

## RECONSIDERING SELECTIVE CONSCIENTIOUS OBJECTION

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*[I]n the forum of conscience, duty to a moral power higher than the State has always been maintained.*<sup>1</sup>

### INTRODUCTION

In 1971, in the midst of the Vietnam War, the United States Supreme Court decided that to qualify as a conscientious objector (“CO”) one must oppose all war, and not just a particular war. The Court’s decision in *Gillette v. United States* turned on its interpretation of section 6(j) of the Military Selective Service Act.<sup>2</sup> Section 6(j) provided, in relevant part, that no person shall “be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.”<sup>3</sup> According to the Court, “an objection involving a particular war rather than all war would plainly not be covered by § 6(j).”<sup>4</sup> Consequently, the Court construed the exemption from combatant military service in section 6(j) not to extend to so-called “selective conscientious objectors” (“SCOs”).<sup>5</sup>

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1. *United States v. Macintosh*, 283 U.S. 605, 633 (1931) (Hughes, C.J., dissenting).

2. 401 U.S. 437, 441 (1971).

3. Military Selective Service Act of 1967, Pub. L. No. 90-40, sec. 7, § 6(j), 81 Stat. 100, 104 (codified as amended at 50 U.S.C. § 3806(j) (Supp. III 2013–2016)).

4. *Gillette*, 401 U.S. at 443.

5. *Id.* (stating that the statutory language in section 6(j) of the Military Selective Service Act “can bear but one meaning; that conscientious scruples relating to war and military service must amount to conscientious opposition to participating personally in any war and all war”). The acronym “SCO” is used throughout this paper to refer to selective conscientious objectors (individuals who object to particular wars, but not all war, as a matter of conscience). In contrast, the acronym “GCO” is used to mean general conscientious objectors (individuals who object to all war as a matter of conscience).

With no draft since the last man was inducted for service in Vietnam in 1973,<sup>6</sup> and no significant change to the language of section 6(j) since the Court's interpretation in *Gillette*,<sup>7</sup> the issue of selective conscientious objection has been seemingly settled for more than forty years. The Supreme Court's recent application of the Religious Freedom Restoration Act ("RFRA")<sup>8</sup> in *Burwell v. Hobby Lobby Stores, Inc.*,<sup>9</sup> however, raises the question of whether selective conscientious objection might find new life under that statute. This article explains the statutory and case law background relating to conscientious objection to war. It then examines whether an issue that previously appeared to be settled law—that SCOs may not receive an exemption from combat service, even if they oppose a particular war based on religious grounds—should be reconsidered as a result of RFRA's enactment. The article concludes that a strong case exists for exemption from combat services for SCOs.

## I. STATUTORY AND CASE LAW BACKGROUND

The United States has had a long history of recognizing and protecting COs.<sup>10</sup> Federal conscription did not begin until the Civil War,<sup>11</sup> but going back as far as the original colonies there were militias and conscription at the local level.<sup>12</sup> Several colonies provided conscientious objection exemptions before independence<sup>13</sup> and

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6. See *Induction Statistics*, SELECTIVE SERV. SYS., <https://www.sss.gov/About/History-And-Records/Induction-Statistics> (last visited Mar. 28, 2018).

7. Compare 50 U.S.C. § 456(j) (Supp. I 1971–1972), with 50 U.S.C. § 3806(j) (Supp. III 2013–2016).

8. See 42 U.S.C. § 2000bb (2012).

9. 573 U.S. \_\_\_, \_\_\_, 134 S. Ct. 2751, 2759 (2014).

10. Of course, COs have not always actually received the protections afforded under law. Historical evidence exists of COs being physically tortured during earlier American wars. See, e.g., STEPHEN M. KOHN, *JAILED FOR PEACE: THE HISTORY OF AMERICAN DRAFT LAW VIOLATORS, 1658–1985*, at 10 (1986) (stating that during the Revolutionary War “an objector from North Carolina was whipped for refusing induction into the state militia: ‘Forty stripes were very heavily laid on, by three different persons, with a whip having nine cords . . .’” (alteration in original)).

11. Andrew M. Pauwels, *Mandatory National Service: Creating Generations of Civic Minded Citizens*, 88 NOTRE DAME L. REV. 2597, 2606 (2012).

12. See Jeffrey Rogers Hummel, *The American Militia and the Origin of Conscription: A Reassessment*, 15 J. LIBERTARIAN STUD. 29, 33 (2001).

13. Massachusetts, for example, provided legal protections for COs as early as 1661. 1 SELECTIVE SERV. SYS., CONSCIENTIOUS OBJECTION (Monograph No. 11, 1950). The colonies of Rhode Island and Pennsylvania followed suit in 1673 and 1757, respectively. *Id.*

some states included protections for COs in their state constitutions dating back to the time of independence.<sup>14</sup>

In debates over the Bill of Rights, James Madison proposed that the Second Amendment include a conscientious objection exemption and provide that a “well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; *but no person religiously scrupulous shall be compelled to bear arms.*”<sup>15</sup> That language was ultimately rejected, with the exact basis for the rejection unclear. At least one commentator has argued that the omission of Madison’s proposed language resulted because the “conference committee deliberating on these amendments felt that such rights were implicit in the first amendment combined with the general language of the [N]inth [A]mendment.”<sup>16</sup> Other commentators contend that the omission of a conscientious objection exemption in the Bill of Rights “was made to protect rather than restrict the rights of conscientious objectors,” since, as previously mentioned, several of the states already included more protective language in their statutes or constitutions.<sup>17</sup> Despite not expressly including a conscientious objection exemption in the Bill of Rights, the debates in Congress indicate a recognition of the need to allow an exemption for those with a religious objection to combat service.<sup>18</sup> Until the Civil War, however, the treatment of COs remained a matter of state control.

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14. For example, article VIII of the Declaration of Rights of the 1776 Pennsylvania Constitution provided:

That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expence of that protection, and yield his personal service when necessary, or an equivalent thereto: But no part of a man’s property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives: Nor can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent, nor are the people bound by any laws, but such as they have in like manner assented to, for their common good.

PA. CONST. of 1776, Declaration of Rights, art. VIII, *reprinted in* PA. LEGISLATIVE REFERENCE BUREAU, CONSTITUTIONS OF PENNSYLVANIA, CONSTITUTION OF THE UNITED STATES 233 (John H. Fertig ed., 1926).

15. 1 ANNALS OF CONG. 778 (1789) (Joseph Gales ed., 1834) (emphasis added).

16. Theodore Hochstadt, *The Right to Exemption from Military Service of a Conscientious Objector to a Particular War*, 3 HARV. C.R.-C.L. L. REV. 1, 35–36 (1967).

17. See Brief for Petitioner at 62–65, *Gillette v. United States*, 401 U.S. 437 (1971) (No. 85) (citing language from the House debate over Madison’s Second Amendment proposal).

18. For example, Representative Boudinot stated while debating the Bill of Rights: [W]hat justice can there be in compelling [COs] to bear arms, when, according

A. *The Conscientious Objection Exemption During the Civil War*

With the need for substantial numbers of troops during the Civil War, the federal government enacted its first conscription statute in 1863.<sup>19</sup> That law, the Conscription Act of 1863, as originally enacted did not include an express conscientious objection exemption.<sup>20</sup> Instead, it allowed a general exemption for any person who “furnish[ed] an acceptable substitute to take his place in the draft” or who paid “such sum, not exceeding three hundred dollars, as the Secretary [of War] may determine, for the procurement of such substitute.”<sup>21</sup> The conscription statute was amended less than a year after its initial enactment to include an express conscientious objection provision.<sup>22</sup> The amended statute stated that:

[M]embers of religious denominations, who shall by oath or affirmation declare that they are conscientiously opposed to the bearing of arms, and who are prohibited from doing so by the rules and articles of faith and practice of said religious denominations, shall, when drafted into the military service, be considered noncombatants, and shall be assigned by the Secretary of War to duty in the hospitals, or to the care of freedmen, or shall pay the sum of three hundred dollars to such person as the Secretary of War shall designate to receive it, to be applied to the benefit of the sick and wounded soldiers: *Provided*, That no person shall be entitled to the benefit of the provisions of this section unless his declaration of conscientious scruples against bearing arms shall be supported by satisfactory evidence that his deportment has been uniformly consistent with such declaration.<sup>23</sup>

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to their religious principles, they would rather die than use them? . . . I hope that in establishing this Government, we may show the world that proper care is taken that the Government may not interfere with the religious sentiments of any person.

1 ANNALS OF CONG. 796 (1789) (Joseph Gales ed., 1834).

19. A bill was introduced for the establishment of a federal conscription statute during the War of 1812, but “[p]eace came before the bill was enacted.” Selective Draft Law Cases, 245 U.S. 366, 384–85 (1918). Likewise, there was no federal draft during the Mexican-American War (1846–1848) because the army comprised of state militias and volunteers “proved adequate to carry the war to a successful conclusion.” *Id.* at 385.

20. The Confederacy also enacted a conscientious objection statute to exempt from combat service

all persons who have been and now are members of the society of Friends and the association of Dunkards, Nazarenes and Mennonists, in regular membership in their respective denominations: *Provided*, Members of the society of Friends, Nazarenes, Mennonists and Dunkards shall furnish substitutes or pay a tax of five hundred dollars each into the public treasury.

Act of Oct. 11, 1862, ch. 45, Pub. Laws of the Confederate States of America.

21. Act of Mar. 3, 1863, ch. 75, § 13, 12 Stat. 731, 733.

22. Act of Feb. 24, 1864, ch. 13, § 17, 13 Stat. 6, 9.

23. *Id.*

Thus, consistent with the earlier treatment of COs by several states with respect to their militias, the federal government recognized the moral imperative of providing an exemption from combat for those with religious objections.

The exemption statute in effect during the Civil War had two notable aspects. First, the exemption applied to “members of religious denominations” that opposed the bearing of arms as a matter of church doctrine.<sup>24</sup> In other words, the exemption applied to members of traditional “peace churches”—Quakers, Mennonites, and Brethren.<sup>25</sup> As we shall see, this limitation persisted through World War I, but eventually the conscientious objection exemption was extended by Congress and the Supreme Court to cover individuals who oppose war on “religious” grounds even if not members of the traditionally recognized peace churches.<sup>26</sup>

Second, the Civil War exemption statute referenced another issue that persisted in subsequent versions of conscientious objection legislation—the need for an individualized determination of legitimacy with respect to the registrant’s application for CO status. As stated in the Civil War-era statute, the declaration of a conscientious objection to bearing arms had to be “supported by satisfactory evidence that [the applicant’s] deportment has been uniformly consistent with such declaration.”<sup>27</sup> Thus, since the inception of the federal conscientious objection exemption, the government has undertaken an individualized inquiry into the validity of the prospective CO’s objection to war.<sup>28</sup> This type of inquiry continued to play an essential role in determining the sincerity of a SCO’s claim for exemption from combat service in subsequent times of war. Moreover, an examination of the sincerity of an CO applicant’s opposition to war is also at the heart of establishing a system capable of successfully identifying SCOs.

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24. *Id.*

25. Brief for the United States at 50, *United States v. Seeger*, 380 U.S. 163 (1965) (No. 50).

26. As explained below, the basis to qualify for the conscientious objection exemption has arguably extended beyond “religious” scruples based on the Supreme Court’s decisions in *United States v. Seeger* and *Welsh v. United States*. See *infra* notes 138–42 and accompanying text.

27. Act of Feb. 24, 1864 § 17, 13 Stat. at 9.

28. See *Seeger*, 380 U.S. at 183–84.

### B. *Exemption from Combat During World War I*

The draft exemption statute in effect during World War I discontinued the option of avoiding combat service by finding a substitute or paying money for a release,<sup>29</sup> but continued to rely on religious denomination as a proxy for CO status. The Selective Draft Act of 1917 stated:

[N]othing in this Act contained shall be construed to require or compel any person to serve in any of the forces herein provided for who is found to be a member of any well-recognized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organizations, but no person so exempted shall be exempted from service in any capacity that the President shall declare to be noncombatant.<sup>30</sup>

Despite the statutory reference to “member[s] of any well-recognized religious sect or organization,” however, President Woodrow Wilson issued an executive order on March 20, 1918,<sup>31</sup> “defining the policy of the President in regard to conscientious objectors.”<sup>32</sup> The executive order said that COs included not only persons “who have . . . been certified by their local boards to be members of a religious sect or organization” forbidding its members from participating in war in any form, but also those “who object to participating in war because of conscientious scruples but have failed to receive certificates as members of a religious sect or organization from their local board.”<sup>33</sup> Thus, by executive order President Wilson broadened the combat exemption beyond just those who were

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29. Under the Selective Draft Act of 1917:

[N]o person liable to military service shall hereafter be permitted or allowed to furnish a substitute for such service; nor shall any substitute be received, enlisted, or enrolled in the military service of the United States; and no such person shall be permitted to escape such service or to be discharged therefrom prior to the expiration of his term of service by the payment of money or any other valuable thing whatsoever as consideration for his release from military service or liability thereto.

Selective Draft Act of 1917, ch. 15, § 3, 40 Stat. 76, 78 (1917) (repealed 1956).

30. *Id.*

31. U.S. WAR DEP'T, STATEMENT CONCERNING THE TREATMENT OF CONSCIENTIOUS OBJECTORS IN THE ARMY 18 (1919). Following this executive order, the Adjutant General of the Army issued a memo stating that the Secretary of War considered “personal scruples against war” to constitute “conscientious objections” and that individuals with such scruples “should be treated in the same manner as other conscientious objectors.” *Id.* at 37.

32. *Id.* at 18.

33. *Id.* at 39.

members of traditional peace churches. This recognized, at least implicitly, that regardless of faith tradition, any individual might hold religious beliefs against killing sufficient to justify exemption from combat service.

The World War I exemption statute introduced for the first time language requiring that the CO oppose “war in any form.”<sup>34</sup> This language would carry forward to subsequent enactments of the exemption statute and would eventually become the statutory basis for the Supreme Court’s decision during the Vietnam War holding that only those who oppose *all* war, so called “general conscientious objectors” (“GCOs”), rather than those who oppose a *specific* war, SCOs, come within the scope of the exemption statute.<sup>35</sup>

The Supreme Court upheld the constitutionality of the World War I conscription statute in *Arver v. United States*.<sup>36</sup> In *Arver*, the Court found the authority of Congress to enact a conscription statute in Article I, Section 8 of the Constitution, which grants Congress the power “to declare war” and “to raise and support armies.”<sup>37</sup> According to the Court, the “powers conferred by these provisions like all other powers given [to the federal government under the Constitution] carry with them . . . the [complementary] authority ‘to make all laws which shall be necessary and proper for carrying [such powers] into execution.’”<sup>38</sup> Under the *Arver* Court’s constitutional construction, the power to “raise and support armies” necessarily includes the power to draft men to serve in those armies. In response to the contention that Congress lacked the power to “compel military service by a selective draft,” the *Arver* Court stated that “[a]s the mind cannot conceive an army without the men to compose it, on the face of the Constitution the objection that it does not give power to provide for such men would seem to be too frivolous for further notice.”<sup>39</sup>

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34. Selective Draft Act of 1917 § 4, 40 Stat. at 78. The conscientious objection statute in place during the Civil War required that the individual “conscientiously oppose[] . . . the bearing of arms,” rather than oppose war in any form. Act of Feb. 24, 1864, ch. 13, § 17, 13 Stat. 6, 9.

