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# How Conscientious Objectors Killed the Draft: The Collapse of the Selective Service during the Vietnam War

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# HOW CONSCIENTIOUS OBJECTORS KILLED THE DRAFT: THE COLLAPSE OF THE SELECTIVE SERVICE DURING THE VIETNAM WAR

BILL RALEY\*

## ABSTRACT

This Article argues that a key-but-overlooked factor in the Vietnam-era breakdown of the draft system was the Supreme Court's expansion of the religious conscientious objector ("CO") exemption. It asserts that the Court understood that the CO exemption violated the Establishment Clause, but rather than strike the exemption down, the Court avoided the constitutional issue by interpreting away the religious element of CO statutes. The Article concludes that the Court's rulings caused CO exemptions to skyrocket, which in turn caused the draft system to collapse toward the end of the Vietnam War.

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## INTRODUCTION

Perhaps the most profound legacy of the Vietnam War was the demise of the draft. Today's all-volunteer force is, in the words of former U.S. Senator Sam Nunn, "a clear result of the Vietnam war."<sup>1</sup> The conventional wisdom is that the brutality and unpopularity of that war created "tremendous pressure to end the draft at almost any price."<sup>2</sup> But the assumption that Vietnam was "a different kind of war"<sup>3</sup> that provoked a different kind of backlash overlooks the fact that Vietnam was not America's first (or even most) brutal and unpopular war,<sup>4</sup> and that the draft has always been a source of serious civil unrest.<sup>5</sup> This raises the question: what was it about Vietnam that pushed the draft past its breaking point?

This Article argues that a key, but overlooked, factor in the Vietnam-era breakdown of the draft system was the Supreme Court's expansion of the religious conscientious objector ("CO") exemption. It asserts that the Court knew that the CO exemption violated the Establishment Clause, but rather than strike it down, the Court avoided the issue by interpreting away the religious element of CO statutes. The Article concludes that the Court's rulings caused CO exemptions to skyrocket, which in turn caused the draft system to collapse towards the end of the Vietnam War.

Part I of this Article describes the historical evolution of both the CO exemption and Establishment Clause jurisprudence, showing that by the Vietnam War era, the CO exemption rested on very shaky constitutional grounds. Part II analyzes the CO exemption cases that reached the Court during the Vietnam War, and how the Court's decision to broaden the statutory definition of religion, rather than declare the exemption unconstitutional, fatally undermined the draft system. Part III addresses the postwar legacy of the Court's CO exemption cases, showing that they were cited by President Ford's controversial presidential clemency board as justification for liberally offering pardons to draft evaders who cited matters of conscience as their motive. Part IV concludes that, if the draft is ever reinstated, the CO exemption will have to be abolished.

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<sup>1</sup> BERNARD ROSTKER, I WANT YOU! THE EVOLUTION OF THE ALL-VOLUNTEER FORCE 15 n.3 (2006).

<sup>2</sup> *Id.*

<sup>3</sup> "A Different Kind of War" was the title of a major study about the Johnson Administration's actions during its escalation of the Vietnam War. GEORGE C. HERRING, LBJ AND VIETNAM: A DIFFERENT KIND OF WAR (1994).

<sup>4</sup> In regard to brutality, more U.S. soldiers were killed in the trenches of WWI in just a year-and-a-half than in the jungles of Vietnam over two decades. The horrors of WWI and lack of support for U.S. involvement are reflected by the fact that more fighting-age men unlawfully evaded the draft than were actually conscripted. Jeanette Keith, *The Politics of Southern Draft Resistance, 1917-1918: Class, Race, and Conscription in the Rural South*, 87 J. AM. HIST. 1335, 1336 (2001).

<sup>5</sup> For example, the first federal draft, implemented during the Civil War, provoked the New York City Draft Riots, which remains "the largest civil insurrection in American history apart from the South's rebellion itself." ERIC FONER, THE NEW AMERICAN HISTORY 95 (1997). Resistance to the draft during WWI drove Congress to pass the Espionage Act of 1917, which marked the beginning of the domestic surveillance state. PAUL JOSEPH, THE SAGE ENCYCLOPEDIA OF WAR: SOCIAL SCIENCE PERSPECTIVES 521–22 (2016).

## I. THE EVOLUTION OF AN UNCONSTITUTIONAL EXEMPTION

This Part provides a historical overview of the CO exemption leading up to the Vietnam War era. It shows that the CO exemption was conceived as an accommodation of pacifists by colonies and early states, and posed no constitutional problems at its inception. But when Congress enacted the first federal CO exemption at the behest of peace churches during the Civil War, this exemption likely violated the Establishment Clause. Congress again included CO exemptions in conscription bills passed during WWI, WWII, and the Korean War, and these exemptions were also constitutionally-suspect. This Part concludes that by the beginning of the Vietnam War, the inherent constitutional problems posed by the CO exemption had not been confronted nor resolved.

