Conscientious Objection: The Constitutional Questions

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CONSCIENTIOUS OBJECTION: THE CONSTITUTIONAL QUESTIONS*

HOWARD R. LURIE**

I. INTRODUCTION

The Military Selective Service Act of 19671 exempts from combatant training and service in the armed forces any person "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." Under this, and preceding similar provisions, thousands of young men2 have been exempted from military service because of their beliefs, while millions of other young men—in spite of their beliefs—have been required to serve.

The Supreme Court has never held that the Constitution requires an exemption for conscientious objectors to war, nor has it held that such an exemption is constitutionally prohibited. The decided cases dealing with the exemption appear to have assumed that it is a matter of legislative grace on the part of the Congress subject, however, to constitutional limitations.3 By judicially expanding the scope of the statutory exemption through statutory interpretation, the Court has avoided reaching the constitutional questions.4 Indeed, it may be said that the Court has evaded the issue.5

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* Note: The following article was written before the Supreme Court's decision in Gillette v. United States and Negre v. Larsen, 91 S. Ct. 828 (1971), was delivered. The judgment of the Court in those cases was that the conscientious objector exemption of the Military Selective Service Act of 1967 is not available to one who is sincerely opposed to participation only in a particular war, i.e., the selective objector, even though that objection is the result of religious training and belief. Following the Supreme Court's decision in these cases, the author prepared an addendum to his article, "After Gillette and Negre—Some Answers" which is printed infra at 156.

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3 As of December 31, 1970, there were 28,188 registrants classified in category I-O (conscientious objector). Selective Service News 4 (February 1971). Not included in these figures are registrants classified in category I-A-O (conscientious objectors willing to serve in a noncombatant capacity).
5 United States v. Seeger, 326 F.2d 846, 848 (2d Cir. 1964).
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The time may soon come, however, when the Court can no longer refuse to confront the issue. This article will examine the issue with a view toward resolving the question.

II. HISTORICAL BACKGROUND

An exemption from military service for those whose religious or religious beliefs presented for them a moral dilemma with respect to obedience to the state or to their consciences is not without historical precedent. The American Colonies dealt with the situation by various means which were later perpetuated in their state statutes and constitutions. By the time of the Civil War the exemption of religious conscientious objectors from military service was an accepted concept. During the Civil War the responsibility for conscription shifted from the states to the federal government. The Draft Law of 1864 provided for noncombatant service for members of religious denominations whose rules and articles of faith and practice prohibited them from bearing arms. The Confederacy generally provided parallel treatment for certain conscientious objectors. The First World War saw the continuation of the exemption for certain religious conscientious objectors.

The 1940 Selective Training and Service Act broadened the World War I exemption by eliminating the requirement that the claimant belong to a pacifist religious sect so long as his opposition to war was based on "religious training and belief." This expansion of the exemption was a recognition of the fact that one could be religious without belonging to a recognized church. The Act did not, however, define or otherwise specify what was meant by "religious training and belief." Two cases decided in the circuit courts between 1940 and

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10 See J. Reither, World History at a GLANCE 102 (1942).


12 Selective Service System Monograph No. 11, Conscientious Objection 41-42 (1950).

13 Id. at 43-48.

14 United States v. Downer, 135 F.2d 521, 524 (2d Cir. 1943).

15 54 Stat. 889.

16 See United States v. Kauten, 133 F.2d 703, 708 (2d Cir. 1943); Berman v. United States, 136 F.2d 377, 381 (9th Cir. 1946), cert. denied, 329 U.S. 795 (1946).
1948 construed that language and reached different results. The Second Circuit in *United States v. Kauten*\(^{17}\) construed the language nontheistically as "a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets."\(^{18}\) That a belief in God was not necessary to the exemption was reiterated in *United States v. Badt*.\(^{19}\) Subsequently, the Ninth Circuit in *Berman v. United States*\(^{20}\) rejected the view of the Second Circuit and construed the language in theistic terms to distinguish "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."\(^{21}\) In the 1948 Universal Military Training and Service Act,\(^{22}\) Congress defined "religious training and belief" to mean "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relations, but does not include essentially political, sociological or philosophical views or a merely personal moral code."\(^{23}\)

### III. PRESENT INTERPRETATION

A literal reading of the statutory language of the Universal Military Training and Service Act would seem to indicate a Congressional purpose to limit the exemption to those whose objection to participation in war was "religious" in the traditional sense of the word, which requires a belief "in a conventional God."\(^{24}\) The constitutionality of the section was raised in *United States v. Seeger*,\(^{25}\) where it was argued that, so interpreted, the statute was unconstitutional under the first amendment's establishment and free exercise clauses in that it did not exempt nonreligious conscientious objectors and discriminated between different forms of religious expression in violation of the due process clause of the fifth amendment. Faced with this constitutional challenge, the Supreme Court avoided it by concluding that Congress meant the language "to embrace all re-

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\(^{17}\) 133 F.2d 703 (2d Cir. 1943).
\(^{18}\) Id. at 708.
\(^{19}\) 141 F.2d 845 (2d Cir. 1944). *See also* United States v. Downer, 135 F.2d 521, 524 (2d Cir. 1943).
\(^{20}\) 156 F.2d 377 (9th Cir. 1946), cert. denied, 329 U.S. 795 (1946).
\(^{21}\) 156 F.2d at 380.
\(^{25}\) 380 U.S. 163 (1965).

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ligions and to exclude essentially political, sociological, or philosophical views." Therefore, if a "sincere and meaningful" belief "occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualified for the exemption" it is a belief "in a relation to a Supreme Being" and is "religious" under the statute. Belief "in a traditional God" is not essential, and the belief need not be externally compelled or derived.

