# Harlan: Concurrence

MR. JUSTICE HARLAN, concurring in the result.

Candor requires me to say that I joined the Court's opinion in *United States v. Seeger,* 380 U. S. 163 (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.[[1]](#footnote-1)

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 a 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 **[p. 345]** belief in God of one who clearly qualifies for the exemption."

380 U.S. at 380 U. S. 165-166. 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.

## I

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 **[p. 346]** 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,* 272 U. S. 652 (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,* 343 U. S. 495 (1952), and my concurring opinion in *Estes v. Texas,* 381 U. S. 532, 381 U. S. 595-596 (1965), and my opinion concurring in the judgment in *Garner v. Louisiana,* 368 U. S. 157, 368 U. S. 185(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. v. United States,* 221 U. S. 1 (1911). It is Congress' will that must here be divined. In that endeavor,[p. 347] 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, *Holy Trinity Church v. United States,* 143 U. S. 457 (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,* 397 U. S. 397(1970).[[2]](#footnote-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. **[p. 348]**

### A

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 exempted 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 621 (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,* 283 U. S. 605 . . . , 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.' " **[p. 349]** 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 **[p. 350]** *Macintosh,* and quoted by the *Berman* majority;[[3]](#footnote-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 noncombatant military service. (*See United States v. Berman [sic],* 156 F. (2d) 377, *certiorari denied,* 329 U.S. 795.)"

S.Rep. No. 1268, 80th Cong., 2d Sess., 14.[[4]](#footnote-4) **[p. 351]**

### B

Against this 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's[[5]](#footnote-5) 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; **[p. 352]** 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."[[6]](#footnote-6) **[p. 353]** 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.[[7]](#footnote-7) **[p. 354]** 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, 297 U. S. 348 (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. **[p. 355]** *Cf. Yates v. United States,* 354 U. S. 298 (1957). As the Court stated in *Aptheker v. Secretary of State,* 378 U. S. 500, 378 U. S. 515 (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, 367 U. S. 211]. 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,* 289 U. S. 373, 289 U. S. 379 (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 **[p. 356]** 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,* 271 U. S. 500 (1926); *United States v. Reese,* 92 U. S. 214 (1876), *with Skinner v. Oklahoma,* 316 U. S. 535(1942); *Nat. Life Ins. Co. v. United States,* 277 U. S. 508 (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,* 374 U. S. 398, 374 U. S. 418 (1963). *See Jacobson v. Massachusetts,* 197 U. S. 11, 197 U. S. 29 (1905) (dictum); *cf. McGowan v. Maryland,* 366 U. S. 420 (1961); *Davis v. Beason,* 133 U. S. 333 (1890); *Hamilton v. Board of Regents,* 293 U. S. 245, 293 U. S. 264-265 (1934); *Reynolds v. United States,* 98 U. S. 145 (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,* 397 U. S. 664, 397 U. S. 694 (1970); *Epperson v. Arkansas,* 393 U. S. 97 (1968); *School District of Abington Township v. Schempp,* 374 U. S. 203, 374 U. S. 305 (1963) (Goldberg, J., concurring); **[p. 357]** *Engel v. Vitale,* 370 U. S. 421 (1962); *Torcaso v. Watkins,* 367 U. S. 488, 367 U. S. 495 (1961); *Fowler v. Rhode Island,* 345 U. S. 67 (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 397 U. S. 696.