### A. Origin and Early Development of the CO Exemption

The practice of exempting conscientious objectors from conscription dates back to the earliest years of British colonization of North America. At that time, the colonies relied on the local militia system for defense against Native Americans and rival colonial powers, and each colony, except Quaker Pennsylvania, required every able-bodied male property owner to serve in the militia.<sup>6</sup> Pacifist Protestants began immigrating to the colonies in large numbers in the second half of the seventeenth century, and immediately ran into trouble with the law when they refused to perform their militia duties.<sup>7</sup>

The pacifists were initially subjected to fines, jail sentences, and property confiscation for violating conscription laws, but “the leaders of the colonial governments gradually worked out accommodations with the pacifist religious communities.”<sup>8</sup> The colonial “legislators recognized the economically productive and otherwise law-abiding nature of the members of these pacifist groups,”<sup>9</sup> and also “came to recognize that many of the religious objectors would rather suffer and die than take up arms and kill other humans.”<sup>10</sup> Faced with competitive pressures to attract pacifistic but otherwise model minority immigrants, and the fact that efforts to forcefully integrate them into the militia were believed to be futile,<sup>11</sup> “a number of

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<sup>6</sup> John Whiteclay Chambers II, *Conscientious Objectors and the American State from Colonial Times to the Present*, in THE NEW CONSCIENTIOUS OBJECTION: FROM SACRED TO SECULAR RESISTANCE 25 (Charles Moskos & John Whiteclay Chambers II eds., 1993).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 26.

<sup>11</sup> An interesting historical anecdote occurred during the French and Indian Wars, when the need for conscripts, coupled with popular resentment of prosperous pacifists’ exemption from military service, led colonial governments to crack down on conscientious objection. When the governor of Virginia directed Col. George Washington to put Quakers in stockades and place them on bread and water rations until they agreed to fight, Washington declined by citing practical considerations. “I could by no means bring the Quakers to any terms,” he responded, as “[t]hey choose rather to be whipped to death than bear arms.” *Id.* at 27.

colonial legislatures provided exemptions for Quakers, Mennonites, and other sectarian pacifists who were conscientiously opposed to bearing arms.”<sup>12</sup>

When the colonies declared independence from Britain, the Revolutionary legislatures enacted CO exemptions designed to continue the tradition of providing alternative service for members of the historic peace churches.<sup>13</sup> For example, New York’s 1777 constitution exempted from military service “the people called Quakers as, from scruples of conscience, may be averse to the bearing of arms.”<sup>14</sup> During the Revolutionary War, the Continental Congress (which did not have a direct role in conscription) passed a resolution recognizing that there were “some people who, from religious principles, cannot bear arms in any case,” and pled for them to support the revolution in ways that would not violate their conscience.<sup>15</sup>

After the Revolutionary War was won and the Bill of Rights was being debated, James Madison included a CO exemption in the list of provisions he submitted for House consideration.<sup>16</sup> If the provision had passed, the Second Amendment would have ended with a clause stating: “but no person religiously scrupulous shall be compelled to bear arms.”<sup>17</sup> In a fascinating debate, Congress argued over how and whether to include this “indulgence” of “the Quakers,” as such an accommodation could lead to undue federal interference with state militias.<sup>18</sup>

For the purposes of this Article, Pennsylvania Rep. Thomas Scott contributed the most interesting argument during the debate over a constitutional CO exemption. Scott made a prediction that was startlingly prescient of what would come to pass nearly two centuries later during the Vietnam War, when secular and religiously-jaded Americans began citing vague New Age beliefs in claiming the CO exemption. “It has been urged that religion is on the decline,” Scott observed. “[I]f so, the argument is more strong in my favor, for when the time comes that religion shall be discarded, the

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<sup>12</sup> *Id.* at 26.

<sup>13</sup> *United States v. Seeger*, 380 U.S. 163, 170 (1965) (noting that CO exemptions were “perpetuated in state statutes and constitutions” after the Revolution).

<sup>14</sup> N.Y. CONST. art XL (1777).

<sup>15</sup> CONTINENTAL CONGRESS, JOURNALS OF THE AMERICAN CONGRESS: FROM 1774 TO 1788: IN FOUR VOLUMES 119 § I (Way & Gideon 1823). The resolution went on to state that “this Congress intends no violence to their consciences,” but then went on to “earnestly recommend” that they “contribute liberally in th[at] time of universal calamity, to the relief of their distressed brethren in the several colonies.” *Id.* This “earnest recommendation” was aimed at Quakers who controversially refused to hire substitute soldiers or pay war fines.

<sup>16</sup> Ellis M. West, *The Right to Religion-Based Exemptions in Early America: The Case of Conscientious Objectors to Conscription*, 10 J. L. & RELIG. 367, 395 (1993-94).

