

# High court contributes confusion to debate

By Larry Witham  
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While justices repeatedly have said religion is not the Supreme Court's business, its rulings have nevertheless addressed it with sometimes confusing results.

The latest definition, by Justice Anthony Kennedy in the court's 1992 ban on school commencement prayers, stated that religion is the conviction "there is an ethic and a morality which transcends human invention."

Forty years earlier, Justice William O. Douglas was more specific when he said, "We are a religious people whose institutions presuppose a Supreme Being."

In the years between, the court tried to describe what exactly the two religion clauses of the First Amendment protect as the nation experienced rising secularism and pluralism.

The future court also "will be forced to grapple with this issue [of defining religion] at least at its edges," Justice Sandra Day O'Connor said in a recent speech.

"The Supreme Court has not tried to define religion, except in the conscientious objector cases, where they pretty much defined it out of existence," said Dean Kelley, counsel on religious liberty to the National Council of Churches.

In a 1965 objector case, the court said any "belief" is religion if it "is sincere and meaningful and occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God."

In another ruling, Mr. Kelley said, a conscientious objector said he was not protesting on religious grounds, but the court told him it was functional religion anyway.

In 1961 the court said the First Amendment must equally protect nontheistic "religions," such as Buddhism and "secular humanism."

The court seemed to waver a decade later, saying not all comprehensive beliefs amount to religion. In 1972 it ruled that the Amish could defy Wisconsin public school attendance laws, but someone holding the views of, say, Henry David Thoreau could not.

While a federal appeals court said transcendental meditation is a religion that cannot be taught in school, the Supreme Court said "donations" made to Scientology could not be deducted as religious giving.

At worst, the Supreme Court narrowed religion to an "irrational" and personal idiosyncrasy with little public legitimacy, said Russell Hittinger, a scholar at the American Enterprise Institute.

He would agree with Chief Justice Warren Berger's 1981 statement that "religious belief need not be acceptable, logical, consistent or comprehensible to others in order to merit First Amendment protection."

But Mr. Hittinger said that view has been taken to extremes, beginning with the conscientious objector cases. It was confused further, he said, in cases about a moment of silence in school and creches in front of courthouses.

Regarding the silent moment, the court ruled it unconstitutional because the "subjective" intent of the lawmakers was religious. In the creche case, the court said the manger scene was religious because an "objective observer" said so.

By taking such views, Mr. Hittinger said, the court "ultimately backs itself into the corner of having no subject to adjudicate."