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Teaching Transcendental Meditation in Public Schools: Defining Religion for Establishment Purposes

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In Malnak v. Maharishi Mahesh Yogi a United States district court held that public school instruction in Transcendental Meditation violates the establishment of religion clause of the first amendment. The Malnak court found Transcendental Meditation to be a religion although its proponents asserted the technique is scientifically based and non-religious. Malnak raises questions as to how religion should be properly defined when interpreting the establishment clause. This Comment analyzes the Malnak decision and discusses recent efforts by the judiciary to delineate a legal definition of religion. It concludes that a broad definition of religion is necessary to effectuate the underlying values of the first amendment.

In recent years courses offering instruction in the technique of Transcendental Meditation (TM) and its theoretical component, the Science of Creative Intelligence (SCI),1 have become popular in public schools throughout the nation.2 However, the propriety of such instruction has recently been challenged on constitutional

1. The full course will hereinafter be referred to as TM/SCI.
2. Courses have been introduced in the secondary schools of a number of states, including California, New York, and New Jersey. See Doerr, Transcendental Meditation Goes to School, 40 EDUC. DIG. 44 (1975); Driscoll, TM as a Secondary School Subject, 54 PHI DELTA KAPPAN 236 (1972); Rubottom, Transcendental Meditation and Its Potential Uses for Public Schools, 36 SOC. EDUC. 851 (1972). Institution of the classes has been aided by a $21,500 grant from the National Institute of Mental Health enabling 150 high school teachers to be trained as TM/SCI instructors. Haddon, New Plant Thrives in a Spiritual Desert, CHRISTIANITY TODAY, Dec. 21, 1973, at 9.
grounds in *Malnak v. Maharishi Mahesh Yogi*. The New Jersey United States district court enjoined the teaching of TM/SCI in courses at five New Jersey secondary schools. The court reasoned that employment of TM/SCI in the educational curriculum constitutes an establishment of religion, prohibited by the first amendment to the United States Constitution.

*Malnak* is the first decision in which a court has determined that a belief or practice is "religious" within the scope of the establishment clause despite contrary claims by its proponents. In prior cases, public school activities enjoined by the courts as an abridgement of the establishment clause were agreed by all parties involved to be religious in nature. The only issue was whether government support of the practices comprised an unconstitutional establishment of religion.

The *Malnak* court had the opportunity to fashion a novel rule of law. The court could have set forth criteria to define the religiousness of a system of beliefs or practices pursuant to the establishment clause of the United States Constitution. However, the *Malnak* court's failure to do so is indicative of the confused line of decisions by the courts during the last two decades dealing with the proper applicable legal definition of religion under both the establishment and free exercise clauses of the first amendment.

This Comment will discuss the implementation of TM/SCI courses in public schools and the subsequent decision in *Malnak*. The Comment will then analyze prior efforts by the judiciary to elucidate a constitutional definition of religion. Finally, the Comment will attempt to develop a framework by which to determine whether given beliefs or practices can be classified as "religious" for establishment clause purposes. The framework is both pragmatic and workable and attempts to effectuate the underlying values served by the establishment clause.

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4. The religion clauses of the first amendment state: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . " U.S. Const. amend. I.
5. TM proponents have argued that TM/SCI is essentially non-religious in nature. However, they experience difficulty in deciding whether it is a philosophy or science or should be classified under some other nomenclature. *Malnak v. Maharishi Mahesh Yogi*, 440 F. Supp. 1284, 1297 (D.N.J. 1977). See also J. Forem, *Transcendental Meditation* 205 (1973) (definition of SCI); Rubottom, *Transcendental Meditation and Its Potential Uses for Public Schools*, 36 Soc. Educ. 851, 853 (1972).
TM/SCI was offered as an elective course at five New Jersey secondary schools during the 1975-1976 academic year. The TM is a simple meditation technique engaged in by the practitioner from 15-20 minutes, twice per day. During meditation, the individual sits in a relaxed position and silently repeats a Sanskrit (the ancient language used in the sacred literature of the Hindu religion) syllable called a “mantra.” This repetition purportedly causes the meditator to enter a new state of consciousness known as “restful alertness,” marked by decreased oxygen consumption and respiration rates. See Wallace & Benson, The Physiology of Meditation, Sci. Am., Feb., 1972, at 84 (pioneering study of the physiological effects of TM).

Currently, the Maharishi Mahesh Yogi is attempting to implement a World Plan by which one teacher of TM/SCI will be trained for every 1,000 persons in the world’s populace. The World Plan has seven goals:

(1) To develop the full potential of the individual;
(2) To improve governmental achievements;
(3) To realize the highest ideal of education;
(4) To eliminate the age-old problem of crime and all behavior that brings unhappiness to the family of man;
(5) To maximize the intelligent use of the environment;
(6) To bring fulfillment to the economic aspirations of individuals and society;
(7) To achieve the spiritual goals of mankind in this generation.

The Science of Creative Intelligence, like TM, was primarily devised and promulgated by the Maharishi Mahesh Yogi. SCI attempts to explain the causes of the physiological and psychological changes undergone during meditation. According to the theory, while in the meditation state the individual is able to reverse the process by which thought develops from the subconscious to the conscious mind and thereby contact its source, an entity entitled the “field of pure creative intelligence.” Rubottom, Transcendental Meditation and Its Potential Uses for Public Schools, 36 Soc. Educ. 851, 853 (1972). This entity is considered the ultimate source of all life. Malnak v. Maharishi Mahesh Yogi, 440 F. Supp. at 1292. Moreover, SCI teaches that when the field of pure creative intelligence is reached, the meditator is able to tap its vast and unlimited powers. Prolonged practice of the technique will supposedly infuse the meditator with all the beneficial qualities of creative intelligence, including greater happiness and expanded awareness, creativity, intelligence, and energy. When the practitioner is able to experience each aspect of creative intelligence, not only during meditation but throughout the waking, sleeping, and dreaming states, he is considered to be self-realized in a new state of consciousness, “cosmic consciousness.” Id. at 1289-90.

A comprehensive syllabus for the introduction of TM/SCI into the educational curriculum was developed by the Maharishi in 1972. Rubottom, Transcendental Meditation and Its Potential Uses for Public Schools, 36 Soc. Educ. 851, 852 (1972). It is claimed that the courses offer an integrated, interdisciplinary, and holistic approach to learning now lacking in the educational system. Id. at 854-57. Educators, in particular, have been impressed by claims that TM will decrease student drug abuse, raise scholastic averages, and improve student-teacher relationships. Driscoll, TM as a Secondary School Subject, 54 Phi Delta KAPPAN 236 (1972) (quote from New York
teachers, none of whom were regular employees of the school system, were trained and paid by the World Plan Executive Council—United States (WPEC-US).\(^9\) Classes met for one hour, five days per week, and were divided into two segments. Fifteen to twenty minutes of each session were devoted to the practice of TM. The remainder of the hour was used for instruction in the Science of Creative Intelligence.\(^{10}\) Class instruction was aided by the use of a textbook entitled *Science of Creative Intelligence for Secondary Education: First-Year Course.*\(^{11}\) In addition, pupils attended a special mandatory initiation ceremony held off campus.\(^{12}\)

Twelve plaintiffs filed suit in United States district court to enjoin further teaching of TM/SCI on the ground the instruction violated the establishment clause. Twenty defendants were named in the action.\(^{13}\) Plaintiffs' motion for summary judgment was granted and a permanent injunction was issued.\(^{14}\) The court held that educational instruction in TM/SCI constitutes state support of religion prohibited by the first amendment.

*The Textbook and Puja*

The *Malnak* court initially examined the characterization of creative intelligence contained in the course textbook. The court found the textbook described creative intelligence so as to equate

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9. The WPEC-US, a nonprofit corporation, is the main organizational vehicle for propagating TM/SCI in the United States.


