NOTES

CONSTITUTIONAL LAW—ESTABLISHMENT CLAUSE—TEACHING OF SCIENCE OF CREATIVE INTELLIGENCE/TRANSCENDENTAL MEDITATION IN PUBLIC SCHOOLS VIOLATES ESTABLISHMENT CLAUSE OF FIRST AMENDMENT—*Malnak v. Yogi*, 592 F.2d 197 (3d Cir. 1979).

During the 1975-76 school year, five public high schools in New Jersey offered an elective course in the Science of Creative Intelligence and its technique of transcendental meditation (SCI/TM).[1] The methods and materials used in the five schools were the same, and the course instructors were employees of World Plan Executive Council—US (WPEC—US).[2] Classes were held four or five days a week at each of the schools.[3] While roughly thirty percent of each class period was devoted to instruction in and practice of the technique of transcendental meditation, the bulk of time spent by the high school students with the WPEC—US teachers was reserved for instruction in the underlying theory of the Science of Creative Intelligence,[4] for which purpose a uniform textbook was used.[5] The major portion of the textbook described, in detail, the qualities of

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[1] Malnak v. Yogi, 592 F.2d 197, 198 (3d Cir. 1979).

Its adherents have described transcendental meditation as

> [n]either a religion or a philosophy, nor a way of life, [but] a natural technique for reducing stress and expanding conscious awareness. It was first introduced into the United States in 1959 by the Indian teacher Maharishi Mahesh Yogi. The term "transcendental" means "going beyond."

H. BLOOMFIELD, M. CAIN & D. JAFFE, TM: DISCOVERING INNER ENERGY AND OVERCOMING STRESS 10 (1975) [hereinafter referred to as BLOOMFIELD].

The technique requires the meditator to contemplate his mantra, or sound aid, see note 7 *infra* and accompanying text, which causes his mind to travel backward through the development of thought until it reaches the source of all thought, "the field of pure creative intelligence." This process and the qualities of creative intelligence are explained by the theory of the Science of Creative Intelligence. Malnak v. Yogi, 440 F. Supp. 1284, 1288–89 (D.N.J. 1977), *aff'd*, 592 F.2d 197 (3d Cir. 1979). *See also* notes 60–69 *infra* and accompanying text.

[2] Malnak v. Yogi, 440 F. Supp. 1284, 1289 (D.N.J. 1977), *aff'd*, 592 F.2d 197 (3d Cir. 1979). WPEC—US is a nonprofit organization which sponsors the teaching of SCI/TM throughout the United States. *Id.* at 1287. As employees of WPEC—US, the teachers were not paid by any of the five school boards involved, and had not been certified by the State Board of Examiners. *Id.* at 1289. The programs were, however, supported by approximately $40,000 in Department of Health, Education and Welfare funds. Note, *Transcendental Meditation and the Meaning of Religion Under the Establishment Clause*, 62 MINN. L. REV. 887, 888 n.7 (1978). HEW was among the 20 named defendants in *Malnak*, 440 F. Supp. at 1288.

[3] Malnak v. Yogi, 592 F.2d 197, 198 (3d Cir. 1979).

[4] Malnak v. Yogi, 440 F. Supp. 1284, 1323 (D.N.J. 1977), *aff'd*, 592 F.2d 197 (3d Cir. 1979).

[5] *Id.* at 1289. The textbook was titled *Science of Creative Intelligence for Secondary Education: First Year Course*. *Id.* at n.6.

creative intelligence.[6] Each student who had chosen to participate in the SCI/TM course was required to attend a special ceremony in order to receive his or her own personal mantra, or thought-sound, which is considered by SCI/TM adherents to be indispensable to the practice of proper meditation technique.[7] These ceremonies, called pujas, were held away from school property on Sundays and were performed privately for each student by his or her instructor.[8]

A group of twelve plaintiffs brought suit to enjoin the teaching of SCI/TM in New Jersey's public schools.[9] They alleged that the course, as taught, conflicted with the establishment clauses of both the state and federal constitutions.[10] The United States District

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[6] *Id.* at 1323. These qualities, as described by the textbook, were found by the court to be religious in nature. *See* notes 60–69 *infra* and accompanying text.

[7] Malnak v. Yogi, 440 F. Supp. 1284, 1305 (D.N.J. 1977), *aff'd*, 592 F.2d 197 (3d Cir. 1979). The Sanskrit term "mantra" means " 'a thought the effects of which are known . . . [although] mantras taught for use in TM have no denotative meaning.' " BLOOMFIELD, *supra* note 1, at 17–18. Individual mantras are never to be revealed once the student has learned the technique of using the mantra from his instructor. *Id* at 18.

Each student who participated in the New Jersey programs promised in writing to keep his mantra a secret. 440 F. Supp. at 1305.

[8] Malnak v. Yogi, 440 F. Supp. 1284, 1305 (D.N.J. 1977), *aff'd*, 592 F.2d 197 (3d Cir. 1979).

Each student was required to bring a clean white handkerchief, some flowers, and several pieces of fruit to his puja, and to remove his shoes upon entering the room in which the ceremony was to be held. After lighting a candle and incense, the teacher sang a Sanskrit chant for three or four minutes and then gave the student his mantra. This ceremony was performed before an eight by twelve inch photograph of Guru Dev, a teacher of Maharishi Mahesh Yogi, who had been dead for over two decades. *Id.* For an English translation of a portion of the chant see note 71 *infra*.

The district court and the court of appeals accorded these facts great weight in determining the religious nature of the SCI/TM course. *See* text accompanying notes 72–75 *infra*.

