

A silhouette of a person in a yoga pose (Urdhva Dhanurasana) is centered at the bottom of the page. The background is a vibrant sunset over a body of water, with the sun low on the horizon, creating a bright orange and yellow glow. The sky is filled with soft, wispy clouds. The overall mood is serene and peaceful.

# Yoga and the First Amendment:

Ten years ago, only 3 million Americans practiced yoga. Today that number is estimated to be 30 million people. Schools are increasingly offering yoga as part of a physical education curriculum, but not everyone is happy about it. This article explores the basics of what is likely to be a frequent litigation issue in the coming years.

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# Does Yoga Promote Religion?

The first three general topics discussed in this article are the First Amendment and definitions of religion and yoga. Each is already the subject of reams of books and articles so the discussion of them here is, by necessity, brief. Following those topics we will discuss how yoga has been treated by several state taxing authorities, review an analysis of two important cases about First Amendment challenges to yoga and meditation in public schools, and conclude by discussing the Sedlock complaint in California.

## The First Amendment

The First Amendment to the United States Constitution states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Until the Fourteenth Amendment was added to the Constitution in 1868, the First Amendment's restraints did not apply to the states. But since then, the Fourteenth Amendment has imposed the same substantive limitations on the states' power to legislate that the First Amendment has always imposed on the U.S. Congress. The California Constitution contains comparable religious freedom provisions in Article I, §4; Article XVI, §5; and Article IX, §8.

So far as religion is concerned, there are two separate clauses in the First Amendment—the Establishment Clause and the Free Exercise Clause. Our focus will be primarily on the Establishment Clause because it is more likely to be implicated in cases which involve teaching yoga in public schools. There is a substantial amount of reported case law regarding the Establishment Clause. We will discuss only a few examples which demonstrate how courts view various school or government activities that intersect with potentially religious activity.

## How Courts Determine Religious Activity

For a state action to be constitutional and not violate the Establishment Clause, it must survive a three-part analysis called the Lemon test: “(1) the challenged governmental action must have a secular purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) it must not foster an excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105 (1971).

## First Prong—Secular Purpose

In analyzing the first prong of the *Lemon* test, the activity does not need to be exclusively secular to be upheld. An activity that has both secular and religious purposes can be constitutional. The Supreme Court has stated that “A religious purpose alone is not enough to invalidate an act of a state legislature. The religious purpose must predominate.” *Edwards v. Aguillard*, 482 U.S. 578, 598, 107 S.Ct. 2573 (1987). As stated in *McGowan v. Maryland*, 366 U.S. 420, 442, 81 S. Ct. 1101 (1961) “[T]he Establishment Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions.” Further, and a potentially important point in the debate over yoga, what was once a religious activity can become secular. For example, it has been noted that, “Although Christmas trees once carried religious connotations, today they typify the secular celebration

of Christmas.” *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 109 S. Ct. 3086 (1989).

### Second Prong—Advancement or Inhibition

In looking at the second prong of the Lemon test and whether the activity advances or inhibits religion, the courts look to whether the activity has the purpose or effect of endorsing, favoring, or promoting religion. In *Wallace v. Jeffree*, a moment-of-silence statute was found to be unconstitutional because it was “enacted ... for the sole purpose of expressing the State’s endorsement of prayer activities.” 472 U.S. at 60, 105 S. Ct. 2479. In that case the Alabama statute required “a period of silence not to exceed one minute in duration ... for meditation or voluntary prayer.” *Id.* Yet, other courts have found moments of silence to be constitutional. For example, in *Bown v. Gwinnett County School District*, 112 F.3d 1464 (11th Cir. 1997) the court held a Georgia statute constitutional that required a moment of silence in public schools because it had a clearly secular purpose and the word “prayer” was not included; rather, it was a moment of “quiet reflection.” *Id.* For similar reasons the Fourth Circuit upheld Virginia’s statute that prescribed “one minute of silence in each classroom.” *Brown v. Gilmore*, 258 F.3d 265, 281 (4th Cir. 2001).

### Third Prong—Excessive Entanglement

In order to determine whether the state action has an excessive entanglement with religion the activity as a whole must be evaluated. The Supreme Court has repeatedly stated that to “Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause.” See, e.g. *Lynch v. Donnelly*, 465 U.S. 668, 680, 104 S. Ct. 1355 (1984). The constitutionality of the activity and whether there is excessive entanglement depends on the entire context. For example, the displaying of the Ten Commandments can be constitutional in one context but not another. See *Van Orden v. Perry*, 545 U.S. 677, 681, 125 S. Ct. 2854 (2005) (upholding a Ten Commandments display on state capitol grounds among other historical documents); and *Stone v. Graham*, 449 U.S. 39, 101 S. Ct. 192 (1980) (the court held that the display of the Ten Commandments on the walls of public classrooms violated the Establishment Clause).

