CHAPTER 2 - FREE EXERCISE OF RELIGION

A. What is Religion?

UNITED STATES v. SEEGER

380 U.S. 163 (1965)

MR. JUSTICE CLARK delivered the opinion of the Court.

These cases involve claims of conscientious objectors under § 6 (j) of the Universal Military Training and Service Act, 50 U. S. C. App. § 456 (j) (1958 ed.), which exempts from combatant training and service in the armed forces of the United States those persons who by reason of their religious training and belief are conscientiously opposed to participation in war in any form. The cases were consolidated for argument and we consider them together although each involves different facts and circumstances. The parties raise the basic question of the constitutionality of the section which defines the term "religious training and belief," as used in the Act, as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code." The constitutional attack is launched under the First Amendment's Establishment and Free Exercise Clauses and is twofold: (1) The section does not exempt nonreligious conscientious objectors; and (2) it discriminates between different forms of religious expression.

We have concluded that Congress, in using the expression "Supreme Being" rather than the designation "God," was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views. We believe that under this construction, the test of belief "in a relation to a Supreme Being" is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where 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. We have concluded that the beliefs of the objectors in these cases meet these criteria, and, accordingly, we affirm the judgments in Nos. 50 and 51 and reverse the judgment in No. 29.

THE FACTS IN THE CASES.

No. 50: Seeger was convicted in the District Court for the Southern District of New York of having refused to submit to induction in the armed forces. He was classified 1-A and he claimed exemption as a conscientious objector. He declared that he was conscientiously opposed to participation in war in any form by reason of his "religious" belief; that he preferred to leave the question as to his belief in a Supreme Being open, "rather than answer 'yes' or 'no'"; that his "skepticism or disbelief in the existence of God" did "not necessarily mean lack of faith in anything whatsoever"; that his was a "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed." He cited such personages as Plato, Aristotle and Spinoza for support of his ethical belief in intellectual and

moral integrity "without belief in God, except in the remotest sense." His belief was found to be sincere, honest, and made in good faith; and his conscientious objection to be based upon individual training and belief, both of which included research in religious and cultural fields. Seeger's claim, however, was denied solely because it was not based upon a "belief in a relation to a Supreme Being" as required by § 6 (j) of the Act.

No. 51: Jakobson was classified 1-A and he made claim to noncombatant classification (1-A-O) as a conscientious objector. He stated on the Selective Service System form that he believed in a "Supreme Being" who was "Creator of Man" in the sense of being "ultimately responsible for the existence of" man and who was "the Supreme Reality" of which "the existence of man is the *result*." He explained that his religious and social thinking had developed after much meditation and thought. He had concluded that man must be "partly spiritual" and, therefore, "partly akin to the Supreme Reality"; and that his "most important religious law" was that "no man ought ever to wilfully sacrifice another man's life as a means to any other end . . . ." He requested a 1-O classification since he felt that participation in any form of military service would involve him in "too many situations and relationships that would be a strain on [his] conscience that [he felt he] must avoid." He submitted a long memorandum of "notes on religion" in which he defined religion as the "*sum and essence of one's basic attitudes to the fundamental problems of human existence*;" he said that he believed in "Godness" which was "the Ultimate Cause for the fact of the Being of the Universe"; that to deny its existence would but deny the existence of the universe because "anything that Is, has an Ultimate Cause for its Being." There was a relationship to Godness, he stated, in two directions, *i. e*., "vertically, towards Godness directly," and "horizontally, towards Godness through Mankind and the World." He accepted the latter one. The Board classified him 1-A-O and Jakobson appealed. The hearing officer found that the claim was based upon a personal moral code and that he was not sincere in his claim. The Appeal Board classified him 1-A. The Court of Appeals reversed, finding that his claim came within the requirements of § 6 (j).

No. 29: Forest Britt Peter was convicted on a charge of refusing to submit to induction. In his Selective Service System form he stated that he was not a member of a religious sect or organization; he failed to execute section VII of the questionnaire but attached to it a quotation expressing opposition to war, in which he stated that he concurred. In a later form he hedged the question as to his belief in a Supreme Being by saying that it depended on the definition and he appended a statement that he felt it a violation of his moral code to take human life and that he considered this belief superior to his obligation to the state. As to whether his conviction was religious, he quoted with approval Reverend John Haynes Holmes' definition of religion as "the consciousness of some power manifest in nature which helps man in the ordering of his life in harmony with its demands . . . [; it] is the supreme expression of human nature; it is man thinking his highest, feeling his deepest, and living his best." The source of his conviction he attributed to reading and meditation "in our democratic American culture, with its values derived from the western religious and philosophical tradition." As to his belief in a Supreme Being, Peter stated that he supposed "you could call that a belief in the Supreme Being or God. These just do not happen to be the words I use." In 1959 he was classified 1-A, although there was no evidence in the record that he was not sincere in his beliefs. After his conviction the Court of Appeals affirmed.

BACKGROUND OF § 6 (j).

Chief Justice Hughes, in his opinion in *United States* v. *Macintosh*, 283 U.S. 605 (1931), enunciated the rationale behind the long recognition of conscientious objection to participation in war accorded by Congress in our various conscription laws when he declared that "in the forum of conscience, duty to a moral power higher than the State has always been maintained."

Governmental recognition of the moral dilemma posed for persons of certain religious faiths by the call to arms came early in the history of this country. Various methods of ameliorating their difficulty were adopted by the Colonies, and were later perpetuated in state statutes and constitutions. Thus by the time of the Civil War there existed a state pattern of exempting conscientious objectors on religious grounds. In the 1864 Draft Act, [the Federal Government] extended exemptions to those conscientious objectors who were members of religious denominations opposed to the bearing of arms. In that same year the Confederacy exempted certain pacifist sects from military duty.

The need for conscription did not again arise until World War I. The Draft Act of 1917 afforded exemptions to conscientious objectors who were affiliated with a "well-recognized religious sect or organization [then] organized and existing and whose existing creed or principles [forbade] its members to participate in war in any form." Although the 1917 Act excused religious objectors only, in December 1917, the Secretary of War instructed that "personal scruples against war" be considered as "conscientious objection." This Act was upheld against constitutional attack in the *Selective Draft Law Cases*, 245 U.S. 366 (1918).

In adopting the 1940 Selective Training and Service Act Congress broadened the exemption afforded in the 1917 Act by making it unnecessary to belong to a pacifist religious sect if the claimant's own opposition to war was based on "religious training and belief." Those found to be within the exemption were not inducted into the armed services but were assigned to noncombatant service. The Congress recognized that one might be religious without belonging to an organized church just as surely as minority members of a faith not opposed to war might through religious reading reach a conviction against participation in war. Indeed, the consensus of the witnesses appearing before the congressional committees was that individual belief -- rather than membership in a church or sect -- determined the duties that God imposed upon a person in his everyday conduct; and that "there is a higher loyalty than loyalty to this country, loyalty to God." Thus, while shifting the test from membership in such a church to one's individual belief the Congress nevertheless continued its historic practice of excusing from armed service those who believed that they owed an obligation, superior to that due the state, of not participating in war in any form.

In 1948 the Congress amended the language of the statute and declared that "religious training and belief" was to be defined as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code."

INTERPRETATION OF § 6 (j).

The crux of the problem lies in the phrase "religious training and belief" which Congress

has defined as "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation." In assigning meaning to this statutory language we may narrow the inquiry by noting briefly those scruples expressly excepted from the definition. The section excludes those persons who, disavowing religious belief, decide on the basis of essentially political, sociological or economic considerations that war is wrong and that they will have no part of it. These judgments have historically been reserved for the Government, and in matters which can be said to fall within these areas the conviction of the individual has never been permitted to override that of the state. The statute further excludes those whose opposition to war stems from a "merely personal moral code," a phrase to which we shall have occasion to turn later in discussing the application of § 6 (j) to these cases. We also pause to take note of what is not involved in this litigation. No party claims to be an atheist or attacks the statute on this ground. The question is not, therefore, one between theistic and atheistic beliefs. We do not deal with or intimate any decision on that situation in these cases. Nor do the parties claim the monotheistic belief that there is but one God; what they claim is that they adhere to theism, which is the "Belief in the existence of a god or gods; . . . Belief in superhuman powers or spiritual agencies in one or many gods," as opposed to atheism. Our question, therefore, is the narrow one: Does the term "Supreme Being" as used in § 6 (j) mean the orthodox God or the broader concept of a power or being, or a faith, "to which all else is subordinate or upon which all else is ultimately dependent"? Webster's New International Dictionary (Second Edition). In considering this question we resolve it solely in relation to the language of § 6 (j) and not otherwise.

Few would quarrel, we think, with the proposition that in no field of human endeavor has the tool of language proved so inadequate in the communication of ideas as it has in dealing with the fundamental questions of man's predicament in life, in death or in final judgment and retribution. This fact makes the task of discerning the intent of Congress in using the phrase "Supreme Being" a complex one. Nor is it made the easier by the variety of spiritual life in our country. Over 250 sects inhabit our land. Some believe in a purely personal God, some in a supernatural deity; others think of religion as a way of life envisioning as its ultimate goal the day when all men can live together in perfect understanding and peace. There are those who think of God as the depth of our being; others, such as the Buddhists, strive for a state of lasting rest through self-denial and inner purification; in Hindu philosophy, the Supreme Being is the transcendental reality which is truth, knowledge and bliss. Even those religious groups which have traditionally opposed war in every form have splintered into various denominations. This vast panoply of beliefs reveals the magnitude of the problem which faced the Congress when it set about providing an exemption from armed service. It also emphasizes the care that Congress realized was necessary in fashioning an exemption which would be in keeping with its policy of not picking and choosing among religious beliefs.

In spite of the elusive nature of the inquiry, we are not without certain guidelines. In amending the 1940 Act, Congress adopted almost intact the language of Chief Justice Hughes in *United States* v. *Macintosh*: "The essence of religion is belief in a relation to *God* involving duties superior to those arising from any human relation."

By comparing the statutory definition with those words, however, it becomes readily apparent that the Congress deliberately broadened them by substituting the phrase "Supreme

Being" for the appellation "God." And in so doing it is also significant that Congress did not elaborate on the form or nature of this higher authority which it chose to designate as "Supreme Being." By so refraining it must have had in mind the admonitions of the Chief Justice when he said that even the word "God" had myriad meanings for men of faith.

Moreover, the Senate Report on the bill specifically states that § 6 (j) was intended to re-enact "substantially the same provisions as were found" in the 1940 Act. That statute refers to "religious training and belief" without more. Admittedly, all of the parties here purport to base their objection on religious belief. It appears, therefore, that we need only look to this clear statement of congressional intent as set out in the report. Under the 1940 Act it was necessary only to have a conviction based upon religious training and belief; we believe that is all that is required here. Within that phrase would come all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate. 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. This construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well-established congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets.

Section 6 (j), then, is no more than a clarification of the 1940 provision. As such it continues the congressional policy of providing exemption from military service for those whose opposition is based on grounds that can fairly be said to be "religious." To hold otherwise would not only fly in the face of Congress' entire action in the past; it would ignore the historic position of our country on this issue since its founding.

Moreover, we believe this construction embraces the ever-broadening understanding of the modern religious community. The eminent Protestant theologian, Dr. Paul Tillich, whose views the Government concedes would come within the statute, identifies God not as a projection "out there" or beyond the skies but as the ground of our very being. The Court of Appeals stated in No. 51 that Jakobson's views "parallel [those of] this eminent theologian rather strikingly." In his book, Systematic Theology, Dr. Tillich says:

"I have written of the God above the God of theism. In such a state [of self-affirmation] the God of both religious and theological language disappears. But something remains, namely, the seriousness of that doubt in which meaning within meaninglessness is affirmed. The source of this affirmation is not the God of traditional theism but the 'God above God,' the power of being, which works through those who have no name for it, not even the name God."

Another eminent cleric, the Bishop of Woolwich, John A. T. Robinson, in his book, Honest To God (1963), states:

"The Bible speaks of a God 'up there.' No doubt its picture of a three-decker universe, of 'the heaven above, the earth beneath and the waters under the earth,' was once taken quite literally. . . . [Later] *in place of a God who is literally or physically 'up there' we have accepted a God who is spiritually or metaphysically 'out there.'* . . . Every one of us lives with some mental picture of a God 'out there,' a God who 'exists' above and beyond the world he

made, a God 'to' whom we pray and to whom we 'go' when we die. But the signs are that we are reaching the point at which the whole conception of a God 'out there,' which has served us so well since the collapse of the three-decker universe, is itself becoming more of a hindrance than a help."

Dr. David Saville Muzzey, a leader in the Ethical Culture Movement, states in his book, Ethics As a Religion (1951), that "everybody except the avowed atheists (and they are comparatively few) believes in some kind of God," and that "The proper question to ask, therefore, is not the futile one, Do you believe in God? but rather, What *kind* of God do you believe in?" Dr. Muzzey attempts to answer that question:

"Instead of positing a personal God, whose existence man can neither prove nor disprove, the ethical concept is founded on human experience. It is anthropocentric, not theocentric. Religion, for all the various definitions that have been given of it, must surely mean the devotion of man to the highest ideal that he can conceive. And that ideal is a community of spirits in which the latent moral potentialities of men shall have been elicited by their reciprocal endeavors to cultivate the best in their fellow men. What ultimate reality is we do not know; but we have the faith that it expresses itself in the human world as the power which inspires in men moral purpose. Thus the 'God' that we love is not the figure on the great white throne, but the perfect pattern, envisioned by faith, of humanity as it should be, purged of the evil elements which retard its progress toward 'the knowledge, love and practice of the right.'"