11. *Id.* at 1289 n.6.

12. *Id.* at 1305. The ceremony is called a "puja." Its significance is discussed in text accompanying notes 22-28 infra.

13. Plaintiffs consisted of eight New Jersey taxpayers, four of whom had children attending a high school at which the course was taught. They comprised an unincorporated association called the Coalition for Religious Integrity. Other plaintiffs included a New Jersey clergyman, Americans United for Separation of Church and State, and Spiritual Counterfeit Project, Inc. Malnak v. Maharishi Mahesh Yogi, 440 F. Supp. at 1287.

Defendants included numerous persons and organizations involved in the propagation of TM/SCI under the aegis of the World Plan Executive Council, the five boards of education that instituted TM/SCI in the educational curriculum, the New Jersey Department of Education, the United States Department of Health, Education and Welfare, and the United States. *Id.* at 1287-88. The Maharishi Mahesh Yogi was also named as a defendant, but plaintiffs were unable to effect personal service on him. *Id.* at 1288 n.1.

its nature and attributes with those commonly associated with an Ultimate Reality or Supreme Being.

According to the textbook, creative intelligence is infinite, eternal, and the constituent source of everything in the universe.\textsuperscript{15} The textbook also ascribed to this entity cosmic intelligence, creating and structuring every aspect of life.\textsuperscript{16} Moreover, the textbook indicated creative intelligence has the powers of omnipotence,\textsuperscript{17} omnipresence,\textsuperscript{18} and omniscience.\textsuperscript{19}

The textbook further stated that the sole purpose of Man and nature is to become infused with the qualities of creative intelligence and thereby to "gain a state of unlimited energy, intelligence, power, creativity, and bliss."\textsuperscript{20} The text also asserted that contacting the field of pure creative intelligence is the exclusive means by which personal fulfillment can be obtained. Additionally, this could be done only through the practice of TM.\textsuperscript{21}

The 	extit{Malnak} court also examined the religious ceremony present in the initiation puja. Although held off campus, attendance at the puja was mandatory for students enrolled in the TM/SCI course. Initiation rites were performed for each student in a small room, the teacher being the only other person present.\textsuperscript{22} The major part of the ceremony consisted of a three- to four-minute Sanskrit chant sung by the teacher. At the chant's close, an

\begin{itemize}
  \item[\textsuperscript{15}] Malnak v. Maharishi Mahesh Yogi, 440 F. Supp. at 1292-95.
  \item[\textsuperscript{16}] Id. at 1292-93. For example, the textbook stated that creative intelligence "guides and sustains every aspect of the universe" and that "the activity of nature is conducted by creative intelligence." \textit{Id.} at 1292.
  \item[\textsuperscript{17}] The textbook further attributed the evolution of life to creative intelligence: "The progress and evolutionary qualities of creative intelligence are at the basis of all growth everywhere; they continually propel life on increasing steps of progress towards the fulness of life." \textit{Id.} at 1293 n.11.
  \item[\textsuperscript{18}] E.g., "the origin of all power in nature." \textit{Id.} at 1294.
  \item[\textsuperscript{19}] For example, the textbook stated that "creative intelligence is present everywhere, within us as well as without us." \textit{Id.}
  \item[\textsuperscript{20}] For example, creative intelligence was called "the universal basis of all life." \textit{Id.}
  \item[\textsuperscript{21}] \textit{Id.} at 1296.
  \item[\textsuperscript{22}] The pupils were required to bring to the ceremony a clean white handkerchief, flowers, and a few pieces of fruit. Upon entering the room where the puja was held, the students removed their shoes, and the handkerchief, flowers, and fruit were placed on a rectangular table covered by a white cloth. The table also contained a brass candleholder, brass incense holder, three brass water-filled dishes, rice, sandalpaste, and a small color photograph of Guru Dev. Guru Dev, who has been dead for over 20 years, was the teacher and guru of the Maharishi Mahesh Yogi. TM proponents claim that he perfected the TM technique and handed it down to the Maharishi. \textit{Id.} at 1305.
\end{itemize}
individual mantra was verbally imparted to the student. The English translation of the chant was never revealed to the students, although each teacher possessed a copy.23

The Malnak court noted the text of the translation labeled the chant an "Invocation," commonly defined as the "invoking or calling upon a spirit, a principle, a person, or a deity for aid."24 The translation also revealed the chant was essentially an expression of reverence for and worship of certain human and divine personages, including the "Lord" and Guru Dev.25 Moreover, it clearly denominated Guru Dev as a personification of the "Lord" and attributed to him divine qualities26 similar to those ascribed to creative intelligence.27

In sum, the textbook clearly described a type of Ultimate Reality which is eternal, infinite, omnipresent, illimitable, perfect, intelligent, and the basic constituent of everything in the universe. Therefore, the court concluded that creative intelligence, no matter how denominated in the SCI theory, would be given the name God in common parlance.28 Moreover, the puja was clearly an in-

23. Id. at 1320.
24. Id. at 1309. A flavor of the chant's structure can be gleaned from the following excerpt:

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.

White as camphor, kindness incarnate, the essence of creation garlanded with Brahman, ever dwelling in the lotus of my heart, the creative impulse of cosmic life, to That, in the form of Guru Dev, I bow down. Offering light to the lotus feet of Shri Guru Dev, I bow down. Offering water to the lotus feet of Shri Guru Dev, I bow down. Offering a handful of flowers.

The Unbounded, like the endless canopy of the sky, the omnipresent in all creation, by whom the sign of That has been revealed, to Him, to Shri Guru Dev adorned with glory, I bow down.

Id. at 1306-07.

25. See note 22 supra.
27. For example, such epithets included "the Unbounded," "the omnipresent in all creation," "the One," "the Eternal," "the Pure," "the Immovable," and "the true preceptor." Id. at 1308.
28. Id. at 1307, 1308 n.18. The translation also disclosed that the fruit and flowers brought by the students to the puja were meant to be offered to Guru Dev as an act of obeisance and worship. Id. at 1308.

The defendants, however, denied the puja was religious in nature. The TM/SCI proponents asserted the puja was a simple ceremony of gratitude similar to pujas avowedly used in a secular context in India. The court quickly dismissed this contention. The court seized upon the futility of expressing gratitude to persons who are deceased unless one believes they possess some sort of spiritual Immortality.
vocation of the spirit of Guru Dev, including worship of him as the incarnation of a divine being.

What Applicable Standard?

After analyzing the features of the TM/SCI course, the Malnak court faced the difficult task of deciding what legal criteria to use in determining whether the course constituted a religion for constitutional purposes. This aspect of the case was novel. In no prior case was it necessary for a court to decide whether a given belief system or activity offended the establishment clause when its proponents denied its religiousness.

The defendants urged the court to adopt a constitutional definition of religion which they termed both "substantive and contextual." The key criterion of "religiousness" under their definition would be the group's subjective characterization of its beliefs or actions as religious or non-religious. This position was rejected by the Malnak court. The court observed that classification of beliefs or activities as religious, philosophical, or scientific will necessarily vary according to one's personal values and conceptual framework. Establishing the religious basis of a belief system or

Moreover, the chant did not express a word of gratitude or thanksgiving. Id. at 1309.

29. Id. at 1315-16.

30. The defendants also contended that a narrower definition of religion should be employed in establishment clause cases than in those involving free exercise. Their distinction was based on the argument that the free exercise clause necessitates a broad definition of religion to ensure individual liberty. However, they claimed that the establishment clause, which was not meant to encompass the "multifarious heterodox beliefs" protected under the free exercise guaranty, is thus more constricted in scope. Id. at 1316 n.20.