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]](#footnote-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, in my view, offends the Establishment Clause and is that kind of classification **[p. 358]** 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]](#footnote-9) The common denominator must be the intensity of moral conviction with which a belief is held.[[10]](#footnote-10) Common experience teaches that, among **[p. 359]** "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 (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]](#footnote-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 Educational,* 330 U. S. 1 (1947), the *Sunday Closing Law Cases,* 366 U. S. 420, 366 U. S. 582, 366 U. S. 599, and 366 U. S. 617 (1961), and *Board* **[p. 360]** *of Education v. Allen,* 392 U. S. 236 (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]](#footnote-12) To the extent that *Zorach v. Clauson,* 343 U. S. 306(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 **[p. 361]** groups, I think these cases unsound[[13]](#footnote-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,* 316 U. S. 535 (1942); *Iowa-Des Moines National Bank v. Bennett,* 284 U. S. 239 (1931).[[14]](#footnote-14) **[p. 362]** 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 he 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 individual 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. *Cf. Iowa-Des Moines National Bank v. Bennett, supra; Smith v. Cahoon,* 283 U. S. 553 (1931).[[15]](#footnote-15) **[p. 363]** 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 **[p. 364]** 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 283 U. S. 565.[[16]](#footnote-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. 88, 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,* 390 U. S. 570, 390 U. S. 585 n. 27 (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. Commission,* 286 U. S. 210, 286 U. S. 235 (1932). *See also Skinner* **[p. 365]** *v. Oklahoma, supra; Nat. Life Ins. Co. v. United States,* 277 U. S. 508 (1928).[[17]](#footnote-17)

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,* 264 U. S. 286 (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 **[p. 366]** of belief with practical exigencies whenever possible. *See Girouard v. United States,* 328 U. S. 61 (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,* 293 U.S. at 293 U. S. 267; *Macintosh v. United States,* 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]](#footnote-18) Thus, I am prepared to accept the prevailing opinion's conscientious objector test not as a reflection of congressional statutory intent but, as patchwork **[p. 367]** 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]](#footnote-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.

1. For a discussion of those principles that determine the appropriate scope for the doctrine of stare decisis, see Moragne v. States Marine Lines, also decided today, post, p. 398 U. S. 375; Boys Markets v. Retail Clerks Union, ante, p. 398 U. S. 235; Helvering v. Hallock, 309 U. S. 106(1940). [↑](#footnote-ref-1)
2. The difference is between the substitution of judicial judgment for a principle that is set forth by the Constitution and legislature and the application of the legislative principle to a new "form" that is no different in substance from the circumstances that existed when the principle was set forth. Cf. Katz v. United States, 389 U. S. 347 (1967). As the Court said in Weems v. United States,

"Legislation, both statutory and constitutional, is enacted, . . . from an experience of evils, . . . its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. . . . [A] principle, to be vital must be capable of wider application than the mischief which gave it birth."