<sup>17</sup> *Id.*

<sup>18</sup> New York Rep. Egbert Benson, for example, stated that “[h]e would always leave it to the benevolence of the Legislature, for, modify it as you please, it will be impossible to express it in such a manner as to clear it from ambiguity. No man can claim this indulgence of right. It may be a religious persuasion, but it is no natural right, and therefore ought to be left to the discretion of the Government. If this stands part of the constitution, it will be a question before the Judiciary on every regulation you make with respect to the organization of the militia, whether it comports with this declaration or not. It is extremely injudicious to intermix matters of doubt with fundamentals.” 1 ANNALS OF CONG. 751 (Joseph Gales ed., 1834) [hereinafter Gales].

generality of persons will have recourse to these pretexts to get excused from bearing arms.”<sup>19</sup>

Madison’s CO exemption survived the first round of congressional debate, but went on to die in a committee, which excised it without explanation. Though they did not mention exemption from bearing arms specifically, several House drafts of what would go on to become the First Amendment also included provisions against “infringe[ments]” on “rights of conscience.”<sup>20</sup> These provisions were also rejected, this time by the Senate, and unfortunately “[n]o record of the Senate debate survives.”<sup>21</sup>

In concluding our discussion of early CO exemptions, it is important to note that the colonial and post-Revolution legislatures granted the exemptions “for practical as well as philosophical reasons,”<sup>22</sup> and that they largely considered CO exemptions an “indulgence” of eccentric sects rather than a free exercise right.<sup>23</sup> It is also important to emphasize that, even after the passage of the First Amendment, these early state laws “respecting the establishment of religion” did *not* pose any constitutional problems. As originally conceived and interpreted, the First Amendment applied *only* to Congress, and was actually designed to permit states to continuing regulating religion (for example, by exempting Quakers and other sects from conscription) without interference from the new federal government.<sup>24</sup>

### B. The Civil War and the First Federal CO Exemption

In 1863, mid-way through the Civil War, Congress implemented the first federal draft in U.S. history.<sup>25</sup> The Enrollment Act (also known as the Civil War Military Draft Act) resurrected Revolutionary War-era penalty fee and hired substitution exemptions, but it did not contain an CO exemption.<sup>26</sup> This surprised the Quakers, as they had been “diligently lobbying Congress and knew that Secretary of War, Edwin M. Stanton and President Lincoln”—both of whom were from Quaker backgrounds—“were both known to be sympathetic to their cause.”<sup>27</sup>

The “Quakers were determined to acquire a legal guarantee against conscription,” as they continued to oppose (as they had during the Revolutionary War) indirect support of war through exemption fees or the provision of substitute conscripts.<sup>28</sup> They

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<sup>19</sup> *Id.* at 767.

<sup>20</sup> *Id.* at 766.

<sup>21</sup> JOHN WITTE & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 80 (4th ed. 2016).

<sup>22</sup> Chambers, *supra* note 7, at 26 (emphasis added).

<sup>23</sup> West, *supra* note 16, at 377.

<sup>24</sup> The First Amendment’s religion clauses were made applicable to the states only after the Supreme Court held that the Fourteenth Amendment incorporated the clauses in *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

<sup>25</sup> ROSTKER, *supra* note 1, at 22.

<sup>26</sup> Enrollment Act, ch. 75, sec. 18, 12 Stat. 731, 783 (1863).

<sup>27</sup> Tara J. Carnahan, *The Quakers and Conscientious Objection*, 20 HISTORIA 1, 7 (2011).

<sup>28</sup> *Id.*

quickly “organized a committee that traveled to Washington” to lobby for a CO exemption.<sup>29</sup> Their efforts paid off, as Congress amended the Enrollment Act in February 1864 to include the following alternative-service exemption: “members of religious denominations 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 denomination, shall, when drafted into the military service, be considered non-combatants.”<sup>30</sup>

A compelling case can be made that this first federal CO exemption violated the First Amendment. It was passed as a direct result of lobbying by an established religious group and tailor-made to cover only them, so it is hard to see it as anything other than a “law respecting an establishment of religion.”<sup>31</sup> But because the exemption was passed near the end of the Civil War, no constitutional challenge reached the Supreme Court before the conflict ended.

### C. Reynolds and Religious Exemptions

When Congress passed the constitutionally-questionable federal CO exemption in 1864, constitutional jurisprudence regarding religion was entirely undeveloped. It would be fifteen more years before the Supreme Court decided its first case involving the First Amendment’s religion clauses.<sup>32</sup> That case, *Reynolds v. United States*,<sup>33</sup> concluded that the Free Exercise clause does not provide conscience-based exemptions from legal duties.

In *Reynolds*, a Mormon living in the Utah Territory was charged with violating a congressional criminal statute that prohibited polygamy in federal territories.<sup>34</sup> The defendant argued that polygamy was a matter of religious duty for Mormons,<sup>35</sup> and that the Constitution provided Mormons with a free exercise exemption from compliance with the statute.<sup>36</sup> The Court rejected this argument by adopting a Jeffersonian interpretation of the First Amendment,<sup>37</sup> holding that “Congress was

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<sup>29</sup> *Id.* at 7–8.

<sup>30</sup> Enrollment Act, ch. 13, sec. 17, 13 Stat. 6, 9 (1864).

<sup>31</sup> U.S. CONST. amend. I.

<sup>32</sup> See Harrop A. Freeman, *A Remonstrance for Conscience*, 106 U. PENN. L. REV. 806, 822 (1958) (stating that Reynolds was “the first case to consider the free exercise clause”); *infra* note 65 and accompanying text (stating that the Supreme Court’s first Establishment Clause case was heard in the late 1940s).

