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Gail White Sweeney

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CONSCIENTIOUS OBJECTION AND THE FIRST AMENDMENT

INTRODUCTION

THROUGHOUT THE 1960's as United States involvement in the war in Vietnam grew, so did the number of young men drafted to fight in Southeast Asia. For men growing up in the 1960's, the draft was the central fact of their lives, looming over otherwise bright futures like a cloud of napalm. The draft's hovering presence molded plans and decisions—pushing men to enlist in the armed services, to enroll in college, or to emigrate to Canada.

Political disillusionment with the war increased; so did resistance to the draft. Shouts of “Say, hey, L.B.J.! How many people did you kill today?” and “Hell no! We won't go!” shook the nation. Finally, President Nixon ended the draft. Humiliated and spent, the United States withdrew.

For the children of the 1970's, Vietnam and the draft were history, part of an earlier time in which bearded young men and long-haired young women stood on corners handing flowers to passers-by. The children of the Seventies set out efficiently toward their futures in a straight line; no dark mass beyond which they could not see obscured their paths.

Now, on the crest of a renewed patriotism engendered by events in Iran and Afghanistan, the President has reinstated draft registration for nineteen- and twenty-year-old men.¹ If registration comes, can conscription be far behind? Indications are that should reinstatement of the draft follow hard upon the heels of registration, opposition will come more quickly and be more widespread than such opposition has been in the past. “People have under their belt the history of a bad war and the realization that they can say no to a bad war—that that's legitimate.”²

In the past, each time Congress has authorized a draft it has authorized an exemption from it for conscientious objectors. This exemption has been judicially viewed as acknowledgement by Congress “that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state.”³ The exemption may, however, have a more pragmatic purpose—to serve as a pressure valve to reduce organized opposition to the draft and the war by removing from the ranks of the pacifists many of their most committed and articulate members.⁴ The conscientious objector

¹ See Presidential Proclamation No. 4771, 45 Fed. Reg. 45247 (July 2, 1980). Discussion of the registration of women is left to other writers.

² N.Y. Times, June 15, 1980, § 1 at 19, col. 1.

³ Stone, *The Conscientious Objector*, 21 Col. U.Q. 253, 269 (1919), quoted in *United States v. Seeger*, 380 U.S. 163, 170 (1965).

exemption makes it possible for the people who qualify under it to refuse to comply with the law while complying with it.

Given the historical position of the exemption and the purposes it serves, conscientious objector status will probably be retained in any new draft legislation. Strong feeling exists in and out of Congress, however, that the C.O. exemption was abused with the support of the Supreme Court during the Vietnam War. As a result of the exemption, people were getting away with nonmurder. Therefore, Congress will feel pressure to either tighten up or eliminate the conscientious objector exemption in any new draft legislation. If either of these steps is taken, the Supreme Court will inevitably be required to confront constitutional questions it has sought hard to avoid. Indeed, it may well be that only by resurrecting the exemption as the Supreme Court has interpreted it can the constitutional questions be sidestepped or at least postponed.

If Congress were to abolish the C.O. exemption, the question would arise: Is there a constitutional right embodied in the Free Exercise Clause of the first amendment to an exemption from the draft based on conscience? If Congress were to narrow the class of those exempted to, for example, members of established peace churches such as the Quakers, Amish, and Mennonites, the question would arise: Is Congress favoring one religion over another or favoring religion over nonreligion in violation of the Establishment Clause of the first amendment?

Several proposals have been made to eliminate the C.O. exemption and replace it with a national civilian service.⁹ Under these plans the registrant or draftee would indicate whether he wanted to fulfill his obligation of national service in military or civilian work. Such proposals would eliminate the administrative difficulties of determining who is entitled to exemption from military or combatant service. (The discussion *infra* of the Court's interpretation of the Vietnam era conscientious objector statute should make obvious how difficult such administrative determinations may be.) Such proposals may also be designed to eliminate potential conflict with the Establishment and Free Exercise Clauses of the first amendment. The proposal for civilian national service (particularly during peacetime) raises another constitutional question however: Does it violate the thirteenth amendment prohibition against involuntary servitude? Compulsory civilian service cannot be readily justified, as can a wartime draft, by the existence of Congress' war powers and the Necessary and Proper Clause. To explore

⁹It has often been noted that the C.O. exemption, at least since 1940, has favored the educated and articulate.

more deeply this thirteenth amendment question, however, is beyond the scope of this comment.