Having construed Seeger's beliefs to be in a relation to a Supreme Being, the Court was able to declare that Seeger's objection to participation in war was based upon religious training and belief, and that he, therefore, qualified for the exemption.

It is doubtful that Congress really meant to exempt persons such as Seeger, who was not religious in the traditional sense of the word, and it appears that the Court stretched the statutory language to include him only to avoid the constitutional infirmities that his exclusion might present.

In its study of the Selective Service System in 1966-67 the National Advisory Commission on Selective Service considered the technical question of whether the statute should be amended to assure as a matter of orderly form that the Supreme Court's interpretation of the law as set forth in the Seeger decision would be followed. But the majority of the Commission concluded that since the Court itself is the final authority for statutory interpretation, such an amendment would be unnecessary.

On the other hand, the Civilian Advisory Panel on Military Manpower Procurement reported to the House Committee on Armed Services at about the same time that the Seeger decision "unduly expanded the basis upon which individual registrants could claim conscientious objections to military service."

26 Id. at 165.
27 Id. at 176.
28 Id. at 178.
29 Id. at 186.
32 Id. at 13.
3. The Supreme Court decision in the Seeger case appears to ignore the intent of Congress which, in amending the language of the 1940 Draft Act, attempted to narrow the circumstances and more clearly define the basis for claiming conscientious objection to military service. The interpretation by the Court of the language added by Congress in this regard actually resulted in a significant broadening of the basis on which these claims can be made with the very real possibility that in the future there will be an ever-increasing number of unjustified appeals for exemption from military service.\textsuperscript{33}

Reporting on the bill that was to become the Military Selective Service Act of 1967 the Conference Committee stated: "The Senate conferees also concurred in the desire of the House language to more narrowly construe the basis for classifying registrants as 'conscientious objectors.'"\textsuperscript{34}

The bill deleted the reference to a "Supreme Being" but continued the exclusion of "essentially political, sociological or philosophical views, or a merely personal moral code."\textsuperscript{35} If it was truly the intent of Congress to limit the scope of the exemption\textsuperscript{36} by deleting the "Supreme Being" language from the statute,\textsuperscript{37} the recent case of \textit{Welsh v. United States}\textsuperscript{38} would seem to indicate that Congress has failed in its attempt. \textit{Welsh}, decided in 1970 under the 1948 Act, is strikingly similar to \textit{Seeger}.

\textsuperscript{33} Id. at 14.
\textsuperscript{35} S. 1432, 90th Cong., 1st Sess., § 7 (1967).
\textsuperscript{36} \textit{Selective Service System, Legal Aspects of Selective Service} 13 (1969).
\textsuperscript{37} The logic behind the deletion would be as follows: The exemption runs in favor of those who oppose war as a result of religious training and belief. Religious training and belief was defined to be a "belief in a relation to a Supreme Being." Since the Supreme Court gave a very broad interpretation to a "belief in a relation to a Supreme Being," anything meeting that test was, by definition, "religious" under the statute. By removing the definition of "religious training and belief" Congress may have intended to narrow its scope.

In syllogistic form, the argument is as follows: Let "A" be religious training and belief; let "B" be a belief in a relation to a Supreme Being; let "C" be Seeger's beliefs. Congress exempted from military service those who were by virtue of "A" opposed to participation in war. "A" is defined as "B." In \textit{Seeger} the Court said "C" is "B," therefore, "C" is "A." If "B" is the link between "C" and "A," Congress could have hoped to break the chain by removing the link between "C" and "A."

\textsuperscript{38} 398 U.S. 333 (1970).
Seeger's conscientious objector claim had been denied "solely because it was not based upon a 'belief in a relation to a Supreme Being.'"\textsuperscript{39} The Supreme Court, therefore, addressed itself to that specific question. Welsh's claim, however, was denied "because his Appeal Board and the Department of Justice hearing officer 'could find no religious basis for the registrant's belief, opinions, and convictions.'"\textsuperscript{40} Welsh had not characterized his beliefs as religious, but attributed them to his "readings in the fields of history and sociology."\textsuperscript{41} The Court\textsuperscript{42} did not, therefore, address itself to the question of whether or not Welsh's beliefs were in a relation to a Supreme Being, which, if answered affirmatively, would, by definition, have qualified his beliefs as religious. Rather, the Court went on to decide the question of the religious character of his beliefs as if the Supreme Being clause were not in the Act.\textsuperscript{43}

In Welsh, the Court said that under Seeger a conscientious objector's opposition to war is "religious" within the meaning of section 6(j) of the Universal Military Training and Service Act, if it stems from his "moral, ethical, or religious beliefs about what is right and wrong and that these beliefs are held with the strength of traditional religious convictions."\textsuperscript{44} Even though an individual's beliefs are purely ethical or moral in source and content, they function as a religion in his life if they "impose upon him a duty of conscience to refrain from participating in any war at any time."\textsuperscript{45} Thus, the Court concluded, the "section exempts from military service all those whose consciences, spurred by deeply held moral, eth-

