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Constitutional Law - First Amendment - Establishment of Religion

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CONSTITUTIONAL LAW—FIRST AMENDMENT—ESTABLISHMENT OF RELIGION—The United States Court of Appeals for the Third Circuit has held that teaching a course in the Science of Creative Intelligence—Transcendental Meditation in public high schools is an establishment of religion prohibited by the first amendment.

Malnak v. Yogi, 592 F.2d 197 (3d Cir. 1979).

During the 1975-76 school year, five New Jersey school boards offered in their high schools an elective course in the Science of Creative Intelligence—Transcendental Meditation (SCI/TM). The course was taught by teachers supported by an organization called the World Plan Executive Council—United States (WPEC-US)[1] using a textbook authored by Maharishi Mahesh Yogi, the founder of the Science of Creative Intelligence.[2] Students electing the course were required to attend a "puja" ceremony,[3] at which they received a Sanskrit sound aid used in meditation, referred to as a "mantra." During this off campus ceremony, individually conducted for each student, a Sanskrit invocation was chanted by the teacher while the student's offerings were placed on a decorated table in the room.[4] With the completion of the

1. Malnak v. Yogi, 440 F. Supp. 1284, 1289 (D.N.J. 1977), *aff'd per curiam*, 592 F.2d 197 (3d Cir. 1979).

2. Malnak v. Yogi, 592 F.2d 197, 198 (3d Cir. 1979). The text described creative intelligence, which could be reached through Transcendental Meditation (TM), as the source of everything in the universe. According to the textbook, of which the district court conducted an exhaustive analysis, every quality we can conceive is in creative intelligence. 440 F. Supp. at 1290. It " 'structures the blueprint of life in our genes . . . regulates the movement of the far distant galaxies and inspires a musician to give expression to the fullness of life.' " *Id.* at 1293 (quoting from the SCI-TM textbook). By regular contact with creative intelligence through TM one develops a natural ability to know right from wrong, and one's mind becomes saturated with all the qualities of creative intelligence: stability, kindness, beauty, independence, decisiveness, happiness, courage, love, justice, purity, etc. *Id.* at 1290-91. Creative intelligence is omnipotent, omnipresent and eternal. *Id.* at 1294. Synonyms used in the text for creative intelligence include pure intelligence, bliss-consciousness, perfection of existence, and Brahman or God consciousness. *Id.* at 1295.

3. 592 F.2d at 198. The "puja" ceremony was held only once for each student, on a Sunday and off school premises. The "mantra" received at this ceremony was never to be revealed.

4. *Id.* Each student was to bring a white handkerchief, flowers and fruit. These offerings were placed on a brass tray before a color picture of Guru Dev, the deceased teacher of Maharishi Mahesh Yogi, while the invocation was chanted. 440 F. Supp. at 1305. The chant, translated by Yogi, was labeled an invocation. It instructs the listener to bow down; uses the words Lord, emancipator of the world, and redeemer; invokes the Hindu gods Vishnu, Shiva and Brahma; and attributes to Guru Dev qualities similar to those attributed to creative intelligence in the textbook. *Id.* 1306-08. Thus, the chant is invoking the spirit or deity of Guru Dev. *Id.* at 1309.

ceremony each student was taken to a quiet place to meditate using his newly acquired mantra.[5]

A coalition of plaintiffs[6] brought an action in the United States District Court for the District of New Jersey to enjoin the teaching of the course because it violated the establishment clauses of both the United States Constitution[7] and the New Jersey Constitution.[8] Relying solely on defendants' depositions, affidavits, the textbook, and the puja ceremony, plaintiffs moved for and were granted a partial summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure. The district court held that SCI/TM was a proscribed religious activity for the purpose of the establishment clause of the first amendment.[9] Several defendants involved in the WPEC-US[10] appealed, contending that the district court erred in determining that teaching SCI/TM in the public schools constituted an establishment of religion.[11] In a per curiam opinion, the United States Court of Appeals for the Third Circuit affirmed,[12] agreeing with the district court's conclusion that SCI/TM was a religious activity for purposes of the establishment clause, and that teaching SCI/TM in public high schools was therefore prohibited by the first amendment.