This comment will examine the possible constitutional consequences of the three other probabilities. 1) that Congress will revive the previous C.O. exemption without amendment; 2) that Congress will amend the statute to narrow the exemption; and, 3) that Congress will eliminate the C.O. exemption altogether. An analysis of earlier statutes is necessary to this end.

I. THE STATUTES

Looking at the C.O. exemption from the Civil War through the Vietnam War, one notes that the general tendency has been to broaden the exemption. This liberalizing has been done both by congressional act and (when Congress has been uncooperative) by administrative and judicial interpretation.

The Draft Act of 1864⁶ exempted members of religious denominations opposed to the bearing of arms. When men were conscripted during World War I, the Draft Act of 1917 exempted those affiliated with a "well-recognized religious sect or organization . . . whose existing creed or principles forbade its members to participate in war in any form."⁷ However, the Secretary of War issued a regulation that authorized exempting those men with "personal scruples against war."⁸ In 1940 Congress eliminated from the Selective Service and Training Act the requirement that the conscientious objector be a member of an organized church. It was sufficient that his opposition to war be based on his "religious training and belief."⁹ This change was a statutory recognition that conscience derives not from institutional membership but from individual belief. In 1948, however, Congress tightened the language, inserting the requirement that "religious training and belief" stem from the "individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation," and excluding objections based "essentially political, sociological, or philosophical views or a merely personal moral code."¹⁰ A 1967 amendment dropped the requirement that the objector believe in a relation to a Supreme Being; it retained, however, the exclusion of "essentially political, sociological, or philosophical views or a merely personal code."¹¹

It was under section 6(j) of the 1948 act, with its requirement of belief in one's relation to a Supreme Being, that most of the Vietnam era

⁶ Ch. 13, § 17, 13 Stat. 6, 9.

⁷ Ch. 15, 40 Stat. 76, 78.

⁸ SELECTIVE SERVICE SYSTEM MONOGRAPH NO. 11, CONSCIENTIOUS OBJECTION, 40-55 (1950).

⁹ Selective Service & Training Act of 1940, Ch. 720, § 5(g), 54 Stat. 885, 889.

¹⁰ Selective Service Act of 1948, Ch. 625, Title I, § 6(j), 62 Stat. 604, 612.

¹¹ Selective Service Act of 1967, Pub. L. 90-40, 81 Stat. 100, 104.

litigation occurred. The results of this litigation led to the dropping of the requirement of belief in a Supreme Being in the 1967 amendment.

II. UNITED STATES V. SEEGER

The seminal case for contemporary analysis of the relationship between conscientious objection and the Constitution is *United States v. Seeger*.¹² *Seeger* consolidates the cases of three young men who were denied exemption under section 6(j) on the grounds that their claims were not based upon "belief in a relation to a Supreme Being." Each had expressed skepticism about the existence of a traditional God. Nonetheless, each had couched his description of his beliefs in religious phraseology. *Seeger* had a "belief in a devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed."¹³ The second young man had said he believed in "Godness" which was the "Ultimate Cause for the fact of the Being in the Universe."¹⁴ The third young man had spoken of "the consciousness of some power manifest in nature which helps man in the ordering of his life in harmony with its demands."¹⁵

As defendants in criminal draft evasion proceedings, the three contended that the statutory definition of religious training and belief as an individual's belief in relation to a Supreme Being was unconstitutional. They argued that the statutory definition violated both the Establishment and Free Exercise Clauses of the first amendment because, (1) it did not exempt nonreligious conscientious objectors and, (2) it discriminated between different forms of religious expression.