It is important to note that if the court finds the activity is not religious in nature, it is not necessary to look to whether there is excessive entanglement. *Newdow v. Rio Linda Union School Dist.*, 597 F.3d 1007, 1038 (2010). For example, in *Newdow*, the court analyzed whether the recital of the Pledge of Allegiance was constitutional. *Id.* Because the court found it was a patriotic and not a religious exercise, it was not necessary to analyze excessive entanglement. *Id.*

The Supreme Court has held under certain circumstances that prayers, invocations, and other overtly religious activities in public schools violate the Establishment Clause. “A student-led prayer before high school football games; a prayer delivered by a clergyman in a high school graduation ceremony; a period of silence in a public school for ‘meditation or voluntary prayer;’ a required Bible reading before each school day; and a daily prayer have all been invalidated as unconstitutional school-sponsored religious activities.” *Newdow*, 597 F.3d at 1020. However, those are generalizations; each situation must be considered based on individual facts, and some of those activities have been allowed on their specific facts. *Id.*

## A Problem of Definition: What is Religion?

In order to assess whether yoga is religious or promotes religion, it is important to understand what religion is in the first place. That is no simple task. Because it crosses so many different boundaries in human experience, religion is notoriously difficult to define. Many definitions of religion have been too inclusive, and many have been too exclusive. Defining religion, for example, with reference to a “God” excludes religions like Buddhism and Jainism which are atheistic and do not include a god or some other deity who created and maintains the universe. Defining religion too broadly also has its drawbacks, since it can be used to describe a person’s intense devotion towards something that is not usually considered religious, like a professional football team.

One scholar has addressed this definitional problem as follows:

It was once a tactic of students of religion to cite the appendix of James H. Leuba’s *Psychological Study of Religion* (1912), which lists more than fifty definitions of religion, to demonstrate that “the effort clearly to define religion in short compass is a hopeless task” (King 1954). Not at all! The moral of Leuba is not that religion cannot be defined, but that it can be defined, with greater or lesser success, more than fifty ways. Besides, Leuba goes on to classify and evaluate his list of definitions. “Religion” is not a native term; it is a term created by scholars for their intellectual purposes and therefore is theirs to define.

As another scholar of religion, Paul Griffiths, explains: “Defining religion is a little like writing diet books or forecasting the performance of the stock market: there’s a great deal of it about and none of it seems to do much good.” In response Griffiths defines religion as “a form of life that seems to those who belong to it to be comprehensive, incapable of abandonment, and of central importance.” Furthermore, “For an account to be comprehensive it must seem to those who offer it that it takes account of everything, that nothing is left unaccounted for by it.” For an account to seem unsurpassable then it is “incapable of being replaced by or subsumed in a better account of what it accounts for.” And, according to Griffiths, for an account to seem central, then it will seem to adherents “to address the questions of paramount importance to the ordering of their lives.” This definition, as Griffiths duly notes, “avoids the difficulty of specifying what the content of a religious form of life should be.” These quotes from Paul Griffiths are important not only for their own academic contribution but, as will become apparent later, are also important for the development of modern judicial definitions of religion in the First Amendment context.

While Griffiths’ definitions may, to an untrained eye, appear to be too broad and might include the fanatical yet commendable devotion to a sports team, the crucial difference is that in religion the form of life is comprehensive, addresses central questions, is incapable of abandonment and is non-negotiable. These terms do not describe even the most ardent sports fan. When it comes down to it, First Amendment lawsuits require that a court try to define something which religious scholars find incapable of simple definition.

Of course American jurisprudence has weighed in on what constitutes religion. The definition began narrowly and has broadened over time. The first definition was introduced in *Davis v. Beason*, 133 U.S. 333, 342, 10 S. Ct. 299 (1890), in which the Supreme Court

defined religion as a term that “has reference to one’s views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.” This theistic definition lasted well into the twentieth century. *United States v. Macintosh*, 283 U.S. 605, 633-34, 51 S.Ct. 570 (1931).

The definition was expanded by Judge Hand in *United States v. Kauten*, when he defined religion as “a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets.” 133 F.2d 703, 706 (2d Cir. 1943). This broader definition of religion, not merely as a belief in a single supernatural being but rather in human relationships at large, was adopted by the Supreme Court in *United States v. Ballard* which defined religion as including “theories of life and of death of the hereafter which are rank heresy to followers of the orthodox faiths.” 322 U.S. 78, 86-87 (1944). The court went on to note that “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.” *Id.* The court recognized that religion is not simply limited to the theistic definition it had adopted in *Davis v. Beason* almost 50 years before. (See also *Torcaso v. Watkins*, 367 U.S. 488, 81 S. Ct. 1680 (1961), striking down a Maryland statute which required office-holders to declare a belief in God, because government cannot “aid those religions based on a belief in the existence of God as against those founded on different beliefs.”)