These are but a few of the views that comprise the broad spectrum of religious beliefs found among us. But they demonstrate very clearly the diverse manners in which beliefs, equally paramount in the lives of their possessors, may be articulated. They further reveal the difficulties inherent in placing too narrow a construction on the provisions of § 6 (j) and thereby lend conclusive support to the construction which we find that Congress intended.

We recognize the difficulties that have always faced the trier of fact in these cases. We hope that the test that we lay down proves less onerous. The examiner is furnished a standard that permits consideration of criteria with which he has had considerable experience. While the applicant's words may differ, the test is simple of application. It is essentially an objective one, namely, does the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption?

Moreover, it must be remembered that in resolving these exemption problems one deals with the beliefs of different individuals who will articulate them in a multitude of ways. In such an intensely personal area, of course, the claim of the registrant that his belief is an essential part of a religious faith must be given great weight.

The validity of what he believes cannot be questioned. As MR. JUSTICE DOUGLAS stated in *United States* v. *Ballard*, 322 U.S. 78, 86 (1944): "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others." Local boards and courts in this sense are not free to reject beliefs because they consider them "incomprehensible." Their task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious.

But we hasten to emphasize that while the "truth" of a belief is not open to question, there

remains the significant question whether it is "truly held." This is the threshold question of sincerity which must be resolved in every case. It is, of course, a question of fact. The Act provides a comprehensive scheme for assisting the Appeal Boards in making this determination, placing at their service the facilities of the Department of Justice, including the Federal Bureau of Investigation and hearing officers.

APPLICATION OF § 6 (j) TO THE INSTANT CASES.

As we noted earlier, the statutory definition excepts those registrants whose beliefs are based on a "merely personal moral code." The records in these cases, however, show that at no time did any one of the applicants suggest that his objection was based on a "merely personal moral code." Indeed at the outset each of them claimed in his application that his objection was based on a religious belief. We have construed the statutory definition broadly and it follows that any exception to it must be interpreted narrowly. The use by Congress of the words "merely personal" seems to us to restrict the exception to a moral code which is not only personal but which is the sole basis for the registrant's belief and is in no way related to a Supreme Being. It follows, therefore, that if the claimed religious beliefs of the respective registrants in these cases meet the test that we lay down then their objections cannot be based on a "merely personal" moral code.

In *Seeger*, No. 50, Seeger professed "religious belief" and "religious faith." He did not disavow any belief "in a relation to a Supreme Being"; indeed he stated that "the cosmic order does, perhaps, suggest a creative intelligence." He decried the tremendous "spiritual" price man must pay for his willingness to destroy human life. In light of his beliefs and the unquestioned sincerity with which he held them, we think the Board, had it applied the test we propose today, would have granted him the exemption. We think it clear that the beliefs which prompted his objection occupy the same place in his life as the belief in a traditional deity holds in the lives of his friends, the Quakers.

In *Jakobson*, No. 51, the Court of Appeals found that the registrant demonstrated that his belief as to opposition to war was related to a Supreme Being. We agree.

We reach a like conclusion in No. 29. It will be remembered that Peter acknowledged "some power manifest in nature . . . the supreme expression" that helps man in ordering his life. As to whether he would call that belief in a Supreme Being, he replied, "you could call that a belief in the Supreme Being or God. These just do not happen to be the words I use." We think that under the test we establish here the Board would grant the exemption to Peter.

MR. JUSTICE DOUGLAS, concurring.

If I read the statute differently from the Court, I would have difficulties. For then those who embraced one religious faith rather than another would be subject to penalties; and that kind of discrimination would violate the Free Exercise Clause.

The words "a Supreme Being" have no narrow technical meaning in the field of religion. Long before the birth of our Judeo-Christian civilization the idea of God had taken hold in many forms. Mention of only two -- Hinduism and Buddhism -- illustrates the fluidity and evanescent scope of the concept. In the Hindu *religion* the Supreme Being is conceived in the

forms of several cult Deities. Though Hindu religion encompasses the worship of many Deities, it believes in only one single God, the eternally existent One Being with his manifold attributes and manifestations.

Buddhism -- whose advent marked the reform of Hinduism -- continued somewhat the same concept. Does a Buddhist believe in "God" or a "Supreme Being"? That, of course, depends on how one defines "God," as one eminent student of Buddhism has explained. Dr. Conze says that if "God" is taken to mean a personal Creator of the universe, then the Buddhist has no interest in the concept. But if "God" means something like the state of oneness with God as described by some Christian mystics, then the Buddhist surely believes in "God," since this state is almost indistinguishable from the Buddhist concept of Nirvana, "the supreme Reality; . . . the eternal, hidden and incomprehensible Peace." And finally, if "God" means one of the many Deities in an at least superficially polytheistic religion like Hinduism, then Buddhism tolerates a belief in many Gods.

When the present Act was adopted in 1948 we were a nation of Buddhists, Confucianists, and Taoists, as well as Christians. Organized Buddhism first came to Hawaii in 1887 when Japanese laborers were brought to work on the plantations. There are now numerous Buddhist sects in Hawaii. In the continental United States Buddhism is found "in real strength" in Utah, Arizona, Washington, Oregon, and California. According to one source, the total number of Buddhists of all sects in North America is 171,000.

When Congress spoke in the vague terms of a Supreme Being I cannot, therefore, assume that it was so parochial as to use the words in the narrow sense urged on us. I would attribute tolerance and sophistication to the Congress, commensurate with the religious complexion of our communities. In sum, I agree with the Court that any person opposed to war on the basis of a sincere belief, which in his life fills the same place as a belief in God fills in the life of an orthodox religionist, is entitled to exemption under the statute. None comes to us [as] an avowedly irreligious person or as an atheist; one, as a sincere believer in "goodness and virtue for their own sakes." His questions and doubts on theological issues are no more alien to the statutory standard than are the awe-inspired questions of a devout Buddhist.

MALNAK v. YOGI

592 F.2d 197 (3d Cir. 1979)

OPINION OF THE COURT PER CURIAM

This appeal requires us to decide whether the district court erred in determining that the teaching of a course called the Science of Creative Intelligence Transcendental Meditation (SCI/TM) in the New Jersey public high schools, under the circumstances presented in the record, constituted an establishment of religion in violation of the first amendment of the United States Constitution. We affirm.

The course under examination was offered as an elective at five high schools during the 1975-76 academic year and was taught four or five days a week by teachers specially trained by the World Plan Executive Council United States, an organization whose objective is to

disseminate the teachings of SCI/TM throughout the United States. The textbook used was developed by Maharishi Mahesh Yogi, the founder of the Science of Creative Intelligence. It teaches that "pure creative intelligence" is the basis of life, and that through the process of Transcendental Meditation students can perceive the full potential of their lives.

Essential to the practice of Transcendental Meditation is the "mantra"; a mantra is the sound aid used while meditating. Each meditator has his own personal mantra which is never to be revealed to any other person. It is by concentrating on the mantra that one receives the beneficial effects said to result from Transcendental Meditation.

To acquire his mantra, a meditator must attend a ceremony called a "puja." Every student who participated in the SCI/TM course was required to attend a puja as part of the course. A puja was performed by the teacher for each student individually; it was conducted off school premises on a Sunday; and the student was required to bring some fruit, flowers and a white handkerchief. During the puja the student stood or sat in front of a table while the teacher sang a chant and made offerings to a deified "Guru Dev." Each puja lasted between one and two hours.[1]

The district court found that the SCI/TM course constituted a religious activity under the first amendment. We agree with the district court's finding that the SCI/TM course was religious in nature. Careful examination of the textbook, the expert testimony elicited, and the

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[1] The district court described the activities of a chanter at the puja ceremony:

The chanter . . . makes fifteen offerings to Guru Dev and fourteen obeisances to Guru Dev. The chant then describes Guru Dev as a personification of "kindness" and of "the creative impulse of cosmic life," and the personification of "the essence of creation," . . . .

The chanter then makes three more offerings to Guru Dev and three additional obeisances to Guru Dev. The chant then moves to a passage in which a string of divine epithets are applied to Guru Dev. Guru Dev is called "The Unbounded," "the omnipresent in all creation," "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 One," "the Eternal," "the Pure," "the Immovable," "the Witness of all intellects, whose status transcends thought," "the Transcendent along with the three gunas," and "the true preceptor." Manifestly, no one would apply all these epithets to a human being.

The district court concluded:

(T)he puja is sung at the direction of Maharishi Mahesh Yogi, a Hindu monk. The words and offerings of the chant invoke the deified teacher, who also was a Hindu monk, of Maharishi Mahesh Yogi. In the chant, this teacher is linked to names known as Hindu deities. Maharishi Mahesh Yogi places such great emphasis on the singing of this chant prior to the imparting of a mantra to each individual student that no mantras are given except at pujas and no one is allowed to teach the Science of Creative Intelligence/Transcendental Meditation unless he or she performed the puja to the personal satisfaction of Maharishi Mahesh Yogi or one of his aides. Needless to say, neither Hinduism nor belief in "the Lord" constitute a dead religion. Both of these beliefs are held by hundreds of millions of people.

uncontested facts concerning the puja convince us that religious activity was involved.

A recognition of the religious nature of the teachings and activities questioned here is largely determinative of this appeal. The district court determined that the SCI/TM course has a primary effect of advancing religion and religious concepts, and that the government aid given to teach the course and the use of public school facilities constituted excessive governmental entanglement with religion. The judgment of the district court will be affirmed.

ADAMS, Circuit Judge, concurring in the result.

I concur in the judgment of the Court that the teaching of a course in the Science of Creative Intelligence constitutes an establishment of religion proscribed by the first amendment. In contrast to the majority, however, I am convinced that this appeal presents a novel and important question that may not be disposed of simply on the basis of past precedent. Rather, as I see it, the result reached today is largely based upon a newer, more expansive reading of "religion" that has been developed in the last two decades in the context of free exercise and selective service cases but not, until today, applied by an appellate court to invalidate a government program under the establishment clause. Moreover, this is the first appellate court decision, to my knowledge, that has concluded that a set of ideas constitutes a religion over the objection and protestations of secularity by those espousing those ideas. Under these circumstances, I am impelled to state my views separately.

I. EXISTING PRECEDENT

For purposes of the issues posed by this controversy, the arguably relevant decisional law may be divided into four principal groupings: cases announcing the traditional definition of religion, cases dealing with prayers recited in school, cases involving the conscientious objector exemption to the selective service laws, and cases touching on the newer constitutional definition of religion. Although the district court, and apparently the majority of this Court, consider these decisions to be controlling on the question raised here, careful reflection reveals as many differences as similarities.

A. The Traditional Definition of Religion

The original definition of religion prevalent in this country was closely tied to a belief in God. James Madison called religion "the duty which we owe to our creator, and the manner of discharging it." Basically, this was the position of the Supreme Court at the end of the nineteenth century. This attitude remained unchallenged for many years. Chief Justice Hughes, writing a dissent in 1931, could conclude without concern that “[t]he essence of religion is belief in a relation to God involving duties superior to those arising from any human relation.

Thus, the traditional definition was grounded upon a Theistic perception of religion. It is not clear, however, given the absence of any concentration in SCI/TM on a "Supreme Being," that it may be considered a religion under this traditional formulation.

B. The School Prayer Cases

Facially, the Supreme Court decisions arguably most pertinent to this case are those

involving school prayer. This is so because an integral part of the preparation of the students for the practice of TM is the performance in Sanskrit of a chant, called the Puja. Accordingly, we are urged to engage in a "textual analysis" of the Puja. In that the English translation of the Puja sounds at least as "religious" as the Regents prayer invalidated in *Engel v. Vitale*, for instance, it is suggested that this case may be properly disposed of under that rubric.

I am not convinced, however, that the school prayer opinions provide particularly persuasive precedents for the resolution of the question presented here.[1] Engel concerned a prayer composed by the New York Board of Regents. That the prayer itself was religious in nature was not questioned. Similar to *Engel* is *Abington School District v. Schempp*. There, the Court invalidated a Pennsylvania statute that required the reading of at least ten verses of the Bible, without comment, at the opening of each school day. That the reading of the verses of the Bible was religious in nature does not seem to have been questioned by any of the parties or Justices who heard the appeal.

The constitutional problems in *Engel* and *Schempp* are relatively straightforward. First, it is clear that the State may not seek to require that school districts engage in a particular form of obviously religious activity. Such religious partisanship, even though nonsectarian, is forbidden by the establishment clause. Second, the general nature of the activities raised serious free exercise questions because they were "voluntary" only in form, not in practice. In order to avoid the official exercises, individual students had to take specific steps that were almost certain to draw attention to them, attention that was unlikely to be desirable, given the majority orientation of the religious practices. In neither case was the "wording" of the exercises of particular importance in resolving the constitutional problem.

Lower court decisions deflecting efforts to introduce prayers into public schools have expanded the teachings of *Engel* and *Schempp* to reach almost any prayer recited as such on school grounds, but none has sought to label as "religious" that which was presented as "nonreligious."