<sup>33</sup> 98 U.S. 145 (1878).

<sup>34</sup> *Id.* at 161.

<sup>35</sup> The plaintiff explained “that the failing or refusing to practise polygamy by such male members of said church, when circumstances would admit, would be punished, and that the penalty for such failure and refusal would be damnation in the life to come.” *Id.* at 161.

<sup>36</sup> *Id.* at 166.

<sup>37</sup> The Court began its analysis by noting that “[t]he word ‘religion’ is not defined in the Constitution,” and that it must “go elsewhere, therefore, to ascertain its meaning.” The Court then turned to Jefferson, “an acknowledged leader of the advocates of the [First Amendment],” to determine what “religion” meant. The Court relied chiefly on the Virginia Statute for Religious Freedom and the famous letter to the Danbury Baptist Association to determine how Jefferson conceived of “religion” and religious freedom. The Court began by noting that early

deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.”<sup>38</sup>

To provide legal exemptions based on religious belief, the Court warned, “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.”<sup>39</sup> Quoting with approval Jefferson’s Danbury Baptist letter, the Court acknowledged “the rights of conscience” as being among man’s “natural rights,” but then qualified that “he has no natural right in opposition to his social duties.”<sup>40</sup>

The *Reynolds* holding had serious implications for federal CO exemptions. In fact, since *Reynolds* concluded that “Congress was deprived of all legislative power over mere opinion”<sup>41</sup> by the First Amendment, it could be argued that *any* exemption based on a conscientious belief, whether sacred *or secular* in origin, constitutes a violation of the Establishment Clause.<sup>42</sup>

#### D. WWI Draft Law and the Selective Draft Law Cases

When Congress began debating reinstating the draft during WWI, “church leaders and political activists descended on Washington to advocate for provisions for those who rejected war on religious grounds.”<sup>43</sup> The *Reynolds* case should have given

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states forced citizens to subsidize religions “whose tenets they could not and did not subscribe,” and punished people for “entertaining heretical opinions.” This was the evil that Jefferson set out to cure through the Virginia Statute of Freedom and the First Amendment. The Court first cited the Virginia Statute of Freedom’s recital, which states that “to suffer the civil magistrate to intrude his powers into the field of opinion” would “destroy[] all religious liberty.” The Court then cited the Danbury Baptist letter as evidence of Jefferson’s understanding of the First Amendment, in which Jefferson wrote that “religion is a matter which lies solely between man and his God; . . . [and] that the legislative powers of the government reach actions only, and not opinions.” *Id.* at 162-64 (emphasis added).

<sup>38</sup> *Id.* at 164.

<sup>39</sup> *Id.* at 167.

<sup>40</sup> *Id.* at 164.

<sup>41</sup> *Id.*

<sup>42</sup> Since *Reynolds* defines religion as “mere opinion” regarding morality, it could be argued that “Congress shall make no law respecting” subjective moral beliefs, whether based on religious principles *or* secular philosophy. The conclusion that Congress must stay neutral when it comes to moral controversies of any type is supported by Jefferson’s 1818 report discussing the University of Virginia’s original curriculum. In that report, Jefferson wrote that in order to maintain “conformity with the principles of our constitution,” “we have proposed no professor of Divinity,” and even secular courses of ethical lectures may develop only “[those] moral obligations . . . in which all sects agree.” THOMAS JEFFERSON, REPORT OF THE BOARD OF COMMISSIONERS FOR THE UNIVERSITY OF VIRGINIA TO THE VIRGINIA GENERAL ASSEMBLY (1818).

<sup>43</sup> CHRISTOPHER CAPOZZOLA, UNCLE SAM WANTS YOU: WORLD WAR I AND THE MAKING OF THE MODERN AMERICAN CITIZEN 58 (2008). The Washington Post colorfully described a meeting between leaders of the Hutterites, a historic peace church, and the Secretary of War as being “the most numerous collection of whiskers the War Department has seen in many a day.” *Id.*

Congress pause about the constitutionality of CO exemptions. Washington, however, was “so distracted by the larger issues of war mobilization that it had little time to devote to the CO question.”<sup>44</sup>

As during the Civil War, the peace churches again “got most of what they wanted,” and a CO exemption was added to the WWI conscription act.<sup>45</sup> Congress, being aware that “[e]ven the perception of certain groups being favored could produce a fair amount of backlash among the general public,” carefully crafted the exemption to limit it to the historic peace churches.<sup>46</sup> The Act exempted only members of a “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*.”<sup>47</sup>

The WWI conscription act was immediately challenged as unconstitutional. In January 1918, less than a year after Congress enacted the Selective Services Act, the Supreme Court upheld it against a number of constitutional challenges.<sup>48</sup> Among these challenges were a claim that the CO exemption was “repugnant to the First Amendment” as “an establishment of a religion or an interference with the free exercise thereof . . . ”<sup>49</sup>