\textsuperscript{40} Welsh v. United States, 398 U.S. 333, 338 (1970).
\textsuperscript{41} \textit{Id.} at 341.
\textsuperscript{42} There was no majority opinion in the Welsh case. Justice Black delivered an opinion in which Justices Douglas, Brennan, and Marshall joined. Justice Harlan concurred in the result, and wrote a separate opinion. 398 U.S. at 344. Justice White, joined by Chief Justice Burger and Justice Stewart, dissented. 398 U.S. at 367. Justice Blackmun took no part in the consideration or decision of the case. 398 U.S. at 344. For purposes of this article, references to the "Court" in Welsh means the Black opinion.
\textsuperscript{43} The Court of Appeals had likewise considered the case as though the "Supreme Being" clause were not in the Act. "The facts and result of Seege at the Supreme Court level lead to only one conclusion: The Supreme Court deleted the 'Supreme Being' clause from the statute . . . . We see no need to consider the constitutionality of this clause because it was already \textit{sub silentio} stricken from the statute and was so considered by the Department of Justice in this case." Welsh v. United States, 404 F.2d 1078, 1082 (9th Cir. 1968), rev'd 398 U.S. 333 (1970).
\textsuperscript{44} Welsh v. United States, 398 U.S. 333, 340 (1970).
\textsuperscript{45} \textit{Id.} at 340.
ical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war."

IV. THE CONSTITUTIONAL QUESTIONS.

Welsh does not, unfortunately, answer the questions as to the constitutionality of the conscientious objector exemption. If anything, it prolongs the agony of uncertainty.

Actually, there have been very few cases reaching the Supreme Court involving conscientious objection, and few of these involved registrants claiming the benefit of the exemption. So long as the claimant could be fitted within the statutory exemption, there was no need to pass upon the constitutional issues which have been raised. In any event, those questions dealt only with whether the apparent limitation upon the exemption was constitutional. By construing the statute so as to eliminate the apparent limitation, the constitutional questions were avoided.

Because the statute has always provided a conscientious objector exemption, the Court has never been called upon to declare that the first amendment requires it. And, so long as the statutory provision is broad enough to encompass any claim that could be made under an argument that exemption is constitutionally required, there has been no need for the Court to reach the constitutional questions. There are, however, several ways in which the constitutional questions could be raised. First, a question could arise if Congress, unhappy over the Court’s expansion of the exemption, were to abolish it, and a claim were made as a matter of constitutional right. Second, a registrant could make a claim for exemption which could not be fit within the statutory exemption. And, third, one clearly not entitled to the exemption could challenge his induction on the ground that the Act unconstitutionally exempts others.

46 Id. at 344.
48 This possibility raises, of course, a difficult question of "standing." "[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 others or other situations in which its application might be unconstitutional." United States v. Raines, 362 U.S. 17, 21 (1960). However, where quotas must be met as they must under the Selective Service
A. IS AN EXEMPTION FOR RELIGIOUS CONSCIENTIOUS OBJECTORS A CONSTITUTIONAL RIGHT?

Religious objectors to war have always been exempt by statute. Twice the Supreme Court, in cases in which the draft exemption could not be employed, 49 refused to hold that an exemption for religious conscientious objectors was a constitutional right. In United States v. Macintosh, 50 it was expressly argued that "a citizen cannot be forced and need not bear arms in a war if he has conscientious religious scruples against doing so." 51 Calling the statement "astonishing," Justice Sutherland rejected it unequivocally:

The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him . . . . That body may grant or withhold the exemption as in its wisdom it sees fit; and if it be withheld, the native-born conscientious objector cannot successfully assert the privilege. No other conclusion is compatible with the well-nigh limitless extent of the war powers . . . which include, by necessary implication, the power, in the last extremity, to compel the armed service of any citizen in the land, without regard to his objections or his views in respect of the justice or morality of the particular war or of war in general. 52

"Sweeping as the foregoing quotation seems to be," said Judge Wyzanski in United States v. Sisson, 53

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49 United States v. Macintosh, 283 U.S. 605 (1931); Hamilton v. Board of Regents of University of California, 293 U.S. 245 (1934). Macintosh involved a Canadian seeking to become a United States citizen. He refused on grounds of conscience to promise in advance that he would bear arms in defense of the United States unless he believed the war to be morally justified. Hamilton involved students at the University of California who challenged the power of the state to compel them to participate in ROTC programs as a condition of attending the University. Neither of these cases involved a registrant seeking a conscientious objector classification from the Selective Service System.

50 283 U.S. 605 (1931).

51 Id. at 623.

52 Id. at 623-24.

The sum of the matter is that a careful scholar could conclude in 1969, as Professor Powell did in 1941, that "Notwithstanding all judicial declarations, it has not been actually decided that a conscientious objector, not within any group exempted by Congress, can be put into the front-line trenches or put into the army where certain refusals to obey orders may be punished by death."\(^5^4\)

Justice White's dissenting opinion in \textit{Welsh} also suggests that the answer is not yet in when he asserts that there are "substantial roots in the Free Exercise Clause\(^5^5\) for the statutory exemption, and that Congress may have granted it because in its view "to deny the exemption would violate the Free Exercise Clause or at least raise grave problems in this respect."\(^5^6\) Unlike Justice Harlan, who unqualifiedly stated in his concurring opinion "Congress, of course, could, entirely consistently with the requirements of the Constitution, eliminate all exemptions for conscientious objectors,"\(^5^7\) Justice White seemed to undermine the authority of \textit{Hamilton v. Board of Regents of the University of California}\(^5^8\) and \textit{United States v. Macintosh}\(^5^9\) for that proposition, saying: "this Court is not alone in being obliged to construe the Constitution in the course of its work. ... .\(^6^0\)

Obviously, if the failure to provide an exemption for religious conscientious objectors amounted to an interference with the free exercise of religion, the granting of an exemption would not be an establishment of religion. It could hardly be argued that Congress was establishing religion when it provided by statute what was commanded by the Constitution. If there is a right to an exemption based upon religious objection, and it is compelled by the free exercise clause, the exemption could be as narrow as the free exercise clause requires without creating any establishment problems. Only if Congress favored some religions or religious beliefs over other religions or religious beliefs would problems arise.\(^6^1\) It was upon this basis that the result in \textit{Seeger} was justified.

