

NOTES

CONSCIENTIOUS OBJECTORS: REQUIREMENT OF A BELIEF IN A SUPREME BEING HELD TO CREATE AN UNCONSTITUTIONAL CLASSIFICATION

THE constitutionality of the conscientious objector provisions of the present Universal Military Training and Service Act¹ has been cast into considerable doubt by recent Supreme Court interpretation of the establishment clause of the first amendment.² Until *United States v. Seeger*,³ however, the statutory requirement of a belief in a Supreme Being had been expressly upheld by courts of appeals.⁴ In rejecting the constitutionality of this requirement, the *Seeger* court based its decision not on the establishment clause, but on the due process clause of the fifth amendment.⁵ This raises the interesting question of what factors influence the judiciary in choosing between constitutional alternatives.

When *Seeger's* request for conscientious objector status was ultimately denied because of his refusal to profess a belief in a Supreme Being, he refused to report for induction and was indicted for failure to do so. *Seeger* claimed that the Supreme Being clause, both inherently and as applied to him, violated the establishment clause and

¹ Universal Military Training and Service Act, § 6 (j), 62 Stat. 612 (1948), 50 U.S.C.A. APP. § 456 (j) (1958): "Nothing 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. *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 . . .*" (Emphasis added.)

² Conklin, *Conscientious Objector Provisions: A View in the Light of Torcaso v. Watkins*, 51 GEO. L.J. 252 (1963). See *Torcaso v. Watkins*, 367 U.S. 488, 494-96 (1961); cf. *School Dist. of Abington v. Schempp*, 374 U.S. 203, 222, 265 (1963) (Clark, J.) (Brennan, J., concurring); *Engle v. Vitale*, 370 U.S. 421, 443-44 (1962) (Douglas, J., concurring); *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961) (Warren, C. J.); *Everson v. Board of Educ.*, 330 U.S. 1, 15-16 (1947); Pfeffer, *Court, Constitution and Prayer*, 16 RUTGERS L. REV. 735 (1962).

³ 326 F.2d 846 (2d Cir.), cert. granted 377 U.S. 922 (1964).

⁴ *Etcheverry v. United States*, 320 F.2d 873 (9th Cir.), cert. denied, 375 U.S. 930 (1963); *Clark v. United States*, 236 F.2d 13 (9th Cir.), cert. denied, 352 U.S. 882 (1956); *United States v. Bendik*, 220 F.2d 249 (2d Cir. 1955); *George v. United States*, 196 F.2d 445 (9th Cir.) (dictum), cert. denied, 344 U.S. 843 (1952). Cf. *Peter v. United States*, 324 F.2d 173 (9th Cir. 1963), cert. granted, 377 U.S. 922 (1964).

⁵ 326 F.2d at 854.

the due process clause.⁶ The district court refused to consider these challenges, stating that since the conscientious objector exemption is ultimately a matter of legislative grace, Congress has the power to limit the privilege on any condition it may choose to impose.⁷ The Court of Appeals for the Second Circuit, however, discredited this position and held that the Supreme Being clause is unconstitutional as an arbitrary classification among religions—a violation of the due process clause of the fifth amendment.

The legislative and judicial backgrounds, against which the present conscientious objector provisions stand, highlight the significance of the present development.⁸ The Selective Training and Service Act of 1940 provided exemption for any person "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."⁹ Although the legislative history of the provision indicated that Congress believed the word "religious" to imply a belief in a Supreme Being,¹⁰ Judge Augustus Hand rejected this interpretation in *United States v. Kauten*.¹¹ By way of dictum, Judge Hand adopted a much broader definition of religion, labeling it:

a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse.¹²

Although Judge Hand's interpretation was subsequently adopted in the Second Circuit,¹³ the Court of Appeals for the Ninth Circuit

⁶ For a discussion of Seeger's standing to raise these constitutional questions, see 50 VA. L. REV. 178, 179 n.2 (1964).

⁷ Brief for the Appellant, p. 37a. Cf. *Clark v. United States*, 236 F.2d 13 (9th Cir.), cert. denied, 352 U.S. 882 (1956); *United States v. Bendik*, 220 F.2d 249 (2d Cir. 1955).

⁸ See generally *United States v. Jakobson*, 325 F.2d 409, 413-14 (2d Cir. 1963), cert. granted, 377 U.S. 922 (1964); Conklin, *supra* note 2, at 256-76.

⁹ Act. of Sept. 16, 1940, ch. 720, § 5 (g), 54 Stat. 889 (1940). See statutory material quoted note 1 *supra* (unitalicized portion).