In contrast, appellants here unwaveringly insist that the Puja chant has no religious meaning and is, in fact, a "secular Puja," quite common in Eastern cultures. And, even if we reject this claim, we are still substantially removed from the facts of *Engel* and *Schempp*: (a) the Puja was never performed in a school classroom, or even on government property; (b) it was never performed during school hours, but only on a Sunday; (c) it was performed only once in the case of each student; (d) it was entirely in Sanskrit, with neither the student nor,

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[1] Nor am I persuaded that the comparison of wording of alleged prayers is a meaningful way to scrutinize establishment clause cases. The actual wording of a school exercise, for example, may be far less important than its context and purpose. A textual analysis might well 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. Yet, such activities have not been held to violate the establishment clause, even though 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. These exercises, in other words, are not "prayers" within the meaning of *Engel* or *Schempp*.

apparently, the teacher who chanted it, knowing what the foreign words meant.

Moreover, the elements of involuntariness present in *Engel* and *Schempp* are wholly absent here. The SCI/TM course was an elective. Only those students who sought a course in SCI/TM had any contact with the chant; they were specifically told that the chant had no religious meaning; and they stated in affidavits that they did not understand it to have such meaning.[2]

Most important for our purposes, those cases provide few insights regarding the constitutional definition of religion. Both the prayer in *Engel* and the Bible readings in *Schempp* are unquestionably and uncompromisingly Theist. Even under the most narrow and traditional definition of religion, prayers to a Supreme Being and readings from the Bible would be considered "religious." But the important question presented by the present litigation is how far the constitutional definition of religion extends beyond the Theistic formulation. The school prayer cases, then, cannot be said to control, or, it would seem, even to address the question whether a particular belief-system should be considered a religion for first amendment purposes.

C. The Conscientious Objector Cases

In contradistinction to the school prayer cases, *United States v. Seeger*, 380 U.S. 163 (1965) and *Welsh v. United States*, 398 U.S. 333 (1970), the leading selective service decisions bespeak a broader definition of religion. *Seeger* and *Welsh*, of course, are not constitutional cases but rather concern the proper interpretation of section 6(j) of the Universal Military Service and Training Act. This provision allowed for conscientious objector status for those who, "by reason of religious training and belief," were "opposed to participation in war in any form." The statute went on to define "religious training or belief" in Theistic terms.

The Supreme Court, in what has been characterized as "a remarkable feat of linguistic transmutation," recast the language of section 6(j) in order to give the exemption a much broader scope. Thus Seeger was granted C.O. status notwithstanding his refusal to affirm his faith in a Supreme Being because the Court concluded that "religious training and belief" encompass non-Theist faiths provided that they are "sincere religious beliefs which (are) based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent." Welsh was similarly favored despite his assertion of only "moral" opposition to war, but in his case the Court was sharply divided.

Although *Seeger* and *Welsh* turned on statutory interpretation, and despite some indication that the Court has, to some degree, drawn back from the broadest possible reading

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[2] It is not meant to suggest that the Puja has no relationship to the ultimate issue of this case. In my view, however, the chant is only one factor to be considered in determining whether SCI/TM itself is a religion. The Puja, because of its ceremonial aspects, may be supportive of the answer supplied to that question, but it does not answer it by itself. Moreover, even if the Puja alone were found to be religious, the proper remedy might well be to enjoin that particular ceremony only, and not to interdict the entire SCI/TM course.

of these cases, they remain constitutionally significant. As a matter of logic and language, if the Court is willing to read "religious belief" so as to comprehend beliefs based upon pantheistic and ethical views, it might be presumed to favor a similar inclusive definition of "religion" as that term appears in the first amendment. The Court's willingness to depart so drastically from the plain language of a statute in order to produce an expansive definition almost certainly unintended by Congress, implies, as Justice Harlan observed in *Welsh*, a "distortion to avert an inevitable constitutional collision."

Most importantly, the constitutional values prompting such a statutory construction can only be taken to suggest a broad definition of religion. Only four Justices explicitly discussed their constitutional concerns in *Welsh*. All four Justices who addressed the constitutional issue concluded that "religion" should not be confined to a Theistic definition. Although four other Justices rested on statutory grounds and no exact definition was forthcoming in any event, *Seeger* and *Welsh* point to a definition at least somewhat broader than that advanced in the earlier decisions of the Supreme Court.

D. Cases Suggesting a New Constitutional Definition

Seeger and *Welsh*, however, are not the only cases presaging a broader reading of "religion" for first amendment purposes. The district court notes other cases more directly on point in that they concern constitutional, not statutory challenges. The most important of these, and the only Supreme Court cases among them, is *Torcaso v. Watkins*, 367 U.S. 488 (1961). *Torcaso* involved a direct constitutional challenge to a Maryland provision that required an official to declare a belief in God in order to hold office in that state. A unanimous Court rejected this requirement, both as a matter of establishment clause values (the state may not favor Theism over pantheism or atheism) and free exercise clause values (an individual may not be barred from holding public office on the basis of his beliefs). In striking down the Maryland law, the Court specifically observed that neither the state nor the federal government "can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." The Court then added an instructive footnote: "Among 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."

This note, although dictum, represents a rejection of the view that religion may, consonant with first amendment values, be defined solely in terms of a Supreme Being. Buddhism and Taoism are, of course, recognized Eastern religions. The other two examples given by the Court refer to explicitly non-Theist organized groups that were found to be religious for tax exemption purposes primarily because of their organizational similarity to traditional American church groups. "Ethical Culture" is a reference to the organization in *Washington Ethical Society v. District of Columbia*, 249 F.2d 127 (D.C. Cir. 1957), which held regular Sunday services and espoused a group of defined moral precepts. Similarly, "Secular Humanism," however broad the term may sound, appears to be no more than a reference to the group seeking an exemption in *Fellowship of Humanity v. County of Alameda*, 153 Cal. App.2d 673 (1957), which, although non-Theist in belief, also met weekly on Sundays and functioned much like a church. In any event, the Court was willing to concede that these groups, "and others," were religious for constitutional purposes.

It would thus appear that the constitutional cases that have actually alluded to the definitional problem, like the selective service cases, strongly support a definition for religion broader than the Theistic formulation of the earlier Supreme Court cases. What this definition is, or should be, has not yet been made entirely clear.

II THE MODERN DEFINITION OF RELIGION

It seems unavoidable, from *Seeger*, *Welsh*, and *Torcaso*, that the Theistic formulation presumed to be applicable in the late nineteenth century cases is no longer sustainable. Under the modern view, "religion" is not confined to the relationship of man with his Creator. Even theologians of traditionally recognized faiths have moved away from a strictly Theistic approach in explaining their own religions. Such movement, when coupled with the growth in the United States, of many Eastern and non-traditional belief systems, suggests that the older, limited definition would deny "religious" identification to faiths now adhered to by millions of Americans. The Court's more recent cases reject such a result.

If the old definition has been repudiated, however, the new definition remains not yet fully formed. It would appear to be properly described as a definition by analogy. The *Seeger* court advertently declined to distinguish beliefs holding "parallel positions in the lives of their respective holders." Presumably beliefs holding the same important position for members of one of the new religions as the traditional faith holds for more orthodox believers are entitled to the same treatment as the traditional beliefs. The tax exemption cases referred to in *Torcaso* also rely primarily on the common elements present in the new challenged groups and the older unchallenged groups and churches. The modern approach thus looks to the familiar religions as models in order to ascertain, by comparison, whether the new set of ideas or beliefs is confronting the same concerns, or serving the same purposes, as unquestioned and accepted "religions."

But it is one thing to conclude "by analogy" that a particular group or cluster of ideas is religious; it is quite another to explain exactly what indicia are to be looked to in making such an analogy and justifying it. There appear to be three useful indicia that are basic to our traditional religions and that are themselves related to the values that undergird the first amendment.

The first and most important of these indicia is the nature of the ideas in question. This means that a court must, at least to a degree, examine the content of the supposed religion, not to determine its truth or falsity, but to determine whether the subject matter it comprehends is consistent with the assertion that it is, or is not, a religion. Expectation that religious ideas should address fundamental questions is in some ways comparable to the reasoning of the Protestant theologian Dr. Paul Tillich, who expressed his view on the essence of religion in the phrase "ultimate concern." Tillich perceived religion as intimately connected to concepts that are of the greatest depth and utmost importance. One's views, be they orthodox or novel, on the deeper and more imponderable questions the meaning of life and death, man's role in the Universe, the proper moral code of right and wrong are those likely to be the most "intensely personal" and important to the believer. They are his ultimate concerns. The first amendment demonstrates a specific solicitude for religion because religious ideas are in many ways more important than other ideas. New and different ways of meeting those concerns are

entitled to the same sort of treatment as the traditional forms.

Thus, the "ultimate" nature of the ideas presented is the most important and convincing evidence that they should be treated as religious. Certain isolated answers to "ultimate" questions, however, are not necessarily "religious" answers, because they lack the element of comprehensiveness, the second of the three indicia. A religion is not generally confined to one question or one moral teaching; it has a broader scope. It lays claim to an ultimate and comprehensive "truth." Thus the so-called "Big Bang" theory, an astronomical interpretation of the creation of the universe, may be said to answer an "ultimate" question, but it is not, by itself, a "religious" idea. Likewise, moral or patriotic views are not by themselves "religious," but if they are pressed as divine law or a part of a comprehensive belief-system that presents them as "truth," they might well rise to the religious level. The component of comprehensiveness is particularly relevant in the context of state education. A science course may touch on many ultimate concerns, but it is unlikely to proffer a systematic series of answers to them that might begin to resemble a religion.

A third element to consider in ascertaining whether a set of ideas should be classified as a religion is any formal, external, or surface signs that may be analogized to accepted religions. Such signs might include formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observation of holidays and other similar manifestations associated with the traditional religions. Of course, a religion may exist without any of these signs, so they are not determinative, at least by their absence, in resolving a question of definition. But they can be helpful in supporting a conclusion of religious status given the important role such ceremonies play in religious life. Thus, even if it is true that a religion can exist without rituals and structure, they may nonetheless be useful signs that a group or belief system is religious.

Although these indicia will be helpful, they should not be thought of as a final "test" for religion. Defining religion is a sensitive and important legal duty.[3] Flexibility and careful consideration of each belief system are needed. Still, it is important to have some objective guidelines in order to avoid Ad hoc justice.

Before applying these guidelines to SCI/TM, however, a separate question must first be examined. Even conceding the propriety of the modern approach in certain contexts, the Court is urged to adopt the position that a less expansive definition is required in establishment clause cases. The broader definition has up until now been exclusively applied in response to free exercise clause values. Appellants contend that such broader definition is

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[3] Appellants have urged that they do not consider SCI/TM to be a religion. But the question of the definition of religion for first amendment purposes is one for the courts, and is not controlled by the subjective perceptions of believers. Supporters of new belief systems may not "choose" to be non-religious, particularly in the establishment clause context. There is some indication that SCI/TM has attempted a transformation from a religion to a secular science in order to gain access to the public schools. Even if this is true, the issue of its religious nature remains a legal question, and the judgment of the Court today represents a conclusion, in effect, that the attempted transformation is not complete.

inappropriate in the context of the establishment clause.

III A UNITARY DEFINITION FOR BOTH RELIGION CLAUSES

There has been considerable speculation whether the broader definition of religion developed in the free exercise cases should be applied under the establishment clause. Professor Tribe has advanced the argument that the free exercise clause should be read broadly to include anything "arguably religious," but that the establishment clause should not be construed to encompass anything "arguably non-religious." In so doing, he has summarized the position of those favoring a dual definition:

> Clearly, the notion of religion in the free exercise clause must be expanded beyond the closely bounded limits of theism to account for the multiplying forms of recognizably legitimate religious exercise. It is equally clear, however, that in the age of the affirmative and increasingly pervasive state, a less expansive notion of religion was required for establishment clause purposes lest all "humane" programs of government be deemed constitutionally suspect. Such a twofold definition of religion may be necessary to avoid confronting the state with increasingly difficult choices that the theory of permissible accommodation could not indefinitely resolve.

Despite the distinguished scholars who advocate this approach, a stronger argument can be made for a unitary definition to prevail for both clauses. This would seem to be the preferable choice for several reasons. First, it is virtually required by the language of the first amendment. As Justice Rutledge put it over thirty years ago:

> "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 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.

Although the Constitution has often been subject to a broad construction, it remains a written document. It is difficult to justify a reading of the first amendment so as to support a dual definition of religion, nor has our attention been drawn to any support for such a view in the sources that have been thought to reveal the intention of the framers. Moreover, the policy reasons put forward by the supporters of a dual definition, in my view, are unpersuasive.

The advocates of a dual definition appear to be motivated primarily by an anxiety that too extensive a definition under the establishment clause will lead to "wholesale invalidation" of government programs. Were a school, or government agency, to advance the cause of peace, or opposition to war, such an official position would not qualify as a "religion" even though some citizens might come to adopt that very view because of their own religious beliefs. All programs or positions that entangle the government with issues and problems that might be classified as "ultimate concerns" do not, because of that, become "religious" programs or positions. Only if the government favors a comprehensive belief system and advances its teachings does it establish a religion. It does not do so by endorsing isolated moral precepts or by enacting humanitarian economic programs.

In this regard it should be noted that the modern definition of religion does not extend so far as to include those who hold beliefs however passionately regarding the utility of Keynesian economics, Social Democracy or, for that matter, Sociobiology. These ideas may in some instances touch on "ultimate concerns," but they are less analogous to religious views than they are to the political or sociological ideas that they are. An undefined belief in humanitarianism, or good intentions, is still far removed from a comprehensive belief system laying a claim to ultimate truth and supported by a formal group with religious trappings.