The Supreme Court offered additional guidance on how to apply the definition of religion by adopting what sounds like Griffiths’ notion of “central importance,” the “ultimate concerns” test, in *United States v. Seeger*, 380 U.S. 163, 85 S. Ct. 850 (1965) and *Welsh v. United States*, 398 U.S. 333, 90 S. Ct. 1792 (1970), both of which were conscientious objector cases. At issue in the conscientious objector cases was the interpretation of a federal statute which exempted from combat military service people opposed to war “by reason of religious training and belief.” *Seeger*, 380 U.S. at 380. The objectors in *Seeger* and *Welsh* did not profess theistic objections

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to war. The Court used a broad definition of religion. Its reason for doing so was that Congress, in choosing to exempt people from combat service, could “not draw the line between theistic or non-theistic beliefs on the one hand and secular beliefs on the other.” 398 U.S. at 356, 90 S. Ct. at 1805 (Harlan, J., concurring). The ultimate concerns test asks the question “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 the exemption?” *Seeger*, 380 U.S. at 184. To answer that question the courts must look to two sub-issues: “whether the beliefs professed by a registrant are

sincerely held and whether they are, in [the objector’s] own scheme of things, religious.” *Id.* at 185.

Circuit courts have tried to apply the Supreme Court’s definitions and provide a workable framework. For example, in *Malmak v. Yogi*, 592 F.2d 197 (3d. Cir., 1979), the issue was whether a transcendental meditation class taught in a public high school was religious in nature and, therefore, barred from public funding. The Court concluded that the classes were religious in nature, and thus violated the constitutional prohibition on governmental establishment of religion. The facts of the case are discussed in more detail later in this article, but Judge Adams’s concurring opinion contains a lengthy, detailed section about the historical development of the legal definition of religion. His approach has been adopted by several other circuits. See *Africa v. Pennsylvania*, 662 F.2d 1025 (3d. Cir. 1981), *United States v. Myers*, 95 F.3d 1475 (10th Cir. 1996), and *United States v. Quaintance*, 471 F. Supp. 2d 1153 (D.N.M. 2006). Judge Adams’s opinion is an excellent discussion, and far more comprehensive than the space here allows.

Basically Judge Adams conducted an evolutionary, historical review, starting with the Supreme Court’s classical, theistic approach to religion in *Davis v. Beason*, 133 U.S. 333 (1890). He went on to analyze school prayer and conscientious objector cases, pointing out how the U.S. Supreme Court, over time, realized that religion cannot be confined to a theistic definition. As Adams aptly states: “If the old definition of religion has been repudiated, however, the new definition remains not yet fully formed.” *Malmak*, 592 F.2d 197, 207. He then proposed a three part definition. The first question is what are the ideas in question? The point here is to examine the content to see if it is consistent with the assertion that it is, or is not, religious in nature. Religion should address fundamental questions or, harkening back to Griffiths definition, “ultimate concerns.” *Id.* at 208-09. Religions are not confined to one question or moral teaching; they have broad scope, which leads to the second question: Is the doctrine at issue “comprehensive?” *Id.* at 209. While something may address some “ultimate concerns,” does it “proffer a systematic series of answers to them that might begin to resemble a religion?” *Id.* And finally, are there formal, external signs that can be compared with accepted religions, like services, clergy, or holidays? *Id.*

Even using Adams’s proposed three-part test, the lines between religion and philosophy can be blurry. For example, are Confucianism and Taoism religions or philosophies? The subject has been debated extensively amongst religious scholars. Some people casually refer to them as ancient Chinese religions, but in some cases they are characterized as philosophies or even as sciences. One university might teach classes about Taoism under the umbrella of the department of religious studies, while another may teach it under the banner of the philosophy department. While these distinctions may seem abstract or theoretical, what happens when they become the subject of a First Amendment lawsuit? As the caption of this section suggests, labels and definitional problems are serious in the First Amendment context.

The overriding theme of the Supreme Court’s cases and Adams’s opinion seem to be to keep one’s eyes, ears and mind open; defining something as religious or not takes a careful and broad analysis. For example, the specific words spoken or read may not be enough to define something as religious standing alone, but placed in context they may. This approach will become more apparent later when we

discuss *Malnak v. Yogi* in more detail, and one case involving yoga.

## Another Problem of Definition: What is Yoga?

### *Historical Roots and Levels of Practice*

Just as religion is hard to define, so too is yoga. Many people in the United States think of yoga as simply a discipline composed of challenging physical poses. It is, however, far more than that if one considers its origins and the contexts within which it was practiced and developed. It is partly because of these foundations that there are First Amendment challenges to yoga teaching.

Though the word “yoga” itself derives from the Sanskrit verb *√yuj* (“to yoke, bind or unite”), one has to be careful when translating from Sanskrit to English. The term “yoga” “is seldom used in the sense of ‘yoke,’ ‘join’ or ‘union’ as is sometimes claimed in popular accounts of yoga,” or as is claimed by the plaintiff in the Sedlock case in San Diego. The term “yoga” more accurately and more generally refers to any sort of disciplined practice, and in this specific context the term is used as “concentration” or “disciplined meditation.” Consequently, while many people could say that they are practicing yoga, each could be using the term differently and referring to different activities—cognitive, physical, or otherwise.