This argument was dismissed by the court. The court found no support for the position, but quoted approvingly from Justice Rutledge's dissent in Everson v. Board of Educ., 330 U.S. 1 (1947). There, speaking for four members of the Court, the Justice stated that the word "religion" has the same substantive meaning under both the free exercise and the establishment clauses:

"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. Id. at 32. The courts have not consistently followed Justice Rutledge's position. They have rather implicitly applied a narrower definition of religion in establishment cases than in those involving free exercise. See text accompanying notes 63-74 infra.
activity on the subjective characterization of its proponents would, in the court's words, "inject a variable into the first amendment test which would preclude a fair and uniform standard." Moreover, the courts would have to determine the religiousness of identical beliefs and practices solely by means of the classification systems of their adherents.

Rather, the Malnak court concluded that a novel legal definition of religion was not necessary to decide the case. Because a constitutional provision was involved, the judicial formulation of a precise definition would rob courts in later cases of flexibility in deciding whether a set of novel or unique beliefs or practices should be subsumed under the aegis of the religion clauses. The court looked instead to the substantive character of beliefs and practices found in prior decisions to be religious within the parameters of the first amendment.

The Malnak court then examined recent decisions interpreting the religion clauses. These decisions indicated that the types of beliefs and practices held by the courts to be religious for constitutional purposes have undergone marked expansion. The Malnak court found especially enlightening the Supreme Court's discussion on the diversity of modern religious expression in United States v. Seeger. Seeger involved the proper meaning of the phrase "religious training and belief" in applying section 6(j) of the Selective Service Act of 1948, which governs conscientious

32. Id. The court, by examining TM/SCI's own history, illustrated the problems associated with giving sole credence to the characterization given beliefs or activities by their proponents. For example, the articles of incorporation of the Spiritual Regeneration Movement (SRM), the first organization to promulgate TM/SCI in the United States, stated that the corporation was a religious one whose "educational purpose shall be to give instructions in a simple system of meditation." Id. at 1319. However, now TM/SCI's proponents claim that TM/SCI is completely secular.
33. Id. at 1315. See also Weiss, Privilege, Posture and Protection: "Religion" in the Law, 73 YALE L.J. 593, 604 (1964) (argument raised that any definition of religion would violate the free exercise clause by dictating which forms religions should take).
34. Malnak v. Maharishi Mahesh Yogi, 440 F. Supp. at 1315. For discussion of these prior decisions, see note 35 & text accompanying notes 35-39 infra.
35. For example, modern cases have found actions and beliefs to be religious although not derived from or propagated by traditional religious sects or organizations. See Engel v. Vitale, 370 U.S. 421 (1962) (nondenominational prayer composed by the New York State Board of Regents for use in school exercises held to offend the establishment clause); Torcaso v. Watkins 367 U.S. 488 (1961). Courts have also held that a belief in the existence of a Supreme Being is not a necessary component of religious belief and practice. Id. at 495 n.11.
The Act states in pertinent part:
Nothing contained in this title shall be construed to require any person
objection exemptions. The Seeger Court, especially cognizant of a recent revolution in the conceptions of God and religion held by segments of the modern religious community, adopted a liberal interpretation of "religious training and belief," holding that within the scope of section 6(j)

would come all sincere religious beliefs which are based on a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition.

Although the Seeger Court was engaged in statutory interpretation, the constraints of the first amendment strongly influenced its decision. The Seeger Court adopted an expansive definition of "religious training and belief" primarily to save the statute from constitutional attack on the ground that it ran afoul of the free exercise clause by discriminating in favor of those holding theistic beliefs against those adhering to non-theistic faiths. See United States v. Seeger, 380 U.S. 163, 188 (1965) (Douglas, J., concurring). See also Dodge, The Free Exercise of Religion: A Sociological Approach, 67 Mich. L. Rev. 679, 713 (1969); Hollingsworth, Constitutional Religious Protection: Antiquated Oddity or Vital Reality?, 34 Ohio St. L.J. 15, 20 (1973).

38. The Seeger Court, for example, took notice of the views of the late Protestant theologian, Dr. Paul Tillich, who described God not as a personal Supreme Being "out there" but in universal terms as the ground of Man's very being. Dr. Tillich also used a definition of "God" very similar to the test for determining "religious training and belief" adopted by the Court: "And if that word [God] has not much meaning for you, translate it, and speak of the depths of your life, of the source of your being, of your ultimate concern, of what you take seriously without any reservation." United States v. Seeger, 380 U.S. 163, 187 (1965) (quoting P. Tillich, The Shaking of the Foundations 57 (1948) (emphasis original)).

The Malnak court also focused on Justice Douglas's concurring Seeger opinion where he discussed the need to characterize Hinduism and Buddhism as religions even though neither posits the existence of a personal God. The Malnak opinion also clearly indicated that striking similarities exist between the theories developed in SCI and the tenets of the Hindu and Buddhist faiths. 440 F. Supp. at 1321-22 (citing United States v. Seeger, 380 U.S. 163, 189-90 (1965) (Douglas, J., concurring)). For example, the Hindu concept of Brahman as being "Truth, Knowledge, and Bliss" and "the source of the entire universe" corresponded closely with the course textbook's description of creative intelligence as "an ocean of bliss," "a field of unlimited happiness," "the home of all knowledge," "the basis of every individual life," and "the source of all existence." Id. at 1322.

The Religiousness of TM/SCI

After surveying the foregoing cases, the Malnak court had little difficulty in finding TM/SCI to be a religion within the scope of the establishment clause. The TM/SCI course textbook ascribed to creative intelligence qualities similar to those normally attributed to God or an Ultimate Reality. Moreover, the text stated this entity can be contacted only through the practice of TM. According to Seeger, concepts concerning a Supreme Being or Ultimate Reality are deemed religious when posited in the doctrines of Secular Humanism, Hinduism, and modern Protestant theology. The court reasoned such concepts could not become less so when presented as a philosophy or science. Under the Seeger formulation, the SCI theory would thus be held religious for constitutional purposes. Furthermore, the puja ceremony was a type of religious ritual involving prayer and worship of a deified person.

Application of the Three-Prong Test

The Malnak court then determined that the TM/SCI courses offered in the five New Jersey secondary schools offended the establishment clause. The Supreme Court has set forth a three-prong test to aid in determining whether specific government involvement with religion contravenes the first amendment. The test states that to avoid running afoul of the establishment clause, the government action in question must: (1) reflect a clearly secular legislative purpose; (2) have a primary effect which neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion.

The avowedly secular purpose of the TM/SCI courses was to make available to students the alleged physiological and psychological benefits of the TM technique. However, the Malnak court held that in effectuating this secular purpose, the government agencies involved were also propagating a religious concept.

40. See text accompanying notes 20-21 supra.

41. The court, in a footnote, stated that a philosophy could presuppose the existence of a Supreme Being or Ultimate Reality without maintaining any organizational structure or house of worship. Yet such a philosophy would still come under the prohibition of the establishment clause if the government aided in the inculcation of the philosophy through educational instruction. Malnak v. Maharishi Mahesh Yogi, 440 F. Supp. at 1322 n.23.

42. See text accompanying notes 23-28 supra.


—that by practicing TM, one could contact a Supreme Being or Ultimate Reality. Moreover, the mechanics of the TM technique were taught by means of a religious ceremony at which attendance was mandatory. Thus, the court concluded, the New Jersey program had a primary effect that advanced religion. Furthermore, the program constituted an excessive government entanglement with religion because both state and federal governments provided funds enabling the TM/SCI courses to be taught. Therefore, because the TM/SCI courses failed to satisfy the last two prongs of the three-prong test, the court held them to be in violation of the establishment clause of the first amendment.