\(^{54}\) \textit{Id.} at 908.
\(^{56}\) \textit{Id.} at 370 (dissenting opinion).
\(^{57}\) \textit{Id.} at 356 (concurring opinion).
\(^{58}\) 293 U.S. 245 (1934).
\(^{59}\) 283 U.S. 605 (1931).
\(^{61}\) "Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no religion; and it may not aid, foster, or
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In *Sherbert v. Verner* the Supreme Court held that an exemption on religious grounds was constitutionally required from a law of general application so as not to interfere with the free exercise of religion. The same reasoning could support a decision requiring an exemption from combatant service for religious conscientious objectors. Indeed, it would appear that this rationale lay behind Judge Wyzanski's decision in *United States v. Sisson* that to draft a man for combat service contrary to his conscientious beliefs would violate the first amendment. Less than two months before the *Welsh* decision, the Supreme Court decided *Walz v. Tax Commission*, upholding the constitutionality of a property tax exemption for property used distinctively for religious purposes. This decision would support the granting of an exemption even though the free exercise clause might not compel it. Since the court of appeals in *Welsh* could find no religious basis for his conscientious objector claim, the Supreme Court could easily, if *Sherbert v. Verner* would support a finding that an exemption was constitutionally required for religious objectors, have denied Welsh's claim. That the Court expanded the scope of the statutory exemption beyond parochial religious objection to encompass non-religious moral and ethical objection as well leads to the conclusion that the free exercise clause does not, in the opinion of a majority of the Court, require an exemption for religious conscientious objectors.

B. Is an Exemption Limited to Religious Conscientious Objectors a Prohibited Establishment of Religion?

Justice Harlan quite clearly holds the opinion that an exemption limited to religious objectors to war is a prohibited establishment of religion. To him, the first amendment requires that in matters of religion government must be wholly neutral. In his view, the implementation of the neutrality principle requires an equal protection mode of analysis. The Court must survey meticulously the circumstances of governmental cate-

promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates government neutrality between religion and religion and religion and nonreligion." *Epperson v. Arkansas*, 393 U.S. 97, 103-4 (1968).


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gories to eliminate, as it were, religious gerrymanders. In any particular case the critical question is whether the circumference of the 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.\(^6\)

In his view, a valid exemption “must encompass the class of individuals it purports to exclude,”\(^6\)\(^7\) i.e., anyone who is conscientiously opposed to war.

The dissenters in *Welsh*, on the other hand, would not find an establishment of religion in an exemption “from the draft for all those who oppose war by reason of religious training and belief,”\(^6\)\(^8\) since such an exemption “has neither the primary purpose nor the effect of furthering religion.”\(^6\)\(^9\)

Justice Black in the opinion of the Court did not expressly address himself to the establishment question. He avoided it by defining “religious belief” in section 6(j) to include moral and ethical beliefs. He sees no establishment problem because to him the statute provides what Justice Harlan says it violates the establishment clause for not providing—an exemption for anyone who is conscientiously opposed to war. In *Seeger*, the Supreme Court defined the Supreme Being clause broadly in order to avoid the constitutional infirmities that would otherwise exist. Undoubtedly, Justice Black did the same thing in *Welsh* for the same reason. If an exemption for objection to war based on narrowly defined religious grounds were constitutional, there would be no reason to avoid the question by construing the language broadly. Without expressly saying so, it seems clear that the Court is of the opinion that to limit the exemption to those whose opposition to war is religious only in a traditional or parochial sense of the word would be an invalid establishment of religion.

Justice White was obviously correct when he said that “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. . . .”\(^6\)\(^7\)\(^5\) However, that does not answer the question of whether, if an exemption for religious believers is


\(^8\) Id. at 369 (dissenting opinion).

\(^9\) Id. at 369 (dissenting opinion).
not required, it is an establishment of religion to provide it. Justice White said, “the Establishment Clause as construed by this Court unquestionably has independent significance; its function is not wholly auxiliary to the Free Exercise Clause.” The *Walz* decision certainly supports that position. However, Justice White does not suggest any basis for drawing the line between religious and non-religious objectors other than the free exercise clause.

White additionally commented that if an exemption for religious objectors is an establishment of religion, it would not “be any less an establishment if camouflaged by granting additional exemptions for nonreligious, but ‘moral’ objectors to war.” Harlan, of course, disagreed.

[The Court’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.]

These comments are significant in that they may forecast the Court’s views on other questions discussed infra.

**C. Is an Exemption Limited to Conscientious Objectors to All Wars a Prohibited Establishment of Religion?**

In addition to requiring that the opposition to war be “by reason of religious training and belief,” the Military Selective Service Act provides that the objection be “to participation in war in any form.” This language has consistently been interpreted administratively to mean that to qualify for the exemption one has to be opposed to participation in all wars. Objection to participation in particular wars only was not sufficient. Thus the exemption has not been available to the “selective conscientious objector.” The Supreme Court has not yet ruled on this question, but it is expected to do so in the current term.

