SUPREME COURT OF UNITED STATES

Elliott Ashton Welsh, II

Vs.

United States.

No. 76.

Argued Jan. 20, 1970.

Decided June 15, 1970.

J. B. Tietz, Los Angeles, Cal., for petitioner.

Solicitor Gen. Erwin N. Griswold for respondent.

Mr. Justice BLACK announced the judgment of the Court and delivered an opinion in which Mr. Justice DOUGLAS, Mr. Justice BRENNAN, and Mr. Justice MARSHALL join.

The petitioner, Elliott Ashton Welsh II, was convicted by a United States District Judge of refusing to submit to induction into the Armed Forces in violation of 50 U.S.C. App. § 462(a), and was on June 1, 1966, sentenced to imprisonment for three years. One of petitioner's defenses to the prosecution was that § 6(j) of the Universal Military Training and Service Act exempted him from combat and noncombat service because he was 'by reason of religious training and belief * * * conscientiously opposed to participation in war in any form.'1 After finding that there was no religious basis for petitioner's conscientious objector claim, the Court of Appeals, Judge Hamley dissenting, affirmed the conviction. [1969] USCA9 84; 404 F.2d 1078 (1968). We granted certiorari chiefly to review the contention that Welsh's conviction should be set aside on the basis of this Court's decision in United States v. Seeger, [1965] USSC 49; 380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733 (1965). 396 U.S. 816, 90 S.Ct. 53, 24 L.Ed.2d 67 (1969). For the reasons to be stated, and without passing upon the constitutional arguments that have been raised, we vote to reverse this conviction because of its fundamental inconsistency with United States v. Seeger, supra.

The controlling facts in this case are strikingly similar to those in Seeger. Both Seeger and Welsh were brought up in religious homes and attended church in their childhood, but in neither case was this church one which taught its members not to engage in war at any time for any reason. Neither Seeger nor Welsh continued his childhood religious ties into his young manhood, and neither belonged to any religious group or adhered to the teachings of any organized religion during the

period of his involvement with the Selective Service System. At the time of registration for the draft, neither had yet come to accept pacifist principles. Their views on war developed only in subsequent years, but when their ideas did fully mature both made application to their local draft boards for conscientious objector exemptions from military service under § 6(j) of the Universal Military Training and Service Act. That section then provided, in part:

'Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.'

In filling out their exemption applications both Seeger and Welsh were unable to sign the statement that, as printed in the Selective Service form, stated 'I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form.' Seeger could sign only after striking the words 'training and' and putting quotation marks around the word 'religious.' Welsh could sign only after striking the words 'my religious training and.' On those same applications, neither could definitely affirm or deny that he believed in a 'Supreme Being,' both stating that they preferred to leave the question open.3 But both Seeger and Welsh affirmed on those applications that they held deep conscientious scruples against taking part in wars where people were killed. Both strongly believed that killing in war was wrong, unethical, and immoral, and their consciences forbade them to take part in such an evil practice. Their objection to participating in war in any form could not be said to come from a 'still, small voice of conscience'; rather, for them that voice was so loud and insistent that both men preferred to go to jail rather than serve in the Armed Forces. There was never any question about the sincerity and depth of Seeger's convictions as a conscientious objector, and the same is true of Welsh. In this regard the Court of Appeals noted, '(t)he government concedes that (Welsh's) beliefs are held with the strength of more traditional religious convictions.' 404 F.2d, at 1081. But in both cases the Selective Service System concluded that the beliefs of these men were in some sense insufficiently 'religious' to qualify them for conscientious objector exemptions under the terms of § 6(j). Seeger's conscientious objector claim 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,' United States v. Seeger, [1965] USSC 49; 380 U.S. 163, 167[1965] USSC 49; , 85 S.Ct. 850, 854[1965] USSC 49; , 13 L.Ed.2d 733 (1965), while Welsh was denied the exemption because his Appeal Board and the Department of Justice hearing officer 'could find no religious basis for the registrant's beliefs, opinions and convictions.' App. 52. Both Seeger and Welsh subsequently refused to submit to induction into the military and both were convicted of that offense.

In Seeger the Court was confronted, first, with the problem that § 6(j) defined 'religious training and belief' in terms of a 'belief in a relation to a Supreme Being * * *,' a definition that arguably gave a preference to those who believed in a conventional God as opposed to those who did not. Noting the 'vast panoply of beliefs' prevalent in our country, the Court construed the congressional intent as being in 'keeping with its long-established policy of not picking and choosing among religious

beliefs,' id., at 175, 85 S.Ct., at 859, and accordingly interpreted 'the meaning of religious training and belief so as to embrace all religions * * *.' Id., at 165, 85 S.Ct., at 854. (Emphasis added.) But, having decided that all religious conscientious objectors were entitled to the exemption, we faced the more serious problem of determining which beliefs were 'religious' within the meaning of the statute. This question was particularly difficult in the case of Seeger himself. Seeger stated 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.' 380 U.S., at 166, 85 S.Ct., at 854. In a letter to his draft board, he wrote:

'My decision arises from what I believe to be considerations of validity from the standpoint of the welfare of humanity and the preservation of the democratic values which we in the United States are struggling to maintain. I have concluded that war, from the practical standpoint, is futile and self-defeating, and that from the more important moral standpoint, it is unethical.' [1963] USCA2 651; 326 F.2d 846, 848 (2 Cir. 1964).

On the basis of these and similar assertions, the Government argued that Seeger's conscientious objection to war was not 'religious' but stemmed from 'essentially political, sociological, or philosophical views or a merely personal moral code.'

In resolving the question whether Seeger and the other registrants in that case qualified for the exemption, the Court stated that '(the) 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.' 380 U.S., at 185, 85 S.Ct., at 863. (Emphasis added.) The reference to the registrant's 'own scheme of things' was intended to indicate that the central consideration in determining whether the registrant's beliefs are religious is whether these beliefs play the role of a religion and function as a religion in the registrant's life. The Court's principal statement of its test for determining whether a conscientious objector's beliefs are religious within the meaning of § 6(j) was as follows:

'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.' 380 U.S., at 176, 85 S.Ct., at 859.