[9] Malnak v. Yogi, 440 F. Supp. 1284, 1287 (D.N.J. 1977), *aff'd*, 592 F.2d 197 (3d Cir. 1979). Among the twelve plaintiffs were eight federal, state, and local taxpayers who had formed an unincorporated association called the Coalition for Religious Integrity. Four of these taxpayers were also parents of students at one of the schools offering the SCI/TM course. The remaining plaintiffs included a clergyman residing in New Jersey and two nonprofit, out-of-state corporations, Americans United for Separation of Church and State, and, Spiritual Counterfeit Project, Inc. *Id.*

The twenty named defendants included the WPEC—US, its president, and a teacher and a project director of SCI/TM. Brief for Appellants at 1, Malnak v. Yogi, 592 F.2d 197 (3d Cir. 1979). Other defendants were the five boards of education responsible for the high schools involved in the SCI/TM program; the State of New Jersey and its Board, Department, and Commission of Education; the United States; and the United States Department of Health, Education and Welfare (see note 2 *supra*). 440 F. Supp. at 1288. Because of his absence from the country, plaintiffs were unable to effect service of process on Maharishi Mahesh Yogi, the founder of the SCI/TM movement. *Id.* at 1288 n.7.

[10] Malnak v. Yogi, 440 F. Supp. 1284, 1312 (D.N.J. 1977), *aff'd*, 592 F.2d 197 (3d Cir. 1979). The first amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I.

Court for the District of New Jersey, in *Malnak v. Yogi*,[11] found that the teaching of the SCI/TM course was a religious activity for first amendment purposes, and was in violation of the establishment clause of the United States Constitution[12] despite the assertions of defendants that SCI/TM was a science and not a religion.[13] Judge Meanor, in a lengthy and highly detailed opinion, granted plaintiffs' motion for partial summary judgment and enjoined the teaching of the course in the public schools of New Jersey.[14] Defendants then brought a motion under rule 60(b)[15] of the Federal Rules of Civil Procedure, requesting relief from the judgment, claiming that the district court had made incorrect determinations of fact in granting summary judgment.[16] The motion was denied.[17]

Several individual defendants and WPEC—US appealed.[18] In a per curiam opinion, the United States Court of Appeals for the Third Circuit, in *Malnak v. Yogi*,[19] affirmed the judgment of the district court "essentially for the reasons set forth by Judge H. Curtis Meanor"[20] in the court below.[21] The circuit court echoed Judge Meanor's findings that the textbook and the puja constituted religious activity[22] and that this determination was dispositive of the case, since the involvement of governmental entities in the dissemination of SCI/TM was undisputed.[23]

The constitution of the State of New Jersey declares that "[t]here shall be no establishment of one religious sect in preference to another." N.J. CONST. art. I, para. 4. The plaintiffs' claim under the New Jersey Constitution was never ruled upon since the finding of a violation of the Federal Constitution's establishment clause rendered consideration of the lesser claim unnecessary. 440 F. Supp. at 1324 n.27.

[11] 440 F. Supp. 1284 (D.N.J. 1977), *aff'd*, 592 F.2d 197 (3d Cir. 1979).

[12] *Id.* at 1324.

[13] Brief for Appellants, *supra* note 9, at 21. Defendants distinguished SCI/TM from a religion by asserting that the underlying theories were based on testable evidence and reason, rather than on faith. They further noted that the habitual practice of TM would result in beneficial physiological and psychological effects whether or not the meditator accepted the theoretical aspects of SCI. *Id.* at 33–34.

[14] 440 F. Supp. at 1327.

[15] Rule 60(b) provides in pertinent part: "the court may relieve a party . . . from a final judgment . . . for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (b) any other reason justifying relief . . . ." FED. R. CIV. P. 60(b).

[16] Brief for Appellants, *supra* note 9, at 68.

[17] *See id.*

[18] Malnak v. Yogi, 592 F.2d 197, 198 (3d Cir. 1979).

[19] 592 F.2d 197 (3d Cir. 1979).

[20] *Id.* at 198.

[21] *Id.* at 199. Because of the abbreviated nature of per curiam decisions and the circuit court's articulated agreement with the reasoning of Judge Meanor's opinion, the primary focus of this note will be a discussion of the lower court's decision.

[22] *Id.*

[23] *Id.*; *see* 440 F. Supp. at 1323.

In the first Supreme Court decision to directly interpret the establishment clause of the first amendment, *Everson v. Board of Education*,[24] the Court considered a plan whereby a local board of education reimbursed parents for part of the cost of transporting their children to parochial schools.[25] The plan in question had been designed pursuant to a New Jersey statute which authorized school boards to provide transportation to nonpublic school students.[26] In upholding the legality of the plan under the establishment clause,[27] the Supreme Court articulated the role of government in its connections with religious groups to be one of neutrality rather than hostility.[28]

In the years following *Everson*, establishment clause cases argued before the Supreme Court resulted in the evolution of a three-pronged test which government action must pass when challenged as fostering an establishment of religion. The three requirements, which first appeared as elements of a single test in *Lemon v. Kurtzman*,[29] mandate that the legislative purpose of the law must be distinctly secular, its "primary effect must . . . neither advance nor inhibit religion,"[30] and it must avoid " 'excessive government entanglement

[24] 330 U.S. 1. Prior to *Everson*, the Supreme Court dealt generally with both religion clauses of the first amendment. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940); Reynolds v. United States, 98 U.S. 145, 164 (1878). *See also* Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943).

The establishment clause was treated independently by the Court for the first time in *Everson*. Walz v. Tax Comm'n, 397 U.S. 664, 702 (1970) (Douglas, J., dissenting); School Dist. v. Schempp, 374 U.S. 203, 216 (1963).

[25] 330 U.S. at 3. The Board of Education was a governmental entity of the Township of Ewing, New Jersey.

[26] *Id.* at 3 & n.1. The statute upon which the reimbursement plan was based provided:

> Whenever in any district there are children living remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school, including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part.