Philosophically, the Indian school of thought called “Yoga” was codified between the 3rd and 4th centuries CE in the Yoga Sutras of Patañjali. It holds that liberation from the cycle of birth and rebirth is brought about by discerning the duality between *purusa* (consciousness) and *prakrti* (materiality). The root cause of suffering and rebirth is an incorrect cognitive habit, namely the misidentification of consciousness (*purusa*) with the material world (*prakrti*). The goal of reaching and maintaining the right cognitive habit, achieving the desired state of awareness and, in this particular context, breaking out of the cycle of birth and rebirth, is attainable by following the practices outlined in the *astanga* (eight limbs) of Yoga, only one of which is *asana* (posture). The other seven limbs are: *yama* (restraint); *niyama* (observance); *pranayama* (breath control); *pratyahara* (withdrawal of sense-organs); *dharana* (fixation); *dhyana* (reflective meditation); and *samadhi* (cultivation of altered states of awareness). Yoga taught and practiced in this specific lineage may fit Griffiths’s definition of religion, namely “a form of life that seems to those who inhabit it to be comprehensive, incapable of abandonment, and of central importance.”

This characterization of yoga, though, is derived from Yoga Sutras of Patañjali. As already mentioned, a more general use of the term “yoga” refers to any sort of “discipline practice” and only a subset of this is “disciplined meditation.” The term yoga was and is used in India bereft of distinguishing content—especially religious content. Anyone who practiced and practices “disciplined meditation,” for this reason, could be said to be “doing yoga.” Historically yoga has evolved in and outside of India in a number of different and even irreconcilable directions. Some who claim to practice yoga focus on the discipline of the mind, while others focus exclusively on the health of the body without reference to, or interest in, meditation, disciplined or otherwise, and without reference to, or interest in, states of awareness. Yoga is, therefore, not part of just one religion, and is a required practice for only those who claim to follow the version prescribed in Patañjali’s Yoga Sutras.

But is yoga in America today the same, or close to what is written in the Yoga Sutras? Stephanie Symon, who wrote an account of how

yoga developed in this country, elegantly describes the situation:

In a country as vast and diverse as ours, yoga has had this going for it: it’s not a unified system, nor even a tree with many branches. It might be three or five trees of different species, each with many branches. ... Yoga is so massive and complicated, so contradictory and baroque, that American society has been able to assimilate any number of versions of it, more or less simultaneously.

First Amendment challengers will tend to lump all yoga into one group of “religious” practitioners, not differentiating the practice or teaching of groups of yoga practitioners who do not attach themselves to Patañjali and who focus exclusively on the health of the body. Courts will have to ask whether those seemingly “secular” practitioners do, either in principle or practice, profess or advance religious beliefs. When they perform certain positions do they know

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and reflect upon the ancient origins of the posture, and any distant religious overtones? Do they require a set ritual, a set of shared beliefs, a clergy, holy places, or other trappings of organized religion? And, moreover, does yoga seem to the overwhelming majority of American practitioners to be “comprehensive?”

### *Is Yoga Inherently Religious?*

There are people who argue that yoga cannot be separated from religion. This is the argument—in San Diego and elsewhere—that yoga is “inherently religious.” For example, in a 2011 article on the Christian Century website, John Sheveland quotes the Hindu American Foundation to say, in essence, that the version of yoga taught in the United States, focusing on physical postures and stretching, is a watered-down version. By limiting themselves to a Patañjali-oriented interpretation (and by insidiously injecting their own agenda), the Hindu American Foundation argues that true yoga cannot be disassociated from Hinduism, further fueling the fire of First Amendment challenges. In his article, Sheveland cites Albert Mohler, president of the Southern Baptist Theological Seminary in Louisville, Ky., who unknowingly embraces, confirms, and supports the Hindu American Foundation perspective and thus contends that “Christians cannot develop a Yoga practice without disregarding the Biblical witness, risking their souls and being compromised by Yogis hyper sexuality.” The National Center for Law and Policy, which we will discuss in more detail later, has a section of its website devoted to Biblical passages which can be used to argue that true Christians cannot practice yoga. These authors or advocacy groups are, of course, generalizing about all of yoga from the limited perspective

of the Indian school of thought called “Yoga,” found in the Yoga Sutras of Patañjali.

In contrast, other authors appeal to a different, non-Patañjali version of Yoga, pointing out how yoga breath control and exercises can positively influence a Christian’s ability to pray, contemplate God and receive the Eucharist. They contend that a physical practice respecting both mind and body merits the attention of Christians, and the Jesuits have long taught the integration of mind and body.

Sheveland, for example, in opposition to some of the groups in his article, argues that yoga and Christianity can easily enhance each other and be perfectly compatible. For example, if yoga’s preference is for holistic living, then it must call for mind, body and action to mutually support and explain each other. Likewise for Christianity, worship and ritual that do not lead to ethical action fails to be worship. It seems, though, that their ability to enhance each other and coexist does not answer the basic question of whether yoga is a religion. This is because there are many religions that, over time, adopt prevailing and popular non-religious practices or practices from other religions, and, to the extent that in Sanskrit, the language of ancient India, the word “yoga” means “union,” that union is traditionally considered to be between the mind, body and spirit. How does that apply to yoga and the First Amendment?