The Court made it clear that these sincere and meaningful beliefs that prompt the registrant's objection to all wars need not be confined in either source or content to traditional or parochial concepts of religion. It held that § 6(j) 'does not distinguish between externally and internally derived beliefs,' id., at 186, 85 S.Ct., at 864 and also held that 'intensely personal' convictions which some might find 'incomprehensible' or 'incorrect' come within the meaning of 'religious belief' in the Act. Id., at 184—185, 85 S.Ct., at 863—864. What is necessary under Seeger for a registrant's conscientious objection to all war to be 'religious' within the meaning of § 6(j) is that this opposition to war stem from the registrant's moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions. Most of the great

religions of today and of the past have embodied the idea of a Supreme Being or a Supreme Reality—a God—who communicates to man in some way a consciousness of what is right and should be done, of what is wrong and therefore should be shunned. If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual 'a place parallel to that filled by * * * God' in traditionally religious persons. Because his beliefs function as a religion in his life, such an individual is as much entitled to a 'religious' conscientious objector exemption under § 6(j) as is someone who derives his conscientious opposition to war from traditional religious convictions.

Applying this standard to Seeger himself, the Court noted the 'compulsion to 'goodness'' that shaped his total opposition to war, the undisputed sincerity with which he held his views, and the fact that Seeger had 'decried the tremendous 'spiritual' price man must pay for his willingness to destory human life.' 380 U.S., at 186—187, 85 S.Ct., at 864. The Court concluded:

'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.' 380 U.S., at 187, 85 S.Ct. at 864—865.

Accordingly, the Court found that Seeger should be granted conscientious objector status.

In the case before us the Government seeks to distinguish our holding in Seeger on basically two grounds, both of which were relied upon by the Court of Appeals in affirming Welsh's conviction. First, it is stressed that Welsh was far more insistent and explicit than Seeger in denying that his views were religious. For example, in filling out their conscientious objector applications, Seeger put quotation marks around the word 'religious,' but Welsh struck the word 'religious' entirely and later characterized his beliefs as having been formed 'by reading in the fields of history and sociology.' App. 22. The Court of Appeals found that Welsh had 'denied that his objection to war was premised on religious belief' and concluded that '(t)he Appeal Board was entitled to take him at his word.?' 404 F.2d at 1082. We think this attempt to distinguish Seeger fails for the reason that it places undue emphasis on the registrant's interpretation of his own beliefs. The Court's statement in Seeger that a registrant's characterization of his own belief as 'religious' should carry great weight, 380 U.S., at 184, 85 S.Ct., at 863, does not imply that his declaration that his views are nonreligious should be treated similarly. When a registrant states that his objections to war are 'religious,' that information is highly relevant to the question of the function his beliefs have in his life. But very few registrants are fully aware of the broad scope of the word 'religious' as used in § 6(j), and accordingly a registrant's statement that his beliefs are nonreligious is a highly unreliable guide for those charged with administering the exemption. Welsh himself presents a case in point. Although he originally characterized his beliefs as nonreligious, he later upon reflection wrote a long and thoughtful letter to his Appeal Board in which he declared that his beliefs were 'certainly religious in the ethical sense of the word.' He explained:

'I believe I mentioned taking of life as not being, for me, a religious wrong. Again, I assumed Mr. (Bradey (the Department of Justice hearing officer)) was using the word 'religious' in the conventional sense, and, in order to be perfectly honest did not characterize my belief as 'religious." App. 44.

The Government also seeks to distinguish Seeger on the ground that Welsh's views, unlike Seeger's, were 'essentially political, sociological, or philosophical views or a merely personal moral code.' As previously noted, the Government made the same argument about Seeger, and not without reason, for Seeger's views had a substantial political dimension. Supra, at 338-339. In this case, Welsh's conscientious objection to war was undeniably based in part on his perception of world politics. In a letter to his local board, he wrote:

'I can only act according to what I am and what I see. And I see that the military complex wastes both human and material resources, that it fosters disregard for (what I consider a paramount concern) human needs and ends; I see that the means we employ to 'defend' our 'way of life' profoundly change that way of life. I see that in our failure to recognize the political, social, and economic realities of the world, we, as a nation, fail our responsibility as a nation.' App. 30.

We certainly do not think that § 6(j)'s exclusion of those persons with 'essentially political, sociological, or philosophical views or a merely personal moral code' should be read to exclude those who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection to participation in all wars is founded to a substantial extent upon considerations of public policy. The two groups of registrants that obviously do fall within these exclusions from the exemption are those whose beliefs are not deeply held and those whose objection to war does not rest at all upon moral, ethical, or religious principle but instead rests solely upon considerations of policy, pragmatism, or expediency. In applying § 6(j)'s exclusion of those whose views are 'essentially political, sociological, or philosophical' or of those who have a 'merely personal moral code,' it should be remembered that these exclusions are definitional and do not therefore restrict the category of persons who are conscientious objectors by 'religious training and belief.' Once the Selective Service System has taken the first step and determined under the standards set out here and in Seeger that the registrant is a 'religious' conscientious objector, it follows that his views cannot be 'essentially political, sociological, or philosophical.' Nor can they be a 'merely personal moral code.' See United States v. Seeger, 380 U.S., at 186, 85 S.Ct. at 864.

Welsh stated that he 'believe(d) the taking of life—anyone's life—to be morally wrong.' App. 44. In his original conscientious objector application he wrote the following:

'I believe that human life is valuable in and of itself; in its living; therefore I will not injure or kill

another human being. This belief (and the corresponding 'duty' to abstain from violence toward another person) is not 'superior to those arising from any human relation.' On the contrary: it is essential to every human relation. I cannot, therefore, conscientiously comply with the Government's insistence that I assume duties which I feel are immoral and totally repugnant.' App. 10.

Welsh elaborated his beliefs in later communications with Selective Service officials. On the basis of these beliefs and the conclusion of the Court of Appeals that he held them 'with the strength of more traditional religious convictions,' 404 F.2d, at 1081, we think Welsh was clearly entitled to a conscientious objector exemption. Section 6(j) requires no more. That section exempts from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war.