N.J. REV. STAT. § 18:14-8 (Cum. Supp. 1941), *codified in* N.J. STAT. ANN. § 18A:39-1 (West Cum. Supp. 1979-1980); 330 U.S. at 3 n.1.

[27] 330 U.S. at 18. The benefit to parochial schools was found to be analogous to benefits derived from public provision of such services as police, fire and sewerage to religious schools. It was therefore separate from any religious function. *Id.* at 17–18.

[28] *Id.* at 18. Writing for the Court, Justice Black wrote: "[The First] Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." *Id.* In his dissent, Justice Rutledge took a much narrower view. He suggested that a violation of separation of church and state would be worked by any use of tax moneys which resulted in help to religious activities. *Id.* at 52 (Rutledge, J., dissenting); *see* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 820 & n.5 (1978).

[29] 403 U.S. 602, 612–13 (1971).

[30] *Id.* at 612. The first two prongs were initially articulated by Justice Clark writing for the majority in School Dist. v. Schempp, 374 U.S. 203, 222 (1963). The *Schempp* Court invalidated, as a violation of the establishment clause, a Pennsylvania law requiring that ten verses of the

with religion.' "[31] The Court reaffirmed the need for laws challenged under the establishment clause to meet all three prongs of this test in its 1973 decision in *Committee for Public Education v. Nyquist.*[32] There the Court struck down a New York statute that gave financial aid to nonpublic elementary and secondary schools without ensuring that the funds were to be used only for secular purposes.[33] The possibility that some of the funds could be used to support religious education, resulting in impermissible advancement of religion, was enough to cause the Court to invalidate the statute.[34]

If the developed standards for judging constitutional challenges on establishment clause grounds are clear, judicial efforts to arrive at a concrete definition of the word religion itself are far less so.[35] In 1890, the Supreme Court in *Davis v. Beason*[36] pronounced a theistic view of the meaning of religion, stressing a belief in God.[37] This

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Bible be read without comment at the start of each school day. The statute was unconstitutional despite a provision allowing a child who presented a written request from a parent or guardian to be excused from the service. *Id.* at 205.

[31] 403 U.S. at 613. This analysis first appeared in Walz v. Tax Comm'n, 377 U.S. 664, 674 (1970).

For a more detailed discussion of the development of the three-pronged test, see Note, *Religious Groups' Use of Public School Buildings During Nonschool Hours Not Violative of Establishment Clause of First Amendment,* 9 SETON HALL L. REV. 524, 528–42 (1978).

[32] 413 U.S. 756, 773 (1973).

[33] *Id.* at 774. Speaking through Justice Powell, the Court invalidated the statute because of its failure " 'to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former.' " *Id.* at 783 (quoting Lemon v. Kurtzman, 403 U.S. 602, 613 (1971)).

[34] 413 U.S. at 790–91.

[35] In the district court opinion in *Malnak*, Judge Meanor wrote, "[o]wing to the variety of form and substance which religions may take, the courts have avoided the establishment of explicit criteria, the possession of which indelibly identifies an activity as religious for purposes of the first amendment." 440 F. Supp. at 1312.

While this may have been so in establishment clause cases, courts have consistently addressed the meaning of the term in free exercise and conscientious objector cases, particularly during the last twenty years. Malnak v. Yogi, 592 F.2d at 200 (Adams, J., concurring in the result).

[36] 133 U.S. 333 (1890) (holding that Mormon belief in polygamy was not religious tenet as people generally view religion, and that while free exercise clause protects belief it does not necessarily protect actions taken pursuant to that belief).

[37] *Id.* at 342. The *Beason* Court declared 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." *Id.*

This early position by the Court appears to have been grounded in the views expressed by the framers of the Constitution. *See, e.g.,* J. MADISON, *A Memorial and Remonstrance on the Religious Rights of Man,* in CORNERSTONES OF RELIGIOUS FREEDOM IN AMERICA 84 (J. Blau ed. 1964). Religion is "the duty which we owe to our Creator, and the manner of discharging it." *Id.*

For a thorough examination of efforts to fix a meaning for the word religion in the context of the first amendment, see Note, *Toward a Constitutional Definition of Religion,* 91 HARV. L. REV. 1056 (1978).

view prevailed[38] until 1943 when the Court of Appeals for the Second Circuit, in *United States v. Kauten*,[39] began to broaden the traditional definition. Speaking through Judge Augustus Hand, the court indicated that the religious nature of a set of ideas did not necessarily require belief in a Supreme Being, but could embrace the imperatives of conscience which represent for some what have historically been considered religious notions.[40]

The Supreme Court reinforced the shift in focus initiated by the Second Circuit in *Kauten* eighteen years later in *Torcaso v. Watkins*.[41] In that case, the Court unanimously invalidated a requirement under the Maryland Constitution that made a declaration of belief in God a prerequisite to the holding of public office in that state.[42] In its opinion the Court rested on both free exercise and establishment grounds, holding that the state may neither favor theistic over nontheistic faiths, nor prevent an individual from holding public office because of his beliefs.[43] The *Torcaso* Court clearly intended to widen the constitutional definition of religion to encompass views which are not centered on a belief in the existence of a Supreme Being when it declared that "neither [state nor federal government] can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."[44]

On the heels of *Torcaso* came the school prayer case of *Engel v. Vitale*.[45] In *Engel*, the Supreme Court held that the daily recitation

[38] In 1931, Chief Justice Hughes wrote that "[t]he essence of religion is belief in a relation to God involving duties superior to those arising from any human relation." United States v. MacIntosh, 283 U.S. 605, 633–34 (1931) (Hughes, C.J., dissenting).

[39] 133 F.2d 703 (2d Cir. 1943).