The asanas, the physical postures of yoga, improve strength, balance and flexibility, no matter how it is taught. In addition, depending upon the pace or flow of the poses and the room temperature, yoga can substantially increase heart rate and have cardiovascular benefits. Broadly speaking, the physical poses of yoga are typically paired with the instructor’s reminders to breathe properly. Such practices can have beneficial effects for the body. These effects have been documented and have been published in credible and scholarly journals such as *The Lancet* and the *Journal of the American Medical Association (JAMA)*. All of these physical benefits can easily be gained with no hint of religion or spirituality.

What effect can yoga have on the mind? The combination of these physical effects, coupled with inward reflection, can decrease anxiety, improve focus and increase the capacity for mental and physical discipline. Yoga and meditation are now commonly suggested for patients with anxiety disorders and some attention deficit issues, and the success of the strategy is supported by the scientific literature. Yoga is reimbursable by Medicare under certain circumstances as well as by leading insurance companies like Kaiser Permanente, and yoga is even provided by the federal government to combat soldiers, to reduce stress and promote clearer and calmer decision making in battle. These benefits can also clearly be attained without any religious overtones.

The last of the three prongs is the spirit, which is where yoga has the potential—even as practiced far from its ancient roots—to cause First Amendment clashes. What is the “spirit” aspect? Is it only a yoga practice advanced enough to incorporate all eight of the limbs prescribed by the Yoga Sutras? The website *about.com* has a specific section about yoga, including whether it is a religion. That section, authored by Ann Pizer, immediately examines the difference between religion and spirituality:

Those who participate in organized religion accept their denomination’s deity or deities and worship through a system of long established rituals. They may read sacred texts that outline a moral code, which they follow, and they may attend

worship meetings lead [sic] by religious leaders who have been ordained by an authority in that religion.

By contrast we can define spirituality as the quest for understanding of ourselves and our place in the universe. Many use organized religion as the conduit for their spirituality, but spirituality can also exist outside the bounds of religion. In other words, spiritual practice is essential to religion but religion is not essential to spiritual practice. Yoga does share some things in common with religion, including a study of ancient texts and the gathering of like-minded individuals for study under a learned teacher, but these things alone do not constitute a religion.

Pizer points out that many people are confused by Yoga’s relationship with Hinduism. In her view they are simply both products of ancient India that have evolved in substantially different forms.

So if yoga isn’t religion, what is it? It could be a hobby, sport, fitness regimen, or recreational activity. It could be considered a philosophy, a discipline, or an adjunct to meditative self-reflection. Unquestionably, yoga can be used along with meditation to achieve subtle effects on the mind and emotions. So while it may become, or has the potential to become, a “spiritual” or religious practice, these are not forms of life that seem to be comprehensive, incapable of abandonment and of central importance for most practitioners. While “ultimate concerns” may appear in passing, it is not the primary purpose of most yoga in the United States. Therefore, these forms of yoga cannot properly be regarded as a religion or promoting one.

The key lesson from this definitional wrangling is that yoga can be divorced from religion. The question in a First Amendment case is whether it does so on a specific set of facts. It depends upon a factual inquiry regarding the way the subject is taught, or practiced, in a publicly funded institution.

## **Legal Challenges to Yoga**

### *The Role of State Taxing Authorities*

At the climax of the movie *The Miracle on 34th Street*, Kris Kringle’s defense lawyer parades into court a succession of postal workers, all employees of the United States government, toting bags of mail addressed to Santa Claus or Kris Kringle. The delivery of the bags to the courtroom, according to the lawyer, signifies that the United States government recognized that his client, Kris Kringle, is the one and only Santa Claus and since the United States government recognizes Kris Kringle as the true Santa Claus, the state court of New York should not disagree. The politically besieged judge, looking for a convenient escape hatch from his no-win situation agrees. Down goes the gavel and free walks Kris. From a practical standpoint, the same situation might apply here, although in which direction is unclear. What have state governments said about yoga?

In Missouri, for example, the state essentially declares that yoga is not religion by deeming it mere physical fitness. In November 2009, the state of Missouri imposed a sales tax on class fees at yoga studios. Yoga practitioners objected, arguing that yoga is a spiritual pursuit and, thus, should be tax-exempt. But a 2008 Missouri Supreme Court decision had already ruled that fees paid for personal training services at a gym are a taxable event, so the Missouri Department of Revenue determined that activities like yoga and Pilates offer similar training services, classifying them as “places of fitness and recreation,” not worship.