Moreover, the establishment clause does not forbid government activity encouraged by the supporters of even the most orthodox of religions if that activity is itself not unconstitutional. The Biblical and clerical endorsement of laws against stealing and murder do not make such laws establishments of religion. Similarly, agitation for social welfare programs by progressive churchmen, even if motivated by the most orthodox of theological reasons, does not make those programs religious. The Constitution has not been interpreted to forbid those inspired by religious principle or conscience from participation in this nation's political, social and economic life.

Finally, the practical result of a dual definition is itself troubling. Such an approach would create a three-tiered system of ideas: those that are unquestionably religious and thus both free from government interference and barred from receiving government support; those that are unquestionably non-religious and thus subject to government regulation and eligible to receive government support; and those that are only religious under the newer approach and thus free from governmental regulation but open to receipt of government support. Belief systems classified in the third grouping are the most advantageously positioned. No reason has been advanced, however, for favoring newer belief systems over older ones. If a Roman Catholic is barred from receiving aid from the government, so too should be a Transcendental Meditator or a Scientologist if those two are to enjoy the preferred position guaranteed by the free exercise clause. They are clearly not entitled to the advantages given by the first amendment while avoiding the disadvantages. The rose cannot be had without the thorn.

For these reasons, then, I think it is correct to read religion broadly in both clauses and agree that the precedents developed in the free exercise context are properly relied upon here. Having reached this conclusion, two final questions remain: Does SCI/TM qualify as a religion under the criteria discussed above and, if it does, does the teaching and funding of this course constitute an establishment of that religion.

IV SCI/TM AS A RELIGION

Although Transcendental Meditation by itself might be defended as appellants sought to do in this appeal as primarily a relaxation or concentration technique with no "ultimate" significance, the New Jersey course at issue here was not a course in TM alone, but a course in the Science of Creative Intelligence. Creative Intelligence, according to the textbook in the record, is "at the basis of all growth and progress" and is, indeed, "the basis of everything." Transcendental Meditation is presented as a means for contacting this "impelling life force" so as to achieve "inner contentment." Creative Intelligence can provide such "contentment" because it is "a field of unlimited happiness," which is at work everywhere and visible in such diverse places as in "the changing of the seasons" and "the wings of a butterfly." That the

existence of such a pervasive and fundamental life force is a matter of "ultimate concern" can hardly be questioned. It is put forth as the foundation of life and the world itself.

The Science of Creative Intelligence provides answers to questions concerning the nature both of world and man, the underlying sustaining force of the universe, and the way to unlimited happiness. Although it is not as comprehensive as some religions – for example, it does not appear to include a complete moral code – it is sufficiently comprehensive to avoid the suggestion of an isolated theory unconnected with any particular world view or basic belief system. SCI/TM provides a way to full self realization and oneness with the underlying reality of the universe. Consequently, it can reasonably be understood as presenting a claim of ultimate "truth."

This conclusion is supported by the formal observances and structure of SCI/TM. Although there is no evidence in the record of organized clergy or traditional rites, there are trained teachers and an organization devoted to the propagation of the faith. And there is a ceremony, the Puja, that is intimately associated with the transmission of the mantra.

SCI/TM is not a Theistic religion, but it is nonetheless a constitutionally protected religion. It concerns itself with the same search for ultimate truth as other religions and seeks to offer a comprehensive answer to questions that haunt modern man. That those who espouse these views and engage in the Puja, or meditate in the hope of reaching the transcendental reality of creative intelligence, would be entitled to the protection of the free exercise clause is clear. They are thus similarly subject to the constraints of the establishment clause.

V THE NEW JERSEY SCI/TM COURSE AS AN ESTABLISHMENT OF RELIGION

Like the majority, I am convinced that the conclusion that SCI/TM is a religion is largely determinative of this appeal. There is nothing *per se* unconstitutional about offering a course in religion or religious writings. A realistic appraisal of the course at issue here, however, demonstrates no such objective secular program.

In applying the three-prong test for determining whether a particular program abridges the establishment clause, the district court credited the government with pursuing a secular purpose, but held that the means employed in pursuing this goal were forbidden. I am in agreement with this conclusion, but entertain some doubt as to the secularity of purpose. Although a secular purpose is usually conceded in establishment clause cases, there is some question whether one can be found here. A careful review reveals nothing other than an effort to propagate TM, SCI, and the views of Maharishi Mahesh Yogi.[4] A conviction that religious education is "good" for students does not make out a secular purpose.

Religious observation and instruction in public schools may be sustainable if ideas are taught in an objective fashion, or if the overall impact of the religious observance is *de*

[4] It is of particular note that New Jersey did not entrust the teaching of SCI/TM to regular public school teachers, but relied upon instructors trained by WPEC. Although the Constitution allows "objective" courses in religion, courts are unlikely to find objectivity in courses taught by Jesuits, rabbis, or fundamentalist ministers brought in to the public schools for the express purpose of teaching that course. A comparable situation is presented here.

minimis. Neither was true here. Once SCI/TM is found to be a religion, the establishment resulting from direct government support of that religion through the propagation of its religious ideas in the public school system is clear.

Although federal courts should be reluctant to interfere in the judgments of educational authorities on questions of what subject matter should be taught in the schools, our constitutional duty to guard against state efforts to promote religion may not be set aside.

UNITED STATES v. KUCH

288 F. Supp. 439 (D.D.C. 1968)

GESELL, District Judge.

Judith H. Kuch, who avers she is an "ordained minister of the Neo-American Church," stands indicted for unlawfully obtaining and transferring marihuana and for the unlawful sale, delivery and possession of LSD. Defendant by her motions to dismiss contends that criminal penalties may not be applied as to her for several reasons relating to her basic contention that the laws impinge on her constitutional right in the free exercise of her alleged religion.

The Neo-American Church was incorporated in California in 1965 as a nonprofit corporation. It claims a nationwide membership of about 20,000. At its head is a Chief Boo Hoo. Defendant Kuch is the primate of the Potomac, a position analogized to bishop. She supervises the Boo Hoos in her area. There are some 300 Boo Hoos throughout the country. In order to join the church a member must subscribe to the following principles:

> "(1) Everyone has the right to expand his consciousness and stimulate visionary experience by whatever means he considers desirable and proper;
>
> "(2) The psychedelic substances, such as LSD, are the true Host of the Church, not drugs. They are sacramental foods, manifestations of the Grace of God, of the infinite imagination of the Self, and therefore belong to everyone;
>
> "(3) We do not encourage the ingestion of psychedelics by those who are unprepared."

Building on the central thesis of the group that psychedelic substances, particularly marihuana and LSD, are the true Host, the Church specifies that "it is the Religious *duty* of all members to partake of the sacraments on regular occasions."

A Boo Hoo is "ordained" without any formal training. He guides members on psychedelic trips, acts as a counselor for individuals having a "spiritual crisis," administers drugs and interprets the Church to those interested. The Boo Hoo of the Georgetown area of Washington, D.C. testified that the Church was pantheistic and lacked a formal theology. Indeed, the church officially states in its so-called "Catechism and Handbook" that "it has never been our objective to add one more institutional substitute for individual virtue to the already crowded lists." In the same vein, this literature asserts "we have the *right* to practice our religion, even if we are a bunch of filthy, drunken bums." The members are instructed that anyone should be taken as a member "no matter what you suspect his motives to be."

The dividing line between what is, and what is not, a religion is difficult to draw. The Supreme Court has given little guidance. Courts must be careful not to permit their own moral and ethical standards to determine the religious implications of beliefs and practices of others. Religions now accepted were persecuted, unpopular and condemned at their inception.

Subtle and difficult though the inquiry may be, it should not be avoided for reasons of convenience. There is need to develop a line of demarcation between religious activities and personal codes of conduct that lack spiritual import. Those who seek constitutional protections for their religion and freedom to practice its beliefs must not be permitted the special freedoms this sanctuary may provide merely by adopting religious nomenclature and cynically using it as a shield to protect them when participating in antisocial conduct that otherwise stands condemned. In a complex society where the requirements of public safety, health and order must be recognized, those who seek immunity from these requirements on religious grounds must at the very least demonstrate adherence to a spiritual discipline.

The defendant has sought to have the Church designated a religion primarily by emphasizing that ingestion of psychedelic drugs brings about a religious awareness and sharpens religious instincts. There was proof offered that the use of psychedelic drugs may, among other things, have religious implications. Various writings on the subject were received in evidence and testimony was taken from two professors who had themselves taken drugs experimentally and had studied religious manifestations of psychedelic drug ingestion.

Just as sacred mushrooms have for 2,000 years or more triggered religious experiences among members of Mexican faiths that use this vegetable, so there is reliable evidence that some but not all persons using LSD or marihuana under controlled conditions may have what some users report to be religious or mystical experiences.

While there may well be and probably are some members of the Neo-American Church who have had mystical and even religious experiences from the use of psychedelic drugs, there is little evidence in this record to support the view that the Church and its members as a body are motivated by or associated because of any common religious concern. The fact that the use of drugs is found in some ancient and some modern recognized religions is an obvious point that misses the mark. What is lacking in the proofs received as to the Neo-American Church is any solid evidence of a belief in a supreme being, a religious discipline, a ritual, or tenets to guide one's daily existence. It is clear that the desire to use drugs and to enjoy drugs for their own sake, regardless of religious experience, is the coagulant of this organization and the reason for its existence.

Reading the so-called "Catechism and Handbook" of the Church containing the pronouncements of the Chief Boo Hoo, one gains the inescapable impression that the membership is mocking established institutions, playing with words and totally irreverent in any sense of the term. Each member carries a "martyrdom record" to reflect his arrests. The Church symbol is a three-eyed toad. Its bulletin is the "Divine Toad Sweat." The Church key is, of course, the bottle opener. The official songs are "Puff, the Magic Dragon" and "Row, Row, Row Your Boat." In short, the "Catechism and Handbook" is full of goofy nonsense, contradictions, and irreverent expressions. There is a conscious effort to assert the attributes of religion but obviously only for tactical purposes. Constitutional principles are embraced

wherever helpful but the effect of the "Catechism and Handbook" and other evidence as a whole is agnostic, showing no regard for a supreme being, law or civic responsibility.

The official seal of the Church is available on flags, pillow cases, shoulder patches, pill boxes, sweat shirts, rings, portable "communion sets," pipes for "sacramental use," and the like. The seal has the three-eyed toad in the center. The name of the Church is at the top and across the bottom is the Church motto: "Victory over Horseshit!" The Court finds this helpful in declining to rule that the Church is a religion within the meaning of the First Amendment.

AFRICA v. THE COMMONWEALTH OF PENNSYLVANIA

662 F.2d 1025 (3d Cir. 1981)

Opinion of the Court by ADAMS, C.J.

Frank Africa, who claims to be a "Naturalist Minister" for the MOVE organization and who is a prisoner of the Commonwealth of Pennsylvania, appeals from a district court judgment holding that the state government is not required, under the religion clauses of the first amendment, to provide him with a diet consisting entirely of raw foods. He maintains that to eat anything other than raw foods would be a violation of his "religion." We affirm.

I.

On July 15, 1981, Frank Africa was convicted of various state offenses and was sentenced to serve a term of up to seven years at the State Correctional Institution at Graterford, Pennsylvania. Prior to his sentence, Africa had been incarcerated in Holmesburg Prison. While at Holmesburg, Africa received a special diet of uncooked vegetables and fruits.

Africa filed a motion for a temporary restraining order in federal district court seeking an order either that he remain in Holmesburg or that Graterford be required to provide him with his dietary needs. In his pleading, Africa averred that, as a Naturalist Minister for MOVE, "I eat an all raw food diet in accordance with my Religious principle. To eat anything else would be a direct violation of my Religion." Africa's motion was assigned to Judge Hannum.

State authorities transferred Africa to Graterford. Later that day, the Common Pleas Court entered an order directing that Africa be returned to Holmesburg pending resolution of his request for injunctive relief. Pursuant to that order, Africa was sent back to Holmesburg.

On July 27, 1981, the district court conducted a hearing on Africa's motion, which was treated as an application for a permanent injunction, and received testimony from Africa himself, Ramona Johnson, a "supporter" of MOVE, and Julius T. Cuyler, the superintendent of Graterford. At the hearing, Judge Hannum sought to determine whether Africa's diet was mandated by his "religion," and, if so, whether the Commonwealth could demonstrate a compelling interest sufficient to infringe upon Africa's dietary practices. Because our disposition of Africa's appeal depends so heavily upon the particular facts of this case, it will be necessary to set forth in some detail the evidence introduced in the proceeding below.

Based on Africa's testimony and on materials he provided the district court, MOVE is a "revolutionary" organization "absolutely opposed to all that is wrong." MOVE was founded

by John Africa, who serves as the group's revered "coordinator" and whose teachings Frank Africa and his fellow "family" members follow. MOVE has no governing body or official hierarchy; instead, because "everything is level" and "there are no ups or downs," all MOVE members, including John Africa, occupy an equivalent position within the organization. In fact, MOVE really has only "one member, one family, one body" since, according to Frank Africa, to talk to an individual MOVE "disciple" is to "talk to everybody."