[40] *Id.* at 708. *Contra*, Berman v. United States, 156 F.2d 377 (9th Cir.), *cert. denied*, 329 U.S. 795 (1946). Judge Hand wrote:

> [C]onscientious objection to participation in any war . . . may justly be regarded as 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.

133 F.2d at 708.

At least two commentators have remarked that this statement by Judge Hand was dictum, since the result of the *Kauten* decision was to deny conscientious objector status to an atheist whose petition was based on political grounds alone. *See* Comment, *Teaching Transcendental Meditation in Public Schools: Defining Religion for Establishment Purposes*, 16 SAN DIEGO L. REV. 325, 337 (1979); Note, *supra* note 37, at 1061 n.35.

[41] 367 U.S. 488 (1961).

[42] *Id.* at 495. The contested portion of the Maryland Constitution had operated to deny appellant, a Secular Humanist, an appointment as a notary public because of his refusal to take the required oath. *Id.* at 489.

[43] *Id.* at 494–95.

[44] *Id.* at 495. *See* 440 F. Supp. at 1313. The *Torcaso* Court named several religions which are not founded upon a belief in God, including Buddhism, Taoism, Ethical Culture and Secular Humanism. 367 U.S. at 495 n.11.

[45] 370 U.S. 421 (1962).

by public schoolchildren of a nondenominational prayer prepared by the New York State Board of Regents was in violation of the establishment clause.[46] The court declared that an activity may be of a religious nature, although it is not connected to any established religious group, if "[i]t is a solemn avowal of divine faith."[47]

The abandonment of a purely theistic approach to defining religion, which had begun in the *Kauten* and *Torcaso* decisions, was given emphasis in *United States v. Seeger*[48] and *Welsh v. United States.*[49] Both *Seeger* and *Welsh* involved judicial construction of section 6(j) of the Universal Military Service and Training Act of 1948.[50] Under this provision an applicant for conscientious objector status was re-

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[46] *Id.* at 424. The prayer read:

> Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.

Id. at 422.

While recitation of the prayer was theoretically voluntary, students who wished to be excused needed a written request from a parent or guardian and were subject to peer pressure if they left the room where the prayer was being said. *Id.* at 423.

A number of school prayers were subsequently invalidated by lower federal courts, rendering such activities virtually impossible. *See, e.g.*, Stein v. Oshinsky, 348 F.2d 999 (2d Cir.), *cert. denied*, 382 U.S. 957 (1965); Goodwin v. Cross Country School Dist. No. 7, 394 F. Supp. 417 (E.D. Ark. 1973); ACLU v. Gallatin Area School Dist., 307 F. Supp. 637 (W.D. Pa. 1969).

Notable among these was DeSpain v. DeKalb Community School Dist., 384 F.2d 836 (7th Cir. 1967), *cert. denied*, 390 U.S. 906 (1968), in which a grace repeated by kindergarteners before their daily snack was found to be a religious activity. The lines recited were:

> We thank you for the flowers so sweet;
> We thank you for the food we eat;
> We thank you for the birds that sing;
> We thank you for everything.

Id. at 837.

The Seventh Circuit found "the . . . 'secular purposes' of the verse were . . . supplemental to its basic and primary purpose, which was the religious act of praising and thanking the Deity." *Id.* at 839. In concurring in the Third Circuit opinion in *Malnak*, Judge Adams suggested that the *DeSpain* decision, like the *Malnak* decision, could be construed as having found an activity to be religious despite assertions of secularity by its proponents. 592 F.2d at 202–03 & n.13. (Adams, J., concurring in the result). *See generally* Sutherland, *Establishment According to Engel*, 76 HARV. L. REV. 25 (1962).

[47] 370 U.S. at 424.

In another school prayer case decided one year after *Engel*, the Supreme Court struck down a Pennsylvania statute requiring the reading of 10 Bible verses without comment at the beginning of each school day. School Dist. v. Schempp, 374 U.S. 203 (1963). As in *Engel*, participation was voluntary in form, but fears of peer pressure prevented children, including the Schempp children, from asking to be excused. *Id.* at 208 n.3. *See* note 46 *supra*. *But see* 374 U.S. at 308 (Stewart, J., dissenting).

[48] 380 U.S. 163 (1965).

[49] 398 U.S. 333 (1970).

[50] Ch. 625, § 6(j), 62 Stat. 604 (1948) (currently found at 50 U.S.C. app. § 456(j) (1970)). Although the decision in *Seeger* turned on statutory construction, its implications in the de-

quired to show that his opposition to war was based upon "religious training and belief,"[51] which was defined in the provision as "an individual's belief in a relation to a Supreme Being."[52]

In *Seeger*, the Supreme Court bent the meaning of these terms to give a much broader reach to the term religion than the legislature had apparently intended. In interpreting section 6(j), the Court created an objective approach to the evaluation of claimed beliefs, and declared that religion could include ideas which "occupy the same place in [the applicant's] life as the belief in a traditional deity holds in the lives" of followers of theistic faiths.[53] The *Seeger* Court indicated, however, that even under this broader definition of religion, individuals whose objections were "political, sociological or economic" would not be within the scope of the exemption.[54]

Speaking through Justice Black, the Court in *Welsh* extended the *Seeger* interpretation of section 6(j). It held that the exemption for reasons of "religious training and belief" was broad enough to encompass moral and ethical principles.[55] This statement of the exemption's sweep represented a significant expansion of the *Seeger* Court's position that objections based on "political, sociological or economic"

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velopment of a constitutional standard for religion have been recognized by several commentators. *See, e.g.*, Clancey & Weiss, *The Conscientious Objector Exemption: Problems in Conceptual Clarity and Constitutional Considerations*, 17 ME. L. REV. 143, 145 (1965); MANSFIELD, CONSCIENTIOUS OBJECTION—1964 TERM, IN 1965 RELIGION AND THE PUBLIC ORDER 3, 8–9 (D. Gianella ed., 1966).