The case was decided “at an early stage in the development of First Amendment doctrine,”<sup>50</sup> decades before the Court would declare the First Amendment to be incorporated by the Fourteenth and subsequently embark on long, tortuous jurisprudential journey to map the boundaries of the First Amendment<sup>51</sup> (a journey that continues to this day). The 1918 Court, therefore, may have held a simplistic view of the First Amendment, and simply assumed that the nation’s long tradition of granting an exemption to religious objectors was *ipso facto* evidence that the exemption was compatible with the Constitution. In any case, the Court devoted only a single sentence to the CO exemption challenge, dismissively brushing the claim aside by stating “we think its unsoundness is too apparent to require us to do more.”<sup>52</sup>

#### E. WWII Draft Law and the Kauten and Berman Cases

On the eve of U.S. entry into WWII, Congress began drafting the Burke-Wadsworth conscription bill, which “contained many features of the Selective Service

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> NICHOLAS A. KREHBIEL, PROTECTOR OF CONSCIENCE, PROPONENT OF SERVICE: GENERAL LEWIS B. HERSHÉY AND ALTERNATIVE SERVICE DURING WORLD WAR II 84 (2009). *See also* JEAN-FRANÇOIS CARON, DISOBEDIENCE IN THE MILITARY 34 (2018) (“The use of the words ‘well-recognized religious sects or organizations’ actually restricted the exemption only to the historic peace churches.”)

<sup>47</sup> Select Service Act, ch. 15, sec 4, 40 Stat. 76, 78 (1917) (emphasis added).

<sup>48</sup> *See generally* Selective Draft Law Cases, 245 U.S. 366 (1918).

<sup>49</sup> *Id.* at 390.

<sup>50</sup> Gillette v. United States, 401 U.S. 437, 452 n.17 (1971).

<sup>51</sup> *See* Steven G. Gey, *Reconciling the Supreme Court’s Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725, 725 (2006) (“It is by now axiomatic that the Supreme Court’s Establishment Clause jurisprudence is a mess—both hopelessly confused and deeply contradictory.”).

<sup>52</sup> *Selective Draft Law Cases*, 245 U.S. at 390.

System which persisted through the Vietnam era.”<sup>53</sup> Just as they did during the Civil War and WWI, leaders of the historic peace churches came forward to lobby Congress to include a CO exemption to the draft.<sup>54</sup> But unlike during past wars, other types of pacifists also came forward to ask that a more liberal conscientious objector clause be included.<sup>55</sup>

In addition to leaders of the historic peace churches, representatives of Catholic, Methodist, and Adventist groups, along with the ACLU, proposed their own versions of a CO exemption.<sup>56</sup> The latter groups all proposed exemptions based on the individual conscience of the objector, not based on the objector’s membership in a church that promotes pacifism.<sup>57</sup> Rejecting the more secular proposals, the House adopted almost “verbatim” the proposal put forth by the Quakers, which exempted one “who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.”<sup>58</sup>

It is difficult to determine what exactly Congress intended by adopting this language, as the congressional debate was sparse and does not indicate a consensus one way or the other. “The Committee Reports are entirely silent on the subject,” and even the statutory language itself “did not originate with Members of Congress” but was rather “language proposed by the Quakers.”<sup>59</sup> It seems quite likely that Congress intended to perpetuate the centuries-old status quo and, in a rush to move on to other matters, simply adopted the proposal put forth by the most venerable of the peace churches which, by its reference to “religious training,” appeared limited to members of churches with pacifistic doctrines.

The opacity of Congress’s objectives, coupled with the statute’s “vague language,” “permitted differing court interpretations of its scope.”<sup>60</sup> In *United States v. Kauten*, the Second Circuit Court of Appeals held, without citing any evidence of congressional intent, that:

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<sup>53</sup> Richard P. Fox, *Conscientious Objection to War: The Background and a Current Appraisal*, 31 CLEV. ST. L. REV. 77, 81 (1982).

<sup>54</sup> Donald Eugene Houston, The Legislative History of the Burke-Wadsworth Act of 1940 39 (August 1969) (unpublished M.A. thesis, Oklahoma State University) (“Traditionally pacifist groups, or advocates of non-combatant service, such as the Quakers, the Mennonites, and the Seventh Day Adventists appeared and repeated their requests for exemptions.”).

<sup>55</sup> *Id.* at 93 (“The pacifists—both individuals and religious groups—contended that compulsory service as here proposed violated the conscience of those who were not members of historically pacifist groups. Adequate provisions, they argued, should be written into the bill to cover anyone who might refuse service, claiming conscientious objection.”).

<sup>56</sup> *Volunteer Armed Forces and Selective Service, Hearing Before the Subcomm. on the Volunteer Armed Service*, 92nd Cong. 83 (1972).

<sup>57</sup> *Id.*

<sup>58</sup> *Selective Service and Amnesty, Hearing before the Subcomm. on Admin. Prac. & Proc. of the Sen. Jud. Comm.*, 92nd Cong. 509 (1972) [hereinafter Hearing] (statement of Bela A. Silard, Chairman, Comm. on Conscientious Objection & Draft of the Amer. Ethical Union).

<sup>59</sup> *Id.* at 509–10.