The Court, however, refused to take up the constitutional challenge. Instead it narrowed the question before it to one of statutory interpretation: "Does the term 'Supreme Being' as used in § 6(j) mean the orthodox God or the broader concept of a power or being, or a faith, 'to which all else is subordinate or upon which all else is ultimately dependent'?"¹⁶ The Court, turning the legislative history of the 1948 Amendment on its head, held that "Supreme Being" means the latter. It established the following test: "A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition."¹⁷

Only after the Court had established its Parallel Position test to determine whether or not an objector believed in a Supreme Being, did it

¹² 380 U.S. 163 (1965).

¹³ *Id.* at 166.

¹⁴ *Id.* at 168.

¹⁵ *Id.* at 169.

¹⁶ *Id.* at 174.

¹⁷ *Id.* at 176. <https://doi.org/10.21766/akronlawreview/vol14/iss1/6>

consider the effect of the other limitation added by Congress to section 6(j) in 1948, that the term "religious training and belief" does not include "essentially political, sociological, or philosophical views, or a merely personal moral code." Instead of seeing this latter limitation as Congress' attempt to define what belief in "a relation to a Supreme Being" was *not*, the Court pulled a quick switch. It explained that once it is determined that a belief holds a parallel position to that of orthodox belief it *a fortiori* is not a "merely personal moral code."¹⁸

In this manner, the Court was able to find that each of the three defendants qualified for conscientious objector status under section 6(j) and avoided the need to handle their constitutional contentions. Had the Court found either that the defendants were atheists (as opposed to theists) or that Congress had intended "Supreme Being" to mean an orthodox God, the Court would have been forced to consider the first amendment questions.

Although the defendants in *Seeger* were found to be covered by the statutory exemption as the Court interpreted it, the test used to catch them in the statutory net did not eliminate the Establishment Clause problems with section 6(j). The Parallel Position test establishes orthodox religion as a norm against which the objector's belief is evaluated. This places orthodox religion in a favored position vis á vis the law, in contravention of the Establishment Clause.¹⁹

More basically, the Court had earlier ruled that laws which aid religions as against nonbelievers are unconstitutional.²⁰ It ought to follow from this that conscientious objector status cannot constitutionally be based upon a religious standard, no matter how liberal that standard is. In *Welsh v. United States*,²¹ the Court was again asked to hold section 6(j) unconstitutional on this ground, and again, it managed, albeit with somewhat more difficulty, to circumvent the question by deciding the case through statutory interpretation.

III. WELSH V. UNITED STATES

On his application for exemption, Welsh had denied that his beliefs were religious and had said he did not know whether he believed in a Supreme Being. He was denied C.O. status because the government "could find no religious basis for the registrant's beliefs, opinions, and convictions."²² The government attempted to distinguish *Welsh* from *Seeger* on two grounds.

¹⁸ *Id.* at 186.

¹⁹ Bowser, *Delimiting Religion in the Constitution: A Classification Problem*, 11 VAL. U.L. REV. 163 (1977).

²⁰ *Torasco v. Watkins*, 367 U.S. 488 (1961).

²¹ 398 U.S. 333 (1970).

First, Welsh more insistently denied that his views were religious. The Supreme Court, however, refused to place such "undue emphasis on the registrant's interpretation of his own beliefs."²³ Although a registrant's characterization of his beliefs as religious should carry great weight, his characterization of his beliefs as nonreligious should not because "very few registrants are fully aware of the broad scope of the word religious as used in § 6(j)."²⁴ Second, the government maintained that Welsh's objection stemmed from "essentially political, sociological, or philosophical views or a merely personal moral code." The Court sidestepped any problems raised by this wording by interpreting it to mean that those registrants were to be excluded "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."²⁵ Through semantic magic the Court found the concepts of politics, sociology, philosophy, and personal morality identical to the concepts of policy, pragmatism, and expediency.