The judgment is reversed.

Reversed.

Mr. Justice BLACKMUN took no part in the consideration or decision of this case.

Mr. Justice HARLAN, concurring in the result.

Candor requires me to say that I joined the Court's opinion in United States v. Seeger, [1965] USSC 49; 380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733 (1965), only with the gravest misgivings as to whether it was a legitimate exercise in statutory construction, and today's decision convinces me that in doing so I made a mistake which I should now acknowledge.

In Seeger the Court construed § 6(j) of the Universal Military Training and Service Act so as to sustain a conscientious objector claim not founded on the theistic belief. The Court, in treating with the provision of the statute that limited conscientious objector claims to those stemming from belief in 'a Supreme Being,' there said: '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,' and held that 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.' 380 U.S., at 165—166, 85 S.Ct., at 854. Today the prevailing opinion makes explicit its total elimination of the statutorily required religious content for a conscientious objector exemption. The prevailing opinion now says: 'If an

individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time' (emphasis added), he qualifies for a § 6(j) exemption.

In my opinion, the liberties taken with the statute both in Seeger and today's decision cannot be justified in the name of the familiar doctrine of construing federal statutes in a manner that will avoid possible constitutional infirmities in them. There are limits to the permissible application of that doctrine, and, as I will undertake to show in this opinion, those limits were crossed in Seeger, and even more apparently have been exceeded in the present case. I therefore find myself unable to escape facing the constitutional issue that this case squarely presents: whether § 6(j) in limiting this draft exemption to those opposed to war in general because of theistic beliefs runs afoul of the religious clauses of the First Amendment. For reasons later appearing I believe it does, and on that basis I concur in the judgment reversing this conviction, and adopt the test announced by Mr. Justice BLACK, not as a matter of statutory construction, but as the touchstone for salvaging a congressional policy of long standing that would otherwise have to be nullified.

* Section 6(j) provided during the period relevant to this case:

'Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.' Universal Military Training and Service Act of 1948, § 6(j), 62 Stat. 612, 50 U.S.C.App. § 456(j).

The issue is then whether Welsh's opposition to war is founded on 'religious training and belief' and hence 'belief in a relation to a Supreme Being' as Congress used those words. It is of course true that certain words are more plastic in meaning than others. 'Supreme Being' is a concept of theology and philosophy, not a technical term, and consequently may be, in some circumstances, capable of bearing a contemporary construction as notions of theology and philosophy evolve. Cf. United States v. Storrs, [1926] USSC 222; 272 U.S. 652, 47 S.Ct. 221, 71 L.Ed. 460 (1926). This language appears, however, in a congressional enactment; it is not a phrase of the Constitution, like 'religion' or 'speech,' which this Court is freer to construe in light of evolving needs and circumstances. Cf. Joseph Burstyn, Inc. v. Wilson, [1952] USSC 66; 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098 (1952), and my concurring opinion in Estes v. Texas, [1965] USSC 138; 381 U.S. 532, 595—596[1965] USSC 138; , 85 S.Ct. 1628, 1666—[1965] USSC 138; 1667, 14 L.Ed.2d 543 (1965), and my opinion concurring in the judgment in Garner v. Louisiana, [1961] USSC 168; 368 U.S. 157, 185[1961] USSC 168; , 82 S.Ct. 248, 263[1961] USSC 168; , 7 L.Ed.2d 207 (1961). Nor is it so broad a statutory directive, like that of the Sherman Act, that we may assume that we are free to adopt and shape policies limited only by the most general statement of purpose. Cf. e.g., Standard

Oil Co. of New Jersey v. United States, [2004] USSC 1; 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911). It is Congress' will that must here be divined. In that endeavor it is one thing to give words a meaning not necessarily envisioned by Congress so as to adapt them to circumstances also uncontemplated by the legislature in order to achieve the legislative policy, Rector, etc., of Holy Trinity Church v. United States, [1892] USSC 53; 143 U.S. 457, 12 S.Ct. 511, 36 L.Ed. 226 (1892); it is a wholly different matter to define words so as to change policy. The limits of this Court's mandate to stretch concededly elastic congressional language are fixed in all cases by the context of its usage and legislative history, if available, that are the best guides to congressional purpose and the lengths to which Congress enacted a policy. Rosado v. Wyman, [1970] USSC 80; 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970).2 The prevailing opinion today snubs both guidelines for it is apparent from a textual analysis of § 6(j) and the legislative history that the words of this section, as used and understood by Congress, fall short of enacting the broad policy of exempting from military service all individuals who in good faith oppose all war.

* The natural reading of § 6(j), which quite evidently draws a distinction between theistic and nontheistic religions, is the only one that is consistent with the legislative history. Section 5(g) of the 1940 Draft Act exampted individuals whose opposition to war could be traced to 'religious training and belief,' 54 Stat. 889, without any allusion to a Supreme Being. In United States v. Kauten, 133 F.2d 703 (C.A.2d Cir. 1943), the Second Circuit, speaking through Judge Augustus Hand, broadly construed 'religious training and belief' to include 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, at 708. The view was further elaborated in subsequent decisions of the Second Circuit, see United States ex rel. Phillips v. Downer, 135 F.2d 521 (C.A.2d Cir. 1943); United States ex rel. Reel v. Badt, 141 F.2d 845 (C.A.2d Cir. 1944). This expansive interpretation of § 5(g) was rejected by a divided Ninth Circuit in Berman v. United States, 156 F.2d 377, 380—381 (1946):

'It is our opinion that the expression 'by reason of religious training and belief' * * * was written into the statute for the specific purpose of distinguishing between a conscientious social belief, or a sincere devotion to a high moralistic philosophy, and one based upon an individual's belief in his responsibility to an authority higher and beyond any worldly one.