**THE SIGNIFICANCE OF **MALNAK

Societal conceptions regarding the content of religious belief and practice have undergone a recent expansion. As a result, a correlative change has taken place in the judicial demarcation of actions and beliefs considered “religious” within the parameters of the first amendment. To further the broad purposes of the free exercise guaranty, and to avoid discriminating among disparate belief systems, the courts, in cases like *Seeger*, have moved toward a broad, expansive definition of religion in free exercise cases. Consequently, former semantic distinctions between religious tenets and moral, philosophical, political, and scientific viewpoints have become blurred.

This blurring creates problems when one attempts to define religion in the establishment clause context. For if a broad definition is uniformly applied when establishment is at issue, the types of governmental activity that might be held “religious” and therefore unconstitutional would be considerably expanded. Theoretically, expansion could endanger many government programs based on moral, philosophical, or political judgments by legislators.

The *Malnak* court was the first court presented with the opportunity to initiate the judicial formulation of clear criteria by which to adjudge whether challenged beliefs or practices are “religious” for establishment clause purposes. However, rather than formu-

45. 440 F. Supp. at 1324.
46. Academic comment dealing with the problem of defining religion under the free exercise clause has been profuse. See Bowser, *Delimiting Religion in the Constitution: A Classification Problem*, 11 Val. U.L. Rev. 163 (1977); Boyan, *Defin-
late such criteria, the *Malnak* court purposefully avoided what it considered to be an "unprecedented definition of religion."47 Instead, the court looked solely to what the Supreme Court has held to be religious beliefs and practices in dissimilar contexts.

This analysis can be faulted on two grounds. First, because the court failed to set forth clear standards for legally defining religion, its holding will give little help to future courts grappling with related establishment claims. Ironically, even though the *Malnak* court eschewed the necessity of fashioning a novel definition of religion, the court implicitly adopted the broad Seeger test.48 Second, the *Malnak* court's discussion fails to comprehend the conceptual problems encountered when the broad Seeger definition of religion is juxtaposed into the establishment context. These problems are indicated by the courts' implicit use of a narrower definition of religion in interpreting the establishment clause than in free exercise cases.49

Instead of looking to judicially characterized religious activity in unrelated areas, the *Malnak* court's analysis would have been more penetrating had it examined TM/SCI's asserted religiousness in relation to the distinct establishment values at stake in the sphere of public education. Such an approach would have avoided the pitfalls associated with the broad Seeger definition of religion but would still effectuate establishment principles.50 The difficulties posed when the liberal, all-inclusive Seeger definition of religion is uniformly applied in both the establishment and the free exercise areas is illustrated by examining the manner in which the courts have defined religion under the two clauses.

The Evolution Toward a Judicial Definition of Religion

Early decisions defined religion as an organized body of believ-

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47. 440 F. Supp. at 1320.
48. The court accomplished this result by accepting the Seeger thesis that any belief in an Ultimate Reality, whether theistic or non-theistic, qualifies as a religious belief. Id. at 1320-22. See United States v. Seeger, 380 U.S. 163, 176 (1965).
49. See text accompanying notes 63-74 infra.
50. See text accompanying notes 75-89 infra.
ers employing religious ceremony and having a faith in and commitment to a supernatural Supreme Being. The first attempt by the Supreme Court to give content to the constitutional meaning of religion came in *Davis v. Beason*.\[^{51}\] The Court used a theistic definition of religion, saying "[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."

The modern trend away from a narrow, theistic definition of religion was initiated in *United States v. Kauten*.\[^{53}\] The Second Circuit affirmed the denial of conscientious objector status to an atheist because his objection to military service was based solely on political grounds. However, in dictum, Judge Augustus Hand, writing for the court, dismissed the notion that a belief in a Supreme Being is a necessary element of "religious training and belief" under the statute. Rather, he contended the proddings of conscience could also be delimit ed as religious:

> 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 . . . . [A] conscientious 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."\[^{54}\]

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51. 133 U.S. 333 (1890). *Davis* involved the criminal prosecution of a member of the Mormon religion under an Idaho statute disenfranchising persons from voting or holding elected office if they belonged to any organization practicing or advocating bigamy or polygamy. The Court upheld the statute's constitutionality against a free exercise challenge. It refused to recognize that a belief in bigamy or polygamy could be a tenet of a bona fide religious faith, saying: "To call their advocacy a tenet of religion is to offend the common sense of mankind." *Id.* at 341-42.

52. *Id.* at 342. *See also* United States v. Macintosh, 283 U.S. 605, 633-34 (1931) (Hughes, C.J., dissenting): "The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation."

53. 133 F.2d 703 (2d Cir. 1943).

54. *Id.* at 708. *Contra*, Berman v. United States, 156 F.2d 377 (9th Cir.), cert. denied, 329 U.S. 795 (1946). The *Berman* court rejected Judge Hand's position that theism is not a necessary criterion of religion, saying: "[P]hilosophy 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.

*See also* Fellowship of Humanity v. County of Alameda, 153 Cal. App. 2d 673, 315 P.2d 394 (1957). The case involved the claim of a Humanist organization to a state constitutional property tax exemption extended to property used "solely and exclusively for religious worship." Noting that Asian religions such as Buddhism, Taoism, and Confucianism do not adhere to the concept of a supernatural personal God, the court held that theism was not a prerequisite to qualification for the tax
The Supreme Court subsequently raised the elimination of theism from a legal definition of religion to the constitutional level in Torcaso v. Watkins. In Torcaso, the Court struck down on free exercise grounds a provision of the Maryland Constitution requiring the declaration of a belief in God as a prerequisite to the holding of public office or the receipt of a state commission. The appellant, a Secular Humanist, was denied a notary public commission because he refused to make the required declaration. However, the Supreme Court held the provision invalid because it discriminated against holders of non-theistic beliefs. The Court added in a footnote that “[a]mong religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others.”

The Seeger Definition

The judicial move toward a broad constitutional definition of religion reached its culmination in the Supreme Court's Seeger decision. The Court defined religion as a belief “to which all else is subordinate or upon which all else is ultimately dependent” and which “occupies in the life of its possessor a place parallel to that filled by the God” of orthodox believers.

The Seeger Court adopted a functional approach to religion, dispensing with theism or a belief in the supernatural. A functional definition does not examine the content of beliefs but looks to the psychological role beliefs play in the life of the individual. Instead the court proposed an objective test that would focus on the function beliefs play in the individual's life. The proposed test was whether or not the belief occupies the same place in the lives of its holders that the orthodox beliefs occupy in the lives of believing majorities, and whether a given group that claims the exemption conducts itself the way groups conceded to be religious conduct themselves. The content of the belief, under such test, is not a matter of governmental concern.


56. Id. at 494-95.
57. Id. at 495 n.11.
58. See text accompanying notes 36-39 supra. Although the Court's holding was limited to statutory interpretation, there is good reason to believe that the broad definition of religious training and belief employed in Seeger may become the constitutional standard in the free exercise area. See, e.g., Mansfield, Conscientious Objection — 1964 Term, in 1965 RELIGION AND THE PUBLIC ORDER 3, 8-9 (D. Giannella ed. 1966).
Therefore, according to the *Seeger* test, a religious belief is one that functions in a non-theist’s life in a manner similar to the way a belief in God functions in the lives of members of the orthodox religious majority.

Generally, the faith in God held by orthodox believers serves the psychological function of answering basic “questions about the meaning of human existence.” Such a belief is a means of explaining or structuring reality and of providing a standard by which to evaluate one’s actions and behavior. Thus, under a functional definition, religious beliefs are those which the individual “considers of supreme importance” and which give meaning and purpose to life. Their relation to a Supreme Being or Transcendent Reality is irrelevant.

Following a subjective, functional approach to defining religion, the *Seeger* Court ignored the manifestations of religion in the institutional or organizational sense. A definition using institutional criteria delineates religion in terms of its traditional forms—a hierarchical organizational structure, houses of worship, a formal clergy, and ritualistic ceremony.