Having done this, the Court found Welsh "clearly entitled" to C.O. status under its new test for the applicability of section 6(j): "This section exempts from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give no rest or peace if they allowed themselves to become a part of an instrument of war."²⁶ The Court, in clear violation of the statutory language, held that one whose objection to war is based upon his moral code qualifies for a section 6(j) exemption.

Justice Harlan, in a concurring opinion that detailed the legislative history of section 6(j), maintained that the statutory language was just not that elastic and that the Court must confront the Establishment Clause issue. He asserted that a statute that classifies based on the distinction between religious and nonreligious belief creates a "religious benefit" that offends the Establishment Clause. The only appropriate criterion for exemption as a conscientious objector "must be the intensity of moral conviction with which a belief is held."²⁷ The Court, however, may choose not to eliminate the unconstitutional provision but rather to build upon it. Thus the justices may rewrite the statute to cure "the defect of underinclusion."²⁸

²³ *Id.* at 341.

²⁴ *Id.*

²⁵ *Id.* at 342-43.

²⁶ *Id.* at 344.

²⁷ *Id.* at 358.

²⁸ *Id.* at 367.

Justice Harlan said the constitutional standard for exemption is "the intensity of moral conviction with which a belief is held." This likewise is the test that those justices endorsing the plurality opinion employed. Such a test does follow logically from *Seeger* and cases that preceded it. Furthermore, it may be the only way for the Court to define religion without itself offending the Establishment Clause; to define religion is to establish what religion is and is not, and to favor or disfavor one set of beliefs against another set of beliefs. No doubt aware of this problem, the Court has never attempted a definition of religion for first amendment purposes. (*Seeger* and *Welsh* are offering a statutory definition.) One tendency, however, is to treat the term "religion" as including as many different types of beliefs as possible. Another tendency is to view religion functionally—not as a set of beliefs but as a role in the life of the believer. This is exactly what *Seeger* did. This approach has resulted in the *Welsh* opinion in a "definition" of religion as virtually equivalent to conscience. We are left with an illogical state of affairs. In order to avoid offense to the Establishment Clause, we define religion broadly as conscience. But if we insert the word "conscience" into the Establishment Clause, it makes little sense; certainly the Framers did not intend to prohibit the establishment of conscience, although perhaps they did intend to prohibit the imposition of the conscience of one person upon other people.

IV. SINCERITY

In *Witmer v. United States*,²⁹ a 1955 case involving the claim of a Jehovah's Witness for a C.O. exemption, the Supreme Court stated that "the ultimate question in conscientious objector cases is the sincerity of the registrant in objecting, on religious grounds, to participation in war in any form."³⁰ In *Seeger* the Court said that sincerity was the threshold question. In *Welsh* it may have become the *only* question. When deciding whether a professed follower of an established religion is entitled to a C.O. exemption, the Court first looks at the tenets of that religion to determine whether they dictate pacifism. If they do, the Court then considers the credibility of the registrant. Does he really adhere to the dogma of his church? In *Seeger* the first question is not whether the registrant adheres to a pacifist religion but whether his pacifism is religious. "A belief that plays a role parallel to that of orthodox religion" is one, in part, that is deeply held. The two prongs of the test begin to merge. By *Welsh* one could argue that sincerity (firmly held conviction) is the only question. If one sincerely believes what he professes to believe, he is entitled to a section 6(j) exemption.

One can also see that determining who qualifies for an exemption

²⁹ 348 U.S. 375 (1955).

becomes more difficult as the test of religion becomes psychological rather than institutional. If, for example, one professes to be a Quaker, the issue of his sincerity is essentially one of his credibility and can be proven by objective means. Does he attend meetings? Does he follow other tenets of the faith? Was he educated or reared as a Quaker? But how do we measure the firmness of one's conviction in a personal and perhaps unique faith?