Africa also summarized what he believed to be the tenets that defined the MOVE organization. MOVE's goals, he asserted, are "to bring about absolute peace, ... to stop violence altogether, to put a stop to all that is corrupt." Toward this end, Africa and other MOVE adherents are committed to a "natural," "moving," "active," and "generating" way of life. By contrast, what they alternatively refer to as "this system" or "civilization" is "degenerating": its air and water are "perverted"; its food, education, and governments are "artificial"; its words are "gibberish." Members of MOVE shun matters "systematic" and "hazardous"; they believe in "using things (but) not misusing things." According to Africa:

> the air is first, but pollution is second. Water is first, but poison is second. The food is first, but the chemicals that hurt the food are second. We believe in the first education, the first government, the first law. This is the perception that John Africa has given us. The water's existence is to be drunk and not poisoned, the air's presence is to be breathed and not polluted, the food's purpose is to be eaten and not distorted. The abuse that life suffers MOVE suffers the same.

MOVE endorses no existing regime or lifestyle; it yields to none in its uncompromising condemnation of a society that it views as "impure," "unoriginal," and "blemished."

According to Africa, MOVE is a religion. In fact, he insists that "just as there is no comparison between the sun's perfection and the lightbulb's failure, there is no comparison between the absolute necessity of our belief and this system's interpretation of religion." Africa testified that MOVE members participate in no distinct "ceremonies" or "rituals"; instead, every act of life itself is invested with religious significance. In his words:

> We are practicing our religious beliefs all the time: when I run, when I put information out like I am doing now, when I eat, when I breathe. All of these things are in accordance to our religious belief. We don't take a date out of the week to practice our religion. It is not a one-day thing or a once-a-week thing or a monthly thing. It doesn't have anything to do with time. Our religion is constant. It is as constant as breathing. Every time a MOVE person opens their mouth, according to the way we believe, we are holding church.

Similarly, Africa contends that, since no one day is any more special than another, for MOVE members every day of the year can be considered a religious "holiday."

Africa did not provide the district court with any purportedly official guidelines setting forth MOVE's religious credo. He did submit, however, a document, which he apparently authored, entitled Brief to Define the Importance of MOVE's Religious Diet. That document sets forth an elaborate explanation of the MOVE philosophical framework and consequently constitutes extremely pertinent evidence for purposes of assessing the nature of the organization. In the Brief, Africa contends that "while religion is seen as a way of life, our

religion is simply the way of life, as our religion in fact is life." Individuals who subscribe to the MOVE ideology must live in harmony with what is natural, or untainted:

> Water is raw, which makes it pure, which means it is innocent, trustworthy, and safe, which is the same as God. Our religion is raw, our belief is pure as original, reliable as chemical free water, nourishing as the earth's soil that connects us to food, satisfying as the air that gives breath to all life.

By rejecting the "polluted" and the "fraudulent," and by concentrating instead on the "healthy" and the "original," men and women are put "in touch with life's vibration."

Central to this conception of an unadulterated existence is what Africa refers to as MOVE's "religious diet." That diet is comprised largely of raw vegetables and fruits;[1] MOVE members who fully adhere to the diet[2] decline to eat any foods that have been processed or cooked. "There is nothing unusual or special about our diet," Africa declares in his Brief; rather, "our religious diet is common and uncomplicated because our diet is provided by God and already done." Failure to follow the diet constitutes deviation from the "direct, straight, and true" and results in "confusion and disease." In part, Africa's total commitment to specific provisions appears prudently based, since he asserts that it is "impossible" for an individual's body to adjust to more traditional fare after it has become accustomed to natural foods. But Africa also insists that he is obligated to follow his diet: “To take away our diet is to leave me to eat nothing, for I have no choice, because when given a choice between eating poison and eating nothing, I have no choice but to eat nothing, for I can't eat other than raw. This would be suicidal and suicide is against life's ministry.”

Africa contends that the diet, in conjunction with "our founder's wisdom," transformed him from a weak, timid, and ailing being to a strong, confident, and healthy individual. "Our religious diet is hard work, simple consistent unmechanized unscientific self-dependent work," he concludes; "our religious diet is family, unity, consistency, (and) uncompromising togetherness."

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[1] The MOVE Organization's Religious Diet, a document made available to the district court, explains that the diet desired by MOVE members consists of:

> (r)aw, uncut-unpeeled, unprocessed chemical free sweet potatoes, yams, white potatoes, turnip roots, all roots of organic eatable nature, wild rice organic, wild organic garlic, onions, peppers, tomatoes, corn, spinach, raw unopened unprocessed nuts, berries, melons, oranges, peaches, pears, grapes, bananas, apples, organic eggs, raw organic water meats, and some land meats.

[2] Africa does not assert that every member of MOVE follows the dietary regimen he describes. Judge Hannum found that "all MOVE members presently incarcerated are not practicing an alleged MOVE preferred diet." And in The MOVE Organization's Religious Diet, it is explained that "there will be members requesting food that is not listed in MOVE's religious diet, which is understandable and expected, as MOVE understands (that) people coming to MOVE with customs other than MOVE's must run clear of these customs at their own pace."

Dietary considerations excepted, Africa shed little light upon what, if any, ethical commandments are part and parcel of the MOVE philosophy. In response to specific questioning by the district court, Africa testified that MOVE members would be unable to serve in the armed forces, since "it is impossible for us to defend this system." At the same time, though, he stressed that, from his point of view, there was nothing inconsistent in seeking judicial intervention to prevent his transfer to Graterford: “We are taught to use anything, anything that is necessary to bring about our purpose.”

Africa's discussion of the MOVE organization and its dietary precepts was corroborated by Ramona Johnson, a self-labeled "MOVE supporter." Johnson testified that her "brother" was "ordained" as a naturalist minister of MOVE by John Africa, and that he is an ardent follower of his religion and its mandates. Johnson confirmed, but added little to Africa's description of the concerns that lie at the heart of the MOVE ideology. She contended that the MOVE "religion is total; it encompasses every aspect of MOVE members' lives; there is nothing that is left out." And she stressed that Africa's raw food diet is both a necessary "part of" and a sincere "reflection of" his religious commitment. Johnson testified that Africa had gone without food for the four day period when he was imprisoned at Graterford.

The final witness at the hearing in the district court was Julius T. Cuyler, the superintendent of Graterford. Cuyler expressed concern about "a proliferation of other groups surfacing in our prison requesting special diets" and warned that, were a court to grant Africa's desired relief, MOVE would attract new "sympathizers." Cuyler contended that the prison's cafeteria already made available to inmates a number of raw foods, such as bananas, apples, and oranges. There were practical reasons, he explained, why Graterford could not be any more accommodating in this regard: it would be "quite a major problem to buy the items that are listed on this diet in the retail market"; the prison's accounting system would be unable to handle such a "major deviation" in the procurement process; some of the foods asked for by Africa, particularly the potatoes, rice, corn, and berries, if "not kept under strict security, would probably be stolen and used for other purposes," such as to "make homemade booze"; accumulation of raw food might lead to a "rodent problem"; and furnishing special diets might delay the prison's feeding process, with the result that "our entire population will be deprived of recreation (time)." In short, according to Cuyler, providing Africa with a raw food diet "could be the straw that could break the camel's back."

The district court denied Africa's application for injunctive relief. Judge Hannum concluded that Africa had failed to establish that MOVE is "a religion within the first amendment." On the contrary, "MOVE is merely a quasi-back-to-nature social movement with an admittedly revolutionary design." As an organization, it is concerned solely with "concepts of health and a return to simplistic living." This the district court found to be more akin to a "social philosophy" than to a religion. Consequently, the district court concluded that both Frank Africa and MOVE itself "are not entitled to the first amendment protections respecting the exercise of religion."

II.

The relevant case law in the free exercise area suggests that two threshold requirements must be met before particular beliefs, alleged to be religious in nature, are accorded first

amendment protection. A court's task is to decide whether the beliefs are (1) sincerely held, and (2) religious in nature. If either of these two requirements is not satisfied, the court need not reach the question, often quite difficult in the penological setting, whether a legitimate and reasonably exercised state interest outweighs the proffered first amendment claim. The requirement of sincerity poses no obstacle in this case. We turn, therefore, to the second issue: whether Africa's beliefs, however sincerely possessed, are religious in nature.

Few tasks that confront a court require more circumspection than that of determining whether a particular set of ideas constitutes a religion within the meaning of the first amendment. Judges are ill-equipped to examine the content of an avowed religion; we must avoid any predisposition toward conventional religions so that unfamiliar faiths are not branded mere secular beliefs. "Religions now accepted were persecuted, unpopular and condemned at their inception." Nonetheless, when an individual invokes the first amendment to shield himself or herself from otherwise legitimate state regulation, we are required to make such uneasy differentiations.

The Supreme Court has never announced a comprehensive definition of religion for use in cases such as the present one. There can be no doubt, however, that the Court has moved considerably beyond the wholly theistic interpretation. In *United States v. Seeger*, the Court recognized as religious an individual's "sincere religious beliefs," even though not theistic in nature, if "based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent." And in *Torcaso v. Watkins*, the Court struck down as a violation of the establishment clause a statute requiring public officials to declare their belief in God before taking office. Justice Black, writing for a unanimous Court, concluded that a state could not favor "those religions based on a belief in the existence of God as against those religions founded on different beliefs"; in a footnote, he observed that a number of religious groups within the United States do not hold to theistic doctrines.

Drawing upon these Supreme Court cases, a number of lower federal courts have adopted a broad, non-theistic approach to the definition-of-religion question. In considering a first amendment claim arising from a non-traditional "religious" belief or practice, the courts have "look(ed) to the familiar religions as models in order to ascertain, by comparison, whether the new set of ideas or beliefs is confronting the same concerns, or serving the same purposes, as accepted 'religions.' " *Malnak v. Yogi*, 592 F.2d 197, 207 (3d Cir. 1979) (Adams, J., concurring). In essence, the analysis consists of a "definition by analogy" approach.

In conducting its inquiry in the case at bar, the district court employed what it referred to as the "inherently vague definitional approach" enunciated in the concurring opinion in *Malnak*. In the *Malnak* opinion, "useful indicia" to determine the existence of a religion were identified and discussed. First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs. After considering Africa's testimony in light of these guideposts, we conclude that MOVE, at least as described by Africa, is not a "religion," in the sense that that term is used in the first amendment.

Fundamental and ultimate questions. Traditional religions consider and attempt to come to

terms with "ultimate" questions -- questions having to do with, among other things, life and death, right and wrong, and good and evil. Not every tenet of an established theology need focus upon such elemental matters, of course; still, it is difficult to conceive of a religion that does not address these larger concerns. For, above all else, religions are characterized by their adherence to certain "underlying theories of man's nature or his place in the Universe."

We conclude that the MOVE organization, as described by Africa, does not satisfy the "ultimate" ideas criterion. Save for its preoccupation with living in accord with the dictates of nature, MOVE makes no mention of what might be classified as a fundamental concern. MOVE does not claim to be theistic: indeed it recognizes no Supreme Being and refers to no transcendental or all-controlling force. Moreover, MOVE does not appear to take a position with respect to matters of personal morality, human mortality, or the meaning and purpose of life. The organization, for example, has no functional equivalent of the Ten Commandments, the New Testament Gospels, the Muslim Koran, Hinduism's Veda, or Transcendental Meditation's Science of Creative Intelligence. Africa insists that he has discovered a desirable way to conduct his life; he does not contend, however, that his regimen is somehow morally necessary or required. Given this lack of commitment to overarching principles, the MOVE philosophy is not sufficiently analogous to more "traditional" theologies.

Despite having concluded that MOVE does not deal with "ultimate ideas," we concede that the matter is not wholly free from doubt. Appointed counsel for Africa argues that MOVE members do share a fundamental concern, namely, an all-consuming belief in a "natural" or "generating" way of life. According to counsel, Africa's insistence on keeping "in touch with life's vibration" amounts to a form of pantheism, wherein "the entity of God is the world itself, and God is "swallowed up in that unity which may be designated "nature' ".... (MOVE's) return to nature is not simply a "preferred" state. It is the only state. It is the state of being in pure harmony with nature. This, MOVE calls godly. This is pantheism."

We decline to accept such a characterization of Africa's views, however. We recognize that, under certain circumstances, a pantheistic-based philosophy might qualify for protection under the free exercise clause. From the record in this case, though, we are not persuaded that Africa is an adherent of pantheism, as that word is commonly defined.[3] His mindset seems to be far more the product of a secular philosophy than of a religious orientation. His concerns appear personal (e.g., he contends that a raw food diet is "healthy" and that pollution and other such products are "hazardous") and social (e.g., he claims that MOVE is a "revolutionary" organization, "absolutely opposed to all that is wrong" and unable to accept existing regimes), rather than spiritual or other-worldly. Indeed, if Africa's statements are

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[3] Pantheism is "(t)he religious belief or philosophical theory that God and the universe are identical (implying a denial of the personality and transcendence of God); the doctrine that God is everything and everything is God." 2 Compact Edition of the Oxford English Dictionary 2067 (1971). See MacIntyre, Pantheism, in 6 Encyclopedia of Philosophy 31, 31, 34 (1967) ("Pantheism is a doctrine that usually occurs in a religious and philosophical context in which there are already tolerably clear conceptions of God and of the universe and the question has arisen of how these two conceptions are related. Pantheism essentially involves two assertions: that everything that exists constitutes a unity and that this all-inclusive unity is divine").

sufficient to describe a religion under the Constitution, it might well be necessary to extend first amendment protection to individuals and organizations who espouse personal and secular ideologies, however much those ideologies appear dissimilar to traditional religious dogmas.

The Supreme Court would appear to have foreclosed such an expansive interpretation of the free exercise clause. In *Wisconsin v. Yoder*, the Court concluded that Wisconsin could not require members of the Amish sect to send their children to school beyond the eighth grade, where there was uncontested evidence that such a course was inconsistent with the Amish religion. In the course of his opinion for the Court, Chief Justice Burger stressed that the objections of the Amish to compulsory secondary education derived from "deep religious conviction(s)" rather than from a "personal" or "secular" philosophy.