35. See *infra* Part I.F (discussing *Gillette v. United States*).

36. Selective Draft Law Cases, 245 U.S. 366, 390 (1918). *Arver* is one of several consolidated cases heard by the Supreme Court addressing the constitutionality of the World War I conscription statute. *Id.* at 366 n.1. Those cases are commonly referred to by the Court and commentators as the *Selective Draft Law Cases*. This article will refer in text to the *Selective Draft Law Cases* as “the *Arver* Case.”

37. *Id.* at 377 (quoting U.S. CONST. art. I, § 8).

38. *Id.*

39. *Id.* at 376–77.

After giving a thorough discussion of the history of conscription in the United States, the Court's decision in *Arver* gave no analysis to the argument that the exemption statute violated the First Amendment's Establishment or Free Exercise Clauses. Instead, the Court simply stated:

[W]e pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the [Selective Service Act] . . . because we think its un-soundness is too apparent to require us to do more.<sup>40</sup>

Likewise, the *Arver* Court rejected a challenge to the World War I conscription statute based on an argument of involuntary servitude in violation of the Thirteenth Amendment.<sup>41</sup> Thus, in *Arver*, the Supreme Court upheld the federal government's authority to conscript men to military service, relying largely on the broad language of the Constitution and a history of required military service, both in the states and abroad.<sup>42</sup>

### C. *The Interbellum Immigration Cases*

The next major conflict involving a draft was World War II, but the Supreme Court decided a series of immigration cases involving conscientious objection issues during the years between World War I and World War II. In the first of those cases, *United States v.*

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40. *Id.* at 389–90.

41. *See id.* at 390 (“[A]s we are unable to conceive . . . of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation, as the result of a war declared by the great representative body of the people, can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement.”).

42. *See id.* at 378–79 n.1 (citing dozens of other countries with statutes requiring mandatory military service). Note that state courts of both the Union and the Confederacy had upheld the validity of conscription statutes during the Civil War, but the United States Supreme Court had not considered the issue until the *Arver* case. *See, e.g., In re Pille*, 39 Ala. 459, 460 (1864); *In re Emerson*, 39 Ala. 437, 439 (1864); *Ex parte Hill*, 38 Ala. 429, 504 (1863); *Parker v. Kaughman*, 34 Ga. 136, 152 (1865); *Barber v. Irwin*, 34 Ga. 27, 28, 72 (1864); *Daly v. Harris*, 33 Ga. 38, 54–55 (1864); *Jeffers v. Fair*, 33 Ga. 347, 348, 371 (1862); *Simmons v. Miller*, 40 Miss. 19, 25–27 (1864); *Gatlin v. Walton*, 60 N.C. (1 Win.) 333, 423 (1864); *Kneedler v. Lane*, 45 Pa. 238, 239, 251–52 (1863); *Ex parte Coupland*, 26 Tex. 386, 405 (1862); *Burroughs v. Peyton*, 57 Va. (16 Gratt.) 470, 498 (1864).

*Schwimmer*,<sup>43</sup> the Court considered whether a forty-nine-year-old, Hungarian-born woman could become a United States citizen despite stating on her application for naturalized citizenship that she “would not take up arms personally” in defense of the United States because she was an “uncompromising pacifist.”<sup>44</sup> The Court determined that this unwillingness to take up arms violated the requirements for citizenship under the Naturalization Act of 1906, which stated that:

[The applicant for naturalization] shall, before he is admitted to citizenship, declare on oath in open court . . . that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same.

It shall be made to appear to the satisfaction of the court . . . that during that time [at least 5 years preceding the application] he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same.<sup>45</sup>

According to the *Schwimmer* Court, “[t]hat it is the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises is a fundamental principle of the Constitution.”<sup>46</sup> Despite the fact that Ms. Schwimmer was female and well over the draft age, her unwillingness to take up arms could “lessen the willingness of [other] citizens to discharge their duty to bear arms in the country’s defense,”<sup>47</sup> thereby detracting from the strength and safety of the government. This, in turn, could hamper the “good order and happiness” of the United States, contrary to the requirements of the Naturalization Act.<sup>48</sup> In effect, the Court found that those opposing war might serve as bad influences on other citizens and therefore concluded that the Naturalization Act denied citizenship to any person who refused to take up arms in defense of the country, even if that person was a forty-nine-year-old woman.<sup>49</sup> As stated by the Court in *Schwimmer*:

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43. 279 U.S. 644 (1929).

44. *Id.* at 647–48.

45. *Id.* at 646 (quoting Naturalization Act of 1906, Pub. L. No. 59-338, § 4, 34 Stat. 596, 597–98).

46. *Id.* at 650.

47. *Id.* at 648, 650.

48. *Id.* at 651–52.

49. *See id.* at 651.

It is shown by official records and everywhere well known that during the recent war [World War I] there were found among those who described themselves as pacifists and conscientious objectors many citizens—though happily a minute part of all—who were unwilling to bear arms in that crisis and who refused to obey the laws of the United States and the lawful commands of its officers and encouraged such disobedience in others. Local boards found it necessary to issue a great number of noncombatant certificates, and several thousand who were called to camp made claim because of conscience for exemption from any form of military service. Several hundred were convicted and sentenced to imprisonment for offenses involving disobedience, desertion, propaganda and sedition. It is obvious that the acts of such offenders evidence a want of that attachment to the principles of the Constitution of which the applicant is required to give affirmative evidence by the Naturalization Act.<sup>50</sup>

Thus, according to the Court in *Schwimmer*, applicants for citizenship had to profess their willingness to bear arms in defense of the country to attain citizenship, even if those applicants were of a sex and age outside the scope of any conscription statute previously (or subsequently) enacted in the United States.<sup>51</sup> The concern over admitting COs to citizenship, even if those individuals would never be drafted themselves, was not the applicant's potential refusal to provide combat service but instead the influence that the applicant might have on others.<sup>52</sup> That influence could potentially result in other citizens refusing to participate in the "reciprocal obligation" of providing military service in exchange for a just and secure government.<sup>53</sup>

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50. *Id.* at 652–53.

51. *See id.* at 651–53.

52. *See id.* at 651 ("The influence of conscientious objectors against the use of military force in defense of the principles of our Government is apt to be more detrimental than their mere refusal to bear arms."). Only Justice Holmes dissented from the decision, stating:

Some of her answers might excite popular prejudice, but if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate. I think that we should adhere to that principle with regard to admission into, as well as to life within this country. And recurring to the opinion that bars this applicant's way, I would suggest that the Quakers have done their share to make the country what it is, that many citizens agree with the applicant's belief and that I had not supposed hitherto that we regretted our inability to expel them because they believe more than some of us do in the teachings of the Sermon on the Mount.

*Id.* at 654–55 (Holmes, J., dissenting).

53. *Id.* at 650 (majority opinion) (quoting *Selective Draft Law Cases*, 245 U.S. 366, 378 (1918)).

The holding of *Schwimmer* was affirmed two years later in *United States v. Macintosh*,<sup>54</sup> where the applicant for citizenship said that he was not a pacifist but that for him to fight in a war he would have to “believe that the war was morally justified.”<sup>55</sup> While the case was clearly “ruled in principle by *United States v. Schwimmer*”<sup>56</sup> and therefore a straightforward decision under very recent precedent, the Court took the opportunity to discuss the extent of the war power granted to Congress under the Constitution. The Court quoted John Quincy Adams’s statement that Congress’s power to wage war “is tremendous; it is strictly constitutional; but it breaks down every barrier so anxiously erected for the protection of liberty, property and of life.”<sup>57</sup> Consistent with Adams’s view, the Court explained that under Congress’s power to wage war

freedom of speech may, by act of Congress, be curtailed or denied so that the morale of the people and the spirit of the army may not be broken by seditious utterances; freedom of the press curtailed to preserve our military plans and movements from the knowledge of the enemy; deserters and spies put to death without indictment or trial by jury; ships and supplies requisitioned; property of alien enemies, theretofore under the protection of the Constitution, seized without process and converted to the public use without compensation and without due process of law in the ordinary sense of that term; prices of food and other necessities of life fixed or regulated; railways taken over and operated by the government; and other drastic powers, wholly inadmissible in time of peace, exercised to meet the emergencies of war.<sup>58</sup>

The *Macintosh* Court explained that these examples illustrate the breadth of Congress’s power with respect to waging war, and further explained that any exemption from combat service was not a matter of constitutional protection but was instead a result of statutory grace by Congress.<sup>59</sup> And so, in *Macintosh*, the Court affirmed its earlier holding in *Schwimmer* and denied citizenship to Mr. Macintosh based on his refusal to “leave the question of his future military service to the wisdom of Congress where it belongs,

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54. *United States v. Macintosh*, 283 U.S. 605, 626 (1931). That holding was later stated by the Court as the “general rule—that an alien who refuses to bear arms will not be admitted to citizenship.” *Girouard v. United States*, 328 U.S. 61, 63 (1946).

55. *Macintosh*, 283 U.S. at 618.

56. *Id.* at 620.

57. *Id.* at 622.

58. *Id.*

59. *Id.* at 623 (“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.”).

and where every native born or admitted citizen is obliged to leave it.”<sup>60</sup> Macintosh’s insistence that “the question whether . . . war is necessary or morally justified must, so far as his support is concerned, be conclusively determined by reference to his opinion” was inconsistent with the Court’s understanding of Congress’s plenary power to declare and wage war.<sup>61</sup> Effectively, the decision of whether an individual must participate in a war was not to be left to the individual, but instead determined by democratically elected representatives in Congress.<sup>62</sup>

The final decision in this series of immigration-related cases was actually decided immediately following World War II in 1946.<sup>63</sup> Even so, the decision justifies a diversion from this chronological examination of the treatment of COs, since it considers the same issue as *Schwimmer* and *Macintosh* but reaches a different result. In *Girouard v. United States*,<sup>64</sup> the applicant for citizenship was a Seventh Day Adventist who stated that he was willing to provide non-combat military service but, based on his religious beliefs, was not willing to engage in combat service.<sup>65</sup> Despite his unwillingness

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60. *Id.* at 624, 635. The Court made several other statements explaining the extent of Congress’s power to wage war. For example, the Court quoted with approval an earlier decision stating:

[A]nd yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense.

*Id.* at 624 (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905)).

61. *See id.* at 622, 624.

62. *See id.* at 611. The Court decided a companion case, *United States v. Bland*, 283 U.S. 636 (1931), on the same day it decided *Macintosh*. In both cases, four justices, including Justice Holmes, dissented. *Bland*, 283 U.S. at 637 (Hughes, C.J., Holmes, Brandeis, & Stone, J.J., dissenting); *Macintosh*, 283 U.S. at 627 (Hughes, C.J., Holmes, Brandeis, & Stone, J.J., dissenting). The dissent argued that the oath required for naturalization was essentially identical to the oath required to hold public office, and that since COs who were citizens were not precluded from holding public office, the oath must not prevent those seeking naturalization from becoming citizens. *Bland*, 283 U.S. at 637 (Hughes, J., dissenting); *Macintosh*, 283 U.S. at 630 (Hughes, J., dissenting). As for the majority’s discussion of the extensive power granted to Congress to declare and wage war, the dissent stated:

Much has been said of the paramount duty to the State, a duty to be recognized, it is urged, even though it conflicts with convictions of duty to God. Undoubtedly that duty to the State exists within the domain of power, for government may enforce obedience to laws regardless of scruples. When one’s belief collides with the power of the State, the latter is supreme within its sphere and submission or punishment follows. But, in the forum of conscience, duty to a moral power higher than the State has always been maintained.

*Macintosh*, 283 U.S. at 633 (Hughes, C.J., dissenting).

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

64. *Id.*

65. *Id.* at 62.

to take up arms, the Court found Mr. Girouard eligible for citizenship.<sup>66</sup> The Court reached this decision based primarily on its statutory interpretation of the Nationality Act of 1940.<sup>67</sup> According to the Court, “[t]he oath [of allegiance] required of aliens [under the Nationality Act] does not in terms require that they promise to bear arms.”<sup>68</sup> This, of course, contradicted the Court’s previous decisions in *Schwimmer* and *Macintosh*.<sup>69</sup>

The *Girouard* Court also discussed fundamental principles of conscience in support of its decision to overturn these previous cases:

The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle. As we recently stated in *United States v. Ballard*, “Freedom of thought, which includes freedom of religious belief, is basic in a society of free men.” The test oath is abhorrent to our tradition. Over the years, Congress has meticulously respected that tradition and even in time of war has sought to accommodate the military requirements to the religious scruples of the individual. We do not believe that Congress intended to reverse that policy when it came to draft the naturalization oath. Such an abrupt and radical departure from our traditions should not be implied.<sup>70</sup>

In breaking with the holdings of *Schwimmer* and *Macintosh*, the *Girouard* Court moved away from its earlier emphasis on Congress’s practically unlimited power to make war and focused instead on the individual’s right of conscience, acknowledging that right as sometimes superior to the laws of the state.<sup>71</sup>

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66. *See id.* at 62, 70.

67. *Id.* at 69.

68. *Id.* at 64.

69. *United States v. Macintosh*, 283 U.S. 605, 626 (1931); *United States v. Schwimmer*, 279 U.S. 644, 650 (1929).

70. *Girouard*, 328 U.S. at 68–69 (citation omitted).

71. *See id.* There was a dissent in *Girouard*, authored by Chief Justice Stone and joined by Justices Reed and Frankfurter. *Id.* at 70 (Stone, C.J., dissenting). The dissent disagreed with the majority’s statutory interpretation of the Nationality Act, pointing out that Congress had numerous opportunities to overturn the Court’s decisions in *Schwimmer* and *Macintosh*, but had failed to do so. *See id.* at 74 (“[F]or six successive Congresses, over a period of more than a decade, there were continuously pending before Congress in one form or another proposals to overturn the rulings in the three Supreme Court decisions in question [*Schwimmer*, *Macintosh*, and *Bland*]. Congress declined to adopt these proposals after full

That *Girouard* came immediately after the conclusion of World War II may have influenced the Court's decision in that the nation had just completed an epic war and seen the successful implementation of a conscientious objection exemption system without any notable negative impact on the country's ability to field an army. Consequently, the Court may have seen less need for the government to be able to force citizens into armed combat than in its earlier decisions, when the country had recently completed the less "popular" World War I. And so, the *Girouard* decision seemed to signal an increased tolerance for COs, borne perhaps of the relatively successful experience with conscientious objection claims during World War II, as described below. The liberalized approach toward conscientious objection claims signaled by the Court's decision in *Girouard* would persist throughout the Korean War and into the Vietnam War, at least until the Court's consideration of selective conscientious objection in 1971. Before examining conscientious objection law during the Korean and Vietnam Wars, first consider the treatment of CO's during World War II, which saw two important lower court decisions construing the scope of the conscientious objection statute.