71 Id. at 373 (dissenting opinion).
72 Id. at 370-71 (dissenting opinion).
73 Id. at 358, n.10 (concurring opinion).
74 See Local Board Memorandum No. 107, SEL. SERV. L. REP. 2200:16 (1970).
75 *Kauten v. United States*, 133 F.2d 703, 708 (2d Cir. 1943).
The constitutional issue could, of course, be avoided if the statute were to be construed to confer an exemption for selective conscientious objection.\textsuperscript{77} It is only if the statute does not recognize selective objection that a constitutional issue is raised.\textsuperscript{78}

It is thought by many that selective objection is purely a political objection.

[S]o-called selective pacifism is essentially a political question of support or nonsupport of a war and cannot be judged in terms of special moral imperatives. Political opposition to a particular war should be expressed through recognized democratic processes and should claim no special right of exemption from democratic decisions.\textsuperscript{79}

Others recognize that objection to a particular war can be the result of religious, moral, or ethical beliefs. It cannot be denied that there are many theologians who recognize the existence of a "Just War" doctrine\textsuperscript{80} which permits its adherents to distinguish between moral and immoral wars on an essentially religious basis. Many whose views are religious only in the sense of Seeger, and others whose views are religious, moral or ethical in the sense of Welsh, while not claiming total pacifism, consider the present war in Vietnam to be wrong and immoral. The character of their views is such that, if opposed to all wars, they would clearly be entitled to the exemption. If they are to be denied the exemption solely because they consider the present war wrong, but are unwilling to condemn all war as wrong, a very serious constitutional question is raised.\textsuperscript{81}

In Seeger, "the Court construed the congressional intent as being in 'keeping with its long-established policy of not picking and choo-


\textsuperscript{79} REPORT OF THE NATIONAL ADVISORY COMMISSION ON SELECTIVE SERVICE, IN PURSUIT OF EQUITY: WHO SERVES WHEN NOT ALL SERVE? 50 (1967).

\textsuperscript{80} For a brief discussion of the "Just War" doctrine see Macgill, Selective Conscientious Objection: Divine Will and Legislative Grace, 54 Va. L. Rev. 1355, 1372-77 (1968). See also Potter, Conscientious Objection to Particular War, 4 Religion and the Public Order 44, 66-77 (1968).

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ing among religious beliefs.’” It is clear from the decided cases that the Congress could not constitutionally limit the exemption to members of certain churches.

For then those who embraced one religious faith rather than another would be subject to penalties; and that kind of discrimination . . . would violate the Free Exercise Clause of the First Amendment. It would also result in a denial of equal protection by preferring some religions over others—an invidious discrimination that would run afoul of the Due Process Clause of the Fifth Amendment.

If the belief “all wars are wrong” is treated differently from the belief “this war is wrong” it would imply that the substance of a belief and not its character is the determining factor. Both beliefs express a moral judgment, and are at least theoretically capable of being characterized as moral, ethical, or religious. Therefore, the only difference between total pacifism and selective pacifism is content and not character.

If the statute draws a permissible distinction between religious and nonreligious belief, and the conscientious objector exemption is limited to religious objectors in recognition of free exercise values, there seems to be no basis upon which to exclude the religious selective objector from the exemption. Even if an exemption is not compelled by the free exercise clause, and is not an establishment of religion if conferred on religious objectors only, an equal protection argument arises if the exemption is granted to total pacifists and denied to religious selective objectors. If, however, the exemption is not compelled by the free exercise clause, and a limitation of the exemption to religious objectors would be an invalid establishment of religion, then if the statute does not distinguish between religious and nonreligious belief, and the only distinction is one of content and not character, the only question is whether the content of the belief is a permissible basis for distinction. In other words, if the distinction between total and selective pacifism is not a distinction between religious beliefs, the fact that the selective objection may be the result of religious training and belief ceases to be relevant, and the denial

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\(^{64}\) See Bolling v. Sharpe, 347 U.S. 497 (1954).
of the exemption to selective objectors is not a preference of one religious belief over another.

D. IS AN EXEMPTION LIMITED TO CONSCIENTIOUS OBJECTORS TO WAR A DENIAL OF EQUAL PROTECTION TO POLITICAL OBJECTORS TO WAR?

The Military Selective Service Act\(^{85}\) clearly excludes from the conscientious objector exemption objection to war arising out of "essentially political, sociological, or philosophical views or a merely personal moral code." In *Welsh*, the Court said that this language should not 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 policy, pragmatism, or expediency."\(^{86}\) The Court emphasized that these exclusions are definitional and do not restrict the category of persons who are conscientious objectors by reason of "religious training and belief."\(^{88}\) Once a registrant is determined to be a "religious" conscientious objector within the meaning of § 6(j), "it follows that his views cannot be 'essentially political, sociological or philosophical.' Nor can they be a 'merely personal moral code.'"\(^{89}\)

It is clear that the religious, moral, or ethical objector to all war is entitled to exemption under *Seeger* and *Welsh*. The political objector is not. The ultimate question, of course, is whether Congress may constitutionally make such a distinction in conscripting for war.

In the ultimate analysis, the exemption for conscientious objectors is a classification of individuals by government on the basis of their beliefs for the purpose of measuring their obligations to the State. The individual's beliefs are measured in three dimensions: (1) content, (2) character, and (3) intensity. Apparently, only a deeply held moral, ethical, or religious objection to war qualifies its holder for the exemption.\(^{90}\)

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\(^{87}\) *Id.* at 342-43.

\(^{88}\) *Id.* at 343.

\(^{89}\) *Id.* at 343.