For purposes of the case at hand, then, it is crucial to realize that the free exercise clause does not protect all deeply held beliefs, however "ultimate" their ends or all-consuming their means. An individual or group may adhere to and profess certain political, economic, or social doctrines, perhaps quite passionately. The first amendment, though, has not been construed to shelter strongly held ideologies of such a nature, however all-encompassing. As the Supreme Court declared in *Yoder*, "(a) way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation ... if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief."[4] While we do not necessarily agree with the district court's description of MOVE as "merely a quasi-back-to-nature social movement of limited proportion," we conclude that the concerns addressed by MOVE, even assuming they are "ultimate" in nature, are more akin to Thoreau's rejection of "the contemporary secular values accepted by the majority" than to the "deep religious conviction(s)" of the Amish.

Comprehensiveness. The concurring opinion in *Malnak* stressed that a religion must consist of something more than a number of isolated, unconnected ideas. "A religion is not generally confined to one question or one moral teaching; it has a broader scope. It lays claim to an ultimate and comprehensive "truth.' "

MOVE appears to consist of a single governing idea, perhaps best described as philosophical naturalism. Apart from this desire to live in a "pure" and "natural" environment, little more of substance can be identified about the MOVE ideology. It would not be possible, we believe, on the basis of the record in this case, to place Africa's dietary concerns within the framework of a "comprehensive belief system." Were we to conclude that Africa's views satisfied the comprehensiveness criterion, it would be difficult to explain why other single-faceted ideologies-such as economic determinism, Social Darwinism, or even vegetarianism-would not qualify as religions under the first amendment.

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[4] The task of drawing distinctions between religiously-based and secularly-derived claims in no way entitles or forces a court to assess the truth of the contentions under review. Unless, however, every individual's subjective definition of a religion is to be controlling in first amendment litigation, "a court must, at least to a degree, examine the content of the supposed religion, not to determine its truth or falsity, but to determine whether the subject matter it comprehends is consistent with the assertion that it is, or is not, a religion."

We acknowledge that our conclusion is not unassailable. It could be argued that Africa's views are comprehensive, since, according to his testimony, his every effort and thought is attributable to his "religious" convictions. MOVE members "are practicing our religious beliefs all the time." The notion that all of life's activities can be cloaked with religious significance is, of course, neither unique to MOVE nor foreign to more established religions. Such a notion by itself, however, cannot transform an otherwise secular, one-dimensional philosophy into a comprehensive theological system. It is one thing to believe that, because of one's religion, day-to-day living takes on added meaning. It is altogether different to contend that certain ideas should be declared religious because an individual alleges that his life is wholly governed by those ideas. We decline to adopt such a self-defining approach.

Structural characteristics. A third indicium of a religion is the presence of "any formal, external, or surface signs that may be analogized to accepted religions. Such signs might include formal services, ceremonial functions, the existence of clergy, structure and organization, observance of holidays and other similar manifestations associated with the traditional religions." *Malnak, supra*, at 209.[5] MOVE lacks almost all of the formal identifying characteristics common to most recognized religions. For example, Africa testified that his organization did not conduct any special services and did not recognize any official customs. Similarly, the group apparently exists without an organizational structure. Although Africa claimed to be an ordained "Naturalist Minister," he did not make clear what responsibilities and benefits, if any, this title conferred on him in contradistinction to other MOVE members. Moreover, MOVE apparently celebrates no holidays. Finally, although Africa referred to a series of guidelines written by John Africa that allegedly set forth MOVE's principal tenets, no such documents were made available to the court; thus, the record contains nothing that arguably might pass for a MOVE scripture book. Given what we know from the record, we are of the view that MOVE is not structurally analogous to those "traditional" organizations that have been recognized as religions under the first amendment.

III.

We conclude first, that to the extent MOVE deals with "ultimate" ideas, it is concerned with secular matters and not with religious principles; second, that MOVE cannot lay claim to be a comprehensive, multi-faceted theology; and third, that MOVE lacks the defining structural characteristics of a traditional religion. We hold, therefore, that MOVE, at least as described by Africa, is not a religion for purposes of the religion clauses.[6] As the result of our holding in this case, the Commonwealth of Pennsylvania is not required under the first amendment to supply Frank Africa with a special raw-food diet.

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[5] Since "a religion may exist without any of these signs, they (may not be) determinative, at least by their absence, in resolving a question of definition." Malnak v. Yogi, 592 F.2d at 209.

[6] We emphasize that our holding is narrow in scope. We do not hold that MOVE forever must be classified as a purely secular organization. We do not preclude other members of MOVE from establishing, on the basis of other evidence, that they are entitled to the protections afforded by the free exercise clause.

B. Protection for Sincerely Held Religious Beliefs

UNITED STATES v. BALLARD

322 U.S. 78 (1944)

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Respondents were indicted and convicted for using, and conspiring to use, the mails to defraud. The indictment charged a scheme to defraud by organizing and promoting the I Am movement through the use of the mails. The charge was that certain corporations were formed, literature sold, funds solicited, and memberships in the I Am movement sought "by means of false and fraudulent representations, pretenses and promises." The false representations charged were eighteen in number. It is sufficient at this point to say that they covered respondents' alleged religious doctrines or beliefs. The following are representative:

> that Guy W. Ballard, now deceased, alias Saint Germain, Jesus, George Washington, and Godfre Ray King, had been selected and thereby designated by the alleged "ascertained masters," Saint Germain, as a divine messenger; and that the words of "ascended masters" and the words of the alleged divine entity, Saint Germain, would be transmitted to mankind through the medium of the said Guy W. Ballard;
>
> that Guy W. Ballard, during his lifetime, and Edna W. Ballard, and Donald Ballard had been selected as divine messengers through which the words of the alleged "ascended masters," including the alleged Saint Germain, would be communicated to mankind under the teachings commonly known as the "I Am" movement;
>
> that Guy W. Ballard, during his lifetime, and Edna W. Ballard and Donald Ballard had, by reason of supernatural attainments, the power to heal persons of ailments and diseases and to make well persons afflicted with any diseases, injuries, or ailments, and did falsely represent to persons intended to be defrauded that the three designated persons had the ability and power to cure persons of those diseases normally classified as curable and also of diseases which are ordinarily classified by the medical profession as being incurable diseases; and did further represent that the three designated persons had in fact cured hundreds of persons afflicted with diseases and ailments.

Each of the representations enumerated in the indictment was followed by the charge that respondents "well knew" it was false. The indictment alleged:

> At the time of making all of the afore-alleged representations, the defendants well knew that all of said aforementioned representations were false and untrue and were made with the intention on the part of the defendants to cheat, wrong, and defraud persons, and to obtain from persons money, property, and other things of value.

The indictment contained twelve counts, one of which charged a conspiracy to defraud. There was a demurrer and a motion to quash, which asserted, among other things, that the indictment attacked the religious beliefs of respondents and sought to restrict the free exercise

of their religion in violation of the Constitution. These motions were denied by the District Court. Early in the trial, however, objections were raised to the admission of certain evidence concerning respondents' religious beliefs. The court confined the issues on this phase of the case to the question of the good faith of respondents. At the request of counsel for both sides the court advised the jury of that action in the following language:

> Now, gentlemen, here is the issue in this case:
>
> First, the defendants in this case made certain representations of belief in a divinity and in a supernatural power. Some of the teachings of the defendants might seem extremely improbable to a great many people. For instance, the appearance of Jesus to dictate some of the works that we have had introduced in evidence, or shaking hands with Jesus, to some people that might seem highly improbable. I point that out as one of the many statements.
>
> Whether that is true or not is not the concern of this Court and is not the concern of the jury. As far as this Court sees the issue, it is immaterial what these defendants preached or wrote or taught in their classes. They are not going to be permitted to speculate on the actuality of the happening of those incidents. Therefore, the religious beliefs of these defendants cannot be an issue.
>
> The issue is: Did these defendants honestly and in good faith believe those things? If they did, they should be acquitted.
>
> If these defendants did not believe those things, they did not believe that Jesus came down and dictated, or that Saint Germain came down and dictated, did not believe the things that they wrote, the things that they preached, but used the mail for the purpose of getting money, the jury should find them guilty.

The District Court reiterated that admonition in the charge to the jury:

> The question of the defendants' good faith is the cardinal question in this case. You are not to be concerned with the religious belief of the defendants, or any of them. The jury will be called upon to pass on the question of whether or not the defendants honestly and in good faith believed the representations which are set forth in the indictment, and honestly and in good faith believed that the benefits which they represented would flow from their belief to those who embraced and followed their teachings, or whether these representations were mere pretenses without honest belief on the part of the defendants or any of them, and, were the representations made for the purpose of procuring money.

The Circuit Court of Appeals reversed the judgment of conviction and granted a new trial. In its view the restriction of the issue in question to that of good faith was error. Its reason was that the scheme to defraud alleged in the indictment was that respondents made the eighteen alleged false representations; and that to prove that defendants devised the scheme described in the indictment "it was necessary to prove that they schemed to make some, at least, of the (eighteen) representations . . . and that some, at least, of the representations which they schemed to make were false." The case is here on a petition for a writ of certiorari which we granted because of the importance of the question presented.

The objection of respondents is not that the truth of their religious doctrines or beliefs should have been submitted to the jury. Their demurrer and motion to quash made clear their position that that issue should be withheld from the jury on the basis of the First Amendment. Moreover, their position is that the court should have gone the whole way and withheld from the jury both that issue and the issue of their good faith.

As we have noted, the Circuit Court of Appeals held that the question of the truth of the representations concerning respondents' religious doctrines or beliefs should have been submitted to the jury. And it remanded the case for a new trial. We do not agree that the truth of respondents' religious doctrines or beliefs should have been submitted to the jury. The First Amendment precludes such a course. "[T]he Amendment embraces two concepts, -- freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom. The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. The First Amendment does not select any one type of religion for preferred treatment. It puts them all in that position. So we conclude that the District Court ruled properly when it withheld from the jury all questions concerning the truth or falsity of the religious beliefs or doctrines of respondents.

Respondents maintain that the reversal of the judgment of conviction was justified on other distinct grounds. The Circuit Court of Appeals did not reach those questions. In view of these circumstances we deem it more appropriate to remand the cause to the Circuit Court of Appeals so that it may pass on the questions reserved.

MR. CHIEF JUSTICE STONE, dissenting:

I am not prepared to say that the guaranty of freedom of religion affords immunity from

criminal prosecution for the fraudulent procurement of money by false statements as to one's religious experiences. To go no further, if it were shown that a defendant in this case had asserted as a part of the alleged fraudulent scheme, that he had physically shaken hands with St. Germain in San Francisco on a day named, or that, as the indictment here alleges, by the exertion of his spiritual power he "had in fact cured hundreds of persons afflicted with diseases and ailments," I should not doubt that it would be open to the Government to submit proof that he had never been in San Francisco and that no such cures had ever been effected. I see no occasion for making any pronouncement on this subject in the present case.

The indictment charges respondents' use of the mails to defraud and a conspiracy to commit that offense by false statements of their religious experiences which had not in fact occurred. But it also charged that the representations were "falsely and fraudulently" made, that respondents "well knew" that these representations were untrue, and that they were made with the intent to cheat and defraud those to whom they were made. With the assent of the prosecution and the defense the trial judge withdrew from the jury the question whether the alleged religious experiences had in fact occurred, but submitted to the jury the single issue whether petitioners honestly believed that they had occurred, with the instruction that if the jury did not so find, then it should return a verdict of guilty. On this issue the jury, on ample evidence that respondents were without belief in the statements which they had made, found a verdict of guilty. Since the indictment and the evidence support the conviction, it is irrelevant whether the religious experiences alleged did or did not occur or whether that issue could or could not, for constitutional reasons, have been rightly submitted to the jury. Certainly none of respondents' constitutional rights are violated if they are prosecuted for the fraudulent procurement of money by false representations as to their beliefs, religious or otherwise.

Obviously if the question whether the religious experiences in fact occurred could not constitutionally have been submitted to the jury the court rightly withdrew it. If it could have been submitted I know of no reason why the parties could not assent to its withdrawal from the jury. On the issue submitted to the jury it properly rendered a verdict of guilty. As no legally sufficient reason for disturbing it appears, the judgment below should be reversed.

MR. JUSTICE ROBERTS and MR. JUSTICE FRANKFURTER join in this opinion.

MR. JUSTICE JACKSON, dissenting:

I should say the defendants have done just that for which they are indicted. If I might agree to their conviction without creating a precedent, I cheerfully would do so. I can see in their teachings nothing but humbug, untainted by any trace of truth. But that does not dispose of the constitutional question whether misrepresentation of religious experience or belief is prosecutable; it rather emphasizes the danger of such prosecutions.

The Ballard family claimed miraculous communication with the spirit world and supernatural power to heal the sick. They were brought to trial for mail fraud on an indictment which charged that their representations were false and that they "well knew" they were false. The trial judge, obviously troubled, ruled that the court could not try whether the statements were untrue, but could inquire whether the defendants knew them to be untrue; and, if so, they could be convicted.

I find it difficult to reconcile this conclusion with our traditional religious freedoms.