Categorizing religion by its institutional manifestations enables one to draw sharp distinctions between the “sacred” and the “secular”; the sacred involving worship, ceremony, and a concern with and belief in the supernatural, the secular a concern with the temporal matters of this world. This distinction is eliminated by the *Seeger* holding that neither a belief in a Supreme Being nor membership in a religious institution is an essential component of religiousness. Rather, by defining religious belief as whatever one deems to be of supreme or ultimate importance, the *Seeger* test

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62. Hollingsworth, *supra* note 37, at 35. According to the *Seeger* decision, the judiciary can make only two inquiries in distinguishing whether a belief is religiously based. First, it may determine whether the questioned belief is one of supreme importance to the individual “upon which all else is... dependent.” 380 U.S. at 176. Second, the courts can inquire whether the belief is “sincerely held” by its holder. However, judicial examination into the validity or comprehensibility of the belief is foreclosed. *Id.* at 185 (citing United States v. Ballard, 322 U.S. 78 (1944)).

makes everyone religious in some sense. Thus, the Seeger test creates difficulties in distinguishing between religious and non-religious beliefs and activities.

The Establishment Paradox

Significantly, the Seeger functional definition of religion has not been employed by the courts in establishment clause cases. To do so would paralyze governmental action in the broad areas of public health, welfare, safety, and morals. Legislation in these fields in effect promotes Seeger-type ultimate values concerning the public good, which may be deemed "religious." 65

64. Under such an approach, even the atheist must be acknowledged as religious because he is supremely committed to the view that God does not exist. The broadness of the test employed in Seeger can be explained by the strong judicial belief that any free exercise definition of religion must be non-normative. This rule was first enunciated in United States v. Ballard, 322 U.S. 78 (1944), in which the Court held that the first amendment forecloses judicial inquiry into the truth or falsity of an asserted religious claim. The Ballard decision was buttressed in Everson v. Board of Educ., 330 U.S. 1 (1947), in which the Court said that governmental discrimination among religions would abridge the establishment clause. Id. at 15. These decisions have thus far led the courts to posit that sincerity of belief is the only criterion for determining a religion-based claim. Otherwise, to impose upon an individual's or group's beliefs judicial or societal conceptions of authentic religious beliefs would be an unconstitutional discrimination among religions.

This rule has not been consistently applied. For example, in Wisconsin v. Yoder, 406 U.S. 205 (1972), the Court, on free exercise grounds, exempted members of the Old Order Amish Church from state compulsory school-attendance laws. The Court's holding appears to have been strongly influenced by the fact that the Old Order Amish are a law-abiding and self-supporting religious community whose way of life has continued unchanged and uninterrupted for over 200 years. Moreover, in dictum, Chief Justice Burger, writing for the majority, made a content-based distinction as to which beliefs are deserving of free exercise protection:

A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief .... Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.

Id. at 215-16. The validity of this proposition seems doubtful because the Chief Justice ignores the fact that under the Seeger definition Thoreau's philosophical views would be defined as religious and granted the same first amendment protection as the beliefs of the Old Order Amish.

Religion and Public Education

Public education is an example of this establishment clause paradox. One of the foremost aims of primary and secondary schooling has been to inculcate societal values in children.\textsuperscript{66} Values like self-sacrifice, scholastic achievement, and honesty have been stressed in the schools along with civic and political values necessary for the success of a democratic polity. However, under the broad \textit{Seeger} test the impartation of such values through the educational process could be an establishment of religion because these values express paramount concerns about the meaning and purpose of life.\textsuperscript{67}

To avoid striking down on constitutional grounds all value-laden educational subjects, the courts, without expressly stating so, have adopted a narrow institutional approach to religion in the educational sphere. The judiciary has prohibited on establishment grounds only practices associated with the dogmas, ceremonies, and liturgy of conventional religious institutions.\textsuperscript{68} Classroom activities and curricular subjects that inculcate ultimate values but are not associated with traditional religious belief and practice have been left untouched by the courts. This is illustrated by an examination of some of the Supreme Court's major establishment decisions dealing with public education.

In \textit{Engel v. Vitale}\textsuperscript{69} the Supreme Court forbade the daily classroom recitation of a nondenominational prayer. Although participation was voluntary and the prayer was allegedly denominationally neutral, the Supreme Court held the practice unconstitutional because the prayer indoctrinated a theistic belief and was closely associated with the tenets and rituals of orthodox religious groups. Similarly, one year after the \textit{Engel} decision, the Court held devotional Bible reading without comment in the classroom to be unconstitutional in \textit{Abington School District v. Schempp.}\textsuperscript{70}

\textsuperscript{67} See text accompanying notes 82-89 infra.
\textsuperscript{69} 370 U.S. 421 (1962).
\textsuperscript{70} 374 U.S. 203 (1963).
While striking down practices commonly associated with religion such as classroom prayer and devotional Bible reading, the Supreme Court has approved other classroom practices equally value-laden but divorced from conventional conceptions of religion. For example, the Engel Court expressly sanctioned the recitation by students of historical documents such as the Declaration of Independence for their moral and spiritual significance. Although these documents contain lofty quasi-religious statements, the Court was apparently guided by the fact that such viewpoints are held in common by most members of society and are not associated with institutionalized religion per se.

The judicial employment of a different constitutional standard in the establishment context is also demonstrated by decisions in the lower courts. The prime example is Sheldon v. Fannin. In Sheldon, members of the Jehovah's Witnesses were suspended from school for refusing to stand during the singing of the National Anthem. The students challenged the suspension on both free exercise and establishment grounds. The district court found no establishment violation because it considered the Anthem of patriotic and not of religious derivation. However, the court agreed with the contention that coerced participation abridged the students' free exercise rights. The court stated that a practice could fail to contravene the establishment clause yet still abridge free exercise rights, "[f]or the former [establishment] looks to the majority's concept of the term religion, the latter [free exercise to] the minority's." 

71. 370 U.S. at 435 n.21.
72. Also instructive is dictum in Chief Justice Warren's majority opinion in McGowan v. Maryland, 366 U.S. 420, 442 (1961), to the effect that legislation effectuating the general welfare and public morals does not contravene the establishment clause merely because it coincides with or is based on the tenets of some religious sects. McGowan, however, was decided prior to the Supreme Court's Seeger decision. Thus, the Chief Justice's statement does not adequately deal with the problem raised in Seeger that any or all legislation effecting ultimate values may be defined as religious in and of itself whether or not the legislative purpose coincides with the tenets of organized religion.

74. Id. at 775. Two other cases, Wright v. Houston Ind. School Dist., 366 F. Supp. 1208 (S.D. Tex. 1972), aff'd per curiam, 486 F.2d 137 (5th Cir. 1973), cert. denied, 417 U.S. 969 (1974), and Cornwell v. State Bd. of Educ., 314 F. Supp. 340 (D. Md. 1969), aff'd per curiam, 428 F.2d 471 (4th Cir.), cert. denied, 400 U.S. 942 (1970), are also illustrative. In both decisions establishment claims were summarily rejected by the court without reaching the problems posed by the application of the broad Seeger definition of religion.

In Wright, school children sought to enjoin as a violation of both the establishment and the free exercise guaranties the teaching of the theory of evolution to
Applicable case law demonstrates the lack of a clear judicial standard by which to demarcate the scope of religion subsumed by the first amendment. Cases involving free exercise claims have generally used a broad, all-inclusive definition of religion. However, when interpreting the establishment clause, the courts have implicitly employed a narrow institutional definition of religion to save government programs from constitutional attack.