In its per curiam opinion the court of appeals also agreed with the district court's determination that when courts are faced with forms of religion unknown in prior decisional law, they must look to the Supreme Court's interpretations of the first amendment's religion clauses for guidance as to the substantive characteristics which have previously been found to constitute religion.[13] In providing such guidance, relatively recent Supreme Court interpretations have characterized as religious the mere affirmation of a belief in a supreme being,[14]

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5. 440 F. Supp. at 1305.

6. Plaintiffs consisted of several taxpayers, parents of high school students, students, a clergyman, and several non-profit organizations. *Id.* at 1287.

7. The Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U. S. CONST. amend. I.

8. The New Jersey Constitution provides that "[t]here shall be no establishment of one religious sect in preference to another . . . ." N. J. CONST. art. 1, § 4.

9. 440 F. Supp. at 1327.

10. Defendant school boards, local and state, and defendant public officials did not join in this appeal. 592 F.2d at 197. Service of process was not effected on defendant Maharishi Mahesh Yogi, a citizen of India. 440 F. Supp. at 1288 n.1. Appellants consisted of the WPEC-US and three individuals, 592 F.2d at 197, involved in the dissemination and propagation of the concepts and techniques of SCI/TM, 440 F. Supp. at 1287.

11. 592 F.2d at 197-98.

12. *Id.* at 199.

13. *Id.*

14. Torcaso v. Watkins, 367 U.S. 488 (1961). In *Torcaso* the Supreme Court held that a state law requiring a public official to state his belief in God as a requirement for holding office, invaded the appointee's freedom of belief and could not be enforced.

the invocation of a supreme being in a public school,[15] and reading without comment verses from the Bible.[16] The court rejected appellants' contention that those prior cases were distinguishable from the *Malnak* dispute due to the assertedly non-religious nature of the SCI/TM course.[17] The court conceded this difference, but viewed the prior decisions as being relevant in ascertaining the various activities and beliefs that previously have been viewed as religious.[18] After careful examination of the textbook, the puja ceremony, and expert testimony,[19] no reversible error was found in the district court's determination that SCI/TM constituted religious activity.[20]

Because the involvement of government was apparent, the determination of SCI/TM as religious was pivotal to the decision on appeal.[21] To measure government involvement in the establishment of a religion, the court of appeals examined the three-pronged test established by the Supreme Court in *Committee for Public Education v. Nyquist*.[22] To be sustained under this test, it is necessary that the government activity reflects a clearly secular purpose and effect, has a primary im-

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15. Engel v. Vitale, 370 U.S. 421 (1963). In *Engel* the Court held that the state was violating the establishment clause by requiring that a non-denominational prayer be recited at the beginning of each school day.

16. School Dist. v. Schempp, 374 U.S. 203 (1963). The Court held that reading verses from the Bible and reciting the Lord's Prayer in public schools were violative of the establishment clause.

17. 592 F.2d at 199. Defendants urged the district court to adopt an approach to the definition of religion which would be both "substantive and contextual." 440 F. Supp. at 1315-16. Although the courts generally do examine the content as well as the context of an activity challenged under the first amendment, they do so objectively and not subjectively, as proposed by defendants. *Id.* at 1316-18. Defendants contended that their determination of SCI/TM as scientific rather than religious should have been controlling, since the information and techniques involved were presented in a scientific context. *Id.* at 1297-1302, 1317-18.

18. 592 F.2d at 199.

19. *Id.* at 199 nn. 1 & 2. The district court, to effect an exhaustive examination of the substance of SCI/TM, looked first at the text used in teaching the course. *See* 440 F. Supp. at 1289-97. The purpose of TM is to reach the field of creative intelligence, and the purpose of the text is to explain the characteristics of creative intelligence. *See* note 2 *supra*. Ultimately the court decided that the text was describing some essence known almost universally as "god." 440 F. Supp. at 1320. An equally extensive analysis of the puja, focusing on the invocation chanted before the icon of Guru Dev and the invocation's strong resemblance to prayer, produced even further evidence that SCI/TM was religious in nature. *See id.* at 1305-09. Finally, the depositions and affidavits of the defendants presented the lower court with information that the predecessor organization to WPEC-US was incorporated in California as a religious corporation known as the Spiritual Regeneration Movement Foundation. *Id.* at 1319.