¹⁰ Waite, *Section 5(g) of the Selective Service Act, as Amended by the Court*, 29 MINN. L. REV. 22, 30-33 (1944), and the congressional hearings cited therein.

¹¹ 133 F.2d 703 (2d Cir. 1943). For a penetrating discussion of the *Kauten* decision, see Waite, *supra* note 10.

¹² 133 F.2d at 708.

"Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men and to his universe—a sense common to men in the most primitive and in the most highly civilized societies. It accepts the aid of logic but refuses to be limited by it. It is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets." *Ibid.*

¹³ *United States ex rel. Phillips v. Downer*, 135 F.2d 521, 524 (2d Cir. 1943).

expressly rejected it and reaffirmed the traditional definition of religion as involving a deity.¹⁴ The Supreme Court, although faced with this conflict between the circuits, refused to grant certiorari and the problem was left with Congress.¹⁵

In the Universal Military Training and Service Act,¹⁶ Congress rejected Judge Hand's approach and added the present Supreme Being clause which expressly requires a belief in a Supreme Being and excludes essentially nontheistic views.¹⁷ The constitutionality of this provision was first upheld by the Court of Appeals for the Ninth Circuit, which applied the reasoning ultimately adopted by the lower court in *Seeger*—that since Congress could deny the exemption altogether, it is free to grant or deny it according to its own conditions.¹⁸ Moreover, this rationale appeared to have been adopted by the Court of Appeals for the Second Circuit,¹⁹ but in the instant case, the court at the outset expressly discredited this position²⁰ and turned to the more vital first and fifth amendment questions.

¹⁴ *Berman v. United States*, 156 F.2d 377 (9th Cir.), cert. denied, 329 U.S. 795 (1946).

"There are those who have a philosophy of life, and who live up to it. There is evidence that this is so in regard to appellant. However, no matter how pure and admirable his standard may be, and no matter how devotedly he adheres to it, his philosophy and morals and social policy without the concept of deity cannot be said to be religion in the sense of that term as it is used in the statute." *Id.* at 381.

¹⁵ 329 U.S. 795 (1946).

¹⁶ 62 Stat. 604 (1948), as amended, 50 U.S.C.A. APP. § 451-73 (1958), as amended, 50 U.S.C.A. APP. § 453-67 (Supp. IV, 1963).

¹⁷ 62 Stat. 612 (1948), 50 U.S.C.A. APP. § 456 (j) (1958). See statutory material quoted note 1 *supra* (italicized portion).

¹⁸ *Clark v. United States*, 236 F.2d 13 (9th Cir.), cert. denied, 352 U.S. 882 (1956). The *Clark* court quoted an earlier dictum in *George v. United States*, 196 F.2d 445, 450 (9th Cir.), cert. denied, 334 U.S. 843 (1952):

"In sum, as the exemption from participation in war on the ground of religious training and belief can be granted or withheld by the Congress, the Congress is free to determine the persons to whom it will grant it, and may deny it to persons whose opinions the Congress does not class as 'religious' in the ordinary acceptance of the word. . . . [S]uch restriction is within the constitutional power of the Congress." 236 F.2d at 24.

¹⁹ *United States v. Bendik*, 220 F.2d 249 (2d Cir. 1955). There has been, however, no Supreme Court consideration of this precise position, for although the issue was squarely presented before the Court in the petition for certiorari in *Clark*, the Court denied the writ. 352 U.S. 882 (1956).

²⁰ "[I]t now seems well-established that legislative power to deny a particular privilege altogether does not imply an equivalent power to grant such a privilege on unconstitutional conditions." 326 F.2d at 851. See *Speiser v. Randall*, 357 U.S. 513 (1958).

The *Seeger* court also attempted to distinguish *United States v. Bendik*, 220 F.2d 249 (2d Cir. 1955), by noting that there the question was the permissibility of a distinction between religious and nonreligious objectors, while in *Seeger* the distinction was among religions. 326 F.2d at 851 n.2.