There is a present need for a consistent constitutional definition of religion under both religion clauses of the first amendment. This necessitates an approach that bridges the gap between the functional and institutional definitions of religion yet solves the dilemma when the broad functional definition is uniformly applied in the establishment context. The solution proposed by this Comment is to use the broad functional definition for both religion clauses. However, to ensure that every government program based on ultimate values is not subjected to establishment challenges, the functional definition should be applied only when the policies served by the establishment clause are at stake.

The exclusion of other theories about Man's origins. The establishment claim was based on the argument that by uncritically teaching only the theory of evolution, the school district was establishing a religion of secularism. Nevertheless the court held the plaintiffs' claim to be frivolous. Although the court conceded the theory of evolution conflicted with the dogmas of many religious groups, plaintiffs had shown no demonstrable "connection between 'religion,' as employed in the first amendment, and Defendants' approach to the subject of evolution." Wright v. Houston Ind. School Dist., 366 F. Supp. at 1210. Rather, the court found the theory "peripheral to the matter of religion." Id. at 1211. As an indicium of the doctrinal confusion reigning in the establishment area, the court supported this proposition by citing the narrow theistic definition of religion in Davis v. Beason, 133 U.S. 333 (1890). Wright v. Houston Ind. School Dist., 366 F. Supp. at 1210 n.5. The liberal Seeger definition was not mentioned by the court. However, it is possible that the theory of evolution could be considered religious according to the Seeger test if it were taught as the sole explanation of Man's origins. It would thus be competing against other, supernatural explanations of the origin and purpose of the human species. See Note, Freedom of Religion and Science Instruction in Public Schools, 87 YALE L.J. 515 (1978) (strong criticism of the Wright decision).

Almost identical establishment and free exercise arguments were similarly dismissed by the court in Cornwell. Plaintiffs challenged a Maryland State Board of Education bylaw requiring sex education courses in public elementary and secondary schools. The Cornwell court found plaintiffs' constitutional claims unpersuasive. Rather, the court examined the courses and found they did not "establish any particular religious dogma or precept." Cornwell v. State Bd. of Educ., 314 F. Supp. 340, 344 (D. Md. 1969), aff'd per curiam, 428 F.2d 471 (4th Cir.), cert. denied, 400 U.S. 942 (1970).
ELEMENTS OF AN ESTABLISHMENT DEFINITION

The Proposed Definition

The proposed definition accepts the functional criteria set forth in Seeger as the fundamental basis of a proper establishment definition of religion. Religion is defined broadly: Religious beliefs are beliefs or values that serve as the objects of the individual's supreme life commitments and upon which all else is ultimately dependent. To retain flexibility and to accommodate structural and theological changes in the growth of modern religious movements, the proposed definition of religion dispenses with theism and ritualism as necessary components of religious belief and practice. Moreover, religion is given the same meaning pursuant to both religion clauses of the first amendment.

An establishment definition should be greater in breadth than the narrow and inconsistent institutional approach implicitly adopted by the courts in establishment cases. When invoked by the establishment clause, the term religion should be understood to include its traditional manifestations, such as prayer and devotional Bible-reading, which prior decisions have already held to be unconstitutional. Furthermore, religion should also be given a meaning flexible enough to prevent government aid to modern religious or quasi-religious movements that do not fit into traditional religious categories.

A theistic or institutional definition of religion is too constricted to carry out the broad purposes of non-establishment in a changing society. When establishment is at issue, there is no logical reason why a religion must adhere to theism or evidence a concern with the supernatural. Nor should a religion necessarily engage in activities traditionally denoted as religious.

Furthermore, if theism and supernaturalism are held to be essential components of religion, constitutional discrimination may occur. Established religions evidencing a belief in the supernatural, embodied in theological dogma and cultic practice, would be foreclosed from government support. However, contemporary and nonconventional movements that use a relatively secular approach and emphasize the solving of Mankind's problems in the here and now would be completely free of any establishment limitation. Under such a narrow approach, Roman Catholicism, with its time-worn traditions and supernatural theology, would be found religious whereas Secular Humanists, who evidence a disdain for the transcendental, would not be considered religious.

75. Hollingsworth, supra note 37, at 30.
Application of the Proposed Definition in Establishment Cases

The proposed definition of religion should be applied by the courts only when significant establishment clause values are at stake because the consistent judicial application of the all-inclusive functional definition in the establishment context could place in constitutional jeopardy all governmentally sponsored programs evidencing Seeger-type ultimate values. Such a result is not feasible and is politically undesirable. However, this paradox can be avoided by recognizing the different policies served by each of the Constitution's religion clauses and limiting the proposed definition to circumstances in which establishment policies are violated.

The free exercise clause primarily protects matters of individual conscience from state interference. The scope of the clause is closely allied with and aided by the assembly, speech, and press guarantees of the first amendment. For these reasons, the courts have defined religion in a functional and content-free manner in the free exercise area. This definition prevents probing by the judiciary or other organs of government into matters of conscience and forecloses governmental discrimination against unconventional and unpopular groups. This result also furthers religious diversity and the development of all types of belief and expression protected in general by the other provisions of the first amendment. Thus, when free exercise is at issue, the courts will usually confer liberally the protection of the clause to all claimants as long as their asserted religious beliefs are sincerely held.

Different values govern the establishment clause. Courts and commentators have stated that the non-establishment guaranty furthers two goals: the precluding of civil strife among organized religious factions competing for government benefits, and the

77. See the Court's statement in Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963): "[T]he Free Exercise Clause ... recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state." See also Van Alstyne, Constitutional Separation of Church and State: The Quest for a Coherent Position, 57 Am. Pol. Sci. Rev. 865, 874 (1963).
    The wholesome "neutrality" of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or
safeguarding of individual religious liberty. The establishment clause advances freedom of religion by forestalling the religious discrimination, persecution, and coercion that inevitably occur whenever the state throws its support behind favored religious groups or tries to inculcate an official religious orthodoxy.

When free exercise is at issue, the courts must accept the bona fide religious claim of each individual. However, courts dealing with establishment should be guided by the general political and social values served by the establishment clause. These values go beyond the protection of individual rights guaranteed by the free exercise clause into broader questions as to the proper scope of government activity in the religious and private spheres. Thus, when assessing establishment claims, the courts need not accept every assertion that a government activity is religiously based but should further examine whether the activity contravenes the underlying values of the establishment clause.

groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. Similarly, in Engel v. Vitale, 370 U.S. 421, 429 (1962), the majority noted that the Framers of the first amendment intended to avoid “the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval.” See also Van Alstyne, Constitutional Separation of Church and State: The Quest for a Coherent Position, 57 Am. Pol. Sci. Rev. 865, 868 (1963).


81. The danger of coercion, for example, strongly influenced the Supreme Court’s decisions on released-time programs, prayer, and devotional Bible-reading in the public schools. Although the establishment clause may overlap in purpose with the free exercise guaranty, violation of the former will usually have a more drastic effect than violation of the latter. Most often, an establishment clause violation will result in a complete prohibition of the questioned government activity. However, a finding that free exercise rights have been abridged will often cause the complaining individual only to be exempted from the government regulation or activity. This exemption was illustrated in Sheldon v. Fannin, 221 F. Supp. 766 (D. Ariz. 1963). If the Sheldon court had found an establishment violation, it would have had to enjoin the playing of the National Anthem in school exercises. By finding only an abridgement of the Jehovah’s Witnesses’ free exercise rights, the court was able to save the patriotic ceremony and merely exempt the plaintiffs from coerced participation. See also Wisconsin v. Yoder, 406 U.S. 205 (1972) (Amish children exempted from compulsory school-attendance statute).
The Proposed Establishment Test

The proposed test seeks to limit pragmatically the functional definition of religion in the establishment arena by narrowing its application to contexts in which underlying establishment values are at stake. A two-prong test is used. To offend the establishment clause, a challenged state practice must serve a functionally religious purpose and must contravene either prong of the test. Under the test, the establishment guaranty is invoked when:

1. government extends aid to groups or organizations primarily espousing a belief or beliefs concerning ultimate values; or
2. governmental action results in the inculcation in individuals of ultimate values not consensually shared by the vast majority of society's members.