[51] Ch. 625, § 6(j), 62 Stat. 604 (1948) (currently found at 50 U.S.C. app. § 456(j) (1970)).

[52] *Id.* Section 6(j), at the time *Seeger* and *Welsh* were decided, provided in pertinent part:

> 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.

Id.

[53] 380 U.S. at 187.

The Court stated "[w]here such beliefs have parallel positions in the lives of their respective holders we cannot say that one is 'in a relation to a Supreme Being' and the other is not." *Id.* at 166. Justice Clark, writing for the Court, defined such "a power or being, or . . . faith [as that] to which all else is subordinate or upon which all else is ultimately dependent." *Id.* at 176. Seeger, who would not declare faith in a Supreme Being, nevertheless was granted conscientious objector status on the basis of his affirmation of " 'a religious faith in a purely ethical creed.' " *Id.* at 166.

Notwithstanding the *Seeger* Court's characterization of its test as an "essentially objective one," *id.* at 184, it becomes substantially subjective when applied, in that it seeks to assess the position occupied in an individual's life by a particular set of ideas. *See* Comment, *supra* note 40, at 339; Note, *supra* note 2, at 897–98.

[54] 380 U.S. at 173.

[55] 398 U.S. at 342–43. The only qualification of the Court's holding was its statement that objections based "solely upon considerations of policy, pragmatism, or expediency" would not justify an exemption under the statute. *Id.*

grounds were insufficient to qualify an applicant for conscientious objector status.[56]

The *Malnak* decision has added to the judicial trend which broadened the meaning of religion in free exercise and conscientious objector cases, by including for the first time within that meaning a series of activities which the practitioners insisted were secular in nature.[57] More importantly, the Third Circuit has increased the scope of the meaning of religion developed in other contexts by using it to strike down a state-supported program on establishment clause grounds.[58]

The reasoning of the district court, which the court of appeals enthusiastically adopted, began with a detailed analysis of the textbook used in the SCI/TM course.[59] The major portion of the text consisted of elaborate descriptions of the qualities of creative intelligence.[60] These descriptions declared that, as the source of all things, "creative intelligence 'is the home of all qualities that we can conceive of in the fields of knowledge and action, existence and evolution.' "[61] Creative intelligence was described, inter alia,[62] as " 'the basis of life,' "[63] " 'the impelling life force,' "[64] " 'always acting, ever vigilant,' "[65] " 'omnipoten[t]' "[66] and " 'omniscient.' "[67] Judge Meanor found that, despite the assertions of the defendants that the statements in the textbook were not meant to be religious, the language of the textbook itself contradicted such protestations.[68] He

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[56] 380 U.S. at 173. One commentator has characterized the narrowing of the categories of exemption in *Welsh* as "the final step in a remarkable feat of linguistic transmutation." Note, *supra* note 37, at 1065 n.60.

The author concluded that this line of reasoning transformed Congress' original intent (to exclude from exemption all applicants whose beliefs were based on other than theistic grounds) into an interpretation excluding only those based on " 'policy, pragmatism, or expediency.' " *Id.* (quoting Welsh v. United States, 398 U.S. 333, 343 (1970)).

[57] 592 F.2d at 200 (Adams, J., concurring in the result). *See also* Brief for Appellants, *supra* note 9, at 21–33.

[58] 592 F.2d at 200 (Adams, J., concurring in the result).

[59] 440 F. Supp. at 1289. See note 5 *supra*.

[60] 440 F. Supp. at 1323.

[61] *Id.* at 1291.

[62] *Id.* at 1289–1305. Judge Meanor's examination of the text contained numerous quotations. *Id.* Those given here are by way of example.

[63] *Id.* at 1292.

[64] *Id.* Creative intelligence is "at the core of everything in the universe." *Id.*

[65] *Id.* at 1293.

[66] *Id.* at 1294.

[67] *Id.*

[68] *Id.* at 1297. In support of this finding, Judge Meanor cited the following quotation from

reasoned that the extraordinary characteristics attributed to creative intelligence by the textbook were parallel to those which are usually ascribed to a deity or ultimate reality.[69]

In an equally thorough textual analysis of the puja, the district court compared the language of the puja to that of invalidated school prayers[70] and found the Sanskrit chant,[71] which was sung by a teacher in the presence of a single student, to be religious in nature.[72] The chant made clear expressions of reverence, such as " 'the Lord,' " and " 'our master' " in its supplications to Guru Dev, the teacher of Maharishi Mahesh Yogi.[73] These and other divine characterizations attributed qualities to Guru Dev which the district court felt would never be used to describe a human being.[74] The defendants urged that the puja was merely a formalized expression of gratitude, but the district court dealt harshly with this contention. Judge Meanor wrote that "[o]ne would no more perform a ceremony of gratitude to a tradition or to a body of knowledge than one would perform a ceremony of gratitude to a chair. . . ."[75]

In its discussion of SCI/TM as a religion for first amendment purposes, the district court declined to fashion an explicit definition

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the textbook: " 'Creative intelligence is not just an abstract concept or idea; it is a concrete reality that can be practically applied to bring success and fulfillment to every phase of living.' " *Id.*

[69] *Id.* at 1300, 1323.

[70] *Id.* at 1310, 1313–15.

[71] The English translation of the chant included the following:

"Invocation

Whether pure or impure, where purity or impurity is permeating everywhere, whoever opens himself to the expanded vision of unbounded awareness gains inner and outer purity.

. . .

