University of Florida Journal of Law & Public Policy

Volume 6 | Issue 2 Article 2

1994

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C. John Sommerville

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In 1965, when the U.S. Supreme Court was deciding a case of conscientious objection to military service, it found that certain statutory definitions of religion were inadequate.[1] So the Court looked for help from outside, and quoted some passages from certain eminent theologians of that day: erstwhile Lutheran Paul Tillich,[2] controversial Anglican Bishop John A.T. Robinson,[3] Dr. David Saville Muzzey of the Ethical Culture Movement,[4] as well as from a draft report from the Vatican II Ecumenical Council.[5]

Why these? Did not choosing a group of theologians establish their view of religion as the law of the land? But who should the Court have consulted, if not these? In a secularized culture, the power to define what is religion and what is arrant nonsense has taken the place of the question of what is orthodox and what is heresy, in terms of its seriousness. Those who define religion for legal purposes thereby govern what religious activities will be permitted to us. Therefore, it is no surprise when questions are raised about the present state of this issue.

In this article, I discuss the main issues involved in defining religion,

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1. United States v. Seeger, 380 U.S. 163, 174-75 (1965).
2. Id. at 180.
3. Id. at 181.
4. Id. at 182-83.
5. Id. at 181-82.

show how some key Supreme Court decisions have created unnecessary difficulties in this area, and suggest how a few changes in the Court's traditional language would be necessary to create a more reasonable, less controversial situation. Finally, I examine some practical implications of these considerations for recent cases.

I. SOURCES OF LEGAL DEFINITIONS

The Supreme Court's actions in defining religion run the risk of establishing the Justices' own views of religion, and will inevitably interfere with the "free exercise" of those who use another definition. It is clear that in the United States the Supreme Court has the *power* to define religion. So the *source* of its definition will be a critical factor in public acceptance of its decisions. The public should feel that the definition is natural and "self-evident," rather than an arbitrary imposition.

That being the case, where can the Court turn for definitions that would have more authority than others? There are at least seven possibilities. Of course, there are dictionary definitions of religion, which are important because they try to reflect common usage. It seems appropriate to govern a people in line with their own understandings of things, especially in a democracy. Choosing "expert" opinions which would violate that common usage may well be resented. On the other hand, it may be precisely those who have eccentric views of religion who will need the law's protection. A second source are the definitions used by those who wrote the First Amendment—say Madison or Jefferson or their contemporaries.

In addition to these, there are various academic definitions as well. Theological definitions are the creations of experts operating within particular confessional groups. Courts want to be sure that these are general or "generic" definitions that do not favor a particular religious tradition. Justices or judges also might recognize that some theologians only try to reflect the understanding of the group they represent, while others are attempting to change their churches by leading them in an unfamiliar direction. There are other academics—anthropologists, sociologists, historians, philosophers, psychologists—who have a sub-specialty in studying religious behavior. They may be sympathetic to religion, but they operate outside any particular church in their academic capacity and try to be impartial and objective. To that end, they claim to be shaping their definitions to the common understanding of the term, describing religion "phenomenologically"—as it is approached or apprehended by common people who might not be able to articulate their own religious compulsions. These fields are not seeking to *impose* a definition, in the manner of the more aggressive theologians, but to *derive* a definition from common behavior and assumptions.

We may postulate further possibilities. One might let "the people," or their representatives, decide on a political definition of religion by an exer-

cise of power, voting down those whom they think are superstitious. But this is one thing that the establishment prohibition was meant to prevent.[6] We also might remember the influence of the media in all areas of our life. We are not accustomed to thinking of the news as an independent entity with an agenda of its own; it presents itself simply as a window on the world, and therefore neutral. But the definitions favored by editors will be powerfully influential when they are pounded into our heads day after day for generations. Finally, we might assume that only the individual can define religion in a manner wholly satisfactory to that individual.

In *Seeger*, the Court chose a definition used by radical theologians, that is those attempting to change their church by leading them in an unfamiliar direction.[7] The reason the Court saw the need for rethinking the matter was that earlier decisions had already moved away from definitions which stipulated a belief in God or a Supreme Being. Such a definition would have been "normative"—implying that those religious beliefs were acceptable and others were not. Not wishing to be too narrow in its treatment of religion—as the country itself became more diverse—the Court shied away from specifying the content expected of religious belief. Still, there had to be some way to decide which beliefs are "religious," and the Court found help in Paul Tillich's notion of religious belief as one's "ultimate concern."[8] This seemed to be the sort of generic and *functional* definition that would test whether a particular party's ideas could be protected as religious even if they were "atheistic" if judged by the old standard of belief in a Supreme Being.