D. *Differing Approaches to the Conscientious Objection Statute During World War II*

In the run-up to United States involvement in World War II, Congress enacted the Selective Training and Service Act of 1940. The statute shifted away from any reference to denominational affiliation,<sup>72</sup> and instead stated: "Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."<sup>73</sup>

Despite the scale of World War II and the unprecedented number of individuals drafted into military service during the war, there were no Supreme Court cases substantively construing the

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hearings and after speeches on the floor advocating the change.").

72. As discussed above, the draft acts in effect during the Civil War and World War I expressly excluded from combat service members of denominations recognized as objecting to war as a matter of creed or doctrine. See *supra* notes 23 and 30 and accompanying text.

73. Selective Training and Service Act of 1940, Pub. L. No. 76-783, § 5(g), 54 Stat. 885, 889.

exemption statute in effect during the war.<sup>74</sup> There were, however, important and conflicting decisions by the Second Circuit and Ninth Circuit Courts of Appeals interpreting the statute. These lower court decisions played influential roles in subsequent statutory enactments and decisions by the Supreme Court.

In *United States v. Kauten*, the Second Circuit construed the meaning of the phrase “religious training and belief,” as used in the Selective Training and Service Act of 1940.<sup>75</sup> The defendant in the case, Mathias Kauten, had refused induction into the army based on his opposition to war.<sup>76</sup> According to the hearing officer’s report denying CO status to Mr. Kauten, “[t]here is no doubt that the Registrant is sincerely opposed to war but this belief emanates from personal philosophical conceptions arising out of his nature and temperament, and which is to some extent, political.”<sup>77</sup> In support of the conclusion that Kauten’s objections to war were not based on “religious training and belief,” the hearing officer found that Kauten “admitted that he was an atheist or at least an agnostic,” and believed that “organized religion is detrimental and a hindrance to science.”<sup>78</sup>

Judge Augustus Hand, writing for the Second Circuit, affirmed the denial of CO status for Kauten.<sup>79</sup> Judge Hand stated that Kauten’s “conviction that war is a futile means of righting wrongs or of protecting the state, that it is not worth the sacrifice, that it is waged for base ends, or is otherwise indefensible is not necessarily a ground of opposition based on ‘religious training and belief.’”<sup>80</sup> Despite Kauten’s sincerity in his opposition to war, that opposition was “based on philosophical and political considerations applicable to this war rather than on ‘religious training and belief.’”<sup>81</sup> Thus, Judge Hand found that the statutory requirement of

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74. There were cases interpreting the procedural aspects of the exemption statute. *See, e.g.,* *Estep v. United States*, 327 U.S. 114, 123 (1946) (holding that “[s]ubmission to induction would be satisfaction of the orders of the local boards, not a further step to obtain relief from them”); *Billings v. Truesdell*, 321 U.S. 542, 558 (1944) (holding that the order and the induction are administrative steps); *Falbo v. United States*, 320 U.S. 549, 554 (1944) (holding that defenses against criminal charges that a registrant had failed to obey a draft board order could be not interposed until all administrative steps had been taken).

75. *United States v. Kauten*, 133 F.2d 703, 707 (2d Cir. 1943).

76. *Id.* at 705.

77. *Id.* at 707 n.2.

78. *Id.*

79. *Id.* at 707–08.

80. *Id.* at 707.

81. *Id.* at 707–08.

“religious training and belief” as the basis for the conscientious objection exemption meant that Congress had not intended to grant the exemption to “the great number of persons who might object to a particular war on philosophical or political grounds.”<sup>82</sup>

In addition, although not relevant to the case (since *Kauten* had stated an opposition to all war) and despite concluding that *Kauten* was not entitled to a conscientious objection exemption due to his lack of a religious basis for his opposition to war, Judge Hand, in dictum, addressed the issue of selective conscientious objection.<sup>83</sup> On this point, Judge Hand stated that:

[The opposition to war] must ex vi termini be a general scruple against “participation in war in any form” and not merely an objection to participation in this particular war. . . .

There is a distinction between a course of reasoning resulting in a conviction that a particular war is inexpedient or disastrous and a conscientious objection to participation in any war under any circumstances. The latter, and not the former, may be the basis of exemption under the Act. The former is usually a political objection, while the latter, we think, may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse.<sup>84</sup>

*Kauten* was important for two reasons. First, because it held that an applicant for CO status had to have a religious, rather than philosophical or political, basis for his opposition to war in order to be granted that status.<sup>85</sup> The Second Circuit’s view of what constituted a “religious” basis was relatively broad, however, with Judge Hand stating that “[i]t is 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.”<sup>86</sup> The court illustrated this definition of religious belief by stating that “religious obligation forbade Socrates, even in order to escape condemnation, to entreat his judges to acquit him, because he believed that it was their sworn duty to decide questions without favor to anyone and only according to law.”<sup>87</sup>

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82. *Id.* at 708.

83. *See id.* at 707.

84. *Id.* at 707–08.

85. *Id.*

86. *See id.* at 708.

87. *Id.*

Thus, although the court in *Kauten* limited the conscientious objection exemption to those with a “religious” basis for their objection to war, the court’s interpretation of what constituted a religious basis extended beyond traditional, deistic religions.

The second aspect of the *Kauten* decision that would carry significant influence in subsequent judicial decisions was the court’s statement that opposition to a particular war is “usually a political objection,”<sup>88</sup> and therefore would not qualify for the conscientious objection exemption. While this statement was unnecessary for the disposition of the *Kauten* case, it would influence the Supreme Court’s eventual consideration of the selective conscientious objection issue during the Vietnam War. The resilience of the statement by Judge Hand—that selective conscientious objection is usually based on political considerations—is rather curious given both that it was dictum and that Judge Hand provided no evidence or reasoned justification for his position.

The second World War II-era conscientious objection case that would exert continuing influence was the Ninth Circuit’s decision in *Berman v. United States*.<sup>89</sup> In *Berman*, the mellifluously named defendant, Herman Berman, argued to the Ninth Circuit that the trial court “erroneously narrowed the meaning of the [exemption statute] . . . by holding that the phrase in the section, by reason of religious training and belief, limits the exemption to those conscientiously opposed to war as a belief related more or less definitely to diety.”<sup>90</sup> Mr. Berman was an adamant socialist who sincerely and consistently opposed war based on its “futility, its hopelessness, its inexpediency, [and] its cost in human lives.”<sup>91</sup> The court found no reason to question the sincerity or strength of Berman’s beliefs.

Nevertheless, the Ninth Circuit held that Berman was not eligible for CO status based on the plain language of the exemption statute.<sup>92</sup> According to the court in *Berman*:

[T]he expression “by reason of religious training and belief” is plain language, and was written into the statute for the specific purpose of

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88. *Id.*

89. 156 F.2d 377 (9th Cir. 1946). While the decision in *Berman* was issued after the conclusion of World War II, the claim for CO status occurred during World War II. *Id.* at 379.

90. *Id.* at 378 (emphasis omitted).

91. *Id.* at 379.

92. *Id.* at 382.

distinguishing between a conscientious social belief, or a sincere devotion to a high moralistic philosophy, and one based upon an individual's belief in his responsibility to an authority higher and beyond any worldly one.<sup>93</sup>

The Ninth Circuit in *Berman* distinguished between religious belief, described as “belief in a relation to God involving duties superior to those arising from any human relation,” and philosophy.<sup>94</sup> The court aptly explained the different nature of philosophical inquiry, as compared to religious belief, by stating that “[t]he intellectually satisfying Meditations of Marcus Aurelius do not suffice for the boy in the fox hole, under fire. His philosophy is not called upon in that agonizing hour. He goes direct to his God to bolster his flagging strength and courage.”<sup>95</sup>

Further, the *Berman* court distinguished its interpretation of “religious training and belief” from the relatively broad understanding of the phrase by the Second Circuit in *Kauten*, stating that no matter “how devotedly [an applicant for CO status] adheres to [his philosophy of life], his philosophy and morals and social policy without the concept of deity cannot be said to be religion in the sense of that term as it is used in the statute.”<sup>96</sup> To extend the exemption from combat to individuals like Berman would render the phrase of “religious training and belief” to have “no practical effect whatever.”<sup>97</sup> Consequently, despite the sincerity of Berman's belief opposing war, the Ninth Circuit held that “such belief was based entirely upon a philosophical, social or political policy” and therefore did not “entitle him to exemption from military duty.”<sup>98</sup>

The *Kauten* and *Berman* cases gave different interpretations of the phrase, “religious training and belief,” as used in the exemption statute. Under the Second Circuit's 1943 interpretation in *Kauten*, the phrase extended beyond traditional deistic religious beliefs, to

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93. *Id.* at 380.

94. *Id.* at 381.

95. *Id.* at 380–81.

96. *See id.* at 381, 384.

97. *Id.* at 382.

98. *Id.* The dissent in *Berman* argued that the majority's requirement of a deity as the basis for religious belief would exclude from the military exemption members of the Taoist and Buddhist faiths, as well as “all believers in Comte's religion of humanism in which humanity is exalted into the throne occupied by a supreme being in monotheistic religions.” *Id.* at 384 (Denman, J., dissenting). Justice Douglas addressed this issue directly in his concurrence in *United States v. Seeger*, where he expressly argued that the exemption statute in effect at the time would apply to devout Buddhists. 380 U.S. 163, 193 (1965) (Douglas, J., concurring).

include individuals, like Socrates, who held their beliefs with such strength that they were willing to sacrifice their lives rather than violate their principles.<sup>99</sup> The Ninth Circuit in *Berman*, on the other hand, required a more traditional, deist-based belief to come within the statute.<sup>100</sup> As explained below, the Ninth Circuit's view prevailed in Congress's subsequent re-enactment of the exemption statute, but during the Vietnam War era the Second Circuit's approach won out, as the Supreme Court expanded the conscientious objection exemption to include individuals with non-deistic, and arguably even non-religious, beliefs in order to avoid First Amendment constitutional concerns with the conscientious objection statute.

#### E. *Conscientious Objection After World War II*

Following the *Kauten* and *Berman* decisions, Congress amended the conscientious objection statute in 1948 to explain the meaning of "religious training and belief."<sup>101</sup> Section 6(j) of the Selective Service Act of 1948 (the "1948 Act") incorporated language very similar to that in the Ninth Circuit's *Berman* decision.<sup>102</sup> The 1948 Act stated:

Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. *Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.*<sup>103</sup>

Thus, between the more expansive approach to interpreting "religious training and belief" taken by the Second Circuit in *Kauten* and the narrower approach taken by the Ninth Circuit in *Berman* requiring belief in "God," Congress opted for the narrower approach.<sup>104</sup> That legislative choice would eventually face judicial scrutiny, however, with the Supreme Court finding that despite the reference to a "Supreme Being" in the statute, Congress did not

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99. *United States v. Kauten*, 133 F.2d 703, 708 (2d Cir. 1943).

100. *Berman*, 156 F.2d at 380.

101. Selective Service Act of 1948, 80 Pub. L. No. 80-759, § 6(j), 62 Stat. 609, 612–13.

102. *Id.*; *Berman*, 156 F.2d at 380.

103. Selective Service Act of 1948 § 6(j), 62 Stat. at 612–13 (emphasis added).

104. *See id.*; *Berman*, 156 F.2d at 380, 382; *Kauten*, 133 F.2d at 708.

mean to foreclose conscientious objection based on more humanistic belief systems.<sup>105</sup>

But before reaching that issue, the Supreme Court decided a series of cases involving members of the Jehovah's Witness faith, with several of these cases addressing procedural issues related to the conscientious objection statute.<sup>106</sup> However, one case, *Sicurella v. United States*, addressed an issue conceptually related to selective conscientious objection, which warrants discussion here.<sup>107</sup> In *Sicurella*, the applicant for CO status stated that he could not serve in the military because he was "already in the Army of Christ Jesus serving as a soldier of Jehovah's appointed Commander Jesus Christ."<sup>108</sup> Sicurella responded to a question about the circumstances under which he believed in the use of force by stating that he would use force

[o]nly in the interests of defending Kingdom Interests, our preaching work, our meetings, our fellow brethren and sisters and our property against attack. I (as well as all Jehovah's Witnesses) defend those when they are attacked and are forced to protect such interests and scripturally so. Because in doing so we do not arm ourselves or carry carnal weapons in anticipation of or in preparation for trouble or to meet threats.<sup>109</sup>

Based on these statements, the Appeal Board classified Sicurella as eligible for combat service, and the Seventh Circuit Court of Appeals upheld his conviction for failing to submit to induction.<sup>110</sup> In reviewing those decisions, the Supreme Court described the question presented in the case as whether "the willingness to use of force in defense of Kingdom interests and brethren is sufficiently

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105. See *United States v. Seeger*, 380 U.S. 163, 165–66 (1965) (discussed *infra* Part I.F).

106. See, e.g., *Gonzales v. United States*, 348 U.S. 407, 417 (1955) (holding that an applicant for CO status must be provided with a copy of the Justice Department's recommendation and a reasonable opportunity to reply to that recommendation); *Simmons v. United States*, 348 U.S. 397, 405–06 (1955) (holding that the Department of Justice had to provide a FBI report to the applicant for CO status); *Witmer v. United States*, 348 U.S. 375, 380 (1955) (examining the standard of review for administrative decisions relating to applications for CO status). The Selective Service Act of 1948 was amended by the Universal Military Training and Service Act in 1951. Universal Military Training and Service Act, ch. 144, sec. 1(a), § 1(a), 65 Stat. 75, 75 (1951). The 1951 Act did not change the language of section 6(j) setting out the standard for exemption from combat service. See *id.* ch. 144, sec. 1(q), § 6(j), 65 Stat. at 86.

107. 348 U.S. 385, 388 (1955).

108. *Id.* at 386.

109. *Id.* at 387.

110. *Id.* at 388 (citing *United States v. Sicurella*, 213 F.2d 911, 914 (1954)).

inconsistent with petitioner's claim as to justify the conclusion that he fell short of being a conscientious objector."<sup>111</sup>

Answering this question, the Court stated that *Sicurella* "emphasized that the weapons of his warfare were spiritual, not carnal," and therefore it was difficult for the Court "to believe that the Congress had in mind this type of [spiritual warfare] when it said the thrust of conscientious objection must go to 'participation in war in any form.'"<sup>112</sup> The Court further stated that:

The test is not whether the registrant is opposed to all war, but whether he is opposed, on religious grounds, to *participation* in war. As to theocratic war, petitioner's willingness to fight on the orders of Jehovah is tempered by the fact that, so far as we know, their history records no such command since Biblical times and their theology does not appear to contemplate one in the future. And although the Jehovah's Witnesses may fight in the Armageddon, we are not able to stretch our imagination to the point of believing that the yardstick of the Congress includes within its measure such spiritual wars between the powers of good and evil where the Jehovah's Witnesses, if they participate, will do so without carnal weapons.