Offering the invocation of the lotus feet of Shri Guru Dev, I bow down.
Offering a seat to the lotus feet of Shri Guru Dev, I bow down.
Offering an ablution to the lotus feet of Shri Guru Dev, I bow down.
Offering a cloth to the lotus feet of Shri Guru Dev, I bow down.
Offering Sandalpaste to the lotus feet of Shri Guru Dev, I bow down.

. . .

Guru Dev, Shri Brahmananda, bliss of the Absolute, transcendental joy, the Self-Sufficient, the embodiment of pure knowledge which is beyond and above the universe like the sky, the aim of 'Thou art that' and other such expressions which unfold eternal truth, the One, the Eternal, the Pure, the Immovable, the Witness of all intellects, whose status transcends thought, the transcendent along with the three gunas, the true preceptor, to Shri Guru Dev, I bow down . . . ."

Id. at 1306–07.

[72] *Id.* at 1309.

[73] *Id.* at 1307. *See* note 71 *supra* and accompanying text.

[74] 440 F. Supp. at 1308. The terms used to describe Guru Dev included " 'the embodiment of pure knowledge which is beyond and above the universe like the sky.' " *Id.*

[75] *Id.* at 1309.

of religion. Rather, the court determined that a decision in *Malnak* could be extrapolated from the kinds of activities that had been found to be religious in prior Supreme Court decisions.[76] The district court refused to accept the " 'substantive and contextual' " approach to defining religion under the first amendment advocated by the defendants,[77] since the outcome of such an inquiry would depend heavily upon an individual's subjective feelings about the nature of the activities, thereby making a uniform first amendment standard impossible.[78]

Judge Meanor recalled that the use of subjective characterizations had been found burdensome in *Welsh* where, although Welsh himself had declared that his petition for conscientious objector status did not stem from religious convictions, the Supreme Court had held that his deep feelings against participating in wars were religious for section 6(j) purposes.[79] Furthermore, " 'the Court's statement in [United States v.] Seeger that a registrant's characterization of his own belief as "religious" should carry great weight does not imply that his declaration that his views are nonreligious should be treated similarly.' "[80]

The district court in *Malnak* found the decisions in *Welsh* and *Seeger* to be significant, not because of their struggle with the problem of defining religion, but because the Supreme Court in both

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[76] *Id.* at 1312, 1320. The court analogized the lack of an explicit constitutional definition of religion in prior cases to the lack of any such definition for speech or press for first amendment purposes. The meaning of such terms changes with time and national growth. *Id.* at 1315. *See also* Weiss, *Privilege, Posture and Protection: "Religion" in the Law*, 73 YALE L.J. 593, 604 (1964). The court recognized that prior religion cases had dealt only with activities which the proponents had agreed were religious, whereas in *Malnak* the defendants claimed that the activities were not religious, 440 F. Supp. at 1315, but the court found that "the novel aspects of the case are more apparent than real." *Id.* at 1320.

[77] 440 F. Supp. at 1315–16 & n.20. Judge Meanor rejected defendants' approach as misnamed and inappropriate, describing it as "devoid of substantive analysis and plac[ing] determinative emphasis on the [practitioner's] subjective characterization of his activity." *Id.* at 1317. Judge Meanor further remarked that the *Malnak* court was following the usual method of analyzing the content of the activity in question and the circumstances surrounding it. *Id.* at 1316–17.

Defendants also termed their analysis a " 'definitional approach,' " claiming that the establishment clause should be more narrowly defined than the free exercise clause, whose broad scope is needed " 'to protect individual liberty.' " *Id.* at 1316 & n.20. This is similar to the dual definition proposed by Professor Tribe of Harvard. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 828 (1978). *See* Galanter, *Religious Freedom in the United States: A Turning Point?*, 1966 WISC. L. REV. 217, 266; note 100 *infra*.

[78] 440 F. Supp. at 1318.

[79] *Id.* at 1319.

[80] *Id.* (quoting *Walsh*, 398 U.S. at 341).

cases chose an expansive interpretation of religion under a statute, an area in which the Supreme Court has traditionally been more restrained than it has been in construing constitutional provisions.[81]

The district court chose to evaluate the types of practices found to be religious under *Engel, Torcaso, Welsh*, and *Seeger*,[82] and to compare them to the characteristics of the SCI/TM course.[83] This inquiry resulted in a finding that the theory of the Science of Creative Intelligence as set forth in the textbook was parallel to the common notion of the worship of a deity[84] and that the Sanskrit chant sung at the puja was a prayer, in that it invoked a divine being.[85]

Having determined that SCI/TM was religious in nature, the district court applied the three-pronged *Lemon* test[86] in order to ascertain whether an impermissible establishment of religion had taken place. The first prong, requiring a clearly secular legislative purpose, was held to have been violated by the method used to achieve that purpose. Although the secular purpose of offering SCI/TM in New Jersey's high schools was to avail students of the stress-reduction benefits of transcendental meditation,[87] the court found the teaching of the religious theory of the Science of Creative Intelligence and the requirement of attendance at a religious ceremony, the puja, to be unacceptable means to a secular end.[88]

The SCI/TM program was found by the district court to have offended the second prong of the test,[89] as the teaching of the Science of Creative Intelligence had the primary effect of advancing religion.[90] The district court further found that the third prong of the *Lemon* test had not been satisfied because the course was offered in the public school curriculum and had received federal funds.[91] This

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[81] 440 F. Supp. at 1314.

[82] *Id.* at 1313–14.

[83] *See id.* at 1320–23; note 76 *supra*.

[84] 440 F. Supp. at 1320–22.

[85] *Id.* at 1323–24. The court added a footnote indicating that the compulsion to attend the puja was more intense than the pressure facing the students in *Engel*, where only the teacher was required to repeat the prayer. *Id.* at n.25. *See* note 46 *supra* and accompanying text.