Many feel that the law has gotten into a muddle because of this effort to broaden the sense of what religion may include. The Court should be given credit for trying to preserve our heritage of rights in an evolving or disintegrating culture, but it has discovered that religion is not an easy thing to define because of cultural variety and change over time.

In a recent book, *The Secularization of Early Modern England: From Religious Culture to Religious Faith*,[9] I tried to show how certain sociological and anthropological concepts help make sense of a very great historical change in religion in England. The study focused, therefore, on the country that was the source of our laws and our political institutions in the period just before our Constitution was written.[10] The "secularization" of the title does not refer to a decline of religious belief so much as the *separation* of various areas of life and thought from religious direction. Essentially, the secularization process reduces religious *practice* to religious *belief* and en-

6. By superstition, I mean the odd beliefs of people you do not respect.

7. *Seeger*, 380 U.S. at 180-83.

8. *Id.* at 187.

9. C. JOHN SOMMERVILLE, THE SECULARIZATION OF EARLY MODERN ENGLAND: FROM RELIGIOUS CULTURE TO RELIGIOUS FAITH (1992).

10. *See generally id.*

courages the emergence of a more conscious faith. It may be surprising to think that religion had not always been a matter of belief or faith in this self-conscious sense. But for many people, then and now, religion is an implicit trust in certain *practices*. Only after all the various aspects of life are separated from religious considerations do people begin to think of religions as "meaning systems"—a definition one encounters more and more.

Jefferson had already reached that understanding when he penned Virginia's "Bill for Establishing Religious Freedom."[11] The change to religion-as-belief had already taken place for the upper classes or intellectual elites of British and American society by his day. Madison, however, at least hinted at a broader definition when he spoke of religion as "the duty which we owe to our creator, *and the manner of discharging it.*"[12] That implies action as well as belief. Samuel Johnson's famous dictionary straddled the fence, defining religion as "(1) Virtue, as founded upon reverence of God, and expectation of future rewards and punishments. (2) A system of divine faith and worship."[13] Thus the time during which the framers of our First Amendment lived was characterized by a balance between religious action and religious belief.

For most early societies, and for many elements in American society even today, religion is *more* a matter of actions than a matter of beliefs. Things would be easier for the Court if religion only meant beliefs and not actions, since it is mostly by our actions that we disturb others. The Court could leave "mere opinions" alone and be confident that its legal restrictions on behavior would never touch the heart of a "faith." But the Court would have to ignore the wording of the First Amendment to take this stand, since it speaks of the "exercise" of religion and its "establishment." That implies behavior and it would be hard to imagine "establishing" a belief, except perhaps by compulsory education. *Practices* are what one can most easily establish.

Commentators on the First Amendment often assume that it guarantees freedom of conscience or of belief and not religion in this wider sense. But hard cases have forced the Court to recognize that religious actions need protection as much as religious belief.[14] They have been slower to realize just how diverse this makes us. Usually in speaking of our diversity, we are thinking of progressive theologians and articulate conscientious objectors. Would that such understanding were directed to a variety of less intellectualized religious positions. Courts need to consider not only those intellectuals

11. Sanford Kessler, *Locke's Influence on Jefferson's "Bill for Establishing Religious Freedom,"* 25 J. CHURCH & ST. 231 (1983).

12. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 818 n.19 (1978) (emphasis added).

13. 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 206 (London 1775).

14. Cantwell v. Connecticut, 310 U.S. 296, 330 (1940).

who are being original in their philosophy but also those elements in society that are not likely to pursue their concerns to the Supreme Court. There are many in our midst who have inherited subcultures which were already "out of date" in the time of the Founding Fathers, but which may outlast the culture of Jefferson's "Enlightenment."