20. 440 F. Supp. at 1322-23.

21. 592 F.2d at 199.

22. 413 U.S. 756 (1973).

pact which neither advances nor inhibits religion, and avoids excessive entanglements with religion.[23] Applying that test to the teaching of SCI/TM in public schools, the *Malnak* court concluded that the activity had as a primary impact the advancement of a religion and religious concepts,[24] and that state and federal financial aid coupled with use of public school facilities constituted excessive government entanglements with religion.[25] Finally, the court considered and rejected appellants' contention that to be unconstitutional the religious impact or effect must be substantial,[26] and that even if the SCI/TM course was clearly religious, its effect was neither significant nor substantial. The court found the authority cited by appellants unpersuasive because of the factual differences between a brief religious interlude during a public high school commencement exercise and the teaching of SCI/TM, which included ceremonial student offerings to deities in the regularly scheduled curriculum.[27]

Judge Adams, in a concurring opinion, was convinced that the appeal presented a novel and important question that could not be disposed of simply on the basis of past precedent.[28] He viewed the decision as based on more than the traditional theistic definition of religion,[29] the school prayer cases,[30] and the conscientious objector-free exercise cases.[31] The decision resulted from a still evolving constitutional definition of religion.[32] Judge Adams saw this appellate decision

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23. *Id.* at 773.

24. School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

25. Lemon v. Kurtzman, 403 U.S. 602 (1971).

26. The cases upon which appellants relied were ones in which the constitutionality of religious invocations and benedictions at high school graduation ceremonies had been upheld because their effect was viewed as de minimus. *See, e.g.*, Grossberg v. Deusebio, 380 F. Supp. 285 (E.D. Va. 1974); Wood v. Mt. Lebanon Township School Dist., 434 F. Supp. 1293 (W.D. Pa. 1972); Weist v. Mt. Lebanon School Dist., 457 Pa. 166, 320 A.2d 362 (1974). Appellants advanced these arguments in support of the proposition that the religious effect must be substantial to be unconstitutional.

27. 592 F.2d at 200.

28. *Id.* at 200 (Adams, J., concurring).

29. This definition is rooted in the principles held by the authors of the Constitution, whose concepts of religion involved man's relationship with a supreme being. *See* Everson v. Board of Educ., 330 U.S. 1, 11-14 (1947).

30. *See* School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

31. *See* Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965).

32. *See* Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965); Torcaso v. Watkins, 367 U.S. 488 (1961); Founding Church of Scientology v. United States, 409 F.2d 1146 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 963 (1969); Washington Ethical Soc'y v. District of Columbia, 249 F.2d 127 (D.C. Cir. 1957); Fellowship of Humanity v. County of Alameda, 153 Cal. App. 2d 673, 315 P.2d 394 (1957).

as the first to apply the more expansive reading of religion, which had been developing in the free exercise cases, to an establishment clause issue; and the first to conclude that a belief constituted a religion over the protestations of those espousing the belief.[33] Since the facts in *Malnak* went beyond existing case law, Judge Adams felt that the court's ruling required a more extensive explanation and justification.[34]

Judge Adams first noted that the traditional theistic definition of religion, exemplified by the Supreme Court's decision in *Davis v. Beason*,[35] was not applicable to the *Malnak* situation because there was no consideration of a supreme being in SCI/TM.[36] He was also unconvinced that the cases involving prayers in public schools[37] were applicable to the *Malnak* situation.[38] Unlike the prayers at issue in those cases, the Sanskrit chant was completely unintelligible to the students, and the puja ceremony was never held on school grounds nor during school hours.[39] Moreover, the SCI/TM course was completely voluntary because it was an elective course.[40] As a result of these distinctions and because of the theistic nature of the activity involved in the school prayer decisions, it followed that they were not directly relevant to a consideration of the SCI/TM course.[41]

Judge Adams also examined the analysis undertaken by the Supreme Court in the conscientious objector decisions of *Welsh v. United States*[42] and *United States v. Seeger*.[43] He read these decisions, in which the Court had given a very broad meaning to the religious exemption from selective service provided in section 6(j) of the Universal

33. 592 F.2d at 200 (Adams, J., concurring).

34. *Id.* at 201 (Adams, J., concurring).