[86] *See* notes 28–32 *supra* and accompanying text. Although the district court and the circuit court in *Malnak* refer to the three-pronged test as the *Nyquist* test, it was in fact formulated for the first time in Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

[87] 440 F. Supp. at 1323; *see* note 1 *supra*.

[88] 440 F. Supp. at 1324.

[89] *Id.* Since all three prongs of the test must be satisfied in order for a government activity to withstand establishment clause scrutiny, the court's analysis could theoretically have stopped after SCI/TM was found to have violated the first part of the test. *See* text accompanying notes 32–34 *supra*.

[90] 440 F. Supp. at 1324.

[91] *Id.* The funds were supplied by the Department of Health, Education and Welfare. *See* note 2 *supra*.

resulted in an excessive entanglement of both state and federal governments in religion.[92]

In writing his concurrence in the result for the Third Circuit, Judge Adams impliedly criticized the per curiam nature of that court's opinion. He noted that because the facts in *Malnak* differed considerably from those presented in the Supreme Court cases cited by the district court, more than a mere affirmation of the lower court's opinion was appropriate. In his view, stretching the scope of prior law "calls for both an explanation and a justification."[93]

Judge Adams argued that the school prayer decisions were not dispositive of the *Malnak* case, since their facts involved concededly religious prayers, while the proponents of SCI/TM maintained that the chant sung during the puja had no religious meaning.[94] He further observed that the other pertinent facts of the SCI/TM case and the school prayer cases differed so markedly[95] that analogizing the language of the puja to that of the school prayers[96] would not be fruitful in determining the scope of the meaning of religion under the first amendment as applied to nontheistic faiths.[97]

Agreeing with the district court, Judge Adams found that the conscientious objector cases of *Seeger* and *Welsh* pointed toward a broader definition of religion under the first amendment[98] as did *Torcaso,* which construed the constitution directly.[99] Judge Adams, like Judge Meanor, favored a unitary approach to defining religion under the first amendment, and agreed that the broad reading of the term developed in free exercise cases was properly applied to the *Malnak* challenge under the establishment clause.[100]

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[92] 440 F. Supp. at 1324.

[93] 592 F.2d at 200–01 (Adams, J., concurring in the result).

[94] *Id.* at 201–03 (Adams, J., concurring in the result).

[95] *Id.* The puja was performed away from school property; it did not interfere with school hours; each student was exposed to the puja only once; an English translation of the chant was never given the students, so that they probably did not understand the meaning of the Sanskrit words. *Id.* at 203 (Adams, J., concurring in the result). Attendance at the puja was mandatory. *Compare* note 46 *with* note 85 *supra.*

[96] 592 F.2d at 201–02 & n.7 (Adams, J., concurring in the result). The district court had used the method of "textual analysis" to compare the puja to the prayers struck down in *Engel* and School Dist. v. Schempp. 440 F. Supp. at 1310.

[97] 592 F.2d at 203 (Adams, J., concurring in the result). Judge Adams characterized the extent of the constitutional definition of religion as "the important question presented by the present litigation." *Id.*

[98] *See id.* at 203–05 (Adams, J., concurring in the result).

[99] *See id.* at 205–07 (Adams, J., concurring in the result).

[100] *Id.* at 213 (Adams, J., concurring in the result); *see* Comment, *supra* note 40, at 339.

Professor Tribe has advocated a dual definition for the religion clauses: "all that is *'arguably religious'* should be considered religious in a free exercise analysis [but] anything *'arguably non-religious'* should not be considered religious in applying the establishment clause." L.

In concurring that SCI/TM was religious in nature, Judge Adams proposed three guidelines against which a challenged set of ideas could be measured:[101] 1) the nature of the ideas and the extent to which they address fundamental or "ultimate" questions;[102] 2) the comprehensiveness of the ideas;[103] and 3) whether the ideas contain any formal components which are analogous to recognized religions.[104] When measured by these indicia, the course in SCI/TM was undoubtedly religious. Judge Adams found that the Science of Creative Intelligence treated comprehensively questions of ultimate concern regarding the nature of man and the universe,[105] and that the formality of the puja and the existence of trained teachers whose mission was to spread SCI/TM were analogous to signs commonly associated with religious activities.[106]

Finally, Judge Adams agreed with the district court's assessment that the New Jersey SCI/TM course constituted an establishment of religion because it failed to pass the three-pronged *Lemon* test.[107] He questioned, however, the purported secular purpose behind the state's involvement,[108] noting that the facts showed "nothing other than an effort to propagate TM, SCI, and the views of Maharishi Mahesh Yogi."[109]

By handing down a per curiam opinion affirming the reasoning and conclusions of the district court, the Third Circuit has left unresolved several questions which arise from the district court's opinion. Adopting by implication the broad concept of religion articulated in *Seeger*,[110] *Welsh*,[111] and *Torcaso*,[112] and rejecting the " 'substantive

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TRIBE, *supra* note 77, at 828 (emphasis in original). Following this approach, the teaching of SCI/TM under the circumstances in *Malnak* would not be considered an establishment of religion, although under other circumstances it could be granted protection under the free exercise clause. *Id. See also* Galanter, *supra* note 77, at 265–68; Note, *supra* note 37, at 1083–86.

[101] 592 F.2d at 208–09 (Adams, J., concurring in the result). Judge Adams pointed out that these guidelines were not meant to be an absolute test, and stressed flexibility in the consideration of all challenged beliefs. *Id.* at 210 (Adams, J., concurring in the result).

[102] *Id.* at 208 (Adams, J., concurring in the result). Judge Adams considered this element to be the most important in determining whether or not a set of ideas is religious. *Id.*

[103] *Id.* at 209 (Adams, J., concurring in the result).