\(^{90}\) *See* Local Board Memorandum No. 107, SEL. SERV. L. REP. 2200:16 (1970).
Hypothetically, one may be opposed to participation in war on religious (however defined) or nonreligious (defined to include all that does not fit within the definition of "religious") grounds. Justice White could find no constitutional impediment to granting an exemption to the religious objector and withholding it from the nonreligious objector. "It cannot be ignored," he said, "that the First Amendment itself contains a religious classification." Justice Harlan disagreed. For him, such a distinction amounted to an improper establishment of religion. Had the statute provided what the Court construed it to provide, Harlan would not find any establishment problem. An exemption of that scope would not be circumscribed by invalid criteria. The distinction then would not be between religious (however defined) and nonreligious objection. The distinction would be purely secular. If the distinction is purely secular, however, it must not violate the equal protection requirement incorporated in the due process clause. There must, therefore, be a secular basis for granting the exemption to some and withholding it from others.

Justice White suggested a secular reason for exempting some objectors in his argument that the religious-nonreligious distinction was valid.

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 which the armed services have to do. On this basis, the exemption has neither the primary purpose nor the effect of furthering religion. An exemption for those who cannot and, regardless of the consequences, will not fight serves purely secular purposes.

However, if the purpose of the exemption is simply to separate those who will not fight from those who will, the motivating factor

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92 See p. 147, supra.
should not be significant so long as the psychological impact on the
individual is the same. Indeed, as a practical matter it may be
impossible to distinguish between moral, ethical, religious, or polit-
ical beliefs. Political judgments are frequently the result of moral,
ethical, and even religious considerations. Welsh himself had great
difficulty in characterizing his views.\textsuperscript{94} Evidently, it was the psy-
chological impact upon him of his beliefs that determined the result,
for the Court of Appeals concluded that he had held them "with the
strength of more traditional religious convictions,"\textsuperscript{95} and the Supreme
Court held this was sufficient. The important consideration seemed
to be whether the individuals' beliefs were such that they "would
give them no rest or peace if they allowed themselves to become a
part of an instrument of war."\textsuperscript{96} Harlan suggests that the test is really
the sincerity or intensity of the objection to war.\textsuperscript{97} "Common experi-
ence 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."\textsuperscript{98}
The threshold question of sincerity which must be resolved in every case
is a question of fact. The validity of what the individual believes
cannot be questioned. "Men may believe what they cannot prove.
They may not be put to the proof of their religious doctrines or
beliefs."\textsuperscript{99} "Local Boards and courts . . . are not free to reject beliefs
because they consider them 'incomprehensible.'"\textsuperscript{100} However, the
boards are permitted to determine whether the belief is "truly
held,"\textsuperscript{101} and their decisions "made in conformity with the regulations
are final even though they may be erroneous. The question of the
jurisdiction of the local board is reached only if there is no basis in
fact for the classification which it gave the registrant."\textsuperscript{102}

To permit an administrative agency such as the Selective Service
System Local Board to conduct an inquiry in "such an intensely
personal area"\textsuperscript{103} as the inner recesses of a man's mind, and to make
conclusive findings of fact is, of course, a questionable practice. This

\textsuperscript{94} See Welsh v. United States, 404 F.2d 1078, 1091 (9th Cir. 1968)
(dissenting opinion of Judge Hamley).
\textsuperscript{95} Id. at 1081.
\textsuperscript{97} Id. at 358.
\textsuperscript{98} Id. at 358-59.
\textsuperscript{100} United States v. Seeger, 380 U.S. 163, 184-85 (1965).
\textsuperscript{101} Id. at 183.
\textsuperscript{102} Estep v. United States, 327 U.S. 114, 122-23 (1946).
\textsuperscript{103} United States v. Seeger, 380 U.S. 163, 184 (1965).
is especially true in view of the regulations under which the System operates, such as 32 C.F.R. section 1624.1(b), which denies to the registrant the assistance of counsel at his personal appearance before the Local Board which makes the crucial finding of fact.

The real question, however, is whether there is any justification for allowing one man to escape military service because of his reasons for concluding that he does not wish to participate in war while denying escape to another because he reaches the same conclusion for different reasons. Unless the Constitution permits an accommodation for religious views, there can be no justification for distinguishing between the moral, ethical, or religious objector and the political or pragmatic objector.

Ultimately, the question becomes: Is what a man believes important to government? If it is, there must be a reason that is constitutionally justifiable. If there is not, the belief, the reasons for it, and the intensity with which it is held, should be irrelevant.

V. CONCLUSION

Expediency rather than compassion may be the true rationale for the conscientious objector exemption. "Conscientious objectors represent one of the smallest groups in the Selective Service System." So long as their numbers were small and the available pool of manpower so large that their loss was of little or no significance, it may have been expedient to exempt those who would not participate in the military effort. It is doubtful that an exemption would exist if the number who could qualify was very great. Compassion rather than expediency may have dictated, however, that the conscientious objector should perform alternative service rather than being sent to prison. Having chosen to show compassion, however, the Congress may not show it to some and unconstitutionally withhold it from others.

If the conscientious objector exemption is compelled by the free exercise clause for religious objectors, it is doubtful that it can be withheld from the religious selective objector. Even if it is not compelled by the free exercise clause, it would appear to be an unconstitutional establishment of religion or a denial of equal protec-

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tion if it did not extend to the religious selective objector, even if it was not an establishment to confine it to religious objectors.

If it is an establishment to confine the exemption to religious objectors to war, it seems doubtful that it could be denied to any sincere objector to war without running afoul of the due process clause as a denial of equal protection. Whether any limited exemption could be drafted that would survive constitutional challenge is questionable. That the present statute fails to do so should be beyond doubt.