Although Seeger's constitutional objections were based primarily on the "establishment" question,²¹ the court discussed this aspect only briefly and inconclusively.²² Instead, the court considered the constitutionality of the provision with respect to the due process clause of the fifth amendment. In order to determine whether the Supreme Being clause constituted an arbitrary classification within the context of religion, the court necessarily became involved in a discussion of the definition of religion.²³ It adopted a definition based primarily on a Supreme Court decision in which a provision in the Maryland Constitution, which required notaries public to affirm their belief in God in order to receive their commissions, was held to violate the establishment clause of the first amendment.²⁴ In the course of that opinion, the Court suggested that a belief in a deity is a belief in some particular kind of religious concept, and also noted a number of religions which do not teach a belief in a Supreme Being. Such language proved to be all that was necessary for the *Seeger* court to revert to the earlier position of the Second Circuit as expounded by Judge Hand in *Kauten*.²⁵ From that position—that the term "religion" may also include beliefs of those who do not profess a relation to a Supreme Being—the court's finding of an impermissible classification under the due process clause of the fifth amendment was a necessary sequitur.²⁶

²¹ Brief for Appellant, pp. 12-29; Reply Brief for Appellant, pp. 4-14.

²² The court quoted the famous interpretation of the establishment clause rendered by Mr. Justice Black in *Everson v. Board of Educ.*, 330 U.S. 1, 15-16 (1947): "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 person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'" While acknowledging that government is precluded from aiding one religion or all religions, the court pointed out that the free exercise clause of the first amendment forbids any governmental hostility to religion or religious beliefs. Having thus posed the dilemma of governmental neutrality in the field of religion, the court apparently decided against any attempt to resolve the difficult problem of the interrelationship of "establishment" and "free exercise."

²³ 326 F.2d at 852-53.

²⁴ *Torcaso v. Watkins*, 367 U.S. 488, 492-96 (1961), where the Court quoted extensively from *Everson* and from *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

²⁵ 326 F.2d at 853.

²⁶ "[W]e cannot conclude that specific religious concepts, even if shared by the overwhelming majority of the country's organized religions, may be selected so as to discriminate against the holders of equally sincere religious beliefs." 326 F.2d at 854.

It is significant, however, that the decision cited by the court as authority for its due process decision has led at least one writer to foresee the demise of the Supreme Being clause on establishment grounds.²⁷ Moreover, language may be found in numerous interpretations of the establishment clause which, if applied literally, would appear to invalidate the Supreme Being clause as an establishment of religion.²⁸ The question, therefore, arises as to why the court chose not to apply one of the available tests under the establishment clause but chose instead to resolve the decision on due process grounds.²⁹

It is submitted that part of the answer lies in the fact that despite the many succinct and definite statements of the "rule" of the establishment clause,³⁰ the *application* of that rule in a particular case is exceedingly difficult to predict.³¹ Thus, in certain situations, the

²⁷ Conklin, *supra* note 2, at 276.

²⁸ "Neither [a state nor the federal government] can pass laws which aid one religion, aid all religions, or prefer one religion over another." *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947) (Black, J.). Compare *id.* at 24, 31-32 (Jackson, J., and Rutledge, J., dissenting); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (Black, J.); *Zorach v. Clauson*, 343 U.S. 306, 319-320 (1952) (Black, J., dissenting).

"[The establishment clause] forbids the State [or the federal government] to employ its facilities or funds in a way that gives any church, or all churches, greater strength in our society than it would have by relying on its members alone." *School Dist. of Abington v. Schempp*, 374 U.S. 203, 229 (1963) (Douglas, J., concurring). Compare *Engel v. Vitale*, 370 U.S. 421, 437 (1962) (Douglas, J., concurring).

"What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) *use essentially religious means to serve governmental ends, where secular means would suffice.*" *School Dist. of Abington v. Schempp*, *supra* at 294-95 (Brennan, J., concurring). (Emphasis added.) Compare Pfeffer, *Court, Constitution and Prayer*, *supra* note 2, at 744.

"The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *School Dist. of Abington v. Schempp*, *supra* at 222 (Clark, J.).

"[R]eligion cannot supply a basis for classification of governmental action. . . ." Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 5 (1961).

²⁹ If, for example, the court had adopted Professor Kurland's test (note 28 *supra*) that legislation may not classify in terms of religion, the same result could have been reached without ever reaching the more complex question of whether the classification was arbitrary and without reviving the old dispute as to the definition of religion.

³⁰ See note 28 *supra*.

³¹ See Pfeffer, *supra* note 28, at 744; Van Alstyne, *Constitutional Separation of Church and State: The Quest for a Coherent Position*, 62 AM. POL. SCI. REV. 865, 871-72 (1963).

