there must be in him three degrees, of will, of understanding, and of result therefrom, thus of determination to use; for will is the receptacle of love, understanding the receptacle of wisdom, and result is use from these.”); APOCALYPSE REVEALED, *supra* note 9, at ¶ 875 (“Love and wisdom without use are not anything. They are only ideal entities, and they do not become real before they are in use. For there are love, wisdom and use, the three of them, which cannot be separated. If they are separated, none of them is anything. Love is not anything without wisdom, but in wisdom it is formed for something. This something for which it is formed is use, and therefore when love by means of wisdom is in use then it is something, in fact it then first comes into existence. They are altogether as end, cause and effect.”). Thus we do not need to look any further than Swedenborg’s writings themselves to find the same justification for this definition. This is another reason this definition is a good one: it is internally consistent.

<sup>171</sup> *Reynolds*, 98 U.S. at 167. See notes 50-55 *supra*, and accompanying text.

<sup>172</sup> Perry Dane, *Constitutional Law and Religion*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 113, 121 (Dennis Patterson ed., Blackwell 1999).

<sup>173</sup> McConnell, *supra* note 159, at 1497 (many of the “framers and ratifiers of the first amendment found it conceivable that a God . . . might exist”). McConnell notes elsewhere that “the historical materials uniformly equate ‘religion’ with belief in God or in gods, though this can be extended without distortion to transcendent extrapersonal authorities not envisioned in traditionally theistic terms.” *Id.* at 1493 (footnotes omitted). He also points out that “Madison, for example, deliberately chose terms other than ‘God’ to refer to the object of religious homage, including ‘Creator,’ ‘Governor of the Universe,’ and ‘Universal Sovereign.’” *Id.* at 1493, n.430 (citing James Madison, *Memorial and Remonstrance*, *supra* note 159, at 184-85).

<sup>174</sup> McConnell, *supra* note 166, at 30 (“An individual needs only to believe conditionally that if there is a God, this idea can be revealed only through the ‘conviction and conscience’ of the individual and not through the hand of the state.”).

<sup>175</sup> Note that this is a golden rule formulation.

<sup>176</sup> McConnell, *supra* note 166, at 30.

religious *nomos* of their fellows.<sup>177</sup>

To conclude, Swedenborg's definition of religion is the best one for constitutional purposes. This definition does not conflict with current law. It is understandable to non-religious as well as religious people. Most significantly, it explains that religion deserves constitutional protection because it is a *nomos* that substantively limits the behavior of its participants. For these reasons, the courts should consider this definition when next they attempt to identify the boundaries of religion.

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<sup>177</sup> Necessarily the Constitution can defend nonreligious conscience as well. "The freedoms of thought, of conscience, and of the academy are effectuated, both logically and in our constitutional development, by the freedoms of speech, of press, and of assembly and by Article VI of the Constitution . . ." William Gorman, *Problems of Church and State in the United States: A Catholic View*, in *THE WALL BETWEEN CHURCH AND STATE* 41, 47 (Dallin H. Oaks ed., University of Chicago Press 1963). See also *TRIBE*, *supra* note 52, at 14-6, 1180 n.11.