We believe that Congress had in mind real shooting wars when it referred to participation in war in any form—actual military conflicts between nations of the earth in our time—wars with bombs and bullets, tanks, planes and rockets.<sup>113</sup>

Consequently, the Court in *Sicurella* reversed the Seventh Circuit and found the applicant to come within the conscientious objection statute.<sup>114</sup> This decision has been argued to mean that one need not oppose all instances of war to qualify as a CO,<sup>115</sup> though the Supreme Court has not accepted this argument. In fact, the Court's Vietnam-era decision in *Gillette* disavowed the potential support offered by *Sicurella* for recognition of selective conscientious objection.

#### F. Vietnam-Era Conscientious Objection Decisions

Following *Sicurella*, the next set of conscientious objection cases to come before the Court arose in the context of the Vietnam War. The first Vietnam-era case heard by the Court broadly construed

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111. *Id.* at 389.

112. *Id.* at 389–90.

113. *Id.* at 390–91.

114. *Id.* at 386–87, 392.

115. Brief for Petitioner, *supra* note 17, at 50.

the phrase “religious training and belief,” extending the term well beyond its interpretation by the Ninth Circuit in *Berman* and even beyond the meaning given the phrase by the Second Circuit in *Kauten*.<sup>116</sup> In *United States v. Seeger*, the Supreme Court granted CO status to three registrants, all of whom espoused beliefs outside the traditional, orthodox religious model.<sup>117</sup> For example, one registrant expressed “skepticism or disbelief in the existence of God” but stated that he maintained a “belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed.”<sup>118</sup> A second registrant said that he believed in “‘Godness’ which was ‘the Ultimate Cause for the fact of the Being of the Universe.’”<sup>119</sup> Finally, the third registrant “was not a member of a religious sect or organization” but said that “he felt it a violation of his moral code to take human life and that he considered this belief superior to his obligation to the state.”<sup>120</sup>

The registrants challenged the constitutionality of the conscientious objection statute’s requirement that the objection be based on “religious training and belief,” and particularly the statute’s definition of religious training and belief as “an individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code.”<sup>121</sup> According to the registrants, this definition violated both the Free Exercise and Establishment Clauses of the First Amendment.<sup>122</sup>

The Supreme Court did not reach the constitutional issues raised by the registrants, however, instead interpreting the statutory language in such a way that all three registrants came within the scope of the exemption statute. First, the Court noted that the definition of religious training and belief set forth in the statute was derived from Justice Hughes’s dissent in *Macintosh*, in which

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116. Compare *United States v. Seeger*, 380 U.S. 163, 164–65 (1965), with *Berman v. United States*, 156 F.2d 377, 380, 382 (1946) (holding that a more deistic belief is necessary to be exempt from military duty through conscientious believer status), and *United States v. Kauten*, 133 F.2d 703, 708 (1943) (holding that a person does not necessarily need to believe in a deity to be exempt from military duty through conscientious believer status).

117. 380 U.S. at 166, 168–69.

118. *Id.* at 166.

119. *Id.* at 168.

120. *Id.* at 169.

121. *Id.* at 165.

122. *Id.*

he stated that “[t]he essence of religion is belief in a relation to God involving duties superior to those arising from any human relation.”<sup>123</sup> This language had been incorporated into the 1948 Act, which defined “religious training and belief” as “an individual’s belief in a relation to a *Supreme Being* involving duties superior to those arising from any human relation.”<sup>124</sup> The Court in *Seeger* claimed that Congress deliberately substituted “Supreme Being” for “God” in the statute and intentionally “did not elaborate on the form or nature of this higher authority which it chose to designate as ‘Supreme Being,’” thereby indicating Congress’s intention to allow for an expansive definition of “religious training and belief.”<sup>125</sup>

The Court also cited to the senate report of the 1948 Act.<sup>126</sup> The senate report stated that the statute was meant to “re-enact ‘substantially the same provisions as were found’ in the 1940 Act,” which referred only to “religious training and belief” and made no mention of a Supreme Being.<sup>127</sup> Thus, according to the Court, “the history of the [exemption statute] belies the notion that it was to be restrictive in application and available only to those believing in a traditional God.”<sup>128</sup>

After explaining Congress’s intended breadth for the conscientious objection statute, the Court laid out a new standard for determining whether a registrant’s belief system qualified for an exemption from combat service. In the Court’s words, the test “is essentially an objective one, namely, does the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption.”<sup>129</sup> The *Seeger* Court further clarified that “the validity of what [an applicant for CO status] believes cannot be questioned.”<sup>130</sup> Rather, the task of draft boards is to “decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own

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123. *Id.* at 175 (emphasis omitted) (quoting *United States v. Macintosh*, 283 U.S. 605, 633–34 (1981) (Hughes, C.J., dissenting)).

124. Selective Service Act of 1948, Pub. L. No. 80-759, § 6(j), 62 Stat. 609, 612–13 (emphasis added).

125. *Seeger*, 380 U.S. at 175–76.

126. *Id.* at 176.

127. *Id.*

128. *Id.* at 178. The Court resolved any perceived tension between *Kauten* and *Berman* by stating that both cases held “in common the conclusion that exemption must be denied to those whose beliefs are political, social or philosophical in nature, rather than religious.” *Id.*

129. *Id.* at 184.

130. *Id.*

scheme of things, religious.”<sup>131</sup> Finally, the Court distinguished the “religious beliefs” of the applicants from “merely personal moral code[s],” which by statute could not constitute the basis for a conscientious objection exemption.<sup>132</sup> According to the Court, a “merely personal” moral code is one that “is not only personal but which is the sole basis for the registrant’s belief and is in no way related to a Supreme Being.”<sup>133</sup>

Under this newly articulated approach, the Court found that all three registrants qualified for the conscientious objection exemption.<sup>134</sup> There was no indication that their stated beliefs were insincere, and the Court found the beliefs of all three to relate in some way to a Supreme Being, even if this relation was extremely tenuous.<sup>135</sup> For example, with respect to Mr. Seeger, the Court said that “[h]e did not disavow any belief ‘in a relation to a Supreme Being’; indeed he stated that ‘the cosmic order does, perhaps, suggest a creative intelligence.’”<sup>136</sup> This, according to the Court, qualified as “religious training and belief.”<sup>137</sup> Thus, in the *Seeger* case the Court significantly extended the conscientious objection statute and untethered it from traditional, God-centered religious beliefs.

The Court moved even further away from requiring belief in deistic religion five years later in *Welsh v. United States*.<sup>138</sup> Although the conscientious objection statute had been amended in 1967 after *Seeger* to eliminate reference to a “Supreme Being,”<sup>139</sup> and *Welsh*

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131. *Id.* at 185.

132. *Id.* at 185–86.

133. *Id.* at 186.

134. *Id.* at 187–88.

135. *See id.*

136. *Id.* at 187.

137. *Id.* at 176. The *Seeger* Court also stated that an applicant’s beliefs need not be “externally derived,” for example, through an established religious denomination. *See id.* at 186–87. Rather, the Court said that the conscientious exemption statute “does not distinguish between externally and internally derived beliefs.” *Id.* at 186.

138. 398 U.S. 333, 344 (1970).

139. The Military Selective Service Act of 1967 provided that:

Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term “religious training and belief” does not include essentially political, sociological, or philosophical views, or a merely personal moral code.

Military Selective Service Act of 1967, Pub. L. No. 90-40, sec. 7, § 6(j), 81 Stat. 100, 104 (codified as amended at 50 U.S.C. § 3806(j) (Supp. III 2013–2016)).

was decided by the Supreme Court in 1970, the statute in effect at the time the petitioner in *Welsh* first applied for CO status still contained the “Supreme Being” language applicable in *Seeger*. Moreover, the facts of *Welsh* were substantially similar to those in *Seeger*.<sup>140</sup> As in *Seeger*, the registrant in *Welsh* did not belong to any organized religion, did not affirm or deny his belief in a “Supreme Being,” and grounded his objection to combat on deeply held conscientious scruples that “killing in war was wrong, unethical, and immoral.”<sup>141</sup>

Despite the applicant’s lack of a traditional religious basis for his objection to war, however, the Court found him to come within the conscientious exemption statute. In particular, the Court stated that under *Seeger*, the determination of whether an objection to war was “religious” within the meaning of the statute required only that the opposition to war “stem from the registrant’s moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions.”<sup>142</sup> In other words, the *Welsh* Court essentially read the requirement for any connection to a higher power out of the statute, stating,

If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual “a place parallel to that filled by . . . God” in traditionally religious persons. Because his beliefs function as a religion in his life, such an individual is as much entitled to a “religious” conscientious objector exemption under § 6 (j) [of the CO statute] as is someone who derives his conscientious opposition to war from traditional religious convictions.<sup>143</sup>

As a result of *Welsh*, the Court put “moral” and “ethical” beliefs on par with “religious” beliefs as possible bases to qualify for CO status.<sup>144</sup> The Court also explained that the statutory exclusion from CO status for those with “essentially political, sociological, or philosophical views or a merely personal moral code” was not meant to prevent those with “strong beliefs about our domestic and

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140. *Welsh*, 398 U.S. at 335.

141. *Id.* at 336–37.

142. *Id.* at 339–40.

143. *Id.* at 340 (first alteration in original).

144. *Id.* at 344.

foreign affairs or even those whose conscientious objection to participation in all wars is founded to a substantial extent upon considerations of public policy” from qualifying for CO status.<sup>145</sup> According to the *Welsh* Court, the

two groups of registrants that obviously do fall within these exclusions from the [conscientious objection] exemption are those whose beliefs are not deeply held and those whose objection to war does not rest at all upon moral, ethical, or religious principle but instead rests solely upon considerations of policy, pragmatism, or expediency.<sup>146</sup>

Given this extremely broad reading of the conscientious objection exemption statute, the Court found it to apply to Welsh, who had stated that he “believe[d] the taking of life—anyone’s life—to be morally wrong” and who the Court of Appeals had found to hold this belief “with the strength of more traditional religious convictions.”<sup>147</sup> In fact, the Court did not find Welsh’s case to be a close one, stating that “Welsh was clearly entitled to a conscientious objector exemption” since the exemption statute encompassed “all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war.”<sup>148</sup>

The evolution of the conscientious objection exemption to this point has been one of continued expansion.<sup>149</sup> Through World War I, the statutory exemption was granted based on membership in historical peace churches, such as the Quakers, Mennonites, and Brethren.<sup>150</sup> During World War II and the Korean War, the exemption expanded beyond this denominational approach and shifted to an individualized inquiry into the sincerity of the registrant’s claim for exemption, which had to be based on a God-centered religious foundation.<sup>151</sup> With the *Seeger* and *Welsh* decisions, the exemption was construed to cover not only traditional religious beliefs, but also moral and ethical beliefs, even if those beliefs had no deistic (*Seeger*) or even religious basis within the traditional sense of the

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145. *Id.* at 342.

146. *Id.* at 342–43.

147. *Id.* at 343.

148. *Id.* at 343–44.

149. William D. Palmer, *Time to Exorcise Another Ghost from the Vietnam War: Restructuring the In-Service Conscientious Objector Program*, 140 MIL. L. REV. 179, 182–85 (1993) (discussing the evolution of the in-service conscientious objection exemption).

150. Frances Heisler, *The Law Versus the Conscientious Objector*, 20 CHI. L. REV. 441, 441 (1953).

151. *United States v. Seeger*, 380 U.S. 163, 165–66 (1965).

word (*Welsh*).<sup>152</sup> This continued expansion of the exemption came to a halt, however, with the Supreme Court's 1971 decision in *Gillette v. United States*, in which the Court considered whether the exemption statute covered SCOs.<sup>153</sup>

The *Gillette* decision involved two SCOs. Guy Gillette had expressed his willingness to “participate in a war of national defense or a war sponsored by the United Nations as a peace-keeping measure, but declared his opposition to American military operations in Vietnam, which he characterized as ‘unjust.’”<sup>154</sup> Gillette’s refusal to participate in the Vietnam War was, “in his words, ‘based on a humanist approach to religion,’ and his personal decision concerning military service was guided by fundamental principles of conscience and deeply held views about the purpose and obligation of human existence.”<sup>155</sup> The other SCO, Louis Negre, was a “devout Catholic” who believed it was “his duty as a faithful Catholic to discriminate between ‘just’ and ‘unjust’ wars, and to forswear participation in the latter.”<sup>156</sup> Negre determined the Vietnam War to be an unjust war according to Catholic teaching and was “firmly of the view that any personal involvement in that war would contravene his conscience and ‘all that [he] had been taught in [his] religious training.’”<sup>157</sup>

The Supreme Court in *Gillette* held that through section 6(j) of the Military Selective Service Act of 1967 (“1967 Act”),

Congress intended to exempt persons who oppose participating in all war—“participation in war in any form”—and that persons who object solely to participation in a particular war are not within the purview of the exempting section, even though the latter objection may have such roots in a claimant’s conscience and personality that it is “religious in character.”<sup>158</sup>

Consequently, the Court concluded that neither Gillette nor Negre came within the scope of the conscientious objection statute.<sup>159</sup> In reaching this holding, the Court relied on its interpretation of the

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152. *Id.* at 184–85; *Welsh*, 398 U.S. at 343–44.

153. 401 U.S. 437, 439 (1971).

154. *Id.*

155. *Id.*

156. *Id.* at 440–41.

157. *Id.* at 441.

158. *Id.* at 447.

159. *Id.* at 463.

express language of section 6(j), and rejected the petitioners' argument that exempting GCOs while requiring service from SCOs violated both the Free Exercise and Establishment Clauses of the First Amendment.<sup>160</sup>

Like the statutes in dispute in *Seeger* and *Welsh*, the 1967 Act provided an exemption from service for those "conscientiously opposed to participation in war in any form."<sup>161</sup> In construing this provision, the Court rejected the petitioners' contention that "in any form" modified "participation" rather than "war." In other words, the petitioners argued that section 6(j) was intended to exempt from military service those individuals who objected to "participation in any form" in war, rather than those who objected to participation in "war in any form."<sup>162</sup> In response to this argument, the Court stated that "[i]t matters little for present purposes whether the words, 'in any form,' are read to modify 'war' or 'participation.'"<sup>163</sup> According to the Court, this was because "conscientious scruples must implicate 'war in any form,' and an objection involving a particular war rather than all war would plainly not be covered by section 6(j)."<sup>164</sup>

Moreover, the Court stated that "an objector must oppose 'participation in war,'" and "[i]t would strain good sense to read this phrase otherwise than to mean 'participation in all war.'"<sup>165</sup> Thus, despite the Supreme Court's previous decision in *Sicurella*, where the Court stated that "[t]he test is not whether the registrant is opposed to all war, but whether he is opposed, on religious grounds, to participation in war,"<sup>166</sup> in *Gillette*, the Court held that a registrant had to object to all war, not just a particular war, to come

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160. *Id.* at 461.