Using sincerity of one's belief as the sole criterion for exemption creates other problems as well, for the trier-of-fact's belief in the sincerity with which another holds a particular faith is necessarily linked to what ideas the trier-of-fact finds believable. What he finds believable may be limited by what he believes. This was pointed out by Justice Jackson dissenting in *United States v. Ballard*.⁵¹ The Ballards were charged with using the mails to defraud by means of a so-called religious movement. They had claimed *inter alia*, miraculous communication with the spirit world and power to heal the sick. The majority held that the truth of the defendants' beliefs could not be considered by the jury, but that the defendants' sincerity (*i.e.*, whether or not they intentionally misrepresented their powers and connections) could be considered. One can see, however, that their sincerity would be placed in issue only after their professed religious beliefs were found to be false. A judicial finding that a particular religious view is false offends the Establishment Clause. Jackson therefore concluded that misrepresentation of religious experience or belief is not prosecutable. If this reasoning were applied in the conscientious objector cases decided after *Welsh*, the registrant's sincerity could not be questioned by the trier-of-fact and one who professed to fall within the section 6(j) exemption would indeed fall there.

But the Court most certainly has not adopted such an approach. Instead, by emphasizing "sincerity" it has been able to exclude more registrants from section 6(j) exemptions.

V. GILLETTE V. UNITED STATES

Gillette v. United States and *Negre v. Larsen* (decided together)⁵² raised the issue of selective conscientious objection. Both defendants objected to participation in the Vietnam War but not to "participation in war in any form" as required by section 6(j). They maintained that the "war in any form" limitation impermissibly discriminates among types of religious belief and affiliation, and that their religious beliefs, which distinguished between just and unjust wars, were as worthy of exemption under section 6(j) and the Establishment Clause as any other religious beliefs.

⁵¹ 322 U.S. 78, 92 (1944).

⁵² 401 U.S. 437 (1971).
<https://www.alexandriaonline.com/akronlawreview/vol14/iss1/6>

The Court demurred, holding that section 6(j) is neutral on its face, that it "does not single out any religious organization or religious creed for special treatment."³³ To the contention that section 6(j) "works a de facto discrimination among religions," the Court replied that the claimant "must be able to show the absence of a neutral, secular basis for the lines government has drawn."³⁴ The Court found neutral and secular reasons for the limitation to war in any form. One such secular justification was to assure fair, even-handed and uniform decision-making, for "a program of excusing objectors to particular wars may be impossible to conduct with any hope of reaching fair and consistent results."³⁵ Why would the extension of the exemption to selective C.O.'s be any harder to administer fairly than exemption of those objecting to participation in all war? It is more difficult because "opposition to a particular war does depend *inter alia* upon particularistic factual beliefs and policy assessments that presumably were overridden by the government that decides to commit lives and resources to a trial of arms."³⁶ In other words, some consideration of "policy" is involved in the registrant's objection to a particular war, to his determination that it is unjust. The question, under the test enunciated in *Welsh*, then should become: Does his objection rest *solely* on considerations of policy and not at all upon "moral, ethical or religious principle"? It has been suggested by one commentator³⁷ that *Gillette* answers this question: "In all probability, yes." And that being the case, exemption for selective objectors should be denied. In other words, the Court doubts the sincerity of the selective objector's statement that his belief is "religious," for the Court states that "opposition to a particular war may more likely be political and nonconscientious, than otherwise."³⁸ Based on the content of the objector's belief the Court is doubting his sincerity. This would seem a violation of the principles established in *Seeger* and *Welsh*, but, states *Gillette*, "sincerity" is a concept that can bear only so much adjudicative weight."³⁹ It is curious that the Court rejects *Gillette's* and *Negre's* claims at least in part because it generally doubts the sincerity of those making such claims; nonetheless, it states that no doubt as to the sincerity and religious nature of the claim of either *Gillette* or *Negre* exists.

It is also curious that the difficulty of determining sincerity is considered too great in the case of *Negre*, a devout Catholic. *Negre* had based his claim on the doctrine of the Catholic church that distinguishes

³³ *Id.* at 451.

³⁴ *Id.* at 452. Note that this requirement shifts the burden of proof to the claimant.

³⁵ *Id.* at 456.