'(I)n United States v. Macintosh, [1931] USSC 149; 283 U.S. 605, 51 S.Ct. 570, 578[1931] USSC 149; , 75 L.Ed. 1302, Mr. (Chief) Justice Hughes in his dissent * * * said: 'The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation." The unmistakable and inescapable thrust of the Berman opinion, that religion is to be conceived in theistic terms, is rendered no less straightforward by the court's elaboration on the difference between beliefs held as a matter of moral or philosophical conviction and those inspired by religious upbringing and adherence to faith.

'There are those who have a philosophy of life, and who live up to it. There is evidence that this is

so in regard to appellant. However, no matter how pure and admirable his standard may be, and no matter how devotedly he adheres to it, his philosophy and morals and social policy without the concept of deity cannot be said to be religion in the sense of that term as it is used in the statute. It is said in State v. Amana Society, 132 Iowa 304, 109 N.W. 894, 898 * * *: 'Surely a scheme of life designed to obviate such results (man's inhumanity to man), and by removing temptations, and all the inducements of ambition and avarice, to nurture the virtues of unselfishness, patience, love, and service, ought not to be denounced as not pertaining to religion when its devotee regards it as an essential tenet of their (sic) religious faith." (Emphasis of Court of Appeals.) Ibid.

In the wake of this intercircuit dialogue, crystallized by the dissent in Berman which espoused the Second Circuit interpretation in Kauten, supra, Congress enacted § 6(j) in 1948. That Congress intended to anoint the Ninth Circuit's interpretation of § 5(g) would seem beyond question in view of the similarity of the statutory language to that used by Chief Justice Hughes in his dissenting opinion in Macintosh and quoted in Berman and the Senate report. The first half of the new language was almost word for word that of Chief Justice Hughes in Macintosh, and quoted by the Berman majority;3 and the Senate Committee report adverted to Berman, thus foreclosing any possible speculation as to whether Congress was aware of the possible alternatives. The report stated:

'This section reenacts substantially the same provisions as were found in subsection 5(g) of the 1940 act. Exemption extends to anyone who, because of religious training and belief in his relationship to a Supreme Being, is conscientiously opposed to combatant military service or to both combatant and non-combatant military service. (See United States v. Berman (sic) 156 F.(2d) 377, certiorari denied, 329 U.S. 795 (67 S.Ct. 480, 91 L.Ed. 680).)' S.Rep. No. 1268, 80th Cong., 2d Sess., 14.4
B

Against his legislative history it is a remarkable feat of judicial surgery to remove, as did Seeger, the theistic requirement of § 6(j). The prevailing opinion today, however, in the name of interpreting the will of Congress, has performed a lobotomy and completely transformed the statute by reading out of it any distinction between religiously acquired beliefs and those deriving from 'essentially political, sociological, or philosophical views or a merely personal moral code.'

In the realm of statutory construction it is appropriate to search for meaning in the congressional vocabulary in a lexicon most probably consulted by Congress. Resort to Webster's5 reveals that the meanings of 'religion' are: '1. The service and adoration of God or a god as expressed in forms of worship, in obedience to divine commands * * *; 2. The state of life of a religious * * *; 3. One of the systems of faith and worship; a form of theism; a religious faith * * *; 4. The profession or practice of religious beliefs; religious observances collectively; pl. rites; 5. Devotion or fidelity; * * *conscientiousness; 6. An apprehension, awareness, or conviction of the existence of a supreme being, or more widely, of supernatural powers or influences controlling one's own, humanity's, or

nature's destiny; also, such an apprehension, etc., accompanied by or arousing reverence, love, gratitude, the will to obey and serve, and the like * * *.' (Emphasis added.)

Of the five pertinent definitions four include the notion of either a Supreme Being or a cohesive, organized group pursuing a common spiritual purpose together. While, as the Court's opinion in Seeger points out, these definitions do not exhaust the almost infinite and sophisticated possibilities for defining 'religion,' there is strong evidence that Congress restricted, in this instance, the word to its conventional sense. That it is difficult to plot the semantic penumbra of the word 'religion' does not render this term so plastic in meaning that the Court is entitled, as matter of statutory construction, to conclude that any asserted and strongly held belief satisfies its requirements. It must be recognized that the permissible shadow of connotation is limited by the context in which words are used. In § 6(j) Congress has included not only a reference to a Supreme Being but has also explicitly contrasted 'religious' beliefs with those that are 'essentially political, sociological, or philosophical' and a 'personal moral code.' This exception certainly is, at the very least, the statutory boundary, the 'asymptote,' of the word 'religion.'

For me this dichotomy reveals that Congress was not embracing that definition of religion that alone speaks in terms of 'devotion or fidelity' to individual principles acquired on an individualized basis but was adopting, at least, those meanings that associate religion with formal, organized worship or shared beliefs by a recognizable and cohesive group. Indeed, this requirement was explicit in the predecessor to the 1940 statute. The Draft Act of 1917 conditioned conscientious objector status on membership in or affiliation with a 'well-recognized religious sect or organization (then) organized and existing and whose existing creed or principles forb(ade) its members to participate in war in any form * * *.' § 4, 40 Stat. 78. That § 5(g) of the 1940 Act eliminated the affiliation and membership requirement does not, in my view, mean as the Court, in effect, concluded in Seeger that Congress was embracing a secular definition of religion.

Unless we are to assume an Alice-in-Wonderland world where words have no meaning, I think it fair to say that Congress' choice of language cannot fail to convey to the discerning reader the very policy choice that the prevailing opinion today completely obliterates: that between conventional religions that usually have an organized and formal structure and dogma and a cohesive group identity, even when nontheistic, and cults that represent schools of thought and in the usual case are without formal structure or are, at most, loose and informal associations of individuals who share common ethical, moral, or intellectual views.

II

When the plain thrust of a legislative enactment can only be circumvented by distortion to avert an inevitable constitutional collision, it is only by exalting form over substance that one can justify this

veering off the path that has been plainly marked by the statute. Such a course betrays extreme skepticism as to constitutionality, and, in this instance, reflects a groping to preserve the conscientious objector exemption at all cost.