Our courts have been strongly affected by the modernizing ideology which I traced, accepting a narrow definition of religion which makes it a matter of one's most philosophical and poetic solitude. But nothing is intrinsically secular. Anything whatsoever can be given religious meaning and purpose: cooking, planting, war, medicine, commerce, play, and politics. In an integral culture, these activities are not just *governed by* religion; they *are* the religion itself. They are the very ways in which people make contact with powers which are beyond the ordinary. This is a challenge for our courts, which should see that we are all allowed to follow our traditions so far as this can be reconciled with our living together.

For purposes of my historical study I distilled a definition of religion from standard anthropological and sociological treatments, to see religion as *that which gives access to supernatural powers or to the presence of such powers*. Only after a process of secularization is the area of religion reduced to little more than beliefs about a "Supreme Being." And that was not the religious experience of many at the time of the Constitution—native Americans, slaves, and whites of many descriptions. They did not philosophize about their religion, they practiced it. Or in the words of the Amendment, they exercised their religion.

II. AMBIGUITIES OF THE FUNCTIONAL/SUBSTANTIVE DISTINCTION

Over the first century of our history, the Supreme Court's understanding of religion tended to be narrow. In 1890, the Supreme Court told the Mormons that their practice of polygamy was not really a religious tenet, because it went against "the laws of all civilized and Christian countries," and would "shock the moral judgment of the community."[15] To call polygamy "a tenet of religion is to offend the commonsense of mankind," the Court stated.[16] Religion was what the Court and the country found more or less self-evident, the consensus of civilization. In our second century, we have become more sensitive to cultural variety. So in 1965 the Court was looking for a definition that would leave the content or the dogmas of a religion aside, and would determine what was religious on another basis. Tillich's definition was offered as a neutral way of deciding whether a belief qualified as truly reli-

15. Davis v. Beason, 133 U.S. 333, 341 (1890).
16. *Id.* at 342.

gious.[17] Whatever functioned as one's ultimate or most serious concern was thereby identified as that which should be protected as an exercise of religion.

Unfortunately, confusion crept into legal thinking at this point. Legal scholars favored a dichotomy of functional, as opposed to "content-based" definitions, and assumed that functional definitions were more acceptable because they were not normative.[18] In other words, identifying what functions as your religion avoids questions of what kind of religion is more acceptable or authentic.

There are two things wrong with this function/content distinction. In the first place, functional definitions are not *sui generis*. They make religions part of a larger category along with whatever else shares the same function. Second, it turns out that functional definitions can be normative also. We need to take up each of these points.

A more significant dichotomy than function/content is the difference between two kinds of substantive definitions. It is true that our laws must avoid entanglement with the specific content of religions. Apparently, the Court had assumed that all substantive definitions referred to specific beliefs. But substantive *analytical* definitions refer to content only in terms of the analytical elements common to religions rather than to specific dogmatic particulars. We are not speaking here of *beliefs* common to all religions. A substantive definition might assert that religions always refer to ultimate reality, without going on to assume that this will involve a "Being" or even that it will involve morality.

To put it another way, analytical definitions may only reveal what questions religions ask or what subjects they address, and not what answers they give. To say that religion is concerned with uncanny powers beyond any human power is an analytical statement, like saying that economics is about the production and exchange of goods. It does not stipulate which are the truest ways of thinking about this power. As we shall see, our frequent mention of power is not accidental, and gains authority from the fact that the very word "religion" comes from the Latin *religare*, which means to hold back or bind fast. In its essence, as anthropologists frequently observe, religion deals with taboos—the marking off of places, times, persons, things or actions as forbidden, invoking dread at their power.[19]

The thing that makes analytical definitions more appropriate than func-

17. United States v. Seeger, 380 U.S. 163, 189 (1965).

18. *E.g.*, Anita Bowser, *Delimiting Religion in the Constitution: A Classification Problem*, 11 VAL. U. L. REV. 163, 166 (1977); Jesse Choper, *Defining 'Religion' in the First Amendment*, 1982 U. ILL. L. REV. 579, 594-601; William G. Hollingsworth, *Constitutional Religious Protection: Antiquated Oddity or Vital Reality*, 34 OHIO ST. L.J. 15, 78 *passim* (1973); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1072 (1978).