161. Military Selective Service Act of 1967, Pub. L. No. 90-40, sec. 7, § 6(j), 81 Stat. 100, 104 (codified as amended at 50 U.S.C. § 3806(j) (Supp. III 2013-2016)).

162. *Gillette*, 401 U.S. at 439-40, 475.

163. *Id.* at 443.

164. *Id.*

165. *Id.*

166. *Sicurella v. United States*, 348 U.S. 385, 390 (1955) (emphasis omitted). In explaining this statement, the *Gillette* Court distinguished the context in *Sicurella* from the situation in *Gillette*. See *Gillette*, 401 U.S. at 446-47. In *Sicurella*, the registrant (a Jehovah's Witness) had stated that he opposed participation in secular wars but was not opposed to participation in a "theocratic war" commanded by Jehovah. See *id.* at 446 (quoting *Sicurella*, 348 U.S. at 390). The *Gillette* Court characterized this willingness to fight in a theocratic war as "highly abstract," and said that section 6(j) was intended to consider a registrant's views with respect to "real shooting wars," rather than abstract theocratic wars. *Id.* at 446-47 (quoting *Sicurella*, 348 U.S. at 391). *Gillette* dealt with the petitioners' willingness to

within the scope of the conscientious objection exemption in section 6(j).<sup>167</sup>

According to the *Gillette* Court, this interpretation of the statute was consistent with both logic and history. The Court's interpretation comported with logic because section 6(j) continued on to state that "[a]ny person claiming exemption from combatant training and service because of such conscientious objections . . . shall, if he is inducted into the armed forces . . . be assigned to noncombatant service as defined by the President."<sup>168</sup> If section 6(j) were intended to exempt those who conscientiously opposed "participation in any form" in war, this assignment to noncombatant service would violate the very requirement for exemption, as the registrant would be required to participate in a noncombatant role in war.<sup>169</sup> In addition, the Court reviewed earlier versions of the exemption statute, going as far back as the American Revolution, to find support for the proposition that the conscientious objection exemption historically applied only to those who opposed all war, such as members of the traditional peace churches.<sup>170</sup>

After concluding that the exemption statute applied only to GCOs, not SCO, the Court turned to the petitioners' contention that such an interpretation of the statute violated the Establishment and Free Exercise Clauses of the First Amendment. Taking up the Establishment Clause challenge first, the Court stated that "the Establishment Clause stands at least for the proposition that when government activities touch on the religious sphere, they must be secular in purpose, evenhanded in operation, and neutral in primary impact."<sup>171</sup> With this standard in mind, the Court found that "[s]ection 6(j) serves a number of valid purposes having noth-

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fight in "secular wars," and therefore *Sicurella* was deemed by the *Gillette* Court to be inapposite. *Id.*

167. *Gillette*, 401 U.S. at 447.

168. 50 U.S.C. § 456(j) (Supp. I 1971–1972) (current version at 50 U.S.C. § 3806(j) (Supp. III 2013–2016)).

169. *See Gillette*, 401 U.S. at 443 n.7.

170. *See id.* at 443–44 n.8. As an example, the Court noted that the Draft Act of 1917 "relieved from military service any person who belonged to 'any well-recognized religious sect or organization . . . whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein.'" *Id.* (alteration in original) (quoting Draft Act of 1917, Pub. L. No. 65-12, § 4, 40 Stat. 76, 78 (1917)).

171. *Id.* at 450.

ing to do with a design to foster or favor any sect, religion, or cluster of religions.”<sup>172</sup> For example, the exemption statute prevented the military from having to deal with the “hopelessness of converting a sincere conscientious objector into an effective fighting man.”<sup>173</sup> In other words, COs make ineffective soldiers, and the exemption statute recognized that reality. The Court further recognized that exemption statutes “reflect[] as well the view that ‘in the forum of conscience, duty to a moral power higher than the state has always been maintained.’”<sup>174</sup> Thus, independent of sectarian affiliation or theological viewpoint, the 1967 Act’s exemption statute embodied the long-recognized tradition that in some instances individual conscience should prevail over the dictates of the state.

In addition to these “neutral and secular” reasons for any exemption, the Court stated that “valid neutral reasons exist for limiting the exemption to objectors to all war,” and not extending it to objectors of particular wars.<sup>175</sup> Among these were the “Government’s need for manpower” and “the interest in maintaining a fair system for determining ‘who serves when not all serve.’”<sup>176</sup> Allowing SCOs to come within the exemption would, according to the Court, extend the exemption to “uncertain dimensions” and would “involve a real danger of erratic or even discriminatory decision-making in administrative practice.”<sup>177</sup> The difficulty of distinguishing between religious opposition and political opposition to a particular war would be “considerable,” and “the belief that a particular war at a particular time is unjust is by its nature changeable and subject to nullification by changing events.”<sup>178</sup>

Furthermore, by limiting the exemption to GCOs, the Court found that Congress had protected “the integrity of democratic decisionmaking against claims to individual noncompliance.”<sup>179</sup> The Court recognized that allowing any exemption based on individual conscience necessarily risks allowing the individual to become “a

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172. *Id.* at 452.

173. *Id.* at 453.

174. *Id.* (quoting *United States v. Macintosh*, 283 U.S. 605, 633 (1931) (Hughes, C.J., dissenting)).

175. *Id.* at 454–56.

176. *Id.* at 455.

177. *Id.*

178. *Id.* at 455–56.

179. *Id.* at 458.

law unto himself,”<sup>180</sup> and this risk is compounded by the administrative difficulty of local boards distinguishing the genuine CO to a particular war from the dissenter who opposes the war on political grounds.<sup>181</sup> Based on these neutral justifications for limiting the exemption to GCOs—concerns over manpower, the need for evenhandedness in administration of the exemption, and an interest in maintaining centralized decision-making rather than allowing each individual to become “a law unto himself”—the Court held that section 6(j) did not violate the Establishment Clause.<sup>182</sup>

Moving briefly to the challenge under the Free Exercise Clause, the Court stated that the “Free Exercise Clause may condemn certain applications clashing with imperatives of religion and conscience, when the burden on First Amendment values is not justifiable in terms of the Government’s valid aims.”<sup>183</sup> That said, the Court found that the “incidental burdens felt by persons in petitioners’ position are strictly justified by *substantial governmental interests* that relate directly to the very impacts questioned.”<sup>184</sup> In addition, the Court noted “the Government’s interest in procuring the manpower necessary for military purposes, pursuant to the constitutional grant of power to Congress to raise and support armies.”<sup>185</sup> Thus, the entirety of the Court’s free exercise analysis amounted to a recognition of the government’s substantial interest in ensuring sufficient manpower to raise and support an army.

In summary, the decision in *Gillette* limited the scope of the conscientious objection exemption based on a statutory interpretation of section 6(j) of the Military Selective Service Act. The decision also rejected the Establishment Clause and Free Exercise Clause

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180. The phrase “a law unto himself” was first used by the Supreme Court in *Reynolds v. United States* where the Court considered religious objections to the law against polygamy. 98 U.S. 145, 166–67 (1878). The Court stated that:

So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

*Id.*

181. See *Gillette*, 401 U.S. at 459–60.

182. See *id.* at 460.

183. *Id.* at 462.

184. *Id.* (emphasis added).

185. *Id.* (citing U.S. CONST. art. I, § 8).

challenges to the conscientious objection statute in light of the neutral bases cited by the Court for distinguishing between GCOs and SCOs, as well as the government's substantial interest in maintaining the distinction. As explained below, RFRA renders the statutory interpretation in *Gillette* irrelevant and requires application of a more rigorous standard of review than the standard applied by the *Gillette* Court to uphold the disparate treatment of GCOs and SCOs. Based on this more rigorous standard, if the Court were to consider the question of selective conscientious objection today, it would most likely reach a different result than it did in *Gillette*. An analysis of a selective conscientious objection claim under RFRA is set forth below.

## II. THE RELIGIOUS FREEDOM RESTORATION ACT

Congress enacted RFRA in 1993,<sup>186</sup> in response to the Supreme Court's decision in *Employment Division v. Smith*.<sup>187</sup> In *Smith*, the Court rejected a Free Exercise Clause challenge to Oregon's decision not to grant unemployment compensation benefits to individuals who were terminated from their jobs due to their use of an illegal drug (peyote) in a religious ceremony.<sup>188</sup> The Court held that the traditional strict scrutiny standard (compelling interest and least restrictive means) did not apply to neutral, generally applicable laws, such as Oregon's drug or unemployment compensation laws, even if those laws incidentally impacted a person's ability to engage in religious practices.<sup>189</sup>

In explaining the scope of the Free Exercise Clause as it relates to generally applicable laws not intentionally directed at religious practices, the Court stated:

It is no more necessary to regard the collection of a general tax, for example, as "prohibiting the free exercise [of religion]" by those citizens who believe support of organized government to be sinful, than it is to regard the same tax as "abridging the freedom . . . of the press"

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186. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb–2000bb-4 (2012)).

187. See 42 U.S.C. § 2000bb(a)(4). See generally *Emp't Div. v. Smith*, 494 U.S. 872, 874 (1989) (examining whether "the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use").

188. *Smith*, 494 U.S. at 890.

189. *Id.* at 882.

of those publishing companies that must pay the tax as a condition of staying in business. It is a permissible reading of the text [of the Free Exercise Clause], in the one case as in the other, to say that if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.<sup>190</sup>

According to the *Smith* Court, to hold otherwise would “make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”<sup>191</sup>

Congress, however, did not share that same concern, and enacted RFRA three years after *Smith*.<sup>192</sup> In RFRA, Congress stated that the “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.”<sup>193</sup> Under the statute, if the government substantially burdens a person’s exercise of religion through a rule of general applicability, that person is entitled to an exemption from the rule unless the government “demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”<sup>194</sup> The definition of “exercise of religion” under RFRA originally made reference to the First Amendment.<sup>195</sup> In 2000, however, Congress amended the definition to “effect a complete separation from First Amendment case law,”<sup>196</sup> and defined the “exercise of religion” to include “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”<sup>197</sup> Moreover, Congress mandated that this concept “be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.”<sup>198</sup> Thus, Congress has manifested a clear

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190. *Id.* at 878 (first and second alterations in original) (quoting *Grosjean v. Am. Press Co.*, 297 U.S. 233, 243 (1989)).

191. *Id.* at 879.

192. See Scott Bomboy, *What Is RFRA and Why Do We Care?*, NAT’L CONST. CTR. (June 30, 2014), <https://constitutioncenter.org/blog/what-is-rfra-and-why-do-we-care/>.

193. 42 U.S.C. § 2000bb-1(a) (2012).

194. *Id.* § 2000bb-1(b).

195. See *id.* § 2000bb-2(4) (1994) (defining “exercise of religion” as “the exercise of religion under the First Amendment”).

196. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. \_\_, \_\_, 134 S. Ct. 2751, 2761–62 (2014).

197. *Id.* at \_\_, 134 S. Ct. at 2762; 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A) (2012).

198. 42 U.S.C. § 2000cc-3(g).

intention to afford broad protections for the exercise of religion under RFRA.

The breadth of protection under RFRA was illustrated by the Supreme Court's 2014 decision in *Burwell v. Hobby Lobby Stores, Inc.*, in which the Court determined that under RFRA, for-profit corporations were protected from a mandate of the Patient Protection and Affordable Care Act ("ACA") that would have required the corporations to provide health insurance with certain types of contraceptive care for their employees.<sup>199</sup> The owners of the closely held corporations in the case argued that the contraception mandate substantially burdened their (and their corporations') exercise of religion because it forced them either to provide abortifacient medical care in violation of their religious beliefs or face substantial financial penalties.<sup>200</sup> The *Hobby Lobby* majority found that "[b]ecause the contraceptive mandate forces them to pay an enormous sum of money—as much as \$475 million per year in the case of Hobby Lobby—if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs."<sup>201</sup>

Because the Court determined that the contraceptive mandate substantially burdened the exercise of religion, the government agency responsible for administering the mandate had to show that the mandate was both in furtherance of a compelling governmental interest and the least restrictive means of furthering that compelling governmental interest.<sup>202</sup> According to the Court, RFRA "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened."<sup>203</sup> This meant that the Court was required to "loo[k] beyond broadly formulated interests," such as "public health" and "gender equality" in the case of the contraceptive mandate, and instead to "look to the marginal interest in enforcing the [challenged law] in these cases."<sup>204</sup> After explaining that RFRA requires a "focused inquiry" into the governmental

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199. *Hobby Lobby*, 573 U.S. at \_\_\_, 134 S. Ct. at 2759, 2765.

200. *Id.* at \_\_\_, 134 S. Ct. at 2775–76.

201. *Id.* at \_\_\_, 134 S. Ct. at 2779.

202. 42 U.S.C. § 2000bb-1(b).

203. *Hobby Lobby*, 573 U.S. at \_\_\_, 134 S. Ct. at 2779 (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006)).

204. *Id.* at \_\_\_, 134 S. Ct. at 2779 (quoting *O Centro*, 546 U.S. at 431).

interest involved rather than broad statements of general interests, however, the Court found it “unnecessary to adjudicate this issue” because the government had failed to meet the “least-restrictive-means standard.”<sup>205</sup> As a result, the determination of whether a compelling governmental interest existed was irrelevant to the ultimate disposition of the case.<sup>206</sup>

With respect to the least-restrictive-means analysis, the Court stated that the standard is “exceptionally demanding.”<sup>207</sup> The standard was not met by the government in *Hobby Lobby* because a regulatory accommodation from providing the objectionable contraceptive methods already existed for non-profit organizations with religious objections. Under that accommodation, an objecting organization could “self-certify that it opposes providing coverage for particular contraceptive services.”<sup>208</sup> After self-certification,

the organization’s insurance issuer or third-party administrator [was required to] “[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan” and “[p]rovide separate payments for any contraceptive services required to be covered” without imposing “any cost-sharing requirements . . . on the eligible organization, the group health plan, or plan participants or beneficiaries.”<sup>209</sup>

The Court found that this alternative system for contraceptive coverage could extend to for-profit organizations with religious objections, and therefore the contraceptive mandate did not constitute the least restrictive means of accomplishing the government’s interest in providing contraceptive care to employees of for-profit organizations.<sup>210</sup> In short, a system existed that allowed the Government to achieve its goal of contraceptive care coverage without requiring that companies with religious objections pay for that coverage.

After concluding that the government had failed to carry its least-restrictive-means burden, the *Hobby Lobby* majority addressed a concern expressed by the dissent that “a ruling in favor of the objecting parties in these cases will lead to a flood of religious

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205. *Id.* at \_\_, 134 S. Ct. at 2779–80.

206. *Id.* at \_\_, 134 S. Ct. at 2780.

207. *Id.* at \_\_, 134 S. Ct. at 2780.

208. *Id.* at \_\_, 134 S. Ct. at 2782.

209. *Id.* at \_\_, 134 S. Ct. at 2782 (second, third, and fourth alterations in original) (first quoting 45 C.F.R. § 147.131(c)(2) (2013); then quoting 26 C.F.R. § 54.9815-2713A(c)(2) (2015)).