³⁶ *Id.* at 459.

³⁷ Bowser, *supra* note 19, at 180.

³⁸ 401 U.S. at 455.

³⁹ *Id.* at 457. Published by IdeaExchange@UAkron, 1981

between just and unjust wars.⁴⁰ That his objection was based on institutionalized religion should have simplified the problem of determining sincerity, as pointed out earlier.⁴¹ Yet the Court found the task too difficult.

Petitioners in *Gillette* also argued that the limitation of section 6(j) to those who oppose war in any form interfered with the free exercise of their religion. The majority answered this contention: "Our analysis of § 6(j) for Establishment Clause purposes has revealed 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."⁴² The free exercise of religion is protected only "when the burden on First Amendment values is not justifiable in terms of the government's valid aims."⁴³ Here the government's interests—particularly its interest "in procuring the manpower necessary for military purposes"⁴⁴—outweigh the individual's right to freely exercise his religion. The suggestion is that in 1971 if Congress excused from military service all those young men who believed the war in Vietnam was morally wrong, it would be unable to raise an army.

The thrust of the *Gillette* decision seems to be that if one has a right to free exercise of conscience, one has it only so long as few other people wish to exercise that right in the same way, but once many people's consciences clash with the interests of government, their consciences are no longer protected by the Free Exercise Clause. The reasoning in *Gillette* is reminiscent of the "clear and present danger" test that the Court earlier employed in the area of freedom of speech. Dissent is respected as long as it is ineffectual.

VI. FREE EXERCISE

The Court in *Gillette* decides only the narrow issue of whether one has a free exercise right to exemption under section 6(j) for "religious" opposition to a particular war. The majority does not address the broader issue (which remains unanswered) of whether a free exercise right to some type of C.O. exemption exists. As Justice Douglas put it in his

⁴⁰ See 401 U.S. 470 (Douglas, J., dissenting) for a discussion of this idea and the theological authority for it.

⁴¹ A similar situation arose in *Clay v. United States*, 403 U.S. 698 (1971). Here Mohammed Ali refused to participate in the Vietnam War because his Moslem religion taught that he not "aid the infidels or nonbelievers in Islam." The Court reversed Ali's conviction on procedural grounds. Only the concurring Justice Douglas reached the substantive issue and found a constitutional right to refuse participation in war of a character proscribed by one's religion.

⁴² 401 U.S. at 461.

⁴³ *Id.* at 462.

⁴⁴ *Id.* <https://ideaexchange.uakron.edu/akronlawreview/vol14/iss1/6>

dissent in *Gillette* "Can a conscientious objector, whether his objection be rooted in 'religion' or in moral values, be required to kill?"⁴⁵

The question was first discussed in *United States v. Macintosh*,⁴⁶ where the petitioner was denied naturalization because he would not swear that he would bear arms on behalf of the United States unless he felt a war was morally justified. Macintosh lost the case because of the Court's statutory interpretation of the oath of allegiance, but in dictum the Court said: "Whether any citizen shall be exempt from serving in the armed forces of the nation in time of war is dependent upon the will of Congress and not upon the scruples of the individual, except as Congress provides."⁴⁷ *MacIntosh* was later overruled⁴⁸ and the force of its dictum dissipated. Although the dissent by Chief Justice Hughes is generally more respected today than the majority opinion, even Hughes did not go so far as to declare a constitutional right to an exemption. Rather he said that the majority's construction of the oath was "directly opposed to the spirit of our institutions and to the historic practice of Congress"; it violated "principles which have long been respected as fundamental."⁴⁹

Why has the Court not clearly ruled⁶⁰ on the question of a free exercise right to conscientious exemption?⁵¹ First, were the Court to find a free exercise right, it would be faced with a conflict between the Free Exercise Clause and the Establishment Clause. If the right freely to exercise his religion entitles one to be excused from military duty, in so excusing him the state is favoring his religion over the religion or non-religion of another. One way out of this dilemma was suggested by the separate opinions of Justice Douglas in the three 1971 cases involving conscientious objectors.⁵² Douglas equated religion with conscience for purposes of free exercise analysis:

It is true that the First Amendment speaks of the free exercise of religion, not of the free exercise of conscience or belief. Yet con-

⁴⁵ *Id.* at 464.