A similar scenario happened in the state of Washington, but with a different outcome. In Washington, yoga is more than simple fitness, but is not religion either. Section 458-20-183 of the Washington Administrative Code, enacted in 1995, distinguishes which physical fitness services are taxed. Yoga class fees are exempt from the tax because: "Physical fitness services do not include instructional lessons such as those for self-defense, martial arts, Yoga and stress management." Despite what the statute says, an excise tax advisory issued in 2005 attempted to qualify yoga as a physical fitness service subject to sales tax. Between 2005 and 2008 there was substantial confusion over the issue and inconsistent treatment of various yoga studios. The Washington Department of Revenue even began to audit yoga studios. What they were looking for was whether the classes were instructional or simply exercise. The studios protested, ultimately convincing the Washington Department of Revenue that there is something more to yoga than physical exercise. The Department of Revenue reconsidered its policy, ultimately deciding not to assess taxes on the studios. In fact the Department of Revenue issued another excise tax advisory in February 2009 which states: "The Department generally presumes that classes offering the traditional practices of Yoga, Tai Chi and Qi Gong do not constitute 'physical fitness services' because physical fitness is a secondary or incidental benefit of these classes, but is not typically the primary focus." Currently in the state of Washington yoga is considered a philosophy and discipline in which the primary purpose is breath regulation and meditation, with secondary physical benefits. But the department could still determine that a particular yoga class is primarily physical fitness. For example, if yoga classes are conducted at a health club or fitness center, the state may presume that physical fitness is the primary focus.

These state tax regulations do not solve the underlying First Amendment question because they are so dependent upon how they are drafted. It seems scary, however, that whether something is religion or not could be decided by state tax departments or its auditors. Just as beauty is in the eye of the beholder, audits could lead to wildly disparate outcomes.

Interestingly, the goals of the commercial yoga community are likely to be conflicting. For example, if a studio or class wants to avoid state-imposed commerce taxes by arguing it is a religious activity, it could later be hoisted on its own petard with the consequent restriction of yoga in government-supported schools or workplaces.

#### *Case Law Regarding Meditation and Yoga in Public Schools*

So far there are only a handful of cases that shed light on how courts apply *Lemon* to yoga and similar practices. One instructive case is *Malnak v. Yogi*, 592 F.2d 197 (3d Cir. 1979), discussed earlier in this article. In that case a group of five New Jersey public high schools offered an elective course in transcendental meditation (TM). A group of parents sued, claiming that the classes were religious in nature and, thus, barred by the Establishment Clause. The parents prevailed at both the district and appellate level, but the courts did not hold that all transcendental meditation is religious in nature; the key to the outcome is how the court analyzed the specific TM course.

The course at issue was taught by specially trained instructors from The World Plan Executive Council United States, which is dedicated to teaching the Science of Creative Intelligence

Transcendental Meditation (SCI/TM). The class was voluntary and usually conducted after school hours. The students used the text written by Maharishi Mahesh Yogi, the founder of SCI. The court analyzed each aspect of the course, including the teaching of a mantra and the final ceremony, the puja. Although the court did not overtly identify one specific factor as the basis of the decision, their description of the puja is what occupied most of the majority opinion. In essence, the court described the puja as making "offerings to a deified 'Guru Dev,'" and the chants invoking a "deified teacher," a Hindu monk. *Malnak* at 198. In contrasting the TM course with constitutionally permissible invocations and benedictions at school graduation ceremonies, the court also described the puja as including "ceremonial student offerings to deities as part of a regularly scheduled course in the schools' educational programs." *Malnak* at 200. Ultimately there were enough trappings of religion to lead the court to conclude that the SCI/TM course—as taught—violated the Establishment Clause of the First Amendment.

Judge Adams applied the legal views discussed earlier to the TM course at issue, and agreed that what was being taught was far more than relaxation and concentration. He analyzed the textbook and what it said about the Science of Creative Intelligence, concluding that it met the tests of religion he laid out, above. According to *Adams*, this meditation course addressed "ultimate concerns," was "sufficiently comprehensive," and had various trappings of religion, such as trained teachers, propagation of the message, and a central ceremony.

Contrast *Malnak* with the one court that has specifically analyzed whether yoga is a religious activity. *Altman v. Bedford Central School District*, 245 F.3d 49 (2d Cir. 2001), involved an elementary school in Bedford, N.Y., that held an international enrichment theme week over the course of several years in the early 1990s. The India portion included traditional stories about Hindu gods, Indian cooking and geography, and other cultural lessons such as "worry dolls" and earth/nature tapes. There was also a gym class that included a yoga demonstration by a Sikh minister. The students participated by performing breathing exercises while stretching. A group of parents sued, claiming—among many other things—that the yoga class violated the First Amendment because it endorsed "eastern religions." The lower court found that the yoga exercises "did not violate the constitution because 'although the presenter was dressed in a turban and wore the beard of a Sikh minister, he did not in his yoga exercise presentation advance any religious concepts or ideas.'" *Id.* at 65-66. The appellate court's decision primarily concerned issues other than yoga, but did not alter the trial court's findings on the yoga class. The lesson from the case is that the physical asanas and regulated breathing are not, by themselves, religion, nor do they promote religion. Despite yoga's roots it can be taught, even by a Sikh minister, in a secular way.

So what is happening in San Diego County? Since the case was just recently filed and there is no developed official record, we have to glean the facts from the Complaint and its attachments, as well as media accounts and the public positions of the protagonists.