35. 133 U.S. 333 (1890). In this case the Court defined "religion" as referring 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." *Id.* at 342.

36. 592 F.2d at 201 (Adams, J., concurring).

37. *See* School Dist. v. Schempp, 374 U.S. 203 (1963); note 16 *supra*. *See also* Engel v. Vitale, 370 U.S. 421 (1962); note 15 *supra*.

38. 592 F.2d at 201 (Adams, J., concurring).

39. *Id.* at 203. However, compare this argument with the Roman Catholic Mass which until recently was said in Latin. It too was unintelligible to many of its participants, yet its status as "prayer" could not be disputed.

40. Both *Engel* and *Schempp* involved activities performed in the classroom; although the daily Bible readings and invocations were voluntary in the sense that any student was free to leave during the activity, the Supreme Court implied that the social stigma that could attach to a child's requesting permission to leave could make the activity involuntary. *See Schempp*, 374 U.S. at 228; *Engel*, 370 U.S. at 430. Judge Adams contrasted this with the SCI/TM course which was entirely voluntary since it was an elective course. 592 F.2d at 203.

41. 592 F.2d at 203 (Adams, J., concurring).

42. 398 U.S. 333 (1970).

43. 380 U.S. 163 (1965).

Military Service and Training Act,[44] as indicative of the Court's willingness to define religion as encompassing more than the traditional system of theistic beliefs.[45]

The fourth line of cases examined by Judge Adams dealt directly with constitutional challenges to questionable religious activity. The only Supreme Court case among them, *Torcaso v. Watkins*,[46] involved a provision in the Maryland Constitution that required a public official to declare a belief in God as a requisite for holding state office. By striking down the law, the Court held that government may not favor religions based on theism as opposed to those based on different beliefs.[47] The decision in *Torcaso*, and the decisions of lower federal courts which applied the *Torcaso* rationale,[48] indicated to Judge Adams that for the purposes of the establishment clause, religion was not restricted to the theistic definition previously applied in the early Supreme Court decisions.[49]

All that remained was to formulate a meaningful definition of religion that would serve to effectuate what Judge Adams perceived to be the fundamental intent of the establishment clause—the creation of a governmental obligation to protect, but never to espouse, the intensely personal response to the imponderable questions about the

44. 65 Stat. 83 (1951) (current version at 50 U.S.C. app. § 456 (1976)). The act provides that "[n]othing contained in this title . . . shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." 50 U.S.C. app. § 456 (1976).

45. 592 F.2d at 204 (Adams, J., concurring).

46. 367 U.S. 488 (1961).

47. *Id.* at 495. In an instructive footnote, the *Torcaso* Court listed Buddhism and Taoism, recognized Eastern religions, and Ethical Culture and Secular Humanism as examples of nontheistic religions. *Id.* at 495 n.11. Therefore, through dictum the Court was progressing from its prior reliance on a "supreme being" definition of religion. 592 F.2d at 206 (Adams, J., concurring).

48. Other cases which applied the *Torcaso* rationale to determine tax exempt status for religious groups by not confining "religion" to a theistic definition include: Founding Church of Scientology v. United States, 409 F.2d 1146, *cert. denied*, 396 U.S. 963 (1969) (Scientology claims kinship with Buddhism and Hinduism and claims benefits to the illnesses of the body by improving the spiritual condition of man); Washington Ethical Soc'y v. District of Columbia, 249 F.2d 127 (D.C. Cir. 1957) (the Ethical Movement, through Sunday services and the ministerial duties of its "Leaders," presents a way of life to form the moral and spiritual qualities of its members without professing a belief in a supreme being); Fellowship of Humanity v. County of Alameda, 153 Cal. App. 2d 673, 315 P.2d 394 (1957) (Secular Humanism, via regularly scheduled Sunday meetings which included meditation, song and Bible readings, nurtured the study of human relationships, without professing a belief in a supreme being). The foregoing belief systems were found to be religious primarily because of their organizational similarity to the structure of traditional American church groups. 592 F.2d at 206 (Adams, J., concurring).