[104] *Id.*

[105] *Id.* at 213 (Adams, J., concurring in the result).

[106] *Id.* at 214 (Adams, J., concurring in the result).

[107] *Id.*

[108] *Id.*

[109] *Id.* at 215 (Adams, J., concurring in the result).

[110] 380 U.S. at 187. Following *Seeger*, the *Malnak* court subscribed to the theory that the concept of ultimacy in a set of beliefs would determine their religious nature, whether or not they encompassed a belief in a Supreme Being. 440 F. Supp. at 1322; 380 U.S. at 176.

[111] 398 U.S. at 342–43. *See* note 81 *supra* and accompanying text.

[112] 367 U.S. at 495; 440 F. Supp. at 1313. *See* text accompanying notes 43–44 *supra*.

and contextual' " approach to defining religion urged by the defendants,[113] the district court advocated a unitary definition for both religion clauses.[114] Yet Judge Meanor's discussion, in footnote twenty, of the district court's preference for a single definition of religion to govern both the free exercise and establishment clauses is unsatisfying. He relied strongly upon Justice Rutledge's dissenting opinion in *Everson*, in which that Justice theorized that since the word religion is found only once in the first amendment, it must have only one meaning, equally applicable to both clauses.[115] Judge Meanor modified this rule by stating that the different protections available under the religion clauses will cause the application of the two clauses to differ.[116] He did not consider, however, the ramifications of applying an expansive *Seeger-Welsh* concept of religion to establishment clause cases, which could result in the invalidation of state action in such traditional governmental spheres as public health, safety, and welfare.[117]

The district court dealt with SCI/TM as a single entity, finding it in violation of the establishment clause due to the religious nature of SCI and the puja. Thus, the question whether TM, taught without SCI or the puja, would constitute an establishment of religion if taught in a public school, remains unanswered.[118]

Ambiguity also inheres in the use of a textual analysis to invalidate the puja as an impermissible prayer. As Judge Adams observed in a footnote, this type of analysis could be used "to invalidate the pledge of allegiance, the singing of 'America the Beautiful,' or the performance of certain works from Handel or Bach by a school glee club."[119] Such activities have not been considered prayers under the school prayer case analysis.[120]

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[113] *See* note 75 *supra*.

[114] 440 F. Supp. at 1316 n.20; *see* notes 77 & 100 *supra* and accompanying text.

[115] 440 F. Supp. at 1316 n.20; 330 U.S. at 32–33 (Rutledge, J., dissenting). Justice Rutledge wrote: " 'Religion' appears only once in the Amendment. But the word governs two prohibitions and governs them alike." *Id.* at 32 (Rutledge, J., dissenting).

[116] 440 F. Supp. at 1316 n.20.

[117] For example, such an application of the *Seeger-Welsh* analysis could effectively thwart anti-prostitution and Sunday-closing laws as establishments of religion, since the significance of such statutes in the eyes of their proponents may be rooted in their moral or ultimate beliefs. *But see, e.g.*, Gallagher v. Crown Kosher Supermkt., 336 U.S. 617 (1961), decided four years prior to *Seeger*, in which Chief Justice Warren wrote that the "purpose or effect" of Massachusetts Sunday-closing laws was not religious and thus did not work an establishment of religion. *Id.* at 624, 627–28, 630.

[118] The court appeared to note that TM may be taught separately. *See* 440 F. Supp. at 1324 n.26.

[119] 592 F.2d at 202 n.7 (Adams, J., concurring in the result).

[120] *Id.* Judge Adams further remarked that

> such activities have not been held to violate the establishment clause, even though

In finding for the first time that a set of ideas is a religion, despite the insistence of secularity by its proponents,[121] and is therefore violative of the establishment clause, the *Malnak* decision calls attention to the need for a set of workable standards upon which future courts may rely in assessing the religious nature of activities under the first amendment. Such a set of standards need not be in the form of a concrete definition, which the district court eschewed as too inflexible,[122] but could take the form of signposts to guide future courts in their assessments. In this regard, Judge Adams's concurrence in the result for the Third Circuit offers an important contribution toward the development of useful guidelines.[123] His proposed indicia represent a thoughtful distillation of the elements prior courts have found significant in religion clause analysis, and will undoubtedly prove valuable to later courts grappling with examinations of those clauses.

The district court opinion in *Malnak* offers little aid to future jurists who will deal with religion under the first amendment. Rather than formulating a coherent guide, the court relied upon its assessment of the "type of activity" found to constitute religion in prior cases.[124] These impressions are not always persuasive,[125] yet they are the sole legacy of the *Malnak* decision. In failing to provide an identifiable—if flexible—guide for future courts faced with similar challenges, the *Malnak* court has created as many questions as it has answered.

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> they include references to God or a Supreme Being, because they are undertaken for patriotic, cultural or other secular reasons, and neither have, nor are intended to have, a religious effect on those participating in or witnessing them.

Id. *See* note 96 *supra*.

[121] *See* notes 12 & 57 *supra* and accompanying text. Such standards have been suggested by numerous commentators. *See, e.g.*, Comment, *supra* note 37, at 341–43; Note, *supra* note 37, at 1072–83; Note, *supra* note 2 at 892–911.

[122] Judge Meanor indicated that the Supreme Court had not established such a definition because of the need for flexibility in dealing with constitutional provisions. 440 F. Supp. at 1312, 1315.

[123] *See* notes 101–06 *supra* and accompanying text.

[124] 440 F. Supp. at 1312.

[125] For example, the type of state compulsion found in *Engel* and *Schempp* was not present in *Malnak*. *See* 592 F.2d at 203 (Adams, J., concurring in the result). *See* notes 46 & 47 *supra*. However, once a student had elected to take the SCI/TM course, he was compelled to attend the puja. *See* note 85 *supra*.