For academic year 2012-2013 the San Diego County School District instituted a yoga program in the primary grades, comprising nine schools and roughly 5,456 students. The classes were, in part, funded by a \$533,000 grant from the Jois Foundation, a nonprofit entity that seeks to promote the benefits of Ashtanga Yoga practice. The foundation takes its name from a famous yoga teacher, Pattabhi

Jois (1915-2004). According to the school district the classes are part of a larger curriculum to improve children's physical and mental well-being. The district professes that it has removed all religious aspects from the yoga classes.

In the fall of 2012 a group of parents protested, claiming that the classes promoted Hinduism and were, therefore, in violation of the Establishment Clause of the First Amendment. The media coverage was widespread. When the matter could not be resolved it led to the lawsuit filed on Feb. 20, 2013. The parents are represented by the National Center for Law and Policy (NCLP). The NCLP claims that the Jois Foundation is a "religious institution."

The Complaint alleges that the school district operated "an

***In essence, the plaintiff claims that Sun Salutation pose is sun worship and Warrior pose represents the beheading of a Hindu god. It is true that the asanas are frequently referred to by their Sanskrit names, but that alone does not make them religious.***

inherently and pervasively religious Ashtanga Yoga curriculum." (Complaint par. 3) The plaintiffs claim that along with the physical practice of yoga, the children are instructed in the Yoga Sutras of Patañjali. The NCLP's website quotes various authors to support its position that yoga is inherently religious. It further alleges that "EUSD's Ashtanga yoga program unlawfully promotes and advances religion, including Hinduism, Buddhism, Taoism, and Western metaphysics." (Complaint par. 3)

It is unlikely that the plaintiffs will prevail on a theory that yoga is "inherently religious" and, thus, its teaching is violative of the First Amendment. Courts are hesitant to make such blanket pronouncements. And even though it may have been associated with religion originally, like the Christmas tree, yoga has evolved away from those roots in many settings. So as in most Establishment Clause cases, including *Malnak* and *Altman*, there will be inquiries into the content of the classes. Here are four examples of inquiries the court could make.

First, what about the plaintiff's claim that Ashtanga Yoga is very religious? The Ashtanga Yoga of Pattabhi Jois is what scholar Elizabeth De Michelis categorizes as an example of "Modern Postural Yoga" (MPY). This form of yoga, founded by Pattabhi Jois and first introduced to the United States in 1975, places "a lot of emphasis on asanas or yoga postures—in other words the more 'physical' or gymnastics-like type of yoga." De Michelis attributes its rising popularity partly to "the highly visible acrobatic and aesthetic qualities of its practice." Another scholar of MPY even suggests that the origins of these practices may be in mid-21st century public performances for entertainment purposes and to attract students.

MPY schools such as Jois's Ashtanga do not demand much of practitioners. Rather, according to De Michelis, "they tend to be individualistic and loosely structured (especially as far as sources of authority are concerned), they place few demands on members, they are tolerant, inclusivist, transient, and have relatively

undefined social boundaries, fluctuating belief systems and relative simple social organizations." The website of Ashtanga Yoga seems to confirm De Michelis's analysis. The Complaint in *Sedlock*, and the affidavit used to support it, take a different view, so one issue will be whether Ashtanga Yoga, as promoted by the Jois Foundation or as taught in the schools, departs from what De Michelis observes.

As another example, the Complaint in *Sedlock* alleges that "Children were taught by a EUSD employed yoga teacher to put their hands in a 'praying hands' position and say 'Namaste' to each other." They allege that "Namaste" is often translated as "I bow to the god within you" and represents the idea that there is divinity in everyone. (Complaint par. 32) This will be a hotly contested issue because it is based on another common translational error from Sanskrit to English. The Indian salutation "Namaste" (literally, nama (bow), te (to you) ) should not be translated into "I bow to the god within you." Practically speaking, a court is likely to find that placing one's hands together—standing alone—is no more of a religious act than is the physical position of kneeling. The Plaintiffs in California concede that Namaste is only "often" translated as acknowledging divinity in everyone. Namaste is a common, respectful and secular greeting in India, and may carry no religious overtone in that setting. The court will have to sort out what the teachers in the grammar schools said about the practice.

Another example is the Plaintiff's claims regarding two specific yoga poses—Warrior and Sun Salutation. In essence they claim that Sun Salutation is sun worship, and Warrior pose represents the beheading of a Hindu god. (Complaint par. 32) It is true that the asanas are frequently referred to by their Sanskrit names, but that alone does not make them religious. For example the *virabhadrasana* has several meanings, including merely "a distinguished hero pose," which has no reference to Hindu or any other mythology. One could perform the distinguished hero pose, concentrating and focusing exclusively on the demands placed on one's quadriceps and gluteus maximus without reference to or knowledge of any mythic figure in Hinduism. The same is true of Sun Salutation and Warrior. But even if there are religious origins to Sun Salutation or Warrior, does that bear any relationship to how they are taught or practiced in America generally, or in the Encinitas grammar schools specifically? It will be interesting to see if 5th graders were taught that Warrior pose had something to do with the beheading of a deity. And people can salute the sun and acknowledge its power without worship.