49. *See* note 35 and accompanying text *supra*.

meaning of life and death, one's place in the universe, or the proper moral code of right and wrong.[50] To facilitate the formulation of that definition he presented three indicia that appear basic to traditional religions. The most important of the three was the "ultimate" nature of the ideas presented,[51] a concept developed by Protestant theologian Dr. Paul Tillich and adopted by the Supreme Court in its decision in *Seeger*.[52] The second of the three indicia was the comprehensiveness of the belief system. Judge Adams posited that before a system of beliefs can be viewed as a religion, it must be broad, pervasive and rule as truth.[53] The third was the presence of external trappings—services, clergy, ceremonies, organization and methods of propagation—which are helpful in the analysis but whose absence is not determinative.[54]

Before applying these flexible guidelines to SCI/TM, Judge Adams examined the definitional dilemma facing the first amendment's religion clauses. Historically the broader definition had been adopted exclusively in free exercise cases.[55] Appellants urged adoption of a less expansive definition of religion because the broader scope definition was inappropriate in an establishment clause challenge.[56] Judge Adams, however, felt the stronger argument was to use a single definition of religion.[57] He reiterated Justice Rutledge's powerful dissent in *Everson v. Board of Education*[58] in which Rutledge presented his views

50. 592 F.2d at 208 (Adams, J., concurring).

51. *Id.* The term "ultimate" concern as used by Dr. Tillich is analogous to God without a name, or the power of being. United States v. Seeger, 330 U.S. 163, 180 (1965) (quoting P. TILLICH, II SYSTEMATIC THEOLOGY 12 (1957)). If the word "God" has no meaning "translate it, and speak to the depths of your life, of the source of your being, of your ultimate concern, of what you take seriously without any reservations." United States v. Seeger, 330 U.S. 163, 187 (1965) (quoting P. TILLICH, THE SHAKING OF THE FOUNDATIONS 57 (1948)). Judge Adams interpreted Tillich as perceiving religion as intimately connected to concepts of great depth and of utmost importance. Consequently, the "ultimate" nature of the concepts should be the best evidence that they be treated as religious. 592 F.2d at 208 (Adams, J., concurring).

52. United States v. Seeger, 330 U.S. 163, 180, 187 (1965).

53. 592 F.2d at 209 (Adams, J., concurring).

54. *Id. See* Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 330 U.S. 163 (1965).

55. 592 F.2d at 210 (Adams, J., concurring).

56. *Id.*

57. *See* Note, *Transcendental Meditation and the Meaning of Religion Under the Establishment Clause*, 62 MINN. L. REV. 877, 904 n.67 (1978) [hereinafter cited *Transcendental Meditation*]; Note, *Toward a Uniform Valuation of the Religion Guarantee*, 80 YALE L.J. 77, 84 (1970) [hereinafter cited as *Toward a Uniform Valuation*]. *Contra*, Galanter, *Religious Freedoms in the United States: A Turning Point?*, 1966 WIS. L. REV. 217, 265-68 [hereinafter cited as Galanter]; Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1083-86 (1978) [hereinafter cited as *Toward a Constitutional Definition*].

58. 330 U.S. 1, 28 (1947).

in support of a unitary definition.[59] Judge Adams adopted this precept reasoning that if a Roman Catholic is denied government aid, so too should a Transcendental Meditator, if both are to receive the protection of the free exercise clause.[60] He concluded that by endorsing the unitary definition, the broad concepts developed in the free exercise cases may legitimately be applied to an establishment clause question.

Guided by these indicia, Judge Adams applied a broad "definition by analogy" to ascertain the religiosity of SCI/TM. From the textbook explanation of creative intelligence,[61] it seemed clear to him that the concepts discussed were "ultimate" in nature, as well as comprehensive, pervasive, and all inclusive. Although the traditional religious trappings of clergy, and marriage and burial rites were absent, sufficient analogy could be drawn on the basis of propagation, organization, and ceremony.[62] Since those who espoused these views would certainly be given free exercise protection, they were similarly subject to the restrictions of the establishment clause.[63] Though not theistic, SCI/TM was a constitutionally protected religion. From this conclusion, it followed that teaching the course in the New Jersey public schools constituted an impermissible establishment of religion under the principles enunciated by the Supreme Court in *Nyquist*.[64]

The *Malnak* decision exemplifies many of the progressive principles with which federal courts have begun to approach conflicts arising

59. 592 F.2d at 211. Justice Rutledge had argued as follows:

> "Religion" appears only once in the amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid "an establishment" and another, much broader, for securing "the free exercise thereof." "Thereof" brings down "religion" with its entire and exact content, no more and no less, from the first into the second guaranty, so that Congress and now the states are as broadly restricted concerning the one as they are regarding the other.