19. WINSTON KING, INTRODUCTION TO RELIGION: A PHENOMENOLOGICAL APPROACH 11 (1968).

tional ones here is that they see things in terms of the elements peculiar to them—what is unique to religion, in this instance. Definitions should strive for this precision. By contrast, functional definitions see things in terms of the wider categories to which they belong. A functional definition of religion sees it as one way of doing some particular thing, among other ways. In other words, functional definitions do not take religion as seriously, indicating that it is only one manner of accomplishing a particular task. If one thought that religion was only one way of bonding society, for example, the Court might wonder why it needed special protections.

One may assume that the Founders thought of religion as *sui generis* with unique characteristics. But when the Supreme Court recently began to assume that "religious" was just another way of saying "intense," it widened the concept of religion so greatly as to make it unnecessary.[20] Wherever one can make functional substitutions, there is no longer the need to invoke a freedom of religious exercise. There are other rights which could govern the case, and indeed many cases involving religion have been resolved more simply under the rights of free speech or assembly. But if religion is *sui generis* we will need a substantive definition.

The other problem with functional definitions is that they can be normative too. Tillich thought that some people had concerns—like their nation or worldly success—that they put in the position of being ultimate, which were *not* truly ultimate and were therefore "idolatrous."[21] But idolatry is a form of religion in most people's lexicons. Justices certainly do not want to decide which of our ultimate concerns are merely idolatrous, which deserve protection and which we should be encouraged to outgrow. Whether or not the Justices knew it, Tillich's own test for true ultimacy was in terms of whether the *object* was worthy of that concern or commitment.[22] So his functional definition ends up being normative.

The *Seeger* decision also cites *Webster's Dictionary*,[23] the defendants's own claims,[24] judicial precedent,[25] the statute—with its political definition of religion,[26] records of the legislature's intent,[27] and a law review article.[28] Justice Douglas, in a concurring opinion, cited the editors of *Life* magazine[29] and various authorities on Hinduism[30] and Buddhism,[31] in his ef-

20. *See* Welsh v. United States, 398 U.S. 333 (1970).

21. PAUL TILLICH, DYNAMICS OF FAITH 12, 27 (1957)

22. *Id.* at 11-12; *see also* James McBride, *Paul Tillich and the Supreme Court: Tillich's "Ultimate Concern" as a Standard in Judicial Interpretation*, 30 J. CHURCH & ST. 245, 267-72 (1988).

23. *Seeger*, 380 U.S. at 174.

24. *Id.*

25. *Id.* at 175-76

26. *Id.* at 174.

27. *Id.* at 176-79.

28. *Id.* at 170.

29. *Id.* at 189 (Douglas, J., concurring).

30. *Id.* at 190 (Douglas, J., concurring).

fort not to find common ground. The Court was looking for help everywhere, but not finding enough.

A number of semantic mistakes were also made in the *Seeger* case which would be amplified later. The Court noted that the statute in question, the Universal Military Training and Service Act of 1948, declared that "a merely personal moral code" would not merit a religious exemption.[32] But the Court claimed, by appealing to Tillich's concept, that a moral belief can "occupy in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption."[33] This is not really true. Purely ethical or moral beliefs do not have a position parallel to the beliefs of those who claim that their actions are subject to extratemporal consequences. This is not to claim that religious beliefs are more moral than others, just different, but frighteningly different. Others have suggested that this matter of extratemporal consequences is the mark of a religious conscience, in that the consequences of violating that conscience are eternal or infinite in some sense.[34]

Defendant Seeger claimed that he had "a religious faith in a purely ethical creed"[35] and the Justices took this as his way of expressing an "ultimate concern."[36] They went on to declare that they would accept "all sincere religious beliefs which are based upon a power or being, or upon a faith [sic], to which all else is subordinate or upon which all else is ultimately dependent."[37] Thus they created an analytical and substantive definition of religion to go along with the earlier functional one.

At trial, the District Court for the Southern District of New York determined that Seeger's "religion" did not qualify for conscientious objector exemption from the draft and he was convicted.[38] The Court of Appeals for the Second Circuit reversed, holding that the Supreme Being requirement distinguished between beliefs that were "externally compelled" or "internally derived," and was therefore an "impermissible classification" under the Due Process Clause of the Fifth Amendment.[39] In other words, the Court of Appeals faulted the trial court for making a distinction between two religious positions.