<sup>60</sup> Timothy G. Todd, *Religious and Conscientious Objection*, 21 STAN. L. REV. 1734, 1735 (1969).

the provisions of the present statute are more generous [than previous exemptions] for they take into account the characteristics of a skeptical generation and make the existence of a conscientious scruple against war in any form, rather than allegiance to a definite religious group or creed, the basis of exemption.<sup>61</sup>

The *Kauten* court then asserted that a definition of religion “is incapable of compression into a few words,” and that any objection to war based on the guidance of “an inward mentor, call it conscience or God” could be “the basis of exemption under the Act.”<sup>62</sup>

The Ninth Circuit, however, reached a different conclusion. In *Berman v. United States*, the Ninth Circuit resorted to the *Webster's* dictionary in defining religion as “[a]n apprehension, awareness, or conviction of the existence of a supreme being.”<sup>63</sup> The court then rejected the appellant’s claim for an exemption based on his socialist convictions, holding that “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>64</sup>

#### F. Everson and Religious Exemptions

Between the end of WWII and the beginning of the Korean War, the Supreme Court decided, for the first time in its history,<sup>65</sup> an Establishment Clause case (*Reynolds* technically involved a Free Exercise claim<sup>66</sup>). That 1947 case, *Everson v. Board of Education*, relied heavily on *Reynolds* in holding that the First Amendment, as incorporated by the Fourteenth, is essentially a federal version of the Virginia Statute of Freedom.<sup>67</sup> The case had profound ramifications for religion-based<sup>68</sup> CO exemptions, as the following passage shows:

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<sup>61</sup> *United States v. Kauten*, 133 F.2d 703, 708 (2d Cir. 1943).

<sup>62</sup> *Id.*

<sup>63</sup> *Berman v. United States*, 156 F.2d 377, 381 (9th Cir. 1946).

<sup>64</sup> *Id.* at 384.

<sup>65</sup> BERNARD SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES 663 (1968) (stating that *Everson* “was, chronologically speaking, the first Establishment Clause case decided by the high bench”).

<sup>66</sup> Though *Reynolds* is a Free Exercise case, the *Everson* Court recognized “the interrelation of these complementary clauses” and held that “[t]here is every reason to give the same application and broad interpretation [of the ‘free exercise’ clause in *Reynolds*] to the ‘establishment of religion’ clause.” *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947).

<sup>67</sup> *Id.* at 29.

<sup>68</sup> Arguably, *Everson* also renders a *secular* CO exemption unconstitutional. As discussed earlier, *Reynolds* defined religion simply as “moral opinion,” and *Everson* cited that Free Exercise case in asserting that “[t]here is every reason to give the same application and broad interpretation to the ‘establishment of religion’ clause.” *Id.* at 15. One can imagine how exemptions based on “moral opinion” could present a major hazard to the democratic system: Congress could, for example, hand out legal exemptions or benefits based on a citizen’s view about a morally-charged but not necessarily religious issue (such as abortion or same-sex marriage) that divides the public along partisan lines.

The “establishment of religion” clause of the First Amendment means at least this: neither a state nor the Federal Government can set up a church. Neither can *pass laws which aid one religion, aid all religions, or prefer one religion over another*. Neither can force nor *influence a person to go to* or to remain away from church against his will or *force him to profess a belief* or disbelief in any religion. *No person can be punished for entertaining or professing religious beliefs or disbelief*, for church attendance or non-attendance . . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between church and State.”<sup>69</sup>

CO exemptions tailored to peace churches clearly “aid one religion, . . . or prefer one religion over another,” and even a broader exemption based on personal religious belief rather than membership in a pacifist denomination would “aid all religions.”<sup>70</sup> During the Vietnam War era, courts recognized that CO exemptions could “influence a person to go to”<sup>71</sup> peace churches, and expressed concern that “religious ‘conversions’ of convenience” could occur on such a mass scale that it “might well upset the orderly administration of the selective service system.”<sup>72</sup> Catholics were “punished for . . . professing religious beliefs” about “just wars” (because the exemption required opposition to *all* wars),<sup>73</sup> atheists were punished for “disbelief” in a Supreme Being,<sup>74</sup> members of mainstream denominations were punished for “church attendance” at non-peace churches,<sup>75</sup> and religious non-conformists were punished for “non-attendance” of any church.<sup>76</sup>

#### *G. Korean War Draft Law*

When Congress began debating legislation to reinstate the draft in anticipation of war in Korea, the peace churches again lobbied for the inclusion of a CO exemption. Mennonite and Brethren representatives appeared at committee meetings to argue in

<sup>69</sup> *Id.* at 15–16 (emphasis added).

<sup>70</sup> *Id.* at 15.

<sup>71</sup> *Id.*

<sup>72</sup> *United States v. Taylor*, 351 F. 2d 228, 230 (6th Cir. 1965).

<sup>73</sup> *Everson*, 330 U.S. at 15; *see also Gillette v. United States*, 401 U.S. 437 (1971).

<sup>74</sup> *United States v. Seeger*, 380 U.S. 163, 166–67 (1965) (the draft board denied the plaintiff’s claim for lack of belief in a “supreme being”).