330 U.S. at 32 (Rutledge, J., dissenting).

60. 592 F.2d at 213 (Adams, J., concurring).

61. *See* note 2 *supra*.

62. The SCI/TM teachers were trained and supported by the World Plan Executive Council, not by the New Jersey school districts. 592 F.2d at 215 n.60. The original organization, the Spiritual Regeneration Movement Foundation, had propagation as its purpose. *See* 440 F. Supp. at 1319-20. For a discussion of the puja as a ceremony, see note 4 *supra*.

63. 592 F.2d at 214 (Adams, J., concurring).

64. *Id.* at 214-15 (Adams, J., concurring). Judge Adams rejected the district court's finding that there was a secular purpose of sorts, that some "good" would come from teaching the course. Indicating that some "good" could also come from instructions in the Protestant, Catholic, Jewish or Islamic faiths, he asserted that education which is "good" for students does not make out a secular purpose. An examination of the content of the SCI/TM course revealed nothing more than an effort to propagate TM, SCI, and the views of Maharishi Mahesh Yogi. *Id.*

under the free exercise and establishment clauses of the first amendment to the United States Constitution. The seeds of those clauses were formulated in the minds of American colonists, many of whom had fled their European homelands because of religious persecution, and who had fresh memories of sovereign supported churches imposing fines, imprisonment, torture, and even death to those who failed to join or support such churches. The first amendment guaranteed that this government would make no laws concerning the establishment of such a state supported religion. From documents authored by Thomas Jefferson and James Madison prior to the adoption of the first amendment, it is certain that their meaning of religion was limited to a belief in a supreme being,[65] a definition routinely accepted by the courts as they determined what sort of government involvement encouraged such an establishment.[66]

Many of the cases involving the application of the establishment clause arose in the context of challenges to the use of public funds for aid to parochial schools or students.[67] In those cases the Court had broadly defined the establishment clause as precluding government aid to one or all religions, preference of one religion over another, and taxation in any manner to support any form of religion.[68] This definition of the standard to be applied under the establishment clause was further developed in cases dealing with religious activity in the public schools.

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65. *See* Everson v. Board of Educ., 330 U.S. 1, 8-14 (1947).

66. *See* Galanter, *supra* note 57, at 265-66.

67. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971) (holding that tax subsidized salary increments for teachers of secular subjects in sectarian schools were prohibited by the establishment clause); Board of Educ. v. Allen, 392 U.S. 236 (1968) (holding that a state's program of lending secular books to public and parochial high school students did not violate the establishment clause); Everson v. Board of Educ., 330 U.S. 1 (1947) (upholding state program of reimbursement of bus fares to parochial as well as public school children). *See also* Walz v. Tax Comm'r, 397 U.S. 664 (1970), in which the Court ruled that granting property tax exemptions to religious organizations did not violate the establishment clause.

68. Everson v. Board of Educ., 330 U.S. at 15-16. The language employed by the Court in *Everson* is illustrative of the establishment clause as it was viewed at that time:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.

Id. (citing Reynolds v. United States, 98 U.S. 244, 249 (1879)).

Permitting teachers of religion to conduct classes in public school facilities was held to be an impermissible establishment of religion,[69] as were state required readings from the Bible, recitation of the Lord's Prayer,[70] and recitation of a non-sectarian prayer in public schools.[71] Since these activities were so obviously religious in nature, the Court was required merely to examine their presence in government financed institutions in order to decide the question of their constitutionality under the establishment clause.