Perhaps the answer is to abolish the exemption entirely and to deal with the conscientious objector administratively through assignment to noncombatant tasks. To the conscientious objector, if to no one else, it ought to be clear that it is a fiction to believe that one can participate in the functioning of a nation at war without also participating in that war as much as the noncombatant in uniform.

ADDENDUM

AFTER Gillette and Negre—SOME ANSWERS

In an eight to one decision, the Supreme Court, in Gillette v. United States and Negre v. Larsen, ended the steady expansion of the conscientious objector exemption from military training and service.

Gillette, a humanist, and Negre, a devout Catholic sought relief from military service on the grounds that they were conscientiously opposed to participation in the war in Vietnam. Neither was

1 Justice Black concurred in the judgment of the Court and in Part I of the opinion of the Court. Justice Douglas dissented.

2 91 S. Ct. 828 (1971).

3 Gillette was convicted of failing to report for induction into the armed forces. He defended on the ground that he should have been exempt from induction as a conscientious objector. He expressed a willingness to participate in a war of national defense or a war sponsored by the United Nations as a peace-keeping measure, but considered the American military operation in Vietnam "unjust". His conviction was affirmed by the Court of Appeals. 420 F.2d 298 (2d Cir. 1970).

Negre sought a discharge from the Army as a conscientious objector after receiving orders for Vietnam duty. He believed that he as a devout Catholic had a duty to discriminate between "just" and "unjust" wars, and to refuse to participate in "unjust" wars. He considered the Vietnam war to be "unjust". His request for a discharge was refused, and he sought relief by habeas corpus. The District Court denied relief and the Court of Appeals affirmed. 418 F.2d 908 (9th Cir. 1969).
opposed to war as such, or to all wars. Both claimed a statutory and a constitutional right to be relieved of the duty of military service on the grounds of their conscientious objection. The Court rejected their claims.

As to their statutory claim the Court concluded that "a straightforward reading" of the statute "can bear but one meaning," that the exemption is limited to one who is conscientiously opposed "to participating personally in any war and all war." The statute recognizes only "a claim of conscience running against war as such."

With respect to their constitutional claim the majority concluded, in an opinion by Justice Marshall, that: (1) a limitation of the exemption to objectors to all wars is not an invalid establishment of religion because it "does not discriminate on the basis of religious affiliation or religious belief, apart of course from beliefs concerning war," but rather "serves a number of valid purposes having nothing to do with a design to foster or favor any sect, religion, or cluster of religions." Furthermore, there are a number of "valid neutral reasons . . . for limiting the exemption to objectors to all war," such as "the Government's need for manpower;" fair administration of a "system for determining 'who serves when not all serve,'" and concern over opening "the doors to a general theory of selective disobedience to law;" "and that the section therefore cannot be said to reflect a religious preference." And (2) the conscription of objectors to particular wars is not an interference with the free exercise of religion, because the laws "are not designed to interfere with any religious ritual or practice, and do not work a penalty against any theological position." A fifth amendment argument that the distinction embodied in the statute "between objectors to all wars and objectors to particular wars—is arbitrary and capricious and works an invidious discrimination" in violation of the "equal protection" principles encompassed by the "due process" clause was

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4 91 S. Ct. at 832.
5 Id. at 834.
6 Justice Black did not concur in this portion of the Court's opinion.
7 91 S. Ct. at 836.
8 Id. at 837-838.
9 Id. at 839.
10 Id.
11 Id.
12 Id. at 841.
13 Id. at 839.
14 Id. at 842.
found not to constitute an independent argument in the context of the cases.\textsuperscript{15}

The preceding article raised four constitutional questions regarding conscientious objection. It seems appropriate to review those questions in light of \textit{Gillette} and \textit{Negre}.

\section*{A. Is an Exemption for Religious Conscientious Objectors a Constitutional Right?}

Justice White, in his dissent in \textit{Welsh v. United States},\textsuperscript{16} argued that Congress could limit the conscientious objector exemption to traditional religious objectors to all war because the exemption has "substantial roots in the Free Exercise Clause,"\textsuperscript{17} and to deny the exemption to religious objectors might, in the eyes of Congress, "violate the Free Exercise Clause or at least raise grave problems in this respect."\textsuperscript{18}

If an exemption were constitutionally required for religious objectors to war, Negre should have been entitled to claim it since "the sincerity or the religious quality" of his views was unquestioned.\textsuperscript{19} The Court, however, concluded that there are "governmental interests of a kind and weight sufficient to justify under the Free Exercise Clause the impact of the conscription laws on those who object to particular wars."\textsuperscript{20} The Court apparently felt constrained to add that "[w]e are not faced with the question whether the Free Exercise Clause itself would require exemption of any class other than objectors to particular wars,"\textsuperscript{21} but notes "that the Court has previously suggested that relief for conscientious objectors is not mandated by the Constitution."\textsuperscript{22} Indeed, it would be difficult to justify a constitutional exemption for religious objectors to all wars, but not for religious objectors to particular wars.