210. *See id.* at \_\_, 134 S. Ct. at 2782.

objections regarding a wide variety of medical procedures and drugs, such as vaccinations and blood transfusions.”<sup>211</sup> In response to this concern, the majority stated that the government had “made no effort to substantiate this prediction” and had not “provided evidence that any significant number of employers sought exemption, on religious grounds, from any of ACA’s coverage requirements other than the contraceptive mandate.”<sup>212</sup> Thus, the burden was on the government to show empirical evidence of the “floodgates” concern it raised, and the government had failed to meet that burden.

### III. APPLYING RFRA TO SELECTIVE CONSCIENTIOUS OBJECTION

As described above, RFRA requires the person challenging a “neutral” law, such as the contraceptive mandate in *Hobby Lobby* or the draft act in the case of a CO, to demonstrate that the law imposes a “substantial burden” on that person’s exercise of religion.<sup>213</sup> If the person challenging the law can make that showing, “that person is entitled to an exemption from the rule unless the Government ‘demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.’”<sup>214</sup> According to the Supreme Court, “RFRA was designed to provide very broad protection for religious liberty. By enacting RFRA, Congress went far beyond what this Court has held is constitutionally required.”<sup>215</sup> As explained below, the draft act places a substantial burden on a SCO’s exercise of religion, thereby triggering strict scrutiny review. While requiring military service of SCOs may or may not constitute a compelling state interest, forcing them into combat is not the least restrictive means of accomplishing that interest.

#### A. *Substantial Burden on the Exercise of Religion*

In the case of a SCO, the statutory penalty for refusing induction into the military is imprisonment for up to five years and a fine of

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211. *Id.* at \_\_, 134 S. Ct. at 2783.

212. *Id.* at \_\_, 134 S. Ct. at 2783.

213. See 42 U.S.C. § 2000bb-1(a) (2012) (“Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.”). According to Congress, “laws [that are] ‘neutral’ toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise.” *Id.*

214. *Hobby Lobby*, 573 U.S. at \_\_, 134 S. Ct. at 2761 (quoting 42 U.S.C. § 2000bb-1(b)).

215. *Id.* at \_\_, 134 S. Ct. at 2767.

up to \$10,000.<sup>216</sup> While the potential financial penalty is significantly less than the amount at issue in *Hobby Lobby*,<sup>217</sup> the potential for a relatively lengthy prison sentence would almost certainly constitute a substantial burden.

Perhaps more important, however, courts and commentators have recognized the essential interest in being permitted to follow one's conscience with respect to participation in war. Compelling combat service in violation of the mandates of conscience substantially burdens that interest and violates the opportunity for self-determination that underlies our very identity as Americans. As explained by Justice Douglas in *Girouard*:

The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle.<sup>218</sup>

The jurist with arguably the greatest understanding of the burden of compulsory service on the CO was Chief Justice Harlan Stone. During World War I (while serving as Dean of Columbia Law School and prior to joining the Supreme Court), then-Dean Stone served as a member of the Board of Inquiry, which heard appeals of CO claims.<sup>219</sup> After the war, then-Dean Stone wrote an essay in the Columbia University Quarterly, describing his experience on the Board. Though harshly critical of some of the COs he

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216. 50 U.S.C. § 3811(a) (Supp. III 2013–2016) (“Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this chapter, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than 5 years or a fine of not more than \$10,000, or by both such fine and imprisonment.”).

217. As previously noted, the fines potentially applicable in *Hobby Lobby* were, at least for one of the companies involved in the case, approximately \$475 million per year. *Hobby Lobby*, 573 U.S. at \_\_\_, 134 S. Ct. at 2759.

218. *United States v. Girouard*, 328 U.S. 61, 68 (1946). Interestingly, despite this statement there is substantial support for the position that it is only through statutory protections afforded by Congress, not through constitutional protections, that one may assert an exemption from combatant military service. In *United States v. Macintosh*, Chief Justice Hughes “enunciated the rationale behind the long recognition of conscientious objection to participation in war accorded by Congress in our various conscription laws when he declared that ‘in the forum of conscience, duty to a moral power higher than the State has always been maintained.’” *United States v. Seeger*, 380 U.S. 163, 169–70 (quoting *United States v. Macintosh*, 283 U.S. 605, 663 (1931) (Hughes, C.J., dissenting)).

219. Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 COLUM. L. REV. 1083, 1132 (2014); Stone, Harlan Fiske, FED. JUD. CTR., <https://www.fjc.gov/history/judges/stone-harlan-fiske> (last visited Mar. 28, 2018).

encountered,<sup>220</sup> then-Dean Stone elegantly explained the purpose of the conscientious objection exemption as follows:

[B]oth morals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process.<sup>221</sup>

Moreover, then-Dean Stone noted the particularly burdensome imposition resulting from compulsory military service because such service requires the individual to *take action*—rather than to *refrain from acting*. Then-Dean Stone wrote:

Viewed in its practical aspects, however, there may be and probably is a very radical distinction between compelling a citizen to refrain from acts which he regards as moral but which the majority of his fellow citizens and the law regard as immoral or unwholesome to the life of the state on the one hand, and compelling him on the other to do affirmative acts which he regards as unconscientious and immoral. The action of the state in compelling the citizen to refrain from doing an act which he regards as moral and conscientious does not in most instances which are likely to occur do violence to his conscience; but conscience is violated if he is coerced into doing an act which is opposed to his deepest convictions of right and wrong. The traditional view of the common law that right motives are no defense for crime

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220. In discussing some of the COs he encountered, then-Dean Stone stated:

Their average mentality was low. Most of them had little comprehension of the great issues involved in the war, or of what the consequences would be if it were lost to America. . . . [A]ll in all they presented a depressing example of dense ignorance of what was going on in the world, and stolid indifference to those moral and political questions which were so profoundly stirring the minds and hearts of their fellow countrymen.

Harlan F. Stone, *The Conscientious Objector*, 21 COLUM. U. Q. 253, 260 (1919). The exception to then-Dean Stone's harsh words were the Quakers he encountered. Of this group he stated:

[T]he Quakers produced a favorable impression by their high intelligence and their evident desire to render service to the country in its time of need so far as possible within the limits of their religious convictions. . . . They were eager to accept the onerous and sometimes dangerous service in the Quaker Reconstruction Unit in Europe, and they have the impression that the problem of the government would not have been serious had it had to deal only with the cases of Quakers.

*Id.*

221. *Id.* at 269.

and should not stay the hand of the law gives very little clue, therefore, to the sound method of dealing with the conscientious objector to war, in the realm of either morals or policy. However rigorous the state may be in repressing the commission of acts which are regarded as injurious to the state, it may well stay its hand before it compels the commission of acts which violate the conscience.<sup>222</sup>

The distinction identified by then-Dean Stone in his essay was subsequently recognized by a federal district court in assessing the exemption claim of a SCO during the Vietnam War and prior to the Supreme Court's issuance of the *Gillette* decision:

[I]n the instant case defendant is not being restrained from doing an affirmative act, rather, the Selective Service Act is commanding him to perform an affirmative act—participation in a war which his conscience tells him is unjust. This distinction was articulated by Chief Justice Stone thusly: “[C]ompelling the citizen to refrain from doing an act which he regards as moral and conscientious does not do violence to his conscience; but his conscience is violated if he is coerced into doing an act which is opposed to his deepest convictions of right and wrong.” If the Selective Service statute does not exempt from its command the Catholic selective objector, then it must run afoul of this prohibition against the State commanding one to act against his conscience.<sup>223</sup>

The district court in that case went on to explain in stark terms the choice confronted by the SCO:

In the case before the court the statute forces defendant McFadden to choose between following the precepts of his religion and going to jail or abandoning those precepts in order to avoid jail. Indeed, the case of defendant McFadden is stronger than Sherbert's [a petitioner in an earlier First Amendment case], for not only is he faced with jail, but if he abandons his conscience he will be put in the position of possibly violating the fundamental precept of his religious belief—the killing of another human being in the cause of an unjust war.<sup>224</sup>

Despite the substantial difference between the financial penalty at stake in *Hobby Lobby* and the fine triggered by a violation of the draft law, the burden imposed by forced military service in violation of one's religious beliefs is profound. There is the potential loss of liberty, with the statute allowing for up to a five-year prison term.<sup>225</sup> To avoid prison, the CO would have to violate his religious

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222. *Id.* at 268–69.

223. *United States v. McFadden*, 309 F. Supp. 502, 505–06 (N.D. Cal. 1970), *vacated*, 401 U.S. 1006 (1971) (alteration in original) (emphasis omitted) (citations omitted) (quoting Stone, *supra* note 220, at 268).

224. *Id.* at 506.

225. 50 U.S.C. § 3811(a) (Supp. III 2013–2016).

faith. Moreover, forced military service would not just require the CO to refrain from action that he believes to be moral or ethical, but would potentially compel him to act in a way contrary to strongly held religious beliefs. For these reasons, forcing a SCO to participate in combatant military service places a substantial burden on the SCO's exercise of religion.

This begs the question, of course, of whether selective conscientious objection is in fact an exercise of religion or, as contended by Justice Hand's opinion in *Kauten*, it is more likely to be simply a political position.<sup>226</sup> The answer to this question must turn on the individual registrant involved, but several Christian denominations recognize selective conscientious objection through a theory known as the "just war doctrine." Under the just war doctrine as explained by the Catholic Church, for example:

A war of aggression is intrinsically immoral. In the tragic case where such a war breaks out, leaders of the State that has been attacked have the right and the duty to organize a defence even using the force of arms. To be licit, the use of force must correspond to certain strict conditions: "the damage inflicted by the aggressor on the nation or community of nations must be lasting, grave and certain; all other means of putting an end to it must have been shown to be impractical or ineffective; there must be serious prospects of success; the use of arms must not produce evils and disorders graver than the evil to be eliminated. The power of modern means of destruction weighs very heavily in evaluating this condition. These are the traditional elements enumerated in what is called the 'just war' doctrine. The evaluation of these conditions for moral legitimacy belongs to the prudential judgment of those who have responsibility for the common good."<sup>227</sup>

Catholic doctrine further expressly recognizes not only general conscientious objection, but also selective conscientious objection and calls for all who refuse to participate in war due to conscientious scruples to accept alternative forms of service in place of military service:

Conscientious objectors who, out of principle, refuse military service in those cases where it is obligatory because their conscience rejects

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226. See *United States v. Kauten*, 133 F.2d 703, 708 (2d Cir. 1943) (stating that objection to particular wars, and not wars in general, "is usually a political objection, while the latter, we think, may justly be regarded as a response of the individual to an inward mentor, call it conscience or God").

227. PONTIFICAL COUNCIL FOR PEACE & JUSTICE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH 217-18 (2005) (emphasis omitted) (quoting CATECHISM OF THE CATHOLIC CHURCH para. 2309, at 556 (Liberia Editrice Vaticana 2d ed. 2016)).

any kind of recourse to the use of force or because they are opposed to the participation in a particular conflict, must be open to accepting alternative forms of service. “It seems just that laws should make humane provision for the case of conscientious objectors who refuse to carry arms, provided they accept some other form of community service.”<sup>228</sup>

Other faith traditions that have recognized selective conscientious objection include, but are not limited to, the Methodist Church,<sup>229</sup> the United Church of Christ,<sup>230</sup> the United Presbyterian Church, the American Baptist Church, and the World Council of Churches.<sup>231</sup> Thus, in several Christian denominations selective conscientious objection is recognized as a part of the denomination’s doctrinal beliefs and constitutes the “exercise of religion” by adherents to these faith traditions.

### B. *The Compelling Interest Analysis*

Once the CO establishes that required combatant service places a substantial burden on his exercise of religion, the onus shifts to the government to show that the burden to the CO is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling interest.<sup>232</sup> The first consideration in this analysis is to identify the purported compelling interest furthered by the statute. As explained above, *Hobby Lobby* makes clear that RFRA requires a “focused inquiry” into the purported interest and rejects interests “couched in very broad terms,”

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228. *Id.* at 219 (emphasis omitted) (quoting SECOND VATICAN ECUMENICAL COUNCIL, PASTORAL CONSTITUTION GAUDIUM ET SPES para. 79 (1966)).

229. In October 1969, the Board of Christian Social Concerns of the United Methodist Church issued a statement which said, in part, “[W]e ask that all those who conscientiously object to preparation for or participation in *any specific* war or all wars be granted legal recognition and assigned to appropriate civilian service.” Brief for Petitioner, *supra* note 17, at 51 (alteration in original) (emphasis added).

230. In June 1967, the General Synod of the United Church of Christ passed the following pronouncement: “Therefore be it resolved that the General Synod of the United Church of Christ recognize the right of conscientious objection to participation in a particular war or in war waged under particular circumstances, as well as the right of conscientious objection to participation in war as such.” *Id.* at 52.

231. In July 1968, the World Council of Churches meeting in Uppsala, Sweden, voted almost unanimously in favor of the following resolution: “[P]rotection of conscience demands that the churches should give spiritual care and support not only to those serving in armed forces, but also to those who, especially in the light of the nature of modern warfare, object to participation in particular wars they feel bound in conscience to oppose.” *Id.* (quoting Edward B. Fiske, *Churches Uphold Right to Oppose Particular Wars*, N.Y. TIMES, July 17, 1968, at 10).

232. 42 U.S.C. § 2000bb-1(b) (2012).

such as, in the context of the contraceptive mandate at issue in *Hobby Lobby*, “public health” or “gender equality.”<sup>233</sup> According to the Court in *Hobby Lobby*, RFRA

“requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law ‘to the person’—the particular claimant whose sincere exercise of religion is being substantially burdened.” This requires [the Court] to “loo[k] beyond broadly formulated interests” and to “scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants”—in other words, to look to the marginal interest in enforcing the contraceptive mandate in these cases.<sup>234</sup>

One could read this statement to support an extremely narrow compelling interest inquiry, focusing entirely on the individual claiming a substantial burden on his exercise of religion. In *Hobby Lobby*, for example, a statement of the compelling interest question justified by the Court’s narrow approach set forth in the above-quoted language would be whether the government has a compelling interest in requiring that Hobby Lobby and the two other petitioning corporations involved in the case provide insurance coverage for the four challenged contraceptive methods at issue. The analog in a SCO case would be whether the government has a compelling interest in requiring that a particular SCO serve in combat. Framing the question this way almost answers itself, as the “marginal interest”<sup>235</sup> of forcing an individual CO into combat is practically non-existent, given the number of individuals who serve in the military during war.<sup>236</sup>

Ultimately, the Court’s statement of the alleged compelling interest in *Hobby Lobby* was slightly broader than might have been expected under the “focused inquiry” described above. In essentially bypassing the compelling interest analysis to reach the least restrictive means analysis on which the case turned, the Court said that it would “assume that *the interest in guaranteeing cost-free access to the four challenged contraceptive methods* is compelling within the meaning of RFRA.”<sup>237</sup> Notably, the Court did not say

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233. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. \_\_\_, \_\_\_, 134 S. Ct. 2751, 2779 (2014).