That, again, was a mistake. Religion is by its nature something that "externally compels." By a phenomenological definition religion always involves

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31. *Id.* at 191 (Douglas, J., concurring).
32. *Id.* at 173.
33. *Id.* at 176.
34. Choper, *supra* note 18, at 597-604.
35. *Seeger*, 380 U.S. at 166. Jakobson, a defendant in a companion case characterized his religion as "attitudes," the violation of which did not seem to involve any consequences to him. *Id.* at 168.
36. *Id.* at 187.
37. *Id.* at 176.
38. *Id.* at 166.
39. *Id.* at 167 (citing United States v. Seeger, 326 F.2d 846 (2d Cir. 1964)).

power or "a Power" outside the believer. The *Seeger* decision itself uses the term "power" eight times in wrestling with the notion of religion. Rudolf Otto, in the classic statement of the phenomenological study of religion, pointed out that the common denominator of humanity's religious sense, not necessarily involving the notion of a God, is a sense of awe or fear before the numinous.[40] The alien character of the power that is the source of this feeling is, he said, an essential characteristic of all religions.[41] In the seventy-five years since his work, students of religion have not disputed that characterization. One's religion is, precisely, that which is not in one's control, and is no doubt why the Founders felt it should be respected. By contrast, a "personal moral code," in Congress's phrase,[42] is more likely to be internally derived.

Justice Douglas thought that the majority opinion had not been forthright.[43] It seems Justice Douglas thought the Court should have invalidated the statute for specifying a "Supreme Being" and thereby singling out one type of religion for protection.[44] Justice Douglas was thinking back to *Torcaso v. Watkins*[45] which had pointed out that not all religions are "theistic."[46] Justice Douglas's colleagues had evaded his objection by claiming that Congress was already trying to liberalize the notion of religion by using the phrase "Supreme Being" instead of "God."[47] That seemed to justify them in liberalizing even further, allowing anything that functioned as religion to justify an exemption from military service.[48]

One should pause to note that not only are some religions without gods, but that not every philosophy that contains the term "God" is a religion. If there is no traffic between that God and the devotee, there is no reason to consider it anything more than a philosophy. The point to be stressed is that it is universally understood that religions must have consequences for the believer.

III. THE COURT BECOMES CREATIVE AND CONTROVERSIAL

In 1970 the Supreme Court further confused the issue of the essence of religion in *Welsh v. United States*,[49] in which the facts were very close to those of *Seeger*. Justice Black, writing for a plurality of four which included

40. RUDOLF OTTO, THE IDEA OF THE HOLY 5 *passim* (John W. Harvey, trans. Oxford 1924).
41. *Id.* at 31-40.
42. 50 U.S.C. § 456(j) (1958).
43. *Seeger*, 380 U.S. at 188 (Douglas, J., concurring).
44. *Id.*
45. 367 U.S. 488 (1961).
46. *Seeger*, 380 U.S. at 193 n.2 (Douglas, J., concurring).
47. *Id.* at 175.
48. *Id.* at 187.
49. 398 U.S. 333 (1970) (plurality opinion).

Justice Douglas, was troubled by the issue of religious establishment which he thought was implied in the exemption from military service provided by Congress. There were two ways to deal with the issue: nullify the statute as an unconstitutional establishment, or define religion so widely as to rob it of any independent meaning. The plurality chose the latter and were accused by Justice Harlan of "groping to preserve the conscientious objector status at all cost."[50]

Welsh had denied that his objection was religious, but the four prevailing Justices declared that he was not the best judge of that matter.[51] His political and personal moral views, specifically excluded by statute from the exemption, were taken as religious by using a functional criterion. For the Court's discussion now turned on how strong or deep the belief was. In other words, for this Court religious meant *intense*, which is presumably something more than sincere. As in a functional definition, religion is here seen as a synonym for a more common characteristic.

One must ask, though, what is an intense belief? Is it not just a belief held by an intense, stubborn or emotional person? That would make it a psychological rather than a religious characteristic. "Religion," on this understanding, is not a type of belief but a level of belief. The exemption which was originally justified only because of religious imperatives is now denied only to "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."[52]

All this contradicted the statute's wording quite directly.[53] The original religious basis for the exemption would have allowed it to someone who did not really mind the prospect of killing and was only restrained by religious dogma. But such a person would fail the Court's new test!