In 1973, the Supreme Court reaffirmed its developing criteria for examining establishment clause challenges with its decision in *Committee for Public Education v. Nyquist.*[72] In that case, which involved a broad state program designed to financially assist parochial schools and the parents of parochial school students, the Court reviewed the numerous establishment clause decisions and enunciated a three-pronged test for determining whether an activity or government program constituted an impermissible establishment of religion. To pass the *Nyquist* test the law in question must reflect a clearly secular legislative purpose, must have a primary effect that neither advances nor inhibits religion, and must avoid excessive government entanglement with religion.[73]

While the meaning of "establishment" under the first amendment was being clarified by the Supreme Court with decisions such as *Nyquist*, the traditional definition of "religion" was being expanded by the Court through decisions in cases involving the free exercise clause.[74] For example, in *Reynolds v. United States*,[75] the Court upheld the Mormons' freedom to worship God in their own way, restricting only their practice of polygamy. This reasoning was extended by the Court in *Cantwell v. Connecticut*,[76] a case in which the Court struck down a state statute that restricted the solicitation of money for religious causes to persons who obtained a certificate from a state official.[77] Four years later in *United States v. Ballard*,[78] the Court ruled

69. McCollum v. Board of Educ. 333 U.S. 203 (1948).

70. School Dist. v. Schempp, 374 U.S. 203 (1963).

71. Engel v. Vitale, 370 U.S. 421 (1962).

72. 413 U.S. 756 (1973).

73. *Id.* at 772-73. The Court went on to invalidate the provisions of the New York program which reimbursed in part the tuition paid by parents of parochial school students, allowed income tax relief to those parents, and gave financial aid to parochial schools for maintenance and repair. *Id.* at 798.

74. *Transcendental Meditation*, *supra* note 57, at 889, 899 n.48.

75. 98 U.S. 244 (1879).

76. 310 U.S. 296 (1940).

77. *Id.* at 301-03.

78. 322 U.S. 78 (1944).

that the founder of the "I Am" movement[79] could not be precluded from sending allegedly fraudulent literature through the mails because the truth or falsity of the religious beliefs contained in the material was excluded from the consideration of its fraudulent nature.[80] Finally, in *Torcaso v. Watkins*,[81] the Court completely departed from a theistic definition of "religion" for the purposes of interpreting the free exercise clause, concluding that free exercise protection extended to those whose religious beliefs did not necessarily include a belief in the traditional concept of a supreme being.[82]

Malnak represents the first time that a federal court has found an activity to be religious despite the contentions of its adherents that it is not. The approach taken in the *Malnak* decision, in which the court compared the substantive characteristics of SCI/TM with activities considered to be religious in prior Supreme Court decisions,[83] may indicate an increased acceptability of using, for the purpose of analogy, free exercise as well as establishment clause decisions. Unfortunately, just as courts before it had avoided defining "religion," the *Malnak* court failed to define that term, even though a definition was essential to its conclusion that teaching SCI/TM in public schools constituted an unconstitutional establishment of religion. The implications of the very narrow holding in *Malnak* are therefore limited to other instances of teaching SCI/TM in public schools, and will be of little assistance in establishment clause situations involving an allegedly religious activity other than SCI/TM.

In arriving at the conclusion that SCI/TM was a religious activity, both the per curiam and concurring opinions drew freely from decisions dealing tangentially with religion.[84] Some or all of the guidelines enunciated in those decisions have been used in evaluating free exercise claims, but the question left unanswered by the *Malnak* court was whether they are appropriate in adjudicating claims brought under the establishment clause. *Malnak* would have been an appropriate vehicle in which to address this dilemma, because of the integral relationship between the free exercise question, which usually involves determining whether a particular activity or belief is a religion, and the establish-

79. The "I Am" movement would make known to mankind through the divine messenger, Ballard, the words of the "ascended masters." Ballard believed that he had talked with Jesus and St. Germain, and that he had the powers to heal diseases, injuries and ailments. He was charged with using the mails to fraudulently obtain money and property from people so afflicted. *Id.* at 79-80.

80. *Id.* at 88.

81. 367 U.S. 488 (1961). *See* note 47 *supra.*

82. 367 U.S. at 495.

83. 592 F.2d at 199.