234. *Id.* at \_\_\_, 134 S. Ct. at 2779 (alterations in original) (citation omitted) (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006)).

235. *Id.* at \_\_\_, 134 S. Ct. at 2779.

236. For example, 4.7 million United States service members served in the military during World War I, 16.1 million during World War II, and 8.7 million during the Vietnam War. See *America’s Wars*, U.S. DEP’T OF VETERANS AFF., [https://www.va.gov/opa/publications/factsheets/fs\\_americas\\_wars.pdf](https://www.va.gov/opa/publications/factsheets/fs_americas_wars.pdf) (last visited Mar. 28, 2018).

237. *Hobby Lobby*, 573 U.S. at \_\_\_, 134 S. Ct. at 2780 (emphasis added).

that the interest at stake was guaranteeing the provision of the four challenged contraceptive methods *by the particular petitioners in the case*. Thus, the Court appeared to move away from the highly individualized inquiry that it had seemingly espoused earlier in the case. Equally notable, the Court expressly rejected framing the interest at stake in the broadest possible terms, such as “public health” and “gender equality.”<sup>238</sup> Thus, the Court seemed to find a middle ground in identifying the interest at stake—not focusing on the particular individual involved in the case, but also not accepting exceptionally sweeping interests such as “public health” and “gender equality.”

Based on its statements in *Hobby Lobby*, it appears that the Court would frame the interest at issue in a SCO case under RFRA not in terms as narrow as whether the government has a compelling interest in requiring an individual SCO to serve in combat or in terms as broad as whether the government has a compelling interest in its ability to establish an effective fighting force. Rather, the relevant inquiry appears to be whether the government has a compelling interest in requiring SCOs to serve in combat. Determining whether this interest constitutes a “compelling government interest” requires the examination of the various justifications for the Court’s decision in *Gillette* and assessing whether these justifications amount to a “compelling interest.”

In *Gillette*, the Supreme Court identified various interests in support of its decision not to recognize selective conscientious objection. These included: manpower concerns, questions about fairness, and the need to protect the integrity of democratic decision-making.<sup>239</sup> As mentioned earlier, the Court did not apply the traditional strict scrutiny standard in *Gillette*, and consequently did not characterize any of these interests as “compelling.” Rather, in upholding the distinction between GCOs and SCOs, the Court stated that the “incidental burdens felt by persons in petitioners’ position are strictly justified by *substantial* governmental interests that relate directly to the very impacts questioned.”<sup>240</sup> Whether these interests amount to “compelling interests” sufficient to justify the substantial burden on the exercise of religion required by RFRA is explored below. As in *Hobby Lobby*, however, the compelling interest inquiry may ultimately prove irrelevant because the

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238. *Id.* at \_\_\_, 134 S. Ct. at 2779.

239. *See Gillette v. United States*, 401 U.S. 437, 455 (1971).

240. *Id.* at 462 (emphasis added).

interests underlying the draft act may be achieved by less restrictive means than forcing SCOs into combat.

### 1. Manpower Considerations

With respect to the issue of manpower, the *Gillette* Court did not cite any empirical data or even provide any substantive discussion of this concern. Rather, the Court simply stated that the government has an “interest in procuring the manpower necessary for military purposes, pursuant to the constitutional grant of power to Congress to raise and support armies.”<sup>241</sup> Despite the lack of data or analysis provided, presumably, the concern over manpower is that broadening the exemption from combat service to include SCOs would hinder the government’s ability to raise a force large enough to support military operations. This seems dubious, however, in light of historical experience.

From World War I through the Vietnam War, the percentage of draft registrants who were exempted from military service due to conscientious objection has never exceeded even one quarter of one percent of the total registrants:

Table 1 – Conscientious Objectors by Conflict<sup>242</sup>

Conflict	Number of Conscientious Objectors (rounded to nearest thousand)	Number of Registrants (rounded to nearest thousand)	% of COs
WWI <sup>243</sup>	4,000	23,456,000	0.02%
WWII <sup>244</sup>	72,000	34,507,000	0.21%
Korea (6/30/52) <sup>245</sup>	8,000	13,225,000	0.06%
Vietnam (1971) <sup>246</sup>	37,000	16,098,000	0.23%

241. *Id.* (citing U.S. CONST. art. I, § 8). The only other mention of manpower concerns in the majority opinion were in the context of the Court’s discussion of fairness, when the Court stated that “[a]part from the Government’s need for manpower, perhaps the central interest involved in the administration of conscription laws is the interest in maintaining a fair system for determining ‘who serves when not all serve.’” *Id.* at 455.

242. COs classified as I-O did not serve in the military but were required to perform alternative service of “national importance.” Selective Service and Training Act of 1940, Pub. L. No. 76-783, § 5(g), 54 Stat. 885, 889. COs classified as I-A-O performed non-combat military service. 32 C.F.R. §§ 1622.2, 1622.14 (1962). The figures in this table and in Table 2 show only those individuals classified as I-O.

243. *See* Hochstadt, *supra* note 16, at 60.

244. *Id.*

245. *Id.*

246. BUREAU OF THE CENSUS., U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, 1972, at 264 tbl.432 (1972) [hereinafter STATISTICAL ABSTRACT, 1972].

Based on historical precedent, even with the addition of SCOs, it is unlikely that the number of individuals exempted from military service would increase significantly. Two historical instances support this position. First, after the Supreme Court broadened the conscientious objection exemption in 1965 in *Seeger*<sup>247</sup> and then again in 1970 in *Welsh*,<sup>248</sup> the number of CO claims increased only negligibly, never exceeding even one quarter of one percent of total registrants:

Table 2 – Conscientious Objectors by Year<sup>249</sup>

Year	Number of Conscientious Objectors (rounded to nearest thousand)	Number of Registrants (18 ½ to 26 years old) (rounded to nearest thousand)	% of COs
1965	11,000	17,967,000	0.06%
1966	9,000	18,971,000	0.05%
1967	11,000	19,901,000	0.06%
1968	13,000	20,829,000	0.06%
1969	16,000	21,785,000	0.07%
1970	28,000	22,705,000	0.12%
1971	37,000	16,098,000	0.23%
1972	10,000	15,012,000	0.06%
1973	9,000	14,840,000	0.06%

In addition to the relatively minor impact resulting from the extension of the conscientious objection exception in *Seeger* and later in *Welsh*, the British experience during World War II provides further support that the inclusion of SCOs would not result in a shortage of available manpower. Despite allowing for selective conscientious objection during the war, the British found that “the number of all COs, including SCOs, was only about 1 in 125 men registering.”<sup>250</sup> According to one commentator, out of approximately 5.9 million “men in uniform” for Great Britain in World War II, only

247. *United States v. Seeger*, 380 U.S. 163, 165–66 (1965).

248. *Welsh v. United States*, 398 U.S. 333, 343–44 (1970); *see supra* Part I.F.

249. Figures for years 1965–1967 come from BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, 1968, at 262 tbl.383 (1968). Figures for 1968–1969 come from BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, 1970, at 262 tbl.397 (1970). Figures for 1970–1971 come from STATISTICAL ABSTRACT, 1972, *supra* note 246, at 264 tbl.432. Figures for 1972–1973 come from BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, 1974, at 322 tbl.523 (1974).

250. Theodore J. Koontz, *A Public Policy Case for Permitting Selective Conscientious Objection*, 3 PUB. AFF. Q. 49, 71 n.17 (1989) (citing WAR RESISTERS’ INT’L, CONSCRIPTION: A WORLD SURVEY; COMPULSORY MILITARY SERVICE AND RESISTANCE TO IT 59 (Devi Prasad & Tony Smythe eds., 1968)).

0.5% to 1.0% of British draft registrants were classified as COs.<sup>251</sup> While the difficulty of drawing strong conclusions from historically singular circumstances like the situation confronting Britain in World War II must be recognized, the British experience demonstrates at least one instance where a country that has actually permitted an exemption for SCOs did not see a flood of exemption claims.

In sum, even with the increasingly unpopular war in Vietnam, an extension of the exemption statute to cover conscientious objection based on non-theistic beliefs did not adversely impact the manpower available to fight the war. Additionally, the British experience in allowing selective conscientious objection during World War II had a negligible impact on manpower. These historical instances of broadening the conscientious objection exemption demonstrate that the potential impact on manpower most likely would not justify compelling combat service by SCOs.

## 2. Issues of Fairness

Of course, when the government drafts citizens for combat service, perceptions of fairness over the conscription system are paramount. If perceived as unfair, popular support for the draft system may diminish to such a point that it undermines citizens' faith in broader government decisions, such as the decision to engage in the conflict giving rise to the need for the draft. As expressed by the Supreme Court in *Gillette*, "perhaps the central interest involved in the administration of conscription laws is the interest in maintaining a fair system for determining 'who serves when not all serve.'"<sup>252</sup>

In explaining the government's concerns over fairness, the Court stated that expanding the exemption to include SCOs "would involve a real danger of erratic or even discriminatory decisionmaking in administrative practice."<sup>253</sup> Moreover, the Court noted:

[O]ver the realm of possible situations, opposition to a particular war may more likely be political and nonconscientious, than otherwise. . . . In short, it is not at all obvious in theory what sorts of objections

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251. See Hochstadt, *supra* note 16, at 60.

252. *Gillette v. United States*, 401 U.S. 437, 455 (1971) (quoting NAT'L ADVISORY COMM'N ON SELECTIVE SERV., IN PURSUIT OF EQUITY: WHO SERVES WHEN NOT ALL SERVE? (1967)).

253. *Id.* at 455.

should be deemed sufficient to excuse an objector, and there is considerable force in the Government's contention that a program of excusing objectors to particular wars may be "impossible to conduct with any hope of reaching fair and consistent results . . ." <sup>254</sup>

And so, the Court in *Gillette* determined that the government's interest in maintaining a perception of fairness in its conscription system would be hindered by the difficult task of distinguishing genuine conscientious objections to a particular war from bogus or politically motivated objections. <sup>255</sup> The Court further determined that it would be especially difficult to make this determination in a consistent manner, since SCOs might present various objections to their participation in a particular war, ranging from the purpose of the war to the use of particular weapons or techniques in the war to political collaboration with certain objectionable allies. <sup>256</sup> According to the Court, "[s]ince objection may fasten on any of an enormous number of variables, the claim is ultimately subjective, depending on the claimant's view of the facts in relation to his judgment that a given factor or congeries of factors colors the character of the war as a whole." <sup>257</sup>

With respect to the Court's statement that "opposition to a particular war may more likely be political and nonconscientious, than otherwise," <sup>258</sup> it is true that a SCO must consider facts relating to the particular conflict in a way that a GCO need not. Those facts will, under the religious beliefs held by the SCO (such as a belief in the just war doctrine) determine whether the conflict at issue is one in which he may conscientiously participate or one that precludes his participation based on conscientious considerations. This does not mean, however, that the determination of whether a

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254. *Id.* at 455–56 (second alteration in original) (quoting Brief for the United States at 28, *Gillette*, 401 U.S. 437 (No. 85)).

255. *Id.*

256. *Id.* The Court in *Gillette* did not fully explain the administrative difficulties that it believed would apply to selective conscientious objection, but did refer to the "Government's contention" that such a system would involve difficulty in reaching "fair and consistent results." *Id.* at 456. In the United States' brief in *Gillette*, the Government cites the broad range of reasons mentioned above for a SCO objector to oppose participation in a particular war and contends that "we cannot see how exemptions for selective objectors could be administered uniformly and fairly without exploration, in each case, in the matters we have suggested." Brief for the United States, *supra* note 254, at 27–28.

257. *Gillette*, 401 U.S. at 456.

258. *Id.* at 456. This statement echoes the argument made by Judge Augustus Hand in *United States v. Kauten*, 133 F.2d 703 (2d Cir. 1943). As previously explained, Judge Hand offered no empirical support for his view that selective conscientious objection is "usually a political objection." *Kauten*, 133 F.2d at 708; *see supra* notes 75–89 and accompanying text.

war is just or unjust is exclusively a political decision and not an exercise of religion.

Under the just war doctrine, the facts relating to a particular conflict may be characterized as “political” because they are the result of political policies determined and implemented by the nation’s leaders, but these policies ultimately determine whether the war is just from a religious perspective. The conclusion about a conflict’s “justness” is an exercise of the individual’s religious sensibilities and is a matter of conscience. Under the just war theory, the individual’s determination of whether a war is just or unjust is an inseparable combination of contemporaneous facts and religious conclusions. The process in making this determination should be familiar to judges and legal practitioners, since it closely matches the common practice of applying law to findings of fact to reach a legal conclusion. In the context of selective conscientious objection, “political” facts are used to draw a “religious” conclusion about the justness of a particular war. To contend that selective conscientious objection based on the just war theory constitutes only a political determination is comparable to characterizing a court’s legal conclusion as factual, rather than legal, because it relies on the particular facts of the case at hand.

Thus, the statement by the Court in *Gillette* that selective conscientious objection “may more likely be political and nonconscientious” appears to misinterpret the well-established just war doctrine.<sup>259</sup> It may also constitute a narrowing of the conscientious objection exclusion described by the Court in earlier decisions. In *Welsh*, for example, the Court examined the statutory exclusion from “religious training and belief” for “essentially political, sociological, or philosophical views, or a merely personal moral code.”<sup>260</sup> With respect to this exclusionary language, the *Welsh* Court stated:

We certainly do not think that § 6(j)’s exclusion of those persons with “essentially political, sociological, or philosophical views or a merely personal moral code” should 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 public policy.*<sup>261</sup>

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259. *Gillette*, 401 U.S. at 455.

260. *Welsh v. United States*, 398 U.S. 333, 342–43 (1970) (quoting 50 U.S.C. § 456(j) (Supp. I 1971–1972) (current version at 50 U.S.C. § 3806(j) (Supp. III 2013–2016))).

261. *Id.* at 342 (emphasis added) (quoting 50 U.S.C. § 456(j) (Supp. I 1971–1972) (current

The Court in *Gillette* failed to explain why a GCO may base his objection to all wars “to a substantial extent upon considerations of public policy,”<sup>262</sup> but considerations of public policy by a SCO somehow disqualify him from the combat exemption. The SCO bases his opposition to participation in a particular war on religious beliefs informed by factual and policy considerations. This is exactly the process described by the Court in *Welsh* as coming within the section 6(j) exemption.

As to the *Gillette* Court’s concern that “it is not at all obvious in theory what sorts of objections should be deemed sufficient to excuse [a SCO],” the language of RFRA provides guidance in ways that the 1967 Act did not.<sup>263</sup> Under RFRA, the relevant consideration is whether government action substantially burdens an individual’s “exercise of religion.”<sup>264</sup> As previously explained, RFRA defines “exercise of religion” as “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”<sup>265</sup> Moreover, Congress mandated that “exercise of religion” be construed “in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.”<sup>266</sup> Therefore, the broad scope of “exercise of religion” as defined in RFRA appears more in line with the Court’s statements in *Welsh* recognizing that political factors may affect a religious determination than the statements in *Gillette* that selective conscientious objection effectively amounts to a political, rather than religious, objection.