I cannot subscribe to a wholly emasculated construction of a statute to avoid facing a latent constitutional question, in purported fidelity to the salutary doctrine of avoiding unnecessary resolution of constitutional issues, a principle to which I fully adhere. See Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 348, 56 S.Ct. 466, 483[1936] USSC 36; , 80 L.Ed. 688 (1936) (Brandeis, J., concurring). It is, of course, desirable to salvage by construction legislative enactments whenever there is good reason to believe that Congress did not intend to legislate consequences that are unconstitutional, but it is not permissible, in my judgment, to take a lateral step that robs legislation of all meaning in order to avert the collision between its plainly intended purpose and the commands of the Constitution. Cf. Yates v. United States, [1957] USSC 89; 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957). As the Court stated in Aptheker v. Secretary of State, [1964] USSC 142; 378 U.S. 500, 515[1964] USSC 142; , 84 S.Ct. 1659, 1668—[1964] USSC 142; 1669, 12 L.Ed.2d 992 (1964):

'It must be remembered that '(a)lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute * * *' or judicially rewriting it. Scales v. United States, 367 U.S., (203) at 211, 81 S.Ct., (1469) at [1961] USSC 132; 1477 (6 L.Ed.2d 782). To put the matter another way, this Court will not consider the abstract question of whether Congress might have enacted a valid statute but instead must ask whether the statute that Congress did enact will permissibly bear a construction rendering it free from constitutional defects.'

The issue comes sharply into focus in Mr. Justice Cardozo's statement for the Court in Moore Ice Cream Co. v. Rose, [1933] USSC 94; 289 U.S. 373, 379[1933] USSC 94; , 53 S.Ct. 620, 622[1933] USSC 94; , 77 L.Ed. 1265 (1933):

"A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.' * * * But avoidance of a difficulty will not be pressed to the point of disingenuous evasion. Here the intention of the Congress is revealed too distinctly to permit us to ignore it because of mere misgivings as to power. The problem must be faced and answered.'

If an important congressional policy is to be perpetuated by recasting unconstitutional legislation, as the prevailing opinion has done here, the analytically sound approach is to accept responsibility for this decision. Its justification cannot be by resort to legislative intent, as that term is usually employed, but by a different kind of legislative intent, namely the presumed grant of power to the courts to decide whether it more nearly accords with Congress' wishes to eliminate its policy

altogether or extend it in order to render what Congress plainly did intend, constitutional. Compare, e.g., Yu Cong. Eng v. Trinidad, [1926] USSC 171; 271 U.S. 500, 46 S.Ct. 619, 70 L.Ed. 1059 (1926); United States v. Reese, [1875] USSC 177; 92 U.S. 214, 23 L.Ed. 563 (1876), with Skinner v. Oklahoma, [1942] USSC 129; 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); Nat. Life Ins. Co. v. United States, [1928] USSC 132; 277 U.S. 508, 48 S.Ct. 591, 72 L.Ed. 968 (1928). I therefore turn to the constitutional question.

III

The constitutional question that must be faced in this case is whether a statute that defers to the individual's conscience only when his views emanate from adherence to theistic religious beliefs is within the power of Congress. Congress, of course, could, entirely consistently with the requirements of the Constitution, eliminate all exemptions for conscientious objectors. Such a course would be wholly 'neutral' and, in my view, would not offend the Free Exercise Clause, for reasons set forth in my dissenting opinion in Sherbert v. Verner, [1842] USSC 33; 374 U.S. 398, 418[1842] USSC 33; , 83 S.Ct. 1790, 1801, 10 L.Ed.2d 965 (1963). See Jacobson v. Massachusetts, [1905] USSC 38; 197 U.S. 11, 29[1905] USSC 38; , 25 S.Ct. 358, 362[1905] USSC 38; , 49 L.Ed. 643 (1905) (dictum); cf. McGowan v. Maryland, [1961] USSC 101; 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961); Davis v. Beason, [1890] USSC 39; 133 U.S. 333, 10 S.Ct. 299, 33 L.Ed. 637 (1890); Hamilton v. Board of Regents of University, [1934] USSC 165; 293 U.S. 245, 264—265[1934] USSC 165; , 55 S.Ct. 197, 204—205[1934] USSC 165; , 79 L.Ed. 343 (1934); Reynolds v. United States, [1878] USSC 141; 98 U.S. 145, 25 L.Ed. 244 (1879); Kurland, Of Church and State and the Supreme Court, 29 U.Chi.L.Rev. 1 (1961). However, having chosen to exempt, it cannot draw the line between theistic or nontheistic religious beliefs on the one hand and secular beliefs on the other. Any such distinctions are not, in my view, compatible with the Establishment Clause of the First Amendment. See my separate opinion in Walz v. Tax Comm'n, [1970] USSC 107; 397 U.S. 664, 694[1970] USSC 107; , 90 S.Ct. 1409, 1424, 25 L.Ed. 697 (1970); Epperson v. Arkansas, [1968] USSC 204; 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968); School District of Abington Township v. Schempp, [1963] USSC 162; 374 U.S. 203, 305[1963] USSC 162; , 83 S.Ct. 1560, 1615, 10 L.Ed.2d 844 (1963) (Goldberg, J., concurring); Engel v. Vitale, [1962] USSC 116; 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962); Torcaso v. Watkins, [1961] USSC 133; 367 U.S. 488, 495[1961] USSC 133; , 81 S.Ct. 1680, 1683, 6 L.Ed.2d 982 (1961); Fowler v. Rhode Island, [1953] USSC 22; 345 U.S. 67, 73 S.Ct. 526, 97 L.Ed. 828 (1953). The implementation of the neutrality principle of these cases requires, in my view, as I stated in Walz v. Tax Comm'n, supra 'an equal protection mode of analysis. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders. In any particular case the critical question is whether the scope of legislation encircles a class so broad that it can be fairly concluded that (all groups that) could be thought to fall within the natural perimeter (are included).' 397 U.S., at 696, 90 S.Ct., at 1425.