84. *See id.* at 199-200; *id.* at 201-12 (Adams, J., concurring).

ment question, which usually involves determining whether the presence of that activity in a public school is constitutional. It must be noted, however, that a unitary definition of religion for purposes of the establishment and free exercise clauses is not without opposition. It has been argued that for the free exercise clause, religion should be defined broadly in order to protect freedom of conscience for any beliefs that are arguably religious, but for the establishment clause, a narrow definition is more appropriate and will protect an arguably non-religious belief system from unnecessary restrictions.[85] Proponents of such a "dual definition" have further suggested that to violate the establishment clause the practice at issue must qualify as a religion based upon objective community understandings,[86] while free exercise infringements are based upon a subjective personal perspective.[87] Under these standards, SCI/TM arguably could be entitled to the protection of the free exercise clause, but could avoid restriction under the establishment clause.[88]

The unitary definition of religion, on the other hand, is primarily based upon the language of the first amendment itself.[89] Proponents of the unitary definition refuse to segregate the clauses where identical issues are at stake, declaring that religion should be defined identically whether the government is inhibiting it or encouraging it and that only the goals in applying the definition should differ.[90] Similar to the dual definition, the examination of a belief under the free exercise clause is subjective, focusing upon the believer's sincerity and requiring that the belief be held in a position in life parallel to that of an orthodox belief. An examination under the establishment clause must be objective, focusing upon the community standard of whether the belief is likely to be accepted as religious, rather than upon any present public understanding of the belief as religious.[91] Under both clauses,

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85. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 827-28 (1978) [hereinafter cited as TRIBE]. *See also Toward a Constitutional Definition, supra* note 57, at 1083.

86. Galanter, *supra* note 57, at 266-67.

87. *Transcendental Meditation, supra* note 57, at 897-98.

88. TRIBE, *supra* note 85, at 828-29. Professor Tribe advocates that for the free exercise clause, "religion" must expand beyond theism to include multiplying forms of legitimate religious exercise, but that the term must be less expansive for the establishment clause "lest all 'humane' programs of government be deemed constitutionally suspect." *Id.* at 827-28. Commenting on the district court's holding in *Malnak*, Tribe argues that "[s]ince TM is arguably non-religious, it should not be considered a religion when an establishment question is raised." *Id.* at 828-29. He also describes what seems to be a narrower definition used by the Supreme Court in establishment clause decisions than in decisions involving free exercise claims. *Id.* at 829. *See also* Galanter, *supra* note 57, at 255-58.

89. *See* note 59 *supra*.

90. *See Toward a Uniform Valuation, supra* note 57, at 84.

91. *Transcendental Meditation, supra* note 57, at 897, 903-04.

the belief system must be comprehensive, ultimate, and fill a position to that of more conventional religions in the life of its adherents. In addition, for an activity or belief to be religious under the establishment clause, there must be an organized group and religous trappings associated with the group or activity.[92] Under a free exercise challenge the court must determine if the believer has *actually* accepted the belief system as his religion; however, under the establishment clause the court must *objectively* determine if the belief system is *likely to be* accepted as religious.[93] Although the *Malnak* court relied heavily upon establishment clause precedent in the per curiam opinion, Judge Adams, by virtue of his concurring opinion, has apparently joined the trend toward a unitary definition of religion as a guideline for interpreting both religion clauses of the first amendment.

Like the Supreme Court establishment clause cases, *Malnak* represents a judicial awareness of a need to protect children from government supported religions in public schools. Although the relaxing techniques of Transcendental Meditation are subsidized in many government areas,[94] the social context of the public high schools and the susceptibility, naivete, and accepting nature of children further increase the likelihood that a student could accept SCI/TM as religious.[95] The current visibility in our society of neo-Oriental cults and the apprehension with which they are viewed support the unitary standard of defining religion in terms of the likelihood of its acceptance. Moreover, prohibiting government preference of one religion over another advances religious Darwinism—the survival of the fittest as applied to religion.[96] Traditionally, religions have been maintained in our nation solely by voluntary means.[97] To decide that government is precluded by the establishment clause from aiding SCI/TM, both directly through tax dollars and indirectly through the use of public high school facilities, further clarifies the criteria necessary to maintain the constitutional goal of keeping church and state separate.

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92. *Id.* at 915-17.

93. *Id.* at 904-05 n.67.

94. *Id.* at 892 n.29.

95. Galanter, *supra* note 57, at 222 n.17.

96. Giannella, *Religious Liberty, Non-Establishment, and the Doctrinal Development* (Pt. II), 81 HARV. L. REV. 513, 517 (1968).

97. *Id. See also Toward a Uniform Valuation, supra* note 57, at 90.