217 U.S. 349, 217 U. S. 373 (1910) (emphasis added).

While it is by no means always simple to discern the difference between the residual principle in legislation that should be given effect in circumstances not covered by the express statutory terms and the limitation on that principle inherent in the same words, the Court in Seeger and the prevailing opinion today read out language that, in my view, plainly limits the principle, rather than illustrates the policy and circumstances that were in mind when § 6(j) was enacted. [↑](#footnote-ref-2)
3. The substitution in § 6(j) of "Supreme Being" instead of "God" as used in Macintosh does not, in my view, carry the burden, placed on it in the Seeger opinion, of demonstrating that Congress "deliberately broadened" Chief Justice Hughes' definition. "God" and "Supreme Being" are generally taken as synonymous terms meaning Deity. It is common practice to use various synonyms for the Deity. The Declaration of Independence refers to "Nature's God," "Creator," "Supreme Judge of the world," and "divine Providence." References to the Deity in preambles to the state constitutions include, for example, and use interchangeably "God," "Almighty God," "Supreme Being." A. Stokes & L. Pfeffer, Church and State in the United States 561 (1964). In Davis v. Beason, 133 U. S. 333, 133 U. S. 342 (1890), the Court spoke of man's relations to his "Creator" and to his "Maker"; in Zorach v. Clauson, 343 U. S. 306, 343 U. S. 313 (1952), and Engel v. Vitale, 370 U. S. 421, 370 U. S. 424 (1962), to the "Almighty." [↑](#footnote-ref-3)
4. The Seeger opinion relies on the absence of any allusion to the judicial conflict to parry the thrust of the legislative history, and assigns significance to the Committee citation of Berman as manifestation of its intention to reenact § 5(g) of the 1940 Act, and also as authority for the exclusion of those whose beliefs are grounded in secular ethics. The citation to Berman would not be conclusive of congressional purpose if Congress had simply reenacted the 1940 Act adding only the express exclusion in the last clause. But the reasoning in Seeger totally ignores the fact that Congress, without other apparent reason, added the "Supreme Being" language of the Berman majority in the face of the Bermandissent which espoused Judge Hand's view in Kauten. The argument in Seeger is not, moreover, strengthened by the fact that Congress, in drafting the 1948 Selective Service laws, placed great weight on the views of the Selective Service System which, the Court suggested, did not view Berman and Kauten as being in conflict. 380 U.S. at 380 U. S. 179. The Selective Service System Monograph No. 11, Conscientious Objection (1950) was not before Congress when § 6(j) was enacted, and the fact that the Service relied on both Kauten and Berman for the proposition that conscientious objection must emanate from a religious, and not a secular, source does not mean that it considered the Supreme Being discussion in Berman as surplusage. [↑](#footnote-ref-4)
5. New International Dictionary, Unabridged (2d ed.1934). [↑](#footnote-ref-5)
6. The prevailing opinion's purported recognition of this distinction slides over the "personal moral code" exception, in § 6(j). Thus, that opinion, in concluding that § 6(j) does not 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,"

but excludes individuals whose beliefs are not deeply held and those whose objection to war does not rest upon "moral, ethical or religious principle," but, instead, rests solely upon considerations of "policy, pragmatism, or expediency," ante at 398 U. S. 342-343, blends morals and religion, two concepts that Congress chose to keep separate. [↑](#footnote-ref-6)
7. The apparent purpose of the 1940 change in language was to eliminate membership as a decisive criterion in recognition of the fact that mere formal affiliation is no measure of the intensity of beliefs, and that many nominal adherents do not share or pursue the ethics of their church. That the focus was made the conscientiousness of the individual's own belief does not mean that Congress was indifferent to its source. Were this the case, there would have been no occasion to allude to "religious training" in the 1940 enactment, and to contrast it with secular ethics in the 1948 statute. Yet the prevailing opinion today holds that "beliefs that are purely ethical," no matter how acquired, qualify the holder for § 6(j) status if they are held with the requisite intensity.