The first prong of the proposed test serves the establishment principle of eliminating the destructive civil strife engendered when religious organizations vie for state assistance. If the principal tenets of a group or organization attempt to supply answers to ultimate questions about Man's purpose and being, thereby forming the supreme life commitment of its adherents, the criteria of the functional definition are met. Moreover, the establishment clause would be violated if the government extended aid in any form to such a group or organization. However, whether a group addressed itself to obedience to God's will, pursuit of universal human brotherhood, or a devotion to the inherent goodness of all men would have no bearing under the proposed test. Government support of each group would be unconstitutional as long as the group's adherents held these beliefs to be of supreme importance.

82. Determining whether such beliefs touch ultimate values would be the most difficult problem encountered by the courts under the proposed definition. However, it should not be too difficult to distinguish, for example, between the NAACP, whose programs are based on ultimate values concerning the inherent equality of the races, and TM/SCI, which claims to hold the panacea to all of society's problems. All groups engaged in social and political action may be expressing some types of ultimate values. Ideals concerning the equality of all men, the moral injustice of war, or the immorality of abortion, for example, are based to some extent on ultimate values about Man's nature and purpose. The distinction, however, between political and social groups and religious organizations is one of degree. One must look to whether the questioned group attempts to provide all-inclusive answers to ultimate questions and to whether such beliefs command an exclusive loyalty or faith from the group's adherents. See Ladd, Public Education and Religion, 13 J. Pub. L. 310, 324 (1964).
The first prong solves the dilemma that arises when the broad functional definition is uniformly applied in the establishment context. Governmental programs and policies that actualize such ultimate values are safe from constitutional challenge under the test. Only when their primary purpose and effect would be to confer a direct benefit on a functionally religious organization would the establishment prohibition come into play. Thus, under the proposed test, government could legislate broadly in the area of public welfare without establishment limitation.

The second prong of the proposed test is intended to further the free exercise rights of individuals by protecting them from indoctrination through the agencies of government in a manner contrary to their religious beliefs. This prong comes into play primarily with the extremely troublesome and complex constitutional issues posed by religious teaching, ceremony, and value inculcation in the realm of public elementary and secondary education. A great deal of the case law on establishment has cropped up in the educational field, largely because school-age children, emotionally immature and with unsettled internal value structures, are uniquely susceptible to religious indoctrination by their peers and by adult authority figures. This susceptibility is magnified by the compulsory nature of public education. Occupying

83. For example, speaking of the inherent coercion involved in released-time programs, Justice Frankfurter perceptively stated that in such programs "[t]he law of imitation operates, and nonconformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend." Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203, 227 (1948) (Frankfurter, J., concurring).

Professor Choper finds freedom from coercion to be the main establishment value served in the educational setting. Under his proposed standard, the establishment clause would prohibit "solely religious activity that is likely to result in (1) compromising the student's religious or conscientious beliefs or (2) influencing the student's freedom of religious or conscientious choice." Choper, Religion in the Public Schools: A Proposed Constitutional Standard, 47 Minn. L. Rev. 329, 330 (1963) (emphasis original). The problem of indoctrination in the schools has also received extensive academic comment. See Arons, The Separation of School and State: Pierce Reconsidered, 46 Harv. Educ. Rev. 76, 96-99 (1976); Galanter, Religious Freedoms in the United States: A Turning Point?, 1966 Wis. L. Rev. 217, 222; Hirschoff, Parents and the Public School Curriculum: Is There a Right to Have One's Child Excused From Objectionable Instruction?, 50 S. Cal. L. Rev. 905-09 (1977); Note, Freedom of Religion and Science Instruction in Public Schools, 87 Yale L.J. 515, 532-36 (1978). See generally Dreeben, The Contribution of Schooling to the Learning of Norms, 37 Harv. Educ. Rev. 211 (1967).

The problem of religious indoctrination does not usually arise in institutions of higher education. Ideally, the college or university student should be exposed to a variety of competing scientific, philosophical, and religious viewpoints in the academic search for Truth. Also, issues of academic freedom are more likely to arise in the setting of higher education than in the primary and secondary schools. For general discussion see Giannella, Religious Liberty, Nonestablishment, and Doctrinal Development, Part II. The Nonestablishment Principle, 81 Harv. L. Rev. 513, 581-82 (1968); Katz, Religious Studies in State Universities, 1966 Wis. L. Rev. 297;
ing five to eight hours of the child's day, school can exert a strong influence on personality and value-formation.

Permissible Values in the Educational Curriculum

If a functional definition of religion were uniformly applied in the educational context, the establishment clause would be violated whenever teachers or other school personnel, through either curricular content or teaching methodology, attempted to inculcate ultimate values in students. Such a result, however, would run counter to the realities of public education in the United States. If the broad functional definition were to be used in the educational sphere, classroom inculcation of democratic values, such as free speech, equality, justice, and majority rule, and moral values, such as honesty, personal integrity, and self-discipline, could be barred as unconstitutional. The result would be a sterile educational environment marked by moral relativism. Moreover, both educators and the Supreme Court have stated that value inculcation is a permissible, and even a necessary, function of public education.

Practical considerations dictate a differentiation between ultimate values that society deems necessary to impart through the educational process and values that if inculcated through the cur-


84. The establishment clause would be triggered only when such values were discussed in an unneutral manner. The Court expressly authorized objective study of the Bible and of religion in general in Abington School Dist. v. Schempp, 374 U.S. 203, 225 (1963). Whether complete objectivity can be achieved in teaching value-laden subjects is questionable. See Arons, The Separation of School and State: Fierce Reconsidered, 46 HARV. EDUC. REV. 76, 96-99 (1976) (schooling is inherently a value-inculcating process).

85. It is implicit in the history and character of American public education that the public schools serve a uniquely public function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions. . . . This is a heritage neither theistic nor atheistic, but simply civic and patriotic. Abington School Dist. v. Schempp, 374 U.S. 203, 241-42 (1963) (Brennan, J., concurring) (emphasis original) (citation omitted). Emphasis on the teaching of moral and spiritual values was advocated by the National Educational Association. EDUCATIONAL POLICIES COMM'N, MORAL AND SPIRITUAL VALUES IN THE PUBLIC SCHOOLS (1951). See also Goldstein, The Asserted Constitutional Right of Public School Teachers to Determine What They Teach, 124 U. PA. L. REV. 1293, 1350 (1976) (The historically accepted view has been that value inculcation is a major function of public education).

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riculum would offend establishment norms.\textsuperscript{86} A solution would be to permit the inculcation of potentially functionally religious values that are consensually shared by society in general and that are essential to effective participation in a democracy.\textsuperscript{87} Schools could then permissibly teach that lying, cheating, and stealing are morally wrong as well as officially encourage the adoption of democratic precepts by students, as these values are unquestioned by the public.\textsuperscript{88}

However, when controversial viewpoints are raised in the classroom, as they inevitably are, the Constitution mandates that they be dealt with in as completely objective a manner as possible. This mandate ensures the balanced presentation of all shades of opinion on the subject, thus allowing the pupil to decide which

\textsuperscript{86} One writer has urged that the only constitutionally effective way to prevent value-inculcation of children in a manner contrary to the desires of their parents is through the institution of an educational voucher system: Each family would be granted funds by the government to pay for the education of its children in the private school of its choice. Arons, \textit{The Separation of School and State: Pierce Reconsidered}, 46 HARV. EDUC. REV. 76 (1976). It is doubtful, however, that contemporary American society is ready to dismantle its system of public education in the interest of promoting cultural pluralism. The American public school system has been a strong influence in creating a relatively culturally homogenous society from a group of diverse peoples. One may thus question the amount of social pluralism that can be tolerated in a democratic society without sacrificing the national unity necessary to the functioning of a strong polity. For a critique of private sectarian schools on these grounds, see Dixon, \textit{Religion, Schools, and the Open Society: A Socio-Constitutional Issue}, 13 J. PUB. L. 267, 306-07 (1964).