In his concurring opinion, Justice Harlan revealed more of the erosion of the notion of religion. "Having chosen to exempt," he wrote, the law "cannot draw the line between theistic or nontheistic religious beliefs on the one hand and secular beliefs on the other."[54] That would transgress the establishment prohibition, for the exemption had to be extended to all beliefs of a certain "intensity of moral conviction."[55] Apparently, Justice Harlan also had fallen into the habit of thinking that the First Amendment was to preserve belief or the inviolability of conscience. But the First Amendment protects religion,

50. *Id.* at 354 (Harlan, J., concurring).

51. *Id.* at 341.

52. *Id.* at 342-43.

53. See Justice Harlan's concurrence for an analysis of the extent to which the plurality's opinion explicitly contradicted the wording of the statute. *Id.* at 356 (Harlan, J., concurring).

54. *Id.* at 356 (Harlan, J., concurring).

55. *Id.* at 358 (Harlan, J., concurring).

not just belief, and the more logical conclusion is that the statutory exemption should be offered to all religions.

Justice Harlan further assumed that the religious exemption was an historical relic from a time when ethics and morals were taught mostly by religious institutions.[56] He implied that they are now the province mostly of secular philosophy.[57] Again, we see the assumption that religion has been replaced by functional equivalents and is not *sui generis*.

The exasperation of a minority on that Court was shown in Justice White's dissent. He and two colleagues pointed out that all the concern over establishment was misplaced; the issue in the draft law was free exercise.[58] Without the religious exemption the law would force the government to prosecute draftees for their religious inability to comply.[59] Seen in that light, these Justices thought that Congress had done a good job in accommodating free exercise, while the Court was embarrassing itself by its arbitrary redefinitions.

IV. MEETING CURRENT QUESTIONS

Congress and the Court could easily agree on a substantive and analytical definition of religion which would echo their earlier ones, while stopping short of the wayward conclusions of *Welsh*. The criticisms made in this article could be answered by combining the formulas that clashed in *Seeger* so that religion is defined as: "The protections guaranteed to religion are offered to those with a sincere belief in, or relation to, a power or being to which all else is subordinate, but excluding essentially political, social or philosophical opinions or a moral code involving no transcendent consequences." Or, in the words of some earlier decisions, our laws could guarantee the rights of religion "to those who, by training or belief, bear responsibility to a power or authority higher than any worldly one, which would lead to the disregard of elementary self-interest."[60] Such a definition would be truer to tradition and expectation, and would restore a sense of dignity to First Amendment interpretation.

If the Court were now to adopt a substantive definition of religion, it would tend to narrow the protections for free exercise in a few areas. Our courts have recently used the cover of religion to enlarge a right of privacy.[61] It was the latter motive that makes the careless logic of *Welsh* seem to

56. *Id.* at 366 (Harlan, J., concurring).

57. *Id.*

58. *Id.* at 371-72 (White, J., dissenting).

59. *Id.*

60. This definition is a combination of cases to which Justice Harlan cites. *Welsh*, 398 U.S. at 348 (Harlan, J., concurring). These cases include United States v. Macintosh, 283 U.S. 605 (1931); Berman v. United States, 156 F.2d 377 (9th Cir. 1946); and United States v. Kauten, 133 F.2d 703 (2d Cir. 1943).

61. Choper, *supra* note 18, at 591.

be part of the cultural "fire sale" of the 1970s.

Correspondingly, such a definition will also narrow the scope of the establishment prohibition. This might displease some conservatives who would like to accuse the government of establishing secularism. Yet, many traditionalists would be willing to see the public encouragement of a civil religion, one which provides an essential foundation under the Constitution itself. Of course, in the area of education, where children have few powers of resistance or discernment, the courts should remain especially watchful. As schools become more all-enveloping, there is a need for public recognition of the important areas not touched by the curriculum. On educational grounds alone we should have some official avowal of the fact that there are values which transcend utility and patriotism, and that are no business of mere schools. To adopt a substantive definition of religion would provide legal protection to religions that seem idolatrous or superstitious to some. That is precisely the reason for constitutional guarantees. Ironically, the Court's effort to broaden the definition of religion in *Seeger* and *Welsh* was to earn wider respect for religion, beyond what the Court thought was due to its traditional forms.