The 'radius' of this legislation is the conscientiousness with which an individual opposes war in general, yet the statute, as I think it must be construed, excludes from its 'scope' individuals motivated by teachings of nontheistic religions,8 and individuals guided by an inner ethical voice

that bespeaks secular and not 'religious' reflection. It not only accords a preference to the 'religious' but also disadvantages adherents of religions that do not worship a Supreme Being. The constitutional infirmity cannot be cured, moreover, even by an impermissible construction that eliminates the theistic requirement and simply draws the line between religious and nonreligious. This is my view offends the Establishment Clause and is that kind of classification that this Court has condemned. See my separate opinion in Walz v. Tax Comm'n, supra; School District of Abington Township v. Schempp (Goldberg, J., concurring) supra; Engel v. Vitale, supra; Torcaso v. Watkins, supra.

If the exemption is to be given application, it must encompass the class of individuals it purports to exclude, those whose beliefs emanate from a purely moral, ethical, or philosophical source.9 The common denominator must be the intensity of moral conviction with which a belief is held.10 Common experience teaches that among 'religious' individuals some are weak and others strong adherents to tenets and this is no less true of individuals whose lives are guided by personal ethical considerations.

The Government enlists the Selective Draft Law Cases, 245 U.S. 366, 38 S.Ct. 159, 62 L.Ed. 349 (1918), as precedent for upholding the constitutionality of the religious conscientious objector provision. That case involved the power of Congress to raise armies by conscription and only incidentally the conscientious objector exemption. The language emphasized by the Government to the effect that the exemption for religious objectors and ministers constituted neither an establishment nor interference with free exercise of religion can only be considered an afterthought since the case did not involve any individuals who claimed to be nonreligious conscientious objectors.11 This conclusory assertion, unreasoned and unaccompanied by citation, surely cannot foreclose consideration of the question in a case that squarely presents the issue.

Other authorities assembled by the Government, far from advancing its case, demonstrate the unconstitutionality of the distinction drawn in § 6(j) between religious and nonreligious beliefs. Everson v. Board of Education, [1947] USSC 44; 330 U.S. 1, 67 S.Ct. 504, 1135, 1144, and 1122[1947] USSC 44; , 91 L.Ed. 711, 551, 563, and 536 (1947); the Sunday Closing Law Cases[1961] USSC 101; , 366 U.S. 420, 582, 599, and 617[1961] USSC 101; , 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961), and Board of Education v. Allen, [1968] USSC 131; 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968), all sustained legislation on the premise that it was neutral in its application and thus did not constitute an establishment, notwithstanding the fact that it may have assisted religious groups by giving them the same benefits accorded to nonreligious groups.12 To the extent that Zorach v. Clauson, [1952] USSC 55; 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1952), and Sherbert v. Verner, supra, stand for the proposition that the Government may (Zorach), or must (Sherbert), shape its secular programs to accommodate the beliefs and tenets of religious

groups, I think these cases unsound.13 See generally Kurland, supra. To conform with the requirements of the First Amendment's religious clauses as reflected in the mainstream of American history, legislation must, at the very least, be neutral. See my separate opinion in Walz v. Tax Comm'n, supra.

IV

Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion. Cf. Skinner v. Oklahoma, [1942] USSC 129; 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); Iowa-Des Moines National Bank v. Bennett, [1931] USSC 190; 284 U.S. 239, 52 S.Ct. 133, 76 L.Ed. 265 (1931).

The appropriate disposition of this case, which is a prosecution for refusing to submit to induction and not an action for a declaratory judgment on the constitutionality of § 6(j), is determined by the fact that at the time of Welsh's induction notice and prosecution the Selective Service was, as required by statute, exempting individuals whose beliefs were identical in all respects to those held by petitioner except that they derived from a religious source. Since this created a religious benefit not accorded to petitioner, it is clear to me that this conviction must be reversed under the Establishment Clause of the First Amendment unless Welsh is to go remediless. Cr. Iowa-Des Moines National Bank v. Bennett, supra; Smith v. Cahoon, [1931] USSC 147; 283 U.S. 553, 51 S.Ct. 582, 75 L.Ed. 1264 (1931).

This result, while tantamount to extending the statute, is not only the one mandated by the Constitution in this case but also the approach I would take had this question been presented in an action for a declaratory judgment or 'an action in equity where the enforcement of a statute awaits the final determination of the court as to validity and scope.' Smith v. Cahoon, 283 U.S., at 565, 51 S.Ct., at 586.16 While the necessary remedial operation, extension, is more analogous to a graft than amputation, I think the boundaries of permissible choice may properly be considered fixed by the legislative pronouncement on severability.

Indicative of the breadth of the judicial mandate in this regard is the broad severability clause, 65 Stat. 83, which provides that '(i)f any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby.' While the absence of such a provision would not foreclose the exercise of discretion in determining whether a legislative policy should be repaired or abandoned, cf. United States v. Jackson, [1968] USSC 68;

390 U.S. 570, 585, n. 27[1968] USSC 68; , 88 S.Ct. 1209, 1218, 20 L.Ed.2d 138 (1968), its existence 'discloses an intention to make the act divisible, and creates a presumption that, eliminating invalid parts, the Legislature would have been satisfied with what remained * * *.' Champlin Rfg. Co. v. Corporation Commission, [1932] USSC 92; 286 U.S. 210, 235[1932] USSC 92; , 52 S.Ct. 559, 565[1932] USSC 92; , 76 L.Ed. 1062 (1932). See also Skinner v. Oklahoma, supra; Nat. Life Ins. Co. v. United States, [1928] USSC 132; 277 U.S. 508, 48 S.Ct. 591, 72 L.Ed. 968 (1928).

In exercising the broad discretion conferred by a severability clause it is, of course, necessary to measure the intensity of commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation. Cf. Nat. Life Ins. Co. v. United States, supra (Brandeis, J., dissenting); Dorchy v. Kansas, [1924] USSC 59; 264 U.S. 286, 44 S.Ct. 323, 68 L.Ed. 686 (1924).