⁴⁶ 283 U.S. 605 (1931).

⁴⁷ *Id.* at 623.

⁴⁸ *Girouard v. United States*, 328 U.S. 61 (1946).

⁴⁹ 283 U.S. at 627. It is interesting to note that Hughes also saw no bar to conscientious exemption on the grounds that Macintosh was a "selective" objector. *Id.* at 629.

⁵⁰ There have been cases in which the Court ruled that the state had the right to deny some benefit to those refusing military service, (see for example *Hamilton v. Board of Regents*, 293 U.S. 245 (1934)) but this is different from having the right to compel an individual to kill.

⁵¹ Justice Douglas dissenting in *Gillette* and *Ehlert v. United States*, 402 U.S. 198 (1971), and concurring in *Clay* stated that such a free exercise exemption does exist. Harlan, in his concurrence in *Welsh*, stated that there is no such free exercise right. The dissenters in *Welsh*—White, Burger, and Stewart—did not decide the issue but wrote "on the assumption . . . that the Free Exercise Clause of the First Amendment does not by its own force require exempting devout objectors from military service. . . ." [Emphasis added]

science and belief are the main ingredients of First Amendment rights. They are the bedrock of free speech as well as religion. The implied First Amendment right of "conscience" is certainly as high as the "right of association" which we recognized in *Shelton v. Tucker* and *NAACP v. Alabama*. [Citations omitted.] Some indeed have thought it higher.⁵³

Thus either by reading "religion" as meaning "conscience" in the Free Exercise Clause and "a particular ideology" in the Establishment Clause or by implying a separate, penumbral right of free exercise of conscience, the right to a conscientious exemption based on conscience could be given constitutional stature without coming into conflict with the Establishment Clause.

But no constitutional right is unqualified. Since 1878 the Court has distinguished between belief and action in the area of free exercise and held that under some circumstances the government may control action.⁵⁴ In *Sherbert v. Verner*⁵⁵ the Court held that to justify interference with the free exercise of religion, a compelling state interest must exist. In order to find whether a compelling state interest existed that would justify the conscription of pacifists, the Court in *Seeger* and *Welsh* may have had to deal with some issues it preferred not to. For one thing, the state interest in denying exemptions necessarily depends on the number of exemptions sought. To argue that the state's ability to pursue the war in Vietnam would be jeopardized by allowing the exemption would be to acknowledge the amount of dissent there was to the war. Furthermore, it would raise the question of whether the state had a valid interest in pursuing the war, or whether Vietnam was an illegal exercise of the war powers. Could there be a compelling state interest in an undeclared war? A compelling state interest in a peacetime draft? All in all, one understands why the Court preferred to evade these questions.

VII. 1980

If Congress in reenacting draft legislation merely takes the Selective Service Act of 1967 out of deep freeze and leaves section 6(j) unaltered, many of these constitutional questions may never be resolved. If, however, Congress either eliminates the C.O. exemption or narrows it, the Court will no doubt be forced to decide the basic first amendment questions.

If Congress for the first time in the history of the draft provides no exemption for conscientious objectors, will the Court hold that such an

⁵³ 401 U.S. at 465-466.

⁵⁴ *Reynolds v. United States*, 98 U.S. 145 (1878).
<https://cd.oakexchange.uakron.edu/akronlawreview/vol14/iss1/6>

⁵⁵ 374 U.S. 398 (1963).

exemption is nonetheless inherent in the Free Exercise Clause? If the Court looks to the "compelling state interest" test for its answer, it may find such an interest in the defense of the nation. The result may depend upon whether the Court looks at the state's action in terms of its interest in conscripting soldiers or in terms of its interest in allowing no exemptions from conscription. (This decision would not be wholly severable from one of the breadth required for any exemption to meet the demands of the Establishment Clause.)