In the first place, as a matter of either practice or philosophy I do not see how we can separate an issue as to what is believed from considerations as to what is believable. The most convincing proof that one believes his statements is to show that they have been true in his experience. Likewise, that one knowingly falsified is best proved by showing that what he said happened never did happen. How can the Government prove these persons knew something to be false which it cannot prove to be false? If we try religious sincerity severed from religious verity, we isolate the dispute from the very considerations which in common experience provide its most reliable answer.

In the second place, I do not know what degree of skepticism or disbelief in a religious representation amounts to actionable fraud. James points out that "Faith means belief in something concerning which doubt is still theoretically possible." Belief in what one may demonstrate to the senses is not faith. All schools of religious thought make enormous assumptions, generally on the basis of revelations authenticated by some sign or miracle. The appeal in such matters is to a very different plane of credulity than is invoked by representations of secular fact in commerce. Some who profess belief in the Bible read literally what others read as allegory or metaphor. Religious symbolism is even used by some with the same mental reservations one has in teaching of Santa Claus or Uncle Sam or Easter bunnies or dispassionate judges. It is hard in matters so mystical to say how literally one is bound to believe the doctrine he teaches and even more difficult to say how far it is reliance upon a teacher's literal belief which induces followers to give him money.

There appear to be persons -- let us hope not many -- who find refreshment and courage in the teachings of the "I Am" cult. If the members of the sect get comfort from the celestial guidance of their "Saint Germain," however doubtful it seems to me, it is hard to say that they do not get what they pay for. Scores of sects flourish in this country by teaching what to me are queer notions. It is plain that there is wide variety in American religious taste. The Ballards are not alone in catering to it with a pretty dubious product.

The chief wrong which false prophets do to their following is not financial. The collections aggregate a tempting total, but individual payments are not ruinous. The real harm is on the mental and spiritual plane. There are those who hunger after higher values which they feel wanting in their humdrum lives. When they are deluded and then disillusioned, cynicism and confusion follow. The wrong of these things, as I see it, is not in the money the victims part with half so much as in the mental and spiritual poison they get. But that is precisely the thing the Constitution put beyond the reach of the prosecutor, for the price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish.

Prosecutions of this character easily could degenerate into religious persecution. I do not doubt that religious leaders may be convicted of fraud for making false representations on matters other than faith or experience, as for example if one represents that funds are being used to construct a church when in fact they are being used for personal purposes. But that is not this case, which reaches into wholly dangerous ground. When does less than full belief in a professed credo become actionable fraud if one is soliciting gifts or legacies? Such inquiries

may discomfort orthodox as well as unconventional religious teachers, for even the most regular of them are sometimes accused of taking their orthodoxy with a grain of salt. I would dismiss the indictment and have done with judicially examining other people's faiths.

Note: In *Africa v. Commonwealth of Pennsylvania*, before the court considered whether Africa's beliefs were religious in nature, it considered, relying on *Ballard*, whether those beliefs were sincerely held:

"The relevant case law in the free exercise area suggests that two threshold requirements must be met before particular beliefs, alleged to be religious in nature, are accorded first amendment protection. A court's task is to decide whether the beliefs avowed are (1) sincerely held, and (2) religious in nature. If either of these two requirements is not satisfied, the court need not reach the question, often difficult in the penological setting, whether a legitimate and reasonably exercised state interest outweighs the proffered first amendment claim.

It is inappropriate for a reviewing court to attempt to assess the truth or falsity of an announced article of faith. Judges are not oracles of theological verity, and the Founders did not intend for them to be declarants of religious orthodoxy. See *United States v. Ballard*, 322 U.S. 78, 85-88 (1944). The Supreme Court has emphasized, however, that "while the "truth' of a belief is not open to question, there remains the significant question whether it is "truly held.' "[1] Without some sort of required showing of sincerity on the part of the individual or organization seeking judicial protection of its beliefs, the first amendment would become "a limitless excuse for avoiding all unwanted legal obligations."

The requirement of sincerity poses no obstacle to Africa in this case. The Commonwealth never intimated that Africa's convictions, however they might be denominated, were other than deeply held and sincerely advanced. Moreover, we are persuaded from our review of the record that Africa's opinions, especially those having to do with his diet, are "truly held" within the meaning of *Ballard* and *Seeger*.[2]"

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[1] We have found no case in which the Supreme Court has explicitly concluded that an inquiry into a claimant's sincerity also is necessary in a constitutional context. Such a requirement, however, plausibly can be inferred from *United States v. Ballard*. In addition, in two recent decisions, the Supreme Court observed, without commenting upon the significance of its observation, that the religious claim was sincerely held. *Thomas v. Review Bd., Ind. Employment Sec. Div.*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 235 (1972).

[2] There is nothing in the record to indicate that Africa has merely "adopt(ed) religious nomenclature and cynically use(d) it as a shield to protect (himself) when participating in antisocial conduct that otherwise stands condemned," *United States v. Kuch*, 288 F. Supp. 439, 443 (D.D.C.1968), or that MOVE is "a masquerade designed to obtain First Amendment protection for acts which otherwise would be unlawful and/or disallowed by prison authorities.

C. Protection Against Forced Affirmations of Belief

TORCASO v. WATKINS

367 U.S. 488 (1961)

MR. JUSTICE BLACK delivered the opinion of the Court.

Article 37 of the Declaration of Rights of the Maryland Constitution provides: "No religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God."

The appellant Torcaso was appointed to the office of Notary Public by the Governor of Maryland but was refused a commission to serve because he would not declare his belief in God. He then brought this action in a Maryland Circuit Court to compel issuance of his commission, charging that the State's requirement that he declare this belief violated "the First and Fourteenth Amendments to the Constitution of the United States."[1]

There is, and can be, no dispute about the purpose or effect of the Maryland Declaration of Rights requirement before us -- it sets up a religious test which was designed to and, if valid, does bar every person who refuses to declare a belief in God from holding a public "office of profit or trust" in Maryland. The power and authority of the State thus is put on the side of one particular sort of believers -- those who are willing to say they believe in "the existence of God." It is true that there is much historical precedent for such laws. Indeed, it was largely to escape religious test oaths that a great many early colonists left Europe and came here hoping to worship in their own way. It soon developed, however, that many of those who had fled to escape religious test oaths turned out to be perfectly willing, when they had the power to do so, to force dissenters from their faith to take test oaths in conformity with that faith. This brought on a host of laws in the new Colonies imposing burdens and disabilities of various kinds upon varied beliefs depending largely upon what group happened to be politically strong enough to legislate in favor of its own beliefs. The effect of all this was the formal or practical "establishment" of particular religious faiths in most of the Colonies, with consequent burdens on the free exercise of the faiths of nonfavored believers.

There were, however, wise and far-seeing men in the Colonies who spoke out against test oaths and the philosophy of intolerance behind them. When our Constitution was adopted, the desire to put the people "securely beyond the reach" of religious test oaths brought about the inclusion in Article VI of that document of a provision that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." Article VI supports the accuracy of our observation that "the test oath is abhorrent to our tradition." Not satisfied, however, with Article VI and other guarantees in the original Constitution, the First Congress proposed and the States very shortly thereafter adopted our Bill of Rights, including

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[1] Appellant also claimed that the State's test oath requirement violates Art. VI of the Federal Constitution." Because we are reversing the judgment on other grounds, we find it unnecessary to consider appellant's contention that this provision applies to state as well as federal offices.

the First Amendment. Since prior cases have thoroughly explored the history behind the First Amendment, and the scope of the religious freedom it protects, we need not cover that ground again. What was said in our prior cases we think controls our decision here.

In *Cantwell* v. *Connecticut*, we said:

"The First Amendment embraces two concepts, -- freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."

Later we decided *Everson* v. *Board of Education*, and said:

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"

It is argued here that this Court's later holding and opinion in *Zorach* v. *Clauson* had in part repudiated the statement in the *Everson* opinion quoted above. But nothing decided or written in *Zorach* lends support to the idea that the Court there intended to open up the way for government, state or federal, to restore the historically and constitutionally discredited policy of probing religious beliefs by test oaths or limiting public offices to persons who have, or perhaps more properly profess to have, a belief in some particular kind of religious concept.

We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.

In upholding the State's religious test for public office the highest court of Maryland said: "The petitioner is not compelled to believe or disbelieve, under threat of punishment or other compulsion. True, unless he makes the declaration of belief he cannot hold public office in Maryland, but he is not compelled to hold office." The fact, however, that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by criteria forbidden by the Constitution. This was settled by our holding in *Wieman* v. *Updegraff*. We there pointed out that Congress could not pass a law providing "that no federal employee shall attend Mass or take any active part in missionary work.'"

This Maryland religious test for public office unconstitutionally invades the appellant's freedom of belief and religion and therefore cannot be enforced against him.

WOOLEY *v.* MAYNARD

430 U.S. 705 (1977)

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The issue on appeal is whether the State of New Hampshire may constitutionally enforce criminal sanctions against persons who cover the motto "Live Free or Die" on passenger vehicle license plates because that motto is repugnant to their moral and religious beliefs.

Since 1969 New Hampshire has required that noncommercial vehicles bear license plates embossed with the state motto, "Live Free or Die." Another New Hampshire statute makes it a misdemeanor "knowingly [to obscure] the figures or letters on any number plate." The term "letters" in this section has been interpreted to include the state motto.

Appellees George Maynard and his wife Maxine are followers of the Jehovah's Witnesses faith. The Maynards consider the New Hampshire State motto to be repugnant to their moral, religious, and political beliefs.[1] Pursuant to these beliefs, the Maynards began early in 1974 to cover up the motto on their license plates.

On March 4, 1975, appellees brought the present action. Following a hearing, the District Court entered an order enjoining the State "from prosecuting [the Maynards] at any time in the future for covering over that portion of their license plates that contains the motto.

The District Court held that by covering up the state motto on his license plate, Mr. Maynard was engaging in symbolic speech." We find it unnecessary to pass on the "symbolic speech" issue, since we find more appropriate First Amendment grounds to affirm the judgment of the District Court. We turn instead to what in our view is the essence of appellees' objection to the requirement that they display the motto "Live Free or Die" on their automobile license plates. This is succinctly summarized in the statement made by Mr. Maynard in his affidavit filed with the District Court: "I refuse to be coerced by the State into advertising a slogan which I find morally, ethically, religiously and politically abhorrent."

We are thus faced with the question of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. We hold that the State may not do so.

A

The right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. See *Board*

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[1] Mr. Maynard described his objection to the state motto:

"[B]y religious training and belief, I believe my 'government' - Jehovah's Kingdom - offers everlasting life. It would be contrary to that belief to give up my life for the state, even if it meant living in bondage. Although I obey all laws of the State not in conflict with my conscience, this slogan is directly at odds with my deeply held religious convictions. I also disagree with the motto on political grounds. I believe that life is more precious than freedom."

of Education v.*Barnette*, 319 U.S. 624 (1943). A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind."

The Court in *Barnette* was faced with a statute which required public school students to participate in daily ceremonies by honoring the flag with words and gestures. The Court held that "a ceremony so touching matters of opinion may [not] be imposed upon the individual by official authority." Compelling the act of a flag salute involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate, but the difference is one of degree. Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life - indeed constantly while his automobile is in public view - to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the State "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to reserve from official control."

New Hampshire's statute in effect requires that appellees use their private property as a "mobile billboard" for the State's ideological message - or suffer a penalty. As a condition to driving an automobile - a virtual necessity for most Americans - the Maynards must display "Live Free or Die" to hundreds of people each day.[2] The fact that most individuals agree with the thrust of New Hampshire's motto is not the test; most Americans also find the flag salute acceptable. The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster an idea they find morally objectionable.

B

Identifying the Maynards' interests as implicating First Amendment protections does not end our inquiry. We must also determine whether the State's countervailing interest is sufficiently compelling to justify requiring appellees to display the state motto. The two interests advanced by the State are that display of the motto (1) facilitates the identification of passenger vehicles, and (2) promotes appreciation of history, individualism, and state pride.

The State first points out that passenger vehicles, but not commercial, trailer, or other vehicles are required to display the state motto. Thus, the argument proceeds, officers of the law are more easily able to determine whether passenger vehicles are carrying the proper plates. However, the record here reveals that New Hampshire passenger license plates normally consist of a specific configuration of letters and numbers, which makes them readily distinguishable from other types of plates, even without reference to the motto. Even were we to credit the State's reasons, "that purpose cannot be pursued by means that broadly stifle fundamental liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in light of less drastic means for achieving the same purpose."

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[2] Some States require that certain documents bear the seal of the State or some other official stamp for purposes of recordation. Such seal might contain a symbol or motto having political or philosophical implications. The purpose of such seal, however, is not to advertise the message it bears but simply to authenticate the document by showing the authority of its origin.

The State's second claimed interest is not ideologically neutral. The State is seeking to communicate to others an official view as to proper appreciation of history, state pride, and individualism. Of course, the State may legitimately pursue such interests in any number of ways. However, where the State's interest is to disseminate an ideology, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message. We conclude that the State of New Hampshire may not require appellees to display the state motto[3] upon their vehicle license plates.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE BLACKMUN joins, dissenting.

The Court holds that the required display of the motto is an unconstitutional "required affirmation of belief." The State has not forced appellees to "say" anything; and it has not forced them to communicate ideas with nonverbal actions reasonably likened to "speech," such as wearing a lapel button promoting a political candidate or waving a flag as a symbolic gesture. The State has simply required that *all* noncommercial automobiles bear license tags with the state motto. Appellees have not been forced to affirm or reject that motto; they are simply required to carry a state auto license tag for identification and registration purposes.