The policy of exempting religious conscientious objectors is one of longstanding tradition in this country and accords recognition to what is, in a diverse and 'open' society, the important value of reconciling individuality of belief with practical exigencies whenever possible. See Girouard v. United States, [1946] USSC 75; 328 U.S. 61, 66 S.Ct. 826, 90 L.Ed. 1084 (1946). It dates back to colonial times and has been perpetuated in state and federal conscription statutes. See Mr. Justice Cardozo's separate opinion in Hamilton v. Board of Regents of University, 293 U.S., at 267, 55 S.Ct., at 206; Macintosh v. United States, 2 Cir., 42 F.2d 845, 847 (1930). That it has been phrased in religious terms reflects, I assume, the fact that ethics and morals, while the concern of secular philosophy, have traditionally been matters taught by organized religion and that for most individuals spiritual and ethical nourishment is derived from that source. It further reflects, I would suppose, the assumption that beliefs emanating from a religious source are probably held with great intensity.

When a policy has roots so deeply embedded in history, there is a compelling reason for a court to hazard the necessary statutory repairs if they can be made within the administrative framework of the statute and without impairing other legislative goals, even though they entail, not simply eliminating an offending section, but rather building upon it.18 Thus I am prepared to accept the prevailing opinion's conscientious objector test, not as a reflection of congressional statutory intent but as patch work of judicial making that cures the defect of underinclusion in § 6(j) and can be administered by local boards in the usual course of business.19 Like the prevailing opinion, I also conclude that petitioner's beliefs are held with the required intensity and consequently vote to reverse the judgment of conviction.

Mr. Justice WHITE, with whom THE CHIEF JUSTICE and Mr. Justice STEWART join, dissenting.

Whether or not United States v. Seeger, [1965] USSC 49; 380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733 (1965), accurately reflected the intent of Congress in providing draft exemptions for religious

conscientious objectors to war, I cannot join today's construction of § 6(j) extending draft exemption to those who disclaim religious objections to war and whose views about war represent a purely personal code arising not from religious training and belief as the statute requires but from readings in philosophy, history, and sociology. Our obligation in statutory construction cases is to enforce the will of Congress, not our own; and as Mr. Justice HARLAN has demonstrated, construing § 6(j) to include Welsh exempts from the draft a class of persons to whom Congress has expressly denied an exemption.

For me that conclusion should end this case. Even if Welsh is quite right in asserting that exempting religious believers is an establishment of religion forbidden by the First Amendment, he nevertheless remains one of those persons whom Congress took pains not to relieve from military duty. Whether or not § 6(j) is constitutional, Welsh had no First Amendment excuse for refusing to report for induction. If it is contrary to the express will of Congress to exempt Welsh, as I think it is, then there is no warrant for saving the religious exemption and the statute by redrafting it in this Court to include Welsh and all others like him.

If the Constitution expressly provided that aliens should not be exempt from the draft, but Congress purported to exempt them and no others, Welsh, a citizen, could hardly qualify for exemption by demonstrating that exempting aliens is unconstitutional. By the same token, if the Constitutional prohibits Congress from exempting religious believers, but Congress exempts them anyway, why should the invalidity of the exemption create a draft immunity for Welsh? Surely not just because he would otherwise go without a remedy along with all those others not qualifying for exemption under the statute. And not as a reward for seeking a declaration of the invalidity of § 6(j); for as long as Welsh is among those from whom Congress expressly withheld the exemption, he has no standing to raise the establishment issue even if § 6(j) would present no First Amendment problems if it had included Welsh and others like him. '(O)ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional.' United States v. Raines, [1936] USSC 36; 362 U.S. 17, 21[1936] USSC 36; , 80 S.Ct. 519, 522[1936] USSC 36; , 4 L.Ed.2d 524 (1960). Nothing in the First Amendment prohibits drafting Welsh and other nonreligious objectors to war. Saving § 6(j) by extending it to include Welsh cannot be done in the name of a presumed congressional will but only by the Court's taking upon itself the power to make draft-exemption policy.

If I am wrong in thinking that Welsh cannot benefit from invalidation of § 6(j) on Establishment Clause grounds, I would nevertheless affirm his conviction; for I cannot hold that Congress violated the Clause in exempting from the draft all those who oppose war by reason of religious training and belief. In exempting religious conscientious objectors, Congress was making one of two judgments, perhaps both. First, § 6(j) may represent a purely practical judgment that religious objectors, however admirable, would be of no more use in combat than many others unqualified for military service. Exemption was not extended to them to further religious belief or practice but to limit military service to those who were prepared to undertake the fighting that the armed services have to do. On this basis, the exemption has neither the primary purpose nor the effect of furthering

religion. As Mr. Justice Frankfurter, joined by Mr. Justice Harlan, said in a separate opinion in the Sunday Closing Law Cases[1961] USSC 101; , 366 U.S. 420, 468[1961] USSC 101; , 81 S.Ct. 1101, 1158[1961] USSC 101; , 6 L.Ed.2d 393 (1961), an establishment contention 'can prevail only if the absence of any substantial legislative purpose other than a religious one is made to appear. See Selective Draft Law Cases[1918] USSC 6; , 245 U.S. 366, 38 S.Ct. 159, 62 L.Ed. 349.'

Second, Congress may have granted the exemption because otherwise religious objectors would be forced into conduct that their religions forbid and because in the view of Congress to deny the exemption would violate the Free Exercise Clause or at least raise grave problems in this respect. True, this Court has more than once stated its unwillingness to construe the First Amendment, standing alone, as requiring draft exemptions for religious believers. Hamilton v. Board of Regents, [1934] USSC 165; 293 U.S. 245, 263—264[1934] USSC 165; , 55 S.Ct. 197, 204—205[1934] USSC 165; , 79 L.Ed. 343 (1934); United States v. Macintosh, [1931] USSC 149; 283 U.S. 605, 623 624[1931] USSC 149; , 51 S.Ct. 570, 574—575[1931] USSC 149; , 75 L.Ed. 1302 (1931). But this Court is not alone in being obliged to construe the Constitution in the course of its work; nor does it even approach having a monopoly on the wisdom and insight appropriate to the task. Legislative exemptions for those with religious convictions against war date from colonial days. As Chief Justice Hughes explained in his dissent in United States v. Macintosh, supra, at 633, 51 S.Ct., at 578, the importance of giving immunity to those having conscientious scruples against bearing arms has consistently been emphasized in debates in Congress and such draft exemptions are "indicative of the actual operation of the principles of the Constitution." However this Court might construe the First Amendment, Congress has regularly steered clear of free exercise problems by granting exemptions to those who conscientiously oppose war on religious grounds.