However, even the prevailing opinion's ambulatory concept of "religion" does not suffice to embrace Welsh, since petitioner insisted that his beliefs had been formed "by reading in the fields of history and sociology" and "denied that his objection to war was premised on religious belief." 404 F.2d at 1082. That opinion not only establishes a definition of religion that amounts to "Newspeak," but it refuses to listen to petitioner who is speaking the same language. [↑](#footnote-ref-7)
8. This Court has taken notice of the fact that recognized "religions" exist that "do not teach what would generally be considered a belief in the existence of God," Torcaso v. Watkins, 367 U. S. 488, 367 U. S. 495 n. 11, e.g., "Buddhism, Taoism, Ethical Culture, Secular Humanism and others." Ibid. See also Washington Ethical Society v. District of Columbia, 101 U.S.App.D.C. 371, 249 F.2d 127 (1957); 2 Encyclopaedia of the Social Sciences 293; J. Archer, Faiths Men Live By 12138, 254-313 (2d ed. revised by Purinton 1958); Stokes & Pfeffer, supra, n. 3, at 560. [↑](#footnote-ref-8)
9. In Sherbert v. Verner, 374 U. S. 398 (1963), the Court held unconstitutional over my dissent a state statute that conditioned eligibility for unemployment benefits on being "able to work and . . . available for work" and further provided that a claimant was ineligible "[i]f . . . The has failed, without good cause . . . to accept available suitable work when offered him by the employment office or the employer. . . ." This, the Court held, was a violation of the Free Exercise Clause as applied to Seventh Day Adventists whose religious background forced them as a matter of conscience to decline Saturday employment. My own conclusion, to which I still adhere, is that the Free Exercise Clause does not require a State to conform a neutral secular program to the dictates of religious conscience of any group. I suggested, however that a State could constitutionally create exceptions to its program to accommodate religious scruples. That suggestion must, however, be qualified by the observation that any such exception in order to satisfy the Establishment Clause of the First Amendment, would have to be sufficiently broad to be religiously neutral. See my separate opinion in Walz v. Tax Comm'n, supra. This would require creating an exception for anyone who, as a matter of conscience, could not comply with the statute. Whether, under a statute like that involved in Sherbert, it would be possible to demonstrate a basis in conscience for not working Saturday is quite another matter. [↑](#footnote-ref-9)
10. Without deciding what constitutes a definition of "religion" for First Amendment purposes it suffices to note that it means, in my view, at least the two conceivable readings of § 6(j) set forth in 398 U. S. but something less than mere adherence to ethical or moral beliefs in general or a certain belief such as conscientious objection. Thus, the prevailing opinion's expansive reading of "religion" in § 6(j) does not, in my view, create an Establishment Clause problem in that it exempts all sincere objectors but does not exempt others, e.g., those who object to war on pragmatic grounds and contend that pragmatism is their creed. [↑](#footnote-ref-10)
11. Thus, Mr. Chief Justice White said:

"And we pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act . . . because we think its unsoundness is too apparent to require us to do more."

245 U.S. at 245 U. S. 389-390. [↑](#footnote-ref-11)
12. My Brother WHITE in dissent misinterprets, in my view, the thrust of Mr. Justice Frankfurter's language in the Sunday Closing Law Cases. See post at 398 U. S. 369. Section 6(j) speaks directly to belief divorced entirely from conduct. It evinces a judgment that individuals who hold the beliefs set forth by the statute should not be required to bear arms, and the statutory belief that qualifies is only a religious belief. Under these circumstances, I fail to see how this legislation has "any substantial legislative purpose" apart from honoring the conscience of individuals who oppose war on only religious grounds. I cannot, moreover, accept the view, implicit in the dissent, that Congress has any ultimate responsibility for construing the Constitution. It, like all other branches of government, is constricted by the Constitution, and must conform its action to it. It is this Court, however, and not the Congress, that is ultimately charged with the difficult responsibility of construing the First Amendment. The Court has held that universal conscription creates no free exercise problem, see cases cited supra at 398 U. S. 356, and Congress can constitutionally draft individuals notwithstanding their religious beliefs. Congress, whether in response to political considerations or simply out of sensitivity for men of religious conscience, can, of course, decline to exercise its power to conscript to the fullest extent, but it cannot do so without equal regard for men of nonreligious conscience. It goes without saying that the First Amendment is perforce a guarantee that the conscience of religion may not be preferred simply because organized religious groups in general are more visible than the individual who practices morals and ethics on his own. Any view of the Free Exercise Clause that does not insist on this neutrality would engulf the Establishment Clause and render it vestigial. [↑](#footnote-ref-12)
13. That the "released-time" program in Zorach did not utilize classroom facilities for religious instruction, unlike McCollum v. Board of Education, 333 U. S. 203 (1948), is a distinction for me without Establishment Clause substance. At the very least, the Constitution requires that the State not excuse students early for the purpose of receiving religious instruction when it does not offer to nonreligious students the opportunity to use school hours for spiritual or ethical instruction of a nonreligious nature. Moreover, whether a released-time program cast in terms of improving "conscience" to the exclusion of artistic or cultural pursuits, would be "neutral" and consistent with the requirement of "voluntarism," is by no means an easy question. Such a limited program is quite unlike the broad approach of the tax exemption statute, sustained in Walz v. Tax Comm'n, supra, which included literary societies, playgrounds, and associations "for the moral or mental improvement of men." [↑](#footnote-ref-13)
14. See Skinner v. Oklahoma, where MR. JUSTICE DOUGLAS, in an opinion holding infirm under the Equal Protection Clause a state statute that required sterilization of habitual thieves who perpetrated larcenies but not those who engaged in embezzlement, noted the alternative courses of extending the statute to cover the excluded class or not applying it to the wrongfully included group. The Court declined to speculate which alternative the State would prefer to adopt and simply reversed the judgment. [↑](#footnote-ref-14)
15. In Iowa-Des Moines National Bank v. Bennett, Mr. Justice Brandeis speaking for the Court in a decision holding that the State had denied petitioners equal protection of the laws by taxing them more heavily than their competitors, observed that:

"The right invoked is that to equal treatment, and such treatment will be attained if either their competitors' taxes are increased or their own reduced."

284 U.S. at 284 U. S. 247. Based on the impracticality of requiring the aggrieved taxpayer at that stage to "assume the burden of seeking an increase of the taxes which . . . others should have paid," the Court held that petitioner was entitled to recover the overpayment.

The Establishment Clause case that comes most readily to mind as involving "underinclusion" is Epperson v. Arkansas, 393 U. S. 97 (1968). There, the State prohibited the teaching of evolutionist theory but "did not seek to excise from the curricula of its schools and universities all discussion of the origin of man." 393 U.S. at 393 U. S. 109. The Court held the Arkansas statute, which was framed as a prohibition, unconstitutional. Since the statute authorized no positive action, there was no occasion to consider the remedial problem. Cf. Fowler v. Rhode Island, 345 U. S. 67 (1953). Most of the other cases arising under the Establishment Clause have involved instances where the challenged legislation conferred a benefit on religious as well as secular institutions. See, e.g., Walz v. Tax Comm'n, supra; Everson v. Board of Education, supra; Board of Education v. Allen, supra. These cases, had they been decided differently, would still not have presented the remedial problem that arises in the instant case, for they were cases of alleged "overinclusion." The school prayer cases, School District of Abington Township v. Schempp, supra, and Engel v. Vitale, supra,and the released-time cases, Zorach v. Clauson, supra; McCollum v. Board of Education, supra,also failed to raise the remedial issue. In the school prayer situation, the requested relief was an injunction against the saying of prayers. Moreover, it is doubtful that there is any analogous secular ritual that could be performed so as to satisfy the neutrality requirement of the First Amendment and even then the practice of saying prayers in schools would still offend the principle of voluntarism that must be satisfied in First Amendment cases. See my separate opinion in Walz v. Tax Comm'n, supra. The same considerations prevented the issue from arising in the one released-time program case that held the practice unconstitutional.

In McCollum, where the Court held unconstitutional a program that permitted

"religious teachers, employed by private religious groups . . . to come weekly into the school buildings during the regular hours .set apart for secular teaching, and then and there, for a period of thirty minutes, substitute their religious teaching for the secular education provided under the compulsory education law,"