Moreover, the Supreme Court’s decision in *Hobby Lobby* shows that the Court was confident in the judiciary’s ability to distinguish insincere claims relating to a burden on the exercise of religion from sincere ones. In discussing legislation modeled on RFRA but applying to “institutionalized persons,” known as the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”),<sup>267</sup>

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version at 50 U.S.C. § 3806(j) (Supp. III 2013–2016))).

262. *Id.*

263. *Gillette*, 401 U.S. at 456. Compare Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb–2000bb-4 (2012)), with Military Selective Service Act of 1967, Pub. L. No. 90-40, sec. 7, § 6(j), 871 Stat. 100 (codified as amended at 50 U.S.C. § 3806(j) (Supp. III 2013–2016)).

264. 42 U.S.C. § 2000bb-1(a).

265. *Id.* § 2000cc-5(7)(A).

266. *Id.* § 2000cc-3(g).

267. Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified as amended at 42 U.S.C. §§ 2000cc–2000cc-5). That legislation was enacted by Congress after the Supreme Court’s decision in *City of Boerne v. Flores*. 521 U.S.

the *Hobby Lobby* Court stated that “Congress was confident of the ability of the federal courts to weed out insincere claims” of religious exercise.<sup>268</sup> According to the Court:

RLUIPA applies to “institutionalized persons,” a category that consists primarily of prisoners, and by the time of RLUIPA’s enactment, the propensity of some prisoners to assert claims of dubious sincerity was well documented. Nevertheless . . . Congress enacted RLUIPA to preserve the right of prisoners to raise religious liberty claims. If Congress thought that the federal courts were up to the job of dealing with insincere prisoner claims, there is no reason to believe that Congress limited RFRA’s reach out of concern for the seemingly less difficult task of doing the same in corporate cases.<sup>269</sup>

Similarly, if Congress believes that courts may distinguish claims regarding prisoners’ religious beliefs between the sincere and the insincere, there is no reason that claims by SCOs cannot also be distinguished. As explained by the Court in *Hobby Lobby*, “RFRA was designed to provide very broad protection for religious liberty,” beyond what the Supreme Court had previously “held is constitutionally required.”<sup>270</sup> Thus, given the breadth of the phrase “exercise of religion” mandated by RFRA, it is more likely that there will be consistent decisions about the validity of selective conscientious objection claims and less concern about the unfairness and inconsistency than under the 1967 Act, which was in effect in *Gillette*.<sup>271</sup>

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507, 536 (1997) (holding RFRA exceeds Congress’s power to regulate the states). RLUIPA provides that

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1(a).

268. *Burwell v. Hobby Lobby*, 573 U.S. \_\_, \_\_, 134 S. Ct. 2751, 2774 (2014).

269. *Id.* at \_\_, 134 S. Ct. at 2774 (footnote omitted).

270. *Id.* at \_\_, 134 S. Ct. at 2767.

271. On the question of fairness, the *Gillette* Court failed to acknowledge the unfairness created by limiting the exemption from combat to those who oppose all war. *See generally Gillette v. United States*, 401 U.S. 437 (1971). In effect, such a limitation means that believers in the traditional “peace” churches (Quakers, Mennonites, and Brethren) are exempted from combat service, but believers of other religious faiths who might hold just as strong religiously based beliefs about the immorality of a particular conflict are required to provide combat service in that conflict. Because an individual could theoretically serve in good conscience in a different conflict does not mitigate the moral damage done to that individual by requiring him to serve in combat and potentially kill others in a war that he believes, based on religious convictions, is unjust and immoral.

All of this is not to discount the importance of fairness in the exemption process. It is instead to say that fairness can be achieved through a carefully crafted process of review based on well-articulated standards, which is exactly what RFRA provides.

### 3. Deference to the Political Process

The final interest identified by the Court in *Gillette* in support of its decision not to recognize selective conscientious objection may be described as a political process interest. The Court explained this interest as follows:

Opposition to a particular war . . . necessarily involves a judgment “that is political and particular,” one “based on the same political, sociological and economic factors that the government necessarily considered” in deciding to engage in a particular conflict. . . .

Tacit at least in the Government’s view of the instant cases is the contention that the limits of § 6(j) serve an overriding interest in protecting the integrity of democratic decisionmaking against claims to individual noncompliance.<sup>272</sup>

The Court further quoted the 1967 report of the National Advisory Commission on Selective Service, which expressed the concern that “exempting persons who dissent from a particular war, albeit on grounds of conscience and religion in part, would ‘open the doors to a general theory of selective disobedience to law’ and jeopardize the binding quality of democratic decisions.”<sup>273</sup> Stated differently, to allow a SCO exemption from a particular war could be viewed as allowing each man to become “a law unto himself.”<sup>274</sup>

Of course, allowing an exemption for GCOs already does this, and yet, as indicated by the figures set out above, this has not resulted in any significant impact on the nation’s ability to raise an army. Moreover, Congress has supported the proposition that religious objections should be treated differently than other types of objections to neutral laws of general applicability. Under RFRA, such laws must yield when they place a substantial burden on the exercise of religion if, but only if, those laws do not support a compelling governmental interest in the least restrictive means available. In effect, RFRA does allow each man to become a law unto

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272. *Id.* at 458 (quoting Brief for the United States, *supra* note 254, at 24–26).

273. *Id.* at 459 (quoting NAT’L ADVISORY COMM’N ON SELECTIVE SERV., *supra* note 252, at 50).

274. See *supra* note 180, discussing the origin of this phrase in *Reynolds v. United States*, 98 U.S. 145 (1878).

himself, but only if he can demonstrate a substantial burden on the exercise of his religion and the government cannot justify that burden under the traditional strict scrutiny standard. General laws must yield, but only to religious objections and only if the government cannot present a compelling interest and show that the least restrictive means are used to achieve that interest.

Even the *Gillette* Court recognized that “it is not inconsistent with orderly democratic government for individuals to be exempted by law, on account of special characteristics, from general duties of a burdensome nature.”<sup>275</sup> And yet, according to the Court in *Gillette*, “it is supportable for Congress to have decided that the objector to all war—to all killing in war—has a claim that is distinct enough and intense enough to justify special status, while the objector to a particular war does not.”<sup>276</sup> Because RFRA does not include language comparable to the 1967 Act’s limitation only on those who object to “war in any form,” however, this special status for GCOs no longer finds express statutory support. As stated by the *Gillette* Court, “[o]f course, we do not suggest that Congress would have acted irrationally or unreasonably had it decided to exempt those who object to particular wars.”<sup>277</sup> By enacting RFRA, Congress has done exactly that and shifted the balance toward greater protection for the exercise of religion, including religious theories of selective conscientious objection.

The interests supporting the decision in *Gillette* were characterized as “substantial” by the Court, not “compelling” as required by RFRA.<sup>278</sup> That said, the Court was not necessarily looking to assess those interests against the traditional strict scrutiny standard applicable under RFRA. Whether the concerns over manpower, fairness, and political process would constitute “compelling governmental interests,” as required by RFRA, was simply not answered by *Gillette*. The issue is certainly debatable, given the historical record showing that past decisions broadening the conscientious objection exemption have had no practical impact on the government’s ability to raise an army. Moreover, the weight given to fairness and political process may be diminished in light of the special

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275. *Gillette*, 401 U.S. at 460.

276. *Id.*

277. *Id.*

278. *Id.* at 462 (“The incidental burdens felt by persons in petitioners’ position are strictly justified by substantial governmental interests that relate directly to the very impacts questioned.”); see 42 U.S.C. § 2000bb-1(b)(1) (2012).

protection afforded to individual religious liberty through Congress's enactment of RFRA.

As in *Hobby Lobby*, however, the compelling interest question may ultimately be “unnecessary to adjudicate” in light of the second part of the government's burden under RFRA: whether the challenged law is “the least restrictive means of furthering [the] compelling governmental interest.”<sup>279</sup> As explained below, the government may further its interests in ensuring sufficient manpower, promoting fairness, and respecting the political process (whether these are compelling or not) through less restrictive means than by forcing SCOs to serve in combat.

### C. *The Least-Restrictive-Means Analysis*

As explained by the Court in *Hobby Lobby*, the “least-restrictive-means standard is exceptionally demanding.”<sup>280</sup> It requires that the government show “that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties.”<sup>281</sup> The plaintiffs in *Hobby Lobby* contended that the most “straightforward” way for the government to accomplish its interest of providing the contraceptive methods at issue to women working for employers with religious objections to those methods would be for the government to simply assume the cost and pay for those forms of contraceptive.<sup>282</sup> In the end, however, the Court did not need to “rely on the option of a new, government-funded program in order to conclude that the HHS regulations [at issue] fail the least-restrictive-means test.”<sup>283</sup> That was because the government had “at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs.”<sup>284</sup> Specifically, the government had “already established an accommodation for non-profit organizations with religious objections.”<sup>285</sup>

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279. 42 U.S.C. § 2000bb-1(b)(2).

280. *Burwell v. Hobby Lobby*, 573 U.S. at \_\_\_, \_\_\_, 134 S. Ct. at 2751, 2780 (2014).

281. *Id.* at \_\_\_, 134 S. Ct. at 2780 (citing 42 U.S.C. § 2000bb-1(a)–(b) (“[R]equiring the Government to ‘demonstrat[e] that application of [a substantial] burden to *the person* . . . is the least restrictive means of furthering [a] compelling governmental interest.”) (alterations in original)).

282. *Id.* at \_\_\_, 134 S. Ct. at 2780.

283. *Id.* at \_\_\_, 134 S. Ct. at 2781–82.

284. *Id.* at \_\_\_, 134 S. Ct. at 2782.

285. *Id.* at \_\_\_, 134 S. Ct. at 2782.

Under the accommodation mentioned by the Court:

[T]he [non-profit] organization can self-certify that it opposes providing coverage for particular contraceptive services.<sup>286</sup> If the organization makes such a certification, the organization's insurance issuer or third-party administrator must "[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan" and "[p]rovide separate payments for any contraceptive services required to be covered" without imposing "any cost-sharing requirements . . . on the eligible organization, the group health plan, or plan participants or beneficiaries."<sup>287</sup>

The *Hobby Lobby* Court concluded that this alternative system of providing contraceptive coverage to employees of non-profit organizations with religious objections to the mandated forms of contraceptives could be expanded to also cover for-profit organizations with religious-based objections to certain forms of contraceptives mandated under the ACA.<sup>288</sup> Because an alternative system for ensuring access to contraceptive care already existed, burdening the religious beliefs of for-profit employers by requiring them to provide objectionable contraceptive care violated RFRA.

In the same way, an alternative system for handling SCOs, rather than requiring them to fight and possibly kill in a war they find immoral, already exists. As explained above, since World War I, every draft act has allowed for COs to serve in noncombatant roles.<sup>289</sup> Starting in World War II, those who objected to combat

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286. It is interesting to note that the Court in *Hobby Lobby* did not fear a flood of false religious objection claims to the contraceptive mandate despite the ability of organizations under the applicable regulations to self-certify their objection to certain forms of contraceptive coverage. The lack of religious objection claims after *Hobby Lobby* confirms the perspective taken by the Court. As shown above, worries over "opening the floodgates" to false conscientious objection claims also did not materialize after the Court expanded the combat exemption under *Seeger* and *Welsh*. Perhaps the lesson to draw from these experiences is that people (and organizations) generally do not fake religious beliefs, even if it might prove expedient or in their self-interest to do so.

287. *Hobby Lobby*, 573 U.S. at \_\_\_, 134 S. Ct. at 2782 (fourth, fifth, and sixth alterations in original) (citations omitted) (first quoting 45 C.F.R. § 147.131 (2013); then quoting 26 C.F.R. § 54.9815-2713A(a)(4), (b) (2015)).

288. *See id.* at \_\_\_, 134 S. Ct. at 2782 & n.38.

289. *See supra* Part I.B. Even before World War I, COs could avoid combat service by either paying a fee or finding a substitute. For example, section 13 of the Conscription Act of 1863 stated:

That any person drafted and notified to appear as aforesaid, may, on or before the day fixed for his appearance, furnish an acceptable substitute to take his place in the draft; or he may pay to such person as the Secretary of War may authorize to receive it, such sum, not exceeding three hundred dollars, as the Secretary may determine, for the procurement of such substitute . . . and thereupon such person so furnishing the substitute, or paying the money, shall be

service were assigned to “noncombatant service as defined by the President,” while registrants who objected to any form of military service, even noncombatant, were instead assigned to “work of national importance under civilian direction.”<sup>290</sup> As the tables in Part III.B.1 above indicate, this system of assigning COs to either non-combat service or alternative service of “national importance” has had no material impact on the size of the fighting force and has allowed for a workable balance between governmental interests and individual religious freedom. SCOs could proceed through the same well-developed procedure used for GCOs to determine that the basis for their objection falls within the scope of RFRA’s protection as a genuine exercise of religion.

Therefore, the government’s interests in raising an army in a fair manner while respecting the religious sensibilities of SCOs may be achieved through a means much less onerous than forced conscription for combat. Simply stated, allowing SCOs to serve as noncombatants or to perform alternative service of “national importance” instead of combat service achieves the government’s goals without subjecting SCOs to the extreme burden of potentially being forced to kill in violation of their religious scruples. The existence of a system for noncombat or alternative service parallels the existence of an alternative contraceptive-funding system in *Hobby Lobby*, and should result in the same conclusion: that the law at issue burdens the exercise of religion in a manner unnecessary to achieve the government’s goals.

For this reason, should the issue arise, a court should find that RFRA offers an exemption from combat service for SCOs.

#### CONCLUSION

The different treatment of SCOs and GCOs has rested on faulty premises for over forty years. There is no evidence that allowing a combat exemption for SCOs will result in a flood of false CO claims.

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discharged from further liability under that draft.  
Act of Mar. 3, 1863, ch. 75, § 13, 12 Stat. 731, 733.

290. Selective Training and Service Act of 1940, Pub. L. No. 76-783, § 5(g), 54 Stat. 885, 889. Men assigned to “work of national importance” based on their religious objection to World War II were commonly sent to former Civilian Conservation Corps (“CCC”) camps where they continued work on soil conservation and reforestation that had been started by the CCC. See NAT’L SERV. BD. FOR RELIGIOUS OBJECTORS, CONGRESS LOOKS AT THE CONSCIENTIOUS OBJECTOR 43 (1943) (statement of Brigadier General Lewis B. Hershey before the Subcommittee of the House Committee on Appropriations on Dec. 11, 1941).

In addition, the view that SCOs are more likely to base their objections on political rather than religious considerations fails to appreciate the necessary interplay between political facts and religious conclusions as illustrated by the just war doctrine. That interplay, however, does not render the just war doctrine any less of an exercise of religion.

The conscientious objection exemption has been expanded consistently from the Civil War until the Supreme Court's *Gillette* decision in 1971. Through RFRA, Congress has reasserted the primacy of religious liberty, and it appears that SCOs may finally receive protection from being forced into combat service in violation of their religious beliefs.