In Part A, the Court relies almost solely on *Barnette*. The Court cites *Barnette* for the proposition that there is a constitutional right to "refrain from speaking." What the Court does not demonstrate is that there is any "speech" or "speaking" in this case. The Court also relies upon the "right to decline to foster [religious, political, and ideological] concepts," and treats the state law as if it were forcing appellees to proselytize, or to advocate an ideological point of view. But this begs the question. The issue, unconfronted by the Court, is whether appellees, in displaying state license tags, the format of which is known to all as having been prescribed by the State, would be considered to be advocating political or ideological views.

The Court recognizes, as it must, that this case substantially differs from *Barnette*, in which schoolchildren were forced to recite the pledge of allegiance while giving the flag salute. However, the Court states "the difference is essentially one of degree." But having recognized the rather obvious differences between these two cases, the Court does not explain why the same result should obtain. The Court suggests that the test is whether the individual is forced "to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." But, once again, these are merely conclusory words, barren of analysis. For example, were New Hampshire to erect a multitude of billboards, each proclaiming "Live Free or Die," and tax all citizens for the cost of erection and maintenance, clearly the message would be "fostered" by the individual citizen-taxpayers and just as clearly those individuals would be "instruments" in that communication. Certainly, however, that

[3] It has been suggested that today's holding will be read as sanctioning the obliteration of the national motto, "In God We Trust" from United States coins and currency. That question is not before us today but we note that currency, which is passed from hand to hand, differs in significant respects from an automobile, which is readily associated with its operator. Currency is generally carried in a purse or pocket and need not be displayed to the public. The bearer of currency is thus not required to publicly advertise the national motto.

case would not fall within the ambit of *Barnette.* In that case, as in this case, there is no *affirmation* of belief. For First Amendment principles to be implicated, the State must place the citizen in the position of either apparently or actually "asserting as true" the message. This was the focus of *Barnette,* and clearly distinguishes this case from that one.

In holding that the New Hampshire statute does not run afoul of our holding in *Barnette,* the New Hampshire Supreme Court aptly articulated why there is no required affirmation of belief in this case: "The defendants' membership in a class of persons required to display plates bearing the State motto carries no implication and is subject to no requirement that they endorse that motto or profess to adopt it as matter of belief."

There is nothing which precludes appellees from displaying their disagreement with the state motto as long as the methods used do not obscure the license plates. Thus appellees could place on their bumper a bumper sticker explaining that they do not profess the motto "Live Free or Die" and that they disagree with the connotations of that motto. Since any implication that they affirm the motto can be easily displaced, I cannot agree that the statutory system may be invalidated under the fiction that appellees are forced to affirm, or profess belief in, the state motto.

The logic of the Court's opinion leads to startling and totally unacceptable results. For example, the mottoes "In God We Trust" and "E Pluribus Unum" appear on the coin and currency of the United States. I cannot imagine that the statutes proscribing defacement of United States currency impinge upon the First Amendment rights of an atheist. The fact that an atheist carries and uses currency does not, in any meaningful sense, convey any affirmation of belief in the motto "In God We Trust." Similarly, there is no affirmation of belief involved in the display of state license tags upon the private automobiles involved here.

McDANIEL v. PATY

435 U.S. 618 (1978)

MR. CHIEF JUSTICE BURGER announced the judgment of the Court and delivered an opinion in which MR. JUSTICE POWELL, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS joined.

The question presented by this appeal is whether a Tennessee statute barring "[Ministers] of the Gospel, or [priests] of any denomination whatever" from serving as delegates to the State's limited constitutional convention deprived appellant McDaniel, an ordained minister, of the right to the free exercise of religion guaranteed by the First Amendment.

I

In its first Constitution, in 1796, Tennessee disqualified ministers from serving as legislators.[1] That disqualifying provision has continued unchanged since its adoption. The

[1] "Whereas Ministers of the Gospel are by their profession, dedicated to God and the care of Souls, and ought not to be diverted from the great duties of their functions; therefore, no

state legislature applied this provision to candidates for delegate to the State's 1977 constitutional convention when it enacted ch. 848, § 4 of the 1976 Tenn. Pub. Acts. McDaniel, an ordained minister of a Baptist Church in Chattanooga, filed as a candidate for delegate to the convention. An opposing candidate sued for a declaratory judgment that McDaniel was disqualified from serving as a delegate.

II

The disqualification of ministers from legislative office was a practice carried from England by seven of the original States; later six new States excluded clergymen from some political offices. The purpose in providing for disqualification was primarily to assure the success of a new political experiment, the separation of church and state. Prior to 1776, most of the 13 Colonies had some form of an established, or government-sponsored, church. Even after ratification of the First Amendment, some States continued pro-establishment provisions. Massachusetts, the last State to accept disestablishment, did so in 1833.

In light of this history and a widespread awareness during that period of undue and often dominant clerical influence in public and political affairs here, in England, and on the Continent, it is not surprising that strong views were held by some that one way to assure disestablishment was to keep clergymen out of public office.

As the value of the disestablishment experiment was perceived, 11 of the 13 States disqualifying the clergy from some types of public office gradually abandoned that limitation. Today Tennessee remains the only State excluding ministers from certain public offices.

The essence of this aspect of our national history is that in all but a few States the selection or rejection of clergymen for public office soon came to be viewed as something safely left to the good sense and desires of the people.

This brief review of the history of clergy-disqualification provisions also amply demonstrates, however, that, at least during the early segment of our national life, those provisions enjoyed the support of responsible American statesmen and were accepted as having a rational basis. Against this background we do not lightly invalidate a statute enacted pursuant to a provision of a state constitution which has been sustained by its highest court.

However, the right to the free exercise of religion unquestionably encompasses the right to preach, proselyte, and perform other similar religious functions, or, in other words, to be a minister of the type McDaniel was found to be. Tennessee also acknowledges the right of its adult citizens generally to seek and hold office as legislators or delegates. Yet under the clergy-disqualification provision, McDaniel cannot exercise both rights simultaneously because the State has conditioned the exercise of one on the surrender of the other. Or, in Madison's words, the State is "punishing a religious profession with the privation of a civil right." In so doing, Tennessee has encroached upon McDaniel's right to the free exercise of religion. "[To] condition the availability of benefits [including access to the ballot] upon this

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Minister of the Gospel, or priest of any denomination whatever, shall be eligible to a seat in either House of the Legislature." Tenn. Const., Art. VIII, § 1 (1796).

appellant's willingness to violate a cardinal principle of [his] religious faith [by surrendering his ministry] effectively penalizes the free exercise of [his] constitutional liberties."

If the Tennessee disqualification provision were viewed as depriving the clergy of a civil right solely because of their religious beliefs, our inquiry would be at an end. The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such. In *Torcaso* v. *Watkins*, the Court reviewed the Maryland constitutional requirement that all holders of "any office of profit or trust in this State" declare their belief in the existence of God. In striking down the requirement, the Court did not evaluate the interests justifying it but rather held that it violated freedom of religious belief.

In our view, however, *Torcaso* does not govern. By its terms, the Tennessee disqualification operates against McDaniel because of his *status* as a "minister." The meaning of those words is, of course, a question of state law. And although the question has not been examined extensively in state-law sources, such authority as is available indicates that ministerial status is defined in terms of conduct and activity rather than in terms of belief. Because the Tennessee disqualification is directed primarily at status, acts, and conduct it is unlike the requirement in *Torcaso*, which focused on *belief*. Hence, the Free Exercise Clause's absolute prohibition of infringements on the "freedom to believe" is inapposite here.

This does not mean, of course, that the disqualification escapes judicial scrutiny or that McDaniel's activity does not enjoy significant First Amendment protection. The Court recently declared: "[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."

Tennessee asserts that its interest in preventing the establishment of a state religion is consistent with the Establishment Clause and thus of the highest order. The constitutional history of the several States reveals that generally the interest in preventing establishment prompted the adoption of clergy disqualification provisions; Tennessee does not appear to be an exception to this pattern. There is no occasion to inquire whether promoting such an interest is a permissible legislative goal, however, for Tennessee has failed to demonstrate that its views of the dangers of clergy participation in the political process have not lost whatever validity they may once have enjoyed. The rationale underlying the Tennessee restriction on ministers is that if elected to public office they will necessarily exercise their powers and influence to promote the interests of one sect or thwart the interests of another, thus pitting one against the others, contrary to the anti-establishment principle with its command of neutrality. However widely that view may have been held in the 18th century, the American experience provides no persuasive support for the fear that clergymen in public office will be less careful of anti-establishment interests or less faithful to their oaths of civil office than their unordained counterparts.

We hold that § 4 of ch. 848 violates McDaniel's First Amendment right to the free exercise of his religion made applicable to the States by the Fourteenth Amendment.

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, concurring in the judgment.

I

The Tennessee Supreme Court sustained Tennessee's exclusion rel[ying] on two interrelated propositions which are inconsistent with decisions of this Court. The first is that a distinction may be made between "religious belief or religious action" on the one hand, and the "career or calling" of the ministry on the other. The second is that the disqualification provision does not interfere with the free exercise of religion because the practice of the ministry is left unimpaired; only candidacy for legislative office is proscribed.

The characterization of the exclusion as one burdening appellant's "career or calling" and not religious belief cannot withstand analysis. Clearly freedom of belief protected by the Free Exercise Clause embraces freedom to profess or practice that belief, even including doing so to earn a livelihood. One's religious belief surely does not cease to enjoy the protection of the First Amendment when held with such depth of sincerity as to impel one to join the ministry.

The provision imposes a unique disability upon those who exhibit a defined level of intensity of involvement in protected religious activity. Such a classification as much imposes a test for office based on religious conviction as one based on denominational preference. Because the challenged provision establishes as a condition of office the willingness to eschew certain protected religious practices, *Torcaso* v. *Watkins*, 367 U.S. 488 (1961), compels the conclusion that it violates the Free Exercise Clause.

The second proposition -- that the law does not interfere with free exercise because it does not directly prohibit religious activity, but merely conditions eligibility for office on its abandonment -- is also squarely rejected by precedent. Because the challenged provision requires appellant to purchase his right to engage in the ministry by sacrificing his candidacy it impairs the free exercise of his religion.

II

The justification of the prohibition as intended to prevent those most intensely involved in religion from injecting sectarian goals and policies into the lawmaking process, and thus to avoid fomenting religious strife or the fusing of church with state affairs, itself raises the question whether the exclusion violates the Establishment Clause. As construed, the exclusion manifests patent hostility toward, not neutrality respecting, religion; forces or influences a minister or priest to abandon his ministry as the price of public office; and, in sum, has a primary effect which inhibits religion.

Our decisions interpreting the Establishment Clause have aimed at maintaining the wall between church and state. Governments have been required to refrain from favoring the tenets or adherents of any religion or of religion over nonreligion. Beyond situations in which government may take cognizance of religion for purposes of accommodating religious liberty, government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits. Tennessee nevertheless invokes the Establishment Clause to excuse the imposition of a civil disability upon those deeply involved in religion. In my view, that Clause will not permit the deprivation of religious liberty here involved.

That public debate of religious ideas may arouse emotion, may incite, may foment religious divisiveness and strife does not rob it of constitutional protection. The mere fact that a purpose of the Establishment Clause is to reduce or eliminate religious divisiveness or strife, does not place religious discussion, association, or political participation in a status less preferred than rights of discussion, association, and political participation generally.

The State's goal of preventing sectarian strife may not be accomplished by regulating religious speech and political association. The Establishment Clause does not license government to treat religion and those who teach or practice it as subversive of American ideals and therefore subject to unique disabilities. Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity. The Establishment Clause is a shield against any attempt by government to inhibit religion as it has done here. It may not be used as a sword to justify repression of religion or its adherents from any aspect of public life. The antidote which the Constitution provides against zealots who would inject sectarianism into the political process is to subject their ideas to refutation in the marketplace of ideas and their platforms to rejection at the polls.

MR. JUSTICE STEWART, concurring in the judgment.

Like MR. JUSTICE BRENNAN, I believe that *Torcaso* v. *Watkins* controls this case. Except for the fact that Tennessee bases its disqualification not on a person's statement of belief, but on his decision to pursue a religious vocation as directed by his belief, that case is indistinguishable from this one -- and that sole distinction is without constitutional consequence.[*]

MR. JUSTICE WHITE, concurring in the judgment.

The plurality states that § 4 "has encroached upon McDaniel's right to the free exercise of religion," but fails to explain in what way McDaniel has been deterred in the observance of his religious beliefs. Certainly he has not felt compelled to abandon the ministry, nor has he been required to disavow any of his religious beliefs. Because I am not persuaded that the Tennessee statute in any way interferes with McDaniel's ability to exercise his religion as he desires, I would not rest the decision on the Free Exercise Clause, but instead would turn to McDaniel's argument that the statute denies him equal protection of the laws. Because I conclude that the State's justification for frustrating the desires of voters and for depriving McDaniel and all other ministers of the right to seek this position is insufficient, I would hold § 4 unconstitutional as a violation of the Equal Protection Clause.

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[*] In *Cantwell* v. *Connecticut*, this Court recognized that "the [First] Amendment embraces two concepts, -- freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." The disability imposed on McDaniel, like the one imposed on Torcaso, implicates the "freedom to believe" more than the less absolute "freedom to act." As did Maryland in *Torcaso*, Tennessee has penalized an individual for his religious status -- for what he is and believes in -- rather than for any particular act deemed harmful to society.