<sup>75</sup> Martha A. Field, *Problems of Proof in Conscientious Objector Cases*, 120 P.A.L.REV. 870, 930 n.261 (1972) (“[S]tudies show that draft boards are most likely to grant claims by members of pacifist churches, that persons affiliated with other churches are the next most favored group, and that persons not affiliated with any church have the most difficult time having their claims sustained. . . . [C]hurch affiliation (and particularly affiliation with traditional peace churches) is often controlling.”).

<sup>76</sup> Henrietta Caroline Milner, *Constitutional Rights and Conscientious Objectors: The Status of Non-Religious Objectors* 18–19 (August, 1969) (M.A. thesis, Oklahoma State University) (“[S]ome boards defined religion to mean an outward expression of church attendance or church affiliation.”).

favor of an expansive exemption based on individual conscience, but Congress showed a “lack of interest” in these proposals.<sup>77</sup> Not only was Congress not interested in broadening the exemption, it actually “sought to foreclose the broader *Kauten* interpretation” of conscientious objection.<sup>78</sup>

In a closed-door session,<sup>79</sup> Congress adopted a CO exemption that borrowed the “religious training and belief” language from the 1940 conscription law, but further qualified that this meant “an individual’s belief in a relation to a *Supreme Being*, . . . but does not include essentially *political, sociological, or philosophical views or a merely personal moral code*.<sup>80</sup> “The legislative history of the 1948 statute is, for a number of reasons, rather sparse,”<sup>81</sup> but it is clear that Congress designed the CO exemption to ensure that future court decisions would resemble *Berman* and not *Kauten*. “Congress incorporated [Berman] not only into the legislative history,” as the Senate report “specifically cit[ed] Berman,”<sup>82</sup> “but also in the very words of the Act”<sup>83</sup> by closely following the *Berman* court’s language.

Interestingly, the Senate report concluded its comments on the CO exemption by stating that “[t]he exemption is viewed as a privilege.”<sup>84</sup> This view is in line with the historical understanding of the CO exemption,<sup>85</sup> and was probably intended to ward off claims that the statute’s exemption was rooted in a Free Exercise right. But the statement also seems oblivious to the *Everson* decision handed down the year before, and reinforces this Article’s thesis that the CO exemption could be constitutionally challenged for providing “privileges” (in the Senate’s own words) on the basis of religion.

#### *H. Part I Conclusion*

Leading up to the Vietnam War, it was quite obvious that the CO exemption rested on constitutionally-shaky grounds. It was clearly a concession carved out for the benefit of religious groups, as the historic peace churches had to lobby for an exemption during every draft in U.S. history. Congress’s own description of it as a “privilege” afforded to believers in a “Supreme Being” demonstrates that it was a “law respecting an establishment of religion.”

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<sup>77</sup> Hearing, *supra* note 58, at 512.

<sup>78</sup> Todd, *supra* note 60, at 1736. See also CURTIS W. TARR, BY THE NUMBERS: THE REFORM OF THE SELECTIVE SERVICE SYSTEM 1970–1972 82 (1981) (“[M]embers of both armed services committees in Congress worried that the concept [of ‘religious training and belief’] might become loose and thus unenforceable. . . . From testimony given then and later, the committee members clearly intended to restrict this provision of the law.”).

<sup>79</sup> Hearing, *supra* note 58, at 511.

<sup>80</sup> Select Service Act, ch. 625, § 6(j), 62 Stat. 604, 613 (1948) (emphasis added).

<sup>81</sup> Hearing, *supra* note 58, at 511.

<sup>82</sup> Todd, *supra* note 60, at 1736 n.21.

<sup>83</sup> Jay R. Dingledy, *Welsh v. United States: A New Substantive Definition for Conscientious Objector*, 32 OHIO ST. L.J. 653, 662 (1971).

<sup>84</sup> S. Rep. No. 80-1268, at 14 (1948).

<sup>85</sup> See West, *supra* note 23, at 377 and accompanying text.

Looking back, however, it is easy to understand why Congress began this habit of providing a blatantly unconstitutional exemption. When Congress instituted the first federal draft during the Civil War, there was already a 200-year-old history of exempting members of peace churches from conscription.<sup>86</sup> Congress simply succumbed to the inertia of tradition, leaving it to the courts to handle any constitutional problems (as Congress is in the habit of doing). This strategy, however, would lead to disaster during the Vietnam War.

## II. THE CO EXEMPTION AND THE DEMISE OF THE DRAFT DURING THE VIETNAM WAR

The U.S. entered the Vietnam War with the constitutionality of the CO exemption unresolved. But rather than strike the unconstitutional exemption down, the U.S. Supreme Court, in a strange line of cases, broadened the exemption in an effort to save it. By the end of the war, virtually every draftee, from the most devout of Amishmen to the most godless of hippies, qualified for the CO exemption.