The recent and controversial decision in *Employment Bureau v. Smith*[62] avoids some of the mistakes made earlier, but raises other problems regarding the concept of religion. The majority opinion clearly acknowledged the constitution's protection of religious actions as well as beliefs.[63] It recognized that any action whatsoever can become religious if the actor gives it a religious meaning. That was implied when the Court declared that the First Amendment was meant to prevent states from prohibiting "acts or abstentions only when they are engaged in for religious reasons,"[64] for that would unfairly burden believers. But it is unlikely that any legislature will ban an activity *only* insofar as it is given a religious meaning. Therefore the Court has created an empty category, and if it follows this logic it will cease to exercise any protection of religious exercise.

Under the new guideline, if a law of general applicability is passed against dunking people under water, a perfectly reasonable law, the Court will deny religious exemptions and thereby prohibit the Baptist religion. This may seem absurd, but it is exactly what happened in *Smith* to a religion that is older than the Baptist religion, and much older than the U.S. government, when the Court refused to grant an exemption for the sacramental use of peyote, a religious practice which predates Columbus.[65] As we have noted earlier, any action whatsoever can be given a religious meaning. Under the

62. 494 U.S. 872 (1990).
63. *Id.* at 877.
64. *Id.*
65. *Id.* at 890.

older *Sherbert* Rule, reasonable exemptions could be made to acts which inhibited religious freedom, unless the government's interest was judged to be compelling.[66] The new majority claims that the *Sherbert* Rule was not being used much anyway.[67]

One wonders about the reasoning behind such a disdain for precedent. The new guideline will, of course, narrow the establishment prohibition, and perhaps that was the goal.[68] On the free exercise side, it will fall hardest on minority faiths. There will then be an obvious test of both the delicate matter of centrality/sincerity of beliefs and how long it takes groups to emigrate, as some Amish communities are doing today because they find Honduras to be freer than the United States. Legislators, who have depended on the courts to fine-tune their general laws, will have to reflect on their more exposed position and on the definition of religion which they employ, if the Court proves uninterested in such questions.

Finally, our considerations of the nature of religion bears on the question of whether the practice of abortion could ever be ruled to be an exercise of religious freedom. This possibility gave pause to proponents of the Religious Freedom Restoration Bill, which was itself a response to the *Smith* decision. They feared that a strengthened First Amendment might be used to justify abortion, if the principles of *Roe v. Wade*[69] are weakened.

Again, the notion that the freedom of religious exercise could be used to permit abortion shows a confusion of the meaning of the term religion. Religions do not permit things; they command them. This is literally part of the definition of religion. One's religion is the final term in one's thinking, or as Tillich put it, one's ultimate concern.[70] To grant *permission* to do something is to indicate that something *else* will become determinative—some personal preference. Probably few could plausibly argue that their religion *demands* abortion. Instead, they will say that their religion permits abortion, or a specific abortion. However, they would be claiming that their ultimate concern is giving way to some lesser consideration like health, career, family finances, a less-than-optimal baby, or embarrassment.

Again, Tillich had the main point right: religion has to do with one's deepest concern, the final cause, or ultimate reality. It does not willingly stand aside while some other concern takes over. If it did, it would be clear that one did not take one's religion very seriously. In the terminology of *Welsh*, you would have shown that you had more intense beliefs than your

66. Sherbert v. Verner, 374 U.S. 398, 402-03 (1963).

67. *Smith*, 494 U.S. at 883.

68. For instance, Justice Scalia, who drove the Court's "bulldozer" (his term) over its free exercise traditions in *Smith II*, showed an unwonted delicacy in its next establishment case, Lee v. Weisman, 112 S. Ct. 2649 (1992).

69. 410 U.S. 959 (1973).

70. TILLICH, *supra* note 21, at 122.

religion.[71]

Of course, the principle enunciated in *Smith* itself would also prohibit a freedom-of-religious-exercise protection for abortion. If *Roe v. Wade* were overturned, there would be some limits on abortion. So long as there are generally applicable criminal laws which were not passed for the express purpose of limiting religious exercise, the present Court is not prepared to grant a religious exemption for the practice.

V. CONCLUSION

Reversing the mistakes of recent court decision goes against the grain of our legal tradition, and certainly we expect justices to show caution in doing so. But there is also room for reflection on whether sufficient caution was shown in the remarkable changes discussed above, which amount to a constitutional revolution.

71. *Welsh*, 398 U.S. at 339-40.