Or the Court may look to the balancing test set out in 1972 in *Wisconsin v. Yoder*,⁵⁶ which held that the state compulsory education statute violated the free exercise rights of the Amish community. *Yoder* posited that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."⁵⁷ The difficulty in predicting the results of an application of this test in the area of conscientious objection is that it is not clear whether the religion side of the scale always weighs the same and it is the amount of state interest that tips the balance one way or another, or whether the weight assigned to religion may vary with the act being exercised and/or its centrality to the faith of the individual. Does, for example, the religiously based refusal to salute the flag⁵⁸ weigh the same as the religiously based refusal to kill a human being? *Yoder* does on the whole suggest that the exercise of religion is a static value. This approach, if applied to the question of conscientious objection, would in all probability result in a finding that one did not have a free exercise right to military exemption,⁵⁹ at least not while the United States was lawfully and actively at war. However, consideration of the degree of violation of conscience involved in forcing one to take another's life might yield a result in favor of the C.O. Seemingly, the constitutional approach is not to consider the nature of the act demanded of the individual, for to assign value to the religious practices of individuals is to evaluate the truth of their beliefs in violation of the Establishment Clause.⁶⁰

The suggestion is also present in *Yoder* that the centrality of a religiously-based act to the tenets of one's religion may bear on the value assigned the free exercise thereof. This idea cannot be clearly distinguished in the case from the question of the sincerity of the Amish in contending

⁵⁶ 406 U.S. 205 (1972).

⁵⁷ *Id.* at 215.

⁵⁸ See *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

⁵⁹ A belief that this would be the result is enhanced by the fact that Justice Douglas, now deceased, is the only justice to have declared that such a right exists. Most of the present justices have spoken of the "suggestion" that there is no such right or "on the assumption" that there is none.

⁶⁰ *United States v. Ballard*, 322 U.S. 78 (1944).

that conventional education beyond the eighth grade violated their religious faith and not just their social mores. Perhaps the questions of sincerity and centrality inevitably merge. In any event, *Yoder* looks to the history of the sect to determine both. If the Court does clearly separate sincerity from centrality for purposes of free exercise analysis and grants more weight to practices as they approach the center of belief, the scales will tip a bit more in favor of a free exercise right to conscientious exemption from conscription.

Yoder is of interest in the present context for another reason. It makes clear that the Burger Court is going to define religion narrowly, for "the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests."⁶¹ To the Chief Justice, a claim by Henry Thoreau would be "philosophical and personal rather than religious."⁶²

The Burger Court clearly is not about to adopt Justice Douglas's idea of a right of conscience inherent in the first amendment. If confronted with a selective service statute that limits the C.O. exemption to members of established faiths or members of established peace churches or which in some other way attempts to circumvent the broad interpretation which the Court has given the concept of religion in section 6(j), the present Court will probably find it constitutional by finding a secular and neutral purpose behind the classification, much as it did in *Gillette*.

CONCLUSION

In conclusion, the relationship between the first amendment and conscientious objection to military service has never been resolved. Furthermore, attempted resolution may involve a clash between the values embodied in the Free Exercise Clause and those embodied in the Establishment Clause. Should Congress restore the draft, but either eliminate or restrict the C.O. exemption, the Supreme Court would be forced to make a ruling on the constitutional dimensions of conscientious exemption. Although Justice Douglas suggested at least a partial solution to the problem when he found a right to the free exercise of conscience embedded in the first amendment, the present Supreme Court would not adopt such an analysis. Instead, it would probably find that there is no free exercise right to C.O. status and no violation of the Establishment Clause in a statute that limits the exemption to adherents of traditional religions.

GAIL WHITE SWEENEY

⁶¹ 406 U.S. at 215, 216.

⁶² That Thoreau would be thrown in jail once again, raises the question, "What are you doing out there, Waldo and Warren?"
http://www.akronlawreview.com/akronlawreview/vol14/iss1/6