If there were no statutory exemption for religious objectors to war and failure to provide it was held by this Court to impair the free exercise of religion contrary to the First Amendment, an exemption reflecting this constitutional command would be no more an establishment of religion than the exemption required for Sabbatarians in Sherbert v. Verner, [1842] USSC 33; 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), or the exemption from the flat tax on book sellers held required for evangelists, Follett v. McCormick, [1944] USSC 50; 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938 (1944). Surely a statutory exemption for religionists required by the Free Exercise Clause is not an invalid establishment because it fails to include nonreligious believers as well; nor would it be any less an establishment if camouflaged by granting additional exemptions for nonreligious, but 'moral' objectors to war.

On the assumption, however, that the Free Exercise Clause of the First Amendment does not by its own force require exempting devout objectors from military service, it does not follow that § 6(j) is a law respecting an establishment of religion within the meaning of the First Amendment. It is very likely that § 6(j) is a recognition by Congress of free exercise values and its view of desirable or required policy in implementing the Free Exercise Clause. That judgment is entitled to respect. Congress has the power 'To raise and support Armies' and 'To make all Laws which shall be necessary and proper for carrying into Execution' that power. Art. I, § 8. The power to raise armies must be exercised consistently with the First Amendment which, among other things, forbids laws prohibiting the free exercise of religion. It is surely essential therefore—surely 'necessary and proper'—in enacting laws for the raising of armies to take account of the First Amendment and to avoid possible violations of the Free Exercise Clause. If this was the course Congress took, then just as in Katzenbach v. Morgan, [1966] USSC 120; 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966), where we accepted the judgment of Congress as to what legislation was appropriate to

enforce the Equal Protection Clause of the Fourteenth Amendment, here we should respect congressional judgment accommodating the Free Exercise Clause and the power to raise armies. This involves no surrender of the Court's function as ultimate arbiter in disputes over interpretation of the Constitution. But it was enough in Katzenbach 'to perceive a basis upon which the Congress might resolve the conflict as it did,' 384 U.S., at 653, 86 S.Ct., at 1725, and plainly in the case before us there is an arguable basis for § 6(j) in the Free Exercise Clause since, without the exemption, the law would compel some members of the public to engage in combat operations contrary to their religious convictions. Indeed, one federal court has recently held that to draft a man for combat service contrary to his conscientious beliefs would violate the First Amendment. United States v. Sisson, 297 F.Supp. 902 (D.C. 1969). There being substantial roots in the Free Exercise Clause for § 6(j) I would not frustrate congressional will by construing the Establishment Clause to condition the exemption for religionists upon extending the exemption also to those who object to war on nonreligious grounds.

We have said that neither support nor hostility, but neutrality, is the goal of the religion clauses of the First Amendment. 'Neutrality,' however, is not self-defining. If it is 'favoritism' and not 'neutrality' to exempt religious believers from the draft, is it 'neutrality' and not 'inhibition' of religion to compel religious believers to fight when they have special reasons for not doing so, reasons to which the Constitution gives particular recognition? It cannot be ignored that the First Amendment itself contains a religious classification. The Amendment protects belief and speech, but as a general proposition, the free speech provisions stop short of immunizing conduct from official regulation. The Free Exercise Clause, however, has a deeper cut: it protects conduct as well as religious belief and speech. '(I)t safeguards the free exercise of the chosen form of religion. Thus the 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.' Cantwell v. Connecticut, [1940] USSC 84; 310 U.S. 296, 303—304[1940] USSC 84; , 60 S.Ct. 900, 903[1940] USSC 84; , 84 L.Ed. 1213 (1940). Although socially harmful acts may as a rule be banned despite the Free Exercise Clause even where religiously motivated, there is an area of conduct that cannot be forbidden to religious practitioners but that may be forbidden to others. See United States v. Ballard, [1944] USSC 72; 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148 (1944); Follett v. McCormick, [1944] USSC 50; 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938 (1944). We should thus not labor to find a violation of the Establishment Clause when free exercise values prompt Congress to relieve religious believers from the burdens of the law at least in those instances where the law is not merely prohibitory but commands the performance of military duties that are forbidden by a man's religion.

In Braunfeld v. Brown, [1961] USSC 96; 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961), and Gallagher v. Crown Kosher Super Market, [1961] USSC 98; 366 U.S. 617, 81 S.Ct. 1122, 6 L.Ed.2d 536 (1961), a majority of the Court rejected claims that Sunday closing laws placed unacceptable burdens on Sabbatarians' religious observances. It was not suggested, however, that the Sunday closing laws in 21 States exempting Sabbatarians and others violated the Establishment Clause because no provision was made for others who claimed nonreligious reasons for not working on some particular day of the week. Nor was it intimated in Zorach v. Clauson, [1952] USSC 55; 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1952), that the no-establishment holding might be infirm because only those pursuing religious studies for designated periods were released from the public school routine; neither was it hinted that a public school's refusal to institute a released-time program would violate the Free Exercise Clause. The Court in Sherbert v. Verner, supra, construed the Free Exercise Clause to require special treatment for Sabbatarians under the State's unemployment compensation law. But the State could deal specially with Sabbatarians whether the

Free Exercise Clause required it or not, for as Mr. Justice HARLAN then said—and I agreed with him—the Establishment Clause would not forbid an exemption for Sabbatarians who otherwise could not qualify for unemployment benefits.

The Establishment Clause as construed by this Court unquestionably has independent significance; its function is not wholly auxiliary to the Free Exercise Clause. It bans some involvements of the State with religion that otherwise might be consistent with the Free Exercise Clause. But when in the rationally based judgment of Congress free exercise of religion calls for shielding religious objectors from compulsory combat duty, I am reluctant to frustrate the legislative will by striking down the statutory exemption because it does not also reach those to whom the Free Exercise Clause offers no protection whatsoever.

I would affirm the judgment below.