\textsuperscript{87} The teaching of these "core" cultural values is advocated in Hall, \textit{Morality and Religion in Public Schools: A Dialogue}, 72 RELIGIOUS EDUC. 273, 279 (1977):

What is needed at present, therefore, is the development of a strong "public" approach to education centered upon and embodying the central core values of our society, and dealing with these values in an authentically secular way, i.e. accepting them as values widely held by people in our society but treating them with neutrality as regards their possible religious foundations.

\textit{See also} Justice Jackson's concurring opinion in \textit{McCollum}, in which he discusses the impossibility and undesirability of removing all religious influences from the curriculum:

[I]t would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure of youth to any religious influences. Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view. Yet the inspirational appeal of religion in these guises is often stronger than in forthright sermon. Even such a "science" as biology raises the issue between evolution and creation as an explanation of our presence on this planet . . . . The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences . . . . Illinois \textit{ex rel.} McCollum v. Board of Educ., 333 U.S. 203, 235-36 (1948).

\textsuperscript{88} However, the ultimate source of these values may be a point of contention. For example, it would be impermissible for an instructor to teach that stealing is wrong because it violates the imperative of the Ten Commandments or of the Hindu law of Karma.
view to adopt.\textsuperscript{89}

\textbf{APPLICATION OF THE PROPOSED DEFINITION OF RELIGION AND TWO-PRONG ANALYSIS TO THE NEW JERSEY TM/SCI COURSES}

Applying the proposed functional definition of religion and two-prong establishment test to the \textit{Malnak} facts, it is apparent that the New Jersey TM/SCI courses offend the establishment clause. The criteria of the functional definition are met because the course textbook posits a system of functionally religious beliefs—the main tenet being that practice of TM allows one to contact the ultimate and constituent source of everything in the universe and that practice of the technique is the only method by which to obtain self-actualization.

Both components of the proposed two-part test are also violated.\textsuperscript{90} TM/SCI is primarily propagated through several interre-

\textsuperscript{89} A good example is the issue of abortion. The question lends itself to controversy and has led to ideological polarization among some segments of society. Furthermore, convictions about the morality of abortion are dependent on beliefs touching ultimate values concerning the nature and beginning of human life. Thus, under the proposed standard, the Constitution would prohibit an instructor from advocating in the classroom either the propriety or the impropriety of the practice.

In further protection of free exercise rights, parents of minority persuasions should also have the right to excuse their children from classes or from activities that might compromise their beliefs. Such a remedy is imperfect. For example, many parents may be unaware that their children are being taught in a manner contrary to their own values. Also, peer pressure on minority children to conform may be heavy, resulting in the imposition of a social stigma if exemption from participation is granted. However, the compromise may be the only workable remedy available. \textit{See Wisconsin v. Yoder, 406 U.S. 205 (1972)} (Amish children exempted from compulsory education statute on free exercise ground); \textit{West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)} (first amendment prevents Jehovah's Witness children from being compelled to salute the flag). \textit{See also Hirschoff, Parents and the Public School Curriculum: Is There a Right to Have One's Child Excused From Objectionable Instruction?, 50 S. CAL. L. REV. 871 (1977).}

\textsuperscript{90} The proposed definition of religion and establishment test are not meant as substitutes for the three-prong \textit{Nyquist} analysis currently employed by the Supreme Court. Rather, the proposed definition of religion and establishment test are intended to be limited in application to situations in which the religiousness of the state activity is at issue. When the religiousness of the activity is unquestioned, as in the case of classroom prayer, the use of the analysis developed in this Comment is unnecessary. In such instances, not only would the criteria of the functional definition be met, but prong one of the establishment test would automatically be violated because such unquestionably religious activity always results in the aggrandizement of some institutionalized religious interests (\textit{e.g.}, classroom prayer is an indirect form of aid to those organized religions holding theistic beliefs).

Moreover, once it is found that the criteria of the proposed definition of religion
lated organizational structures, all under the control of the movement's founder, the Maharishi Mahesh Yogi. A principal goal of these organizations is to secure a commitment among TM practitioners to the religious beliefs set forth in the course textbook.

Moreover, by introducing TM/SCI courses into the curriculum, the state was directly aiding in the furtherance of TM/SCI's organizational goals to the detriment of other organized religious groups. Thus, the first prong is violated.

The second prong is contravened because the TM/SCI instruction infringed on the right of students not to be indoctrinated with a system of ultimate values. The instruction first accomplished this infringement through the biased presentation contained in the course textbook. The text posited as objective fact a pseudo-scientific theory purportedly explaining the structure of the universe and the ultimate goals of mankind. Second, the compulsory initiation puja ceremony compromised students' religious beliefs by coercing them unwittingly to participate in a ceremony in which a deceased guru was worshipped as a divine being.

Moreover, the theories expounded in the textbook and the worship present in the puja ceremony are not the types of practices and beliefs comprising the core values of the American cultural tradition. Rather, they are practices and beliefs that a substantial number of society's members would find personally objectionable. The establishment clause is meant to guard against the indoctrination of students in such beliefs under the guise of government.

and establishment test are met, the Nyquist test must still be applied to determine the ultimate constitutionality of the challenged activity. Under the Nyquist test, for example, government action must show a primary or principal effect that neither advances nor inhibits religion to avoid the establishment prohibition. Government aid to a religious or quasi-religious organization may thus be found to offend establishment principles under the analysis developed in this Comment yet not violate the Nyquist test if the government aids the organization only remotely or indirectly. The government activity would not then evidence a primary or principal effect that advances religion.

91. See notes 7-9 and accompanying text supra.
92. See text accompanying notes 21-28 supra.
93. The conclusion drawn here that the introduction of TM/SCI courses into the public schools infringes on the establishment clause raises the question of which other aspects of the educational curriculum may equally run afoul of the first amendment under the proposed definition of religion. A possibility, by way of example, is values clarification, a widely instituted program in the field of moral education that has become increasingly controversial. Primarily expounded by educator Sidney B. Simon, values clarification uses a variety of classroom exercises to focus on the process of valuing (i.e., the process of choosing and internalizing values). The underlying principle is a utilitarian, empirical approach to valuation which suggests that the content of one's values is not as important as that they are chosen freely, considered valuable to the individual, and are person-
CONCLUSION

Courts during the last four decades have moved from the application of a traditional, theistic definition of religion in assessing free exercise of religion claims toward a definition that is all-inclusive and content-free. This growth is in keeping with many strands of modern religious thought and reflects a judicial desire to avoid discriminating against free exercise claimants on the basis of the content of their beliefs. However, literal judicial employment of such an open-ended definition in the establishment clause context leads to severe theoretical problems and the possible constitutional endangerment of a wide variety of government programs evidencing broadly defined “religious” values.

However, courts considering establishment challenges to government action have implicitly used a narrower definition of religion than that employed in giving content to the meaning of religion for free exercise clause purposes. This was aptly illustrated in the Malnak case, in which the court held Transcendental Meditation to be a religion within the parameters of the establishment clause without clearly enunciating the standards it employed in reaching its decision.

It is hoped that the definition of religion and establishment test developed in this Comment will aid in the identification of the issues at stake when religion is defined in the establishment area and will provide the basis for a consistent and workable approach...
that will advance the values served by the establishment clause of the first amendment.

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