\section*{B. Is an Exemption Limited to Religious Conscientious Objectors a Prohibited Establishment of Religion?}

It seems clear that the majority in \textit{Welsh} was of the opinion that to limit the exemption to those whose opposition to war is

\begin{footnotesize}
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\item \textsuperscript{15} Id. at 836, n.14.
\item \textsuperscript{16} 398 U.S. 333 (1970).
\item \textsuperscript{17} Id. at 372.
\item \textsuperscript{18} Id. at 370.
\item \textsuperscript{19} 21 S. Ct. at 831.
\item \textsuperscript{20} Id. at 842.
\item \textsuperscript{21} Id. at 842, n.23.
\item \textsuperscript{22} Id.
\end{itemize}
\end{footnotesize}
religious only in a traditional or parochial sense of the word would be an invalid establishment of religion. Although the statute clearly excludes from the exemption objection to war arising out of "essentially political, sociological, or philosophical views, or a merely personal moral code,"\(^{23}\) the Court in *Gillette* and *Negre* did not decide that "conscientious objection to a particular war necessarily falls within" that excluded class.\(^{24}\) No distinction is drawn in these cases on the basis of the nature of the objection to war. There is, therefore, no reason to reconsider this specific question at this time.

C. IS AN EXEMPTION LIMITED TO CONSCIENTIOUS OBJEC-
TORS TO ALL WARS A PROHIBITED ESTABLISHMENT
OF RELIGION?

It was suggested in the preceding article that if the distinction between those who were entitled to the conscientious objector exemption, and those who were not, was a distinction on the basis of content of belief and not nature or character (*i.e.*, religious versus non-religious) of belief, no establishment problem would be raised in denying the exemption to a religious selective objector even though it was granted to the religious pacifist. Once it is clear that the distinction is premised on the content and not the character of the belief, in order to sustain the distinction, the Court need only find a valid secular reason for the distinction in order to satisfy the equal protection requirement of the due process clause.

In *Gillette* and *Negre*, however, Marshall did not take this approach. He did not consider the "equal protection" argument to be independent of the "establishment" argument, and did not, therefore, treat it at all. He looked to "neutral, secular reasons to justify the line that Congress has drawn"\(^{25}\) only to sustain the exemption against the "establishment" argument. Since the Court found that there are neutral, secular reasons for exempting conscientious objectors the Court held that it is not an invalid establishment of religion. The difficulty with Marshall's approach is that the valid neutral reasons that satisfy the no-establishment requirement do not satisfy the equal protection requirement.

Justice Marshall gave two reasons for the exemption which have "nothing to do with a design to foster or favor any sect, religion, or

\(^{24}\) 91 S. Ct. at 835.
\(^{25}\) Id. at 836, n.14
cluster of religions.” They were: (1) “considerations of a pragmatic nature, such as the hopelessness of converting a sincere conscientious objector into an effective fighting man,” and (2) the duty to obey a “moral power higher than the State.” Both of these reasons, however, apply with equal strength to the sincere conscientious objector to a particular war as well as the objector to all wars, and Marshall, himself, acknowledged this fact.

Marshall did, however, assert that “valid neutral reasons exist for limiting the exemption to objectors to all war.” Foremost among these is “the interest in maintaining a fair system for determining ‘who serves when not all serve.’” Since opposition to a particular war is more likely to be political than conscientious, there is danger that the two kinds of objection could not fairly be distinguished.

This argument, of course, assumes that political objection does not qualify for an exemption. The disqualification of political objection can, no doubt, now be sustained on the grounds that it is necessarily objection to a particular war. The validity of a distinction on the basis of the content of beliefs should not be premised on grounds of a difference in the character or nature of beliefs until the validity of the distinction based on character is sustained.

Marshall also sustained the exclusion of the selective objector from the exemption on the grounds that “it is difficult to know how to judge the ‘sincerity’ of the objector’s conclusion that the war in toto is unjust and that any personal involvement would contravene conscience and religion.” But unless United States v. Ballard is to be overruled on this point, the objector’s conclusion that the war is unjust is not open to question. No reason is given as to why it is any more difficult to adjudicate the “sincerity” of a selective objector than an objector to all war.

Ultimately, Marshall reached the government’s contention that the limits of the exemption “serve an overriding interest in protecting the integrity of democratic decisionmaking against claims to individ-

26 Id. at 837-838.
27 Id. at 838.
28 Id.
29 Id.
30 Id. at 839.
31 Id.
32 Id.
33 Id. at 840.
34 322 U.S. 78 (1944).
Although the Court did not adopt that "interest" as the neutral and secular basis for the exemption, it did conclude that fairness in conjunction with other valid concerns supports the Congressional decision that the objector to all war "has a claim that is distinct enough and intense enough to justify special status, while the objector to a particular war does not." Among these other concerns are fears of opening "the doors to a general theory of selective disobedience to law," of weakening "the resolve of those who otherwise would feel themselves bound to serve," and of "a mood of bitterness and cynicism" which "might corrode the spirit of public service" if "it be thought that those who go to war are chosen unfairly or capriciously."

Valid as these other considerations may be, they do not suggest an answer to the "equal protection" argument. They justify only a limitation on the number of persons exempted and the manner of exempting them. They provide no justification for exempting A but not B.

D. IS AN EXEMPTION LIMITED TO CONSCIENTIOUS OBJECTORS TO WAR A DENIAL OF EQUAL PROTECTION TO POLITICAL OBJECTORS TO WAR?

As indicated supra at 160, an affirmative answer to this question is foreclosed by the decision in Gillette and Negre.

CONCLUSION

One can only participate in a real shooting war. Yet the gist of Gillette and Negre is that an exemption from participation in that real shooting war depends upon a present unwillingness to do the impossible, i.e., fight in past wars or future hypothetical wars. A sincere conscientious objection to participation in the one war that matters is irrelevant.

The preceding article suggested that the conscientious objector exemption should be abolished because there was no constitutional basis upon which to sustain the statutory limitations. The result in Gillette and Negre seems to justify that conclusion.

35 91 S. Ct. at 840-841.
36 Id. at 841.
37 Id.
38 Id.
39 Id.
40 Id.