The final example of inquiries for the court is the allegation that the Encinitas schools used the Chinese yin/yang symbol in place of bullet points on written materials. Even if those materials were used by students, is the use of the yin/yang symbol religious? The "balance" symbol is believed to be Taoist in origin. If Taoism is not defined as a religion at all, but is defined as a philosophy, can the symbol be religious on its own? The plaintiffs appear to target any eastern symbols as religious. The court will inquire about what was taught, if anything, about the symbol.

The Complaint in *Sedlock* points out that John Shorling, director of The University of Virginia's Mindfulness Center (modeled on Jon Kabat-Zinn's Center for Mindfulness), acknowledges that, like meditation, yoga "has been practiced for thousands of years in different religious traditions," and "at their highest forms if you really want to go deeply into them it's difficult to do them without practicing in a religious tradition." (Complaint par. 29) Let's analyze that statement, as a court might. First, the fact that something has been

practiced for thousands of years does not make it religious. War, agriculture and long distance running have been “practiced” since ancient times as well. The next statement merely acknowledges that, if one takes the practice to its roots and highest forms, it is difficult—not impossible—to avoid religious tradition. In other words, there are gradations of the practice, some secular, some not. This is consistent with how the Supreme Court views issues like these. Under the Supreme Court’s traditional tests there will be an inquiry into whether the grade-schoolers are actually learning and practicing secularly as novices, or as advanced experts along the path to the Yoga Sutras of Patañjali.

How does all this fit into the Supreme Court’s framework? In looking at the first prong of the *Lemon* test, will a court find that yoga has a secular purpose? Does the potentially religious practice predominate? As noted by the Supreme Court, the Establishment Clause does not hold an activity unconstitutional because it “merely happens to coincide or harmonize with the tenets of some or all religions.” *McGowan*, 366 U.S. 442. Is the intent of the schools, or even that of the grant-giving Jois Foundation to promote religion? The Encinitas district, at least according to its public statement, has made an effort to remove any religion or religious undertone from the yoga classes. The Court will have to test that statement, as well as test whether any religious purpose is “predominant” and therefore in violation of the Establishment Clause. *Edwards v. Aguillard*, 482 U.S. 578, 598, 107 S. Ct. 2573 (1987). Is there excessive entanglement with religion, or are the plaintiffs exaggerating the religious component? If the plaintiffs can prove much of what is in their Complaint about the religious overtones of the teaching process, coupled with enough quotes from the Jois Foundation about its spiritual goals, a court could potentially conclude, like the Malnak decision, that the program promotes religion.

## Conclusion

Yoga classes as a whole must be evaluated; to simply focus on yoga’s religious roots or religious aspects at the extremes of the practice is counter to the analysis applied by the courts. In the moment of silence cases, the statutes found to be unconstitutional were those which stated that there would be a moment of silence for meditation or “prayer.” See *Wallace*, 472 U.S. at 60. When the activity constituted simply a moment of silence for the children’s well-being they were found to be constitutional.

One of the complaining parents in California has been quoted as saying, “They are teaching children ... how to look within for peace and comfort.” Based on the case law, it is very unlikely that teaching a child how to look within for peace and comfort—a cornerstone of meditative practices—sufficiently promotes religion to be declared unconstitutional. We can neither proscribe nor forbid what people think as they sit quietly. That is the essence of the First Amendment. So long as yoga classes do not incorporate religious aspects of the Hindu practice of yoga, but rather are part of the school district’s curriculum to promote the children’s physical and mental well-being, they are likely to be upheld.

The legal interplay between Yoga and the First Amendment is just getting started. We expect a fascinating new chapter in First Amendment analysis of religious activity.

## Addendum

On July 1, 2013, Judge John S. Meyer issued a tentative ruling

from the bench to be followed by a written order finding that the Encinitas Unified School District’s (EUSD) yoga classes are permissible under the United States and California Constitutions and the Education Code. As we thought, Plaintiffs’ were unsuccessful in arguing yoga is “inherently religious” and therefore violative of the First Amendment. Judge Meyer recognized this case was a challenge for the Court but engaged in a fact specific inquiry into whether the yoga practiced in the EUSD establishes religion. In weighing the evidence presented, Judge Meyer determined that yoga was religious and therefore analyzed the yoga classes under the three-prong test in *Lemon v. Kurtzman* as we expected he would. In analyzing the first prong, whether there was a secular purpose, the Court found that the purpose of the classes was to teach physical education, health and wellness and therefore there was a secular purpose. In analyzing the second prong, whether the class’s primary effect was to advance religion, the Court determined that a reasonable student would not objectively perceive that EUSD yoga advances religion. Finally, in analyzing whether the yoga classes foster excessive entanglement with religion, the Court concluded the district was not teaching a religious component in its health and wellness program. Although troubled by the potential influence of the Jois foundation, the Court found that there was no evidence yoga was different from other forms of physical activity.

In sum, Judge Meyer engaged in a fact specific inquiry consistent with prior judicial decisions and provided a framework to guide school districts on how to create permissible yoga programs. The issue is sure to continue to be an important one as Judge Meyer suggested this case would be appealed and there is no doubt another program may reach farther than the EUSD yoga classes. ☺

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