333 U.S. at 333 U. S. 205, the relief requested was an order to mandamus the authorities to discontinue the program. No question arose as to whether the program might have been saved by extending a similar privilege to other students who wished extracurricular instruction in, for example, atheistic or secular ethics and morals. Cf. my separate opinion in Walz v. Tax Comm'n, supra. Moreover. as in the prayer cases, since the defect in the Illinois program was not the mere absence of neutrality, but also the encroachment on "voluntarism," see ibid., it is doubtful whether there existed any remedial alternative to voiding the entire program. A further complication would have arisen in these cases by virtue of the more limited discretion this Court enjoys to extend a policy for the States even as a constitutional remedy. Cf. Skinner v. Oklahoma, supra; Morey v. Doud, 354 U. S. 457(1957); Dorchy v. Kansas, 264 U. S. 286 (1924). [↑](#footnote-ref-15)
16. As long as the Selective Service continues to grant exemptions to religious conscientious objectors, individuals like petitioner are not required to submit to induction. This is tantamount to extending the present statute to cover those in petitioner's position. Alternatively the defect of underinclusion that renders this statute unconstitutional could be cured in a civil action by eliminating the exemption accorded to objectors whose beliefs are founded in religion. The choice between these two courses is not one for local draft boards nor is it one that should await civil litigation where the question could more appropriately be considered. Consequently, I deem it proper to confront the issue here, even though, as a technical matter, no judgment could issue in this case ordering the Selective Service to refrain entirely from granting exemptions. [↑](#footnote-ref-16)
17. In Skinner, the Court impliedly recognized the mandate of flexibility to repair a defective statute -- even by extension -- conferred by a broad severability clause. As already noted, the Court there declined to exercise discretion, however, since, absent a clear indication of legislative preference it was for the state courts to determine the proper course.

While Mr. Justice Brandeis in a dissenting opinion in Nat. Life Ins. Co., supra, at 277 U. S. 522,277 U. S. 534-535, expressed the view that a severability clause in terms like that, before us now is not intended to authorize amendment by expanding the scope of legislation, his remarks must be taken in the context of a dissent to a course he deemed contrary to that Congress would have chosen. Thus, after quoting Hill v. Wallace, 259 U. S. 44, 259 U. S. 71(1922), to the effect that a severability clause

"furnishes assurance to courts that they may properly sustain separate sections or provisions of a partly invalid act without hesitation or doubt as to whether they would have been adopted, even if the legislature had been advised of the invalidity of part [b]ut . . . does not give . . . power to amend the act,"

Justice Brandeis observed, that:

"Even if such a clause could ever permit a court to enlarge the scope of a deduction allowed by a taxing statute, . . . the asserted unconstitutionality can be cured as readily by [excision] as by [enlargement],"

and that the former would most likely have been the congressional preference in that particular case. Cf. Iowa-Des Moines National Bank v. Bennett, supra. [↑](#footnote-ref-17)
18. I reach these conclusions notwithstanding the admonition in United States v. Reese that it "is no part of [this Court's] duty" "[t]o limit [a] statute in [such a way as] to make a new law, [rather than] enforce an old one." 92 U. S. 214, 92 U. S. 221 (1876). See also Yu Cong Eng v. Trinidad, 271 U. S. 500 (1926); Marchetti v. United States, 390 U. S. 39, 390 U. S. 60 (1968). Neither of these cases involved statutes evincing a congressional intent to confer a benefit on a particular group, thus requiring the frustration of third-party beneficiary legislation when the acts were held invalid. Moreover the saving construction in Marchetti would have thwarted, not complemented, the primary purpose of the statute by introducing practical difficulties into that enforcement of state gambling laws that the statute was designed to further. [↑](#footnote-ref-18)
19. During World War I, when the exemption was granted to members or affiliates of "well-recognized religious sect[s]," the Selective Service System found it impracticable to compile a list of "recognized" sects, and left the matter to the discretion of the local boards. Second Report of the Provost Marshal General to the Secretary of War on the Operations of the Selective Service System to December 20, 1918, p. 56. As a result, some boards treated religious and nonreligious objectors in the same manner. Report of the Provost Marshal General to the Secretary of War on the First Draft Under the Selective Service Act, 1917, p. 59. Finally, by presidential regulation dated March 20, 1918, it was ordered that conscientious objector status be open to all conscientious objectors without regard to any religious qualification. The experience during World War II, when draft boards were operating under the broad definition of religion in United States v. Kauten, 133 F.2d 703 (C.A.2d Cir.1943), also demonstrates the administrative viability of today's test. Not only would the test announced today seem manageable, but it would appear easier than the arcane inquiry required to determine whether beliefs are religious or secular in nature. [↑](#footnote-ref-19)