Court may choose to apply the doctrinaire interpretation of the establishment clause to strike down some governmental practice.³² On the other hand, the Court may uphold the governmental practice by reciting the broad rule, yet applying it flexibly to permit certain incidental involvements of government in the field of religion.³³ The Court may even invoke the free exercise clause in electing to treat the governmental practice as a constitutional necessity.³⁴ These cases are difficult to reconcile and offer little indication of which avenue the Court will choose to pursue in any future situation.³⁵ Faced with this uncertainty, the *Seeger* court seemingly was reluctant to apply the doctrinaire establishment argument.

A more practical consideration, however, may have influenced the court's rationale more than the inherent uncertainty of the establishment clause. It seems clear that if the Supreme Being clause had been invalidated under the establishment clause, a disturbing

³² *E.g.*, *School Dist. of Abington v. Schempp*, 374 U.S. 203 (1963); *Engle v. Vitale*, 370 U.S. 421 (1962); *Torcaso v. Watkins*, 367 U.S. 488 (1961).

³³ *E.g.*, *Everson v. Board of Educ.*, 330 U.S. 1 (1947), where the establishment clause was held not to prohibit New Jersey from spending public funds to pay the bus fares of parochial school pupils as a part of a general program under which it paid the fares of pupils attending public and other schools. *Cf.* *Zorach v. Clauson*, 343 U.S. 306 (1952).

³⁴ *E.g.*, *Sherbert v. Verner*, 374 U.S. 398 (1963), where a member of the Seventh-Day Adventist Church was unable to retain employment because she refused to work on Saturday and filed for unemployment compensation, which was refused. The Supreme Court held (with two dissents) that appellant's right to free exercise of her religion required the state to honor her claim for benefits.

³⁵ *Compare* *McCullum v. Board of Educ.*, 333 U.S. 203 (1948), *with* *Zorach v. Clauson*, 343 U.S. 306 (1952). *Compare* *Sherbert v. Verner*, 374 U.S. 398 (1963), *with* *Braunfeld v. Brown*, 366 U.S. 599 (1961).

For a thorough and perceptive discussion of the underlying reasons behind the uncertainty in the area of the "religion" clauses of the first amendment, see Van Alstyne, *supra* note 31. Professor Van Alstyne notes that despite a well-accepted standard of neutrality, the disagreement which exists concerning the myriad applications of that standard is due to the Court's failure to resolve certain basic and difficult questions:

"1. By what means are secular interests of government rationally distinguishable from religious interests which government may neither abridge nor establish?"

"2. Assuming there is a tenable distinction, to what extent will the Court attempt to determine which among several intertwined secular and religious objectives the legislature was primarily attempting to promote in fact?"

"3. Assuming that a particular item of secular legislation also produces a significant advantage or disadvantage to religion, how feasible must alternative means of accomplishing the secular objective without the same effect on religion be, before the Court will hold that the availability of those alternative means operates to invalidate the particular scheme selected by a legislature?"

"4. In determining whether religion has been burdened or benefitted by a particular law, to what extent will the Court review related laws to measure the *net* effect of the broader governmental activity?" *Id.* at 873.

question would have arisen as to the constitutionality of the "religious training and belief" clause itself—in so far as it too classifies in terms of religion.³⁶ If the "religious training and belief" clause were ever held to be unconstitutional, the future of any sort of conscientious objector provisions would be placed in a most precarious position. Congress would be faced with a choice between no conscientious objector provision at all and one based solely on a subjective inquiry as to sincerity³⁷—a test which would appear exceedingly difficult to administer.³⁸ The *Seeger* decision merely serves to postpone these intriguing first amendment questions—possibly in the hope that before the question presents itself again for judicial consideration, the Supreme Court will have evolved a more workable philosophy of the first amendment religion clauses.³⁹

³⁶ It could also be argued that Congress is achieving a secular purpose (that of determining the subjective sincerity of those claiming conscientious objections) by a religious means—the objective test of whether or not he has had religious training and has a religious belief. Compare *School Dist. of Abington v. Schempp*, 374 U.S. at 294-95 (1963) (Brennan, J., concurring); *Pfeffer*, *supra* note 22, at 744 (1962). Of course, this larger question was not before the court in *Seeger*, but the implications of a first amendment decision must have been apparent.

³⁷ Conklin, *supra* note 2, at 281.

³⁸ *Ibid.* Cf. Smith & Bell, *The Conscientious-Objector Program—A Search for Sincerity*, 19 U. PITT. L. REV. 695 (1958).

³⁹ See Van Alstyne, *supra* note 35. The Supreme Court has recently granted certiorari in three of the conscientious objector cases. 377 U.S. 922 (1964).