The Court's broadening of the CO exemption arguably did what the war itself and millions of anti-war activists could not do: end the draft. After 1970, when the Court held that secular anti-war beliefs qualified an individual for the "religious" CO exemption, the Selective Service System completely broke down, and Congress abolished the draft soon after. This Part discusses the Court's two major Vietnam-era CO exemption cases—*United States v. Seeger* and *United States v. Welsh*—and how they fatally destabilized the draft system.

### A. *Seeger and the Subsequent Revision of the Draft Law*

"In 1965," despite a steady escalation of conflict in Vietnam, "few people applied for conscientious objector status."<sup>87</sup> The (arguably) narrow<sup>88</sup> 1948 exemption was still in effect, and the 300-year-old status quo of limiting the exemption to members of the historic peace churches was still being followed. Many draftees who might have been interested in applying did not do so because they "knew that existing . . . CO criteria excluded them."<sup>89</sup>

But in March of 1965, the 300-year-old tradition of limiting the CO exemption to peace church members ended abruptly. That month, the Supreme Court issued a decision in a case brought by Daniel Andrew Seeger, a lapsed Catholic who applied

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<sup>86</sup> KREHBIEL, *supra* note 46, at 62–63 (stating that the first CO exemptions date back to 1663 in the Massachusetts and Rhode Island colonies).

<sup>87</sup> Robert A. Seeley, *Vietnam: The War We Cannot Escape, A FURTHER FLIGHT*, [www.givewings.com/writings/essays\\_on\\_war/vietnam.html](http://www.givewings.com/writings/essays_on_war/vietnam.html) (last visited Oct. 15, 2019).

<sup>88</sup> Curtis W. Tarr, *Selective Service and Conscientious Objectors*, 57 A.B.A. J. 976, 978 (1971) (noting that General Hershey, the Director of the Selective Service System, expressed concern to the House Committee on Armed Services that the wording of 1948 exemption "might prove the intent of Congress to restrict the provisions of the act," but "might also be interpreted as an intent further to broaden the act").

<sup>89</sup> U.S. PRESIDENTIAL CLEMENCY BOARD, REPORT TO THE PRESIDENT 37 (1975).

for a CO exemption based on his secular moral values.<sup>90</sup> The draft board had denied Seeger's application for exemption "because his conscientious objections were not dependent upon 'a belief in a relation to a Supreme Being'" as required by the 1948 statute.<sup>91</sup>

Seeger appealed the draft board's decision, arguing that a CO exemption based on "religious training and belief" in a "Supreme Being" violated the Establishment Clause. The Second Circuit Court of Appeals—the same circuit that issued the *Kauten* ruling—agreed with Seeger and held that the "Supreme Being" limitation was unconstitutional.<sup>92</sup> In a conclusion that reflects the argument that Vietnam was a hot battlefield in a Cold War against communism, the Second Circuit held:

[T]he Supreme Court [has] acknowledged that "[w]e are a religious people whose institutions presuppose a Supreme Being." Our disposition of this appeal is in keeping with this declaration. It has often been noted that the principal distinction between the free world and the Marxist nations is traceable to democracy's concern for the rights of the individual citizen, as opposed to the collective mass of society. And this dedication to the freedom of the individual, of which our Bill of Rights is the most eloquent expression, is in large measure the result of the nation's religious heritage. Indeed, we here respect the right of Daniel Seeger to believe what he will largely because of the conviction that every individual is a child of God; and that Man, created in the image of his Maker, is endowed for that reason with human dignity.<sup>93</sup>

The U.S. government appealed the Second Circuit's ruling to the Supreme Court. "[T]he fact that Congress chose to draw the line of exemption on the basis of religious belief confronted the Court with a difficult constitutional question."<sup>94</sup> It would be tough for the Court to reconcile an exemption limited to monotheistic believers with *Everson*, and it might not be able to reconcile *any* conscience-based exemption with *Reynolds*.<sup>95</sup>

The Court ultimately decided to avoid the "difficult constitutional question"<sup>96</sup> by granting Seeger a CO exemption on *statutory* grounds, rendering his constitutional

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<sup>90</sup> United States v. Seeger, 380 U.S. 163, 169 (1965).

<sup>91</sup> United States v. Seeger, 326 F.2d 846, 847 (2d Cir. 1964).

<sup>92</sup> *Id.* at 854.

<sup>93</sup> *Id.* at 854–55.

<sup>94</sup> CONG. RESEARCH SERV., THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION: ANALYSIS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES TO JUNE 28, 2012, S. Doc. No. 112-9, at 1100 (2013).

<sup>95</sup> See *supra* note 42.

<sup>96</sup> 118 CONG. REC. 13, 176 (1972) (statement of Rep. Dellums) ("The Seeger case did not reach the constitutional question of whether the state might require a belief in God as a condition for exemption.").

challenge moot.<sup>97</sup> Applying the doctrine of “constitutional avoidance,”<sup>98</sup> in which a court may go “to extremes to construe an Act of Congress to save it from demise on constitutional grounds,”<sup>99</sup> the Court held that Seeger, who expressly “[r]efus[ed] to assert a simple belief or disbelief in a deity” and “reject[ed] dependence upon [a] Creator for a guide to morality,”<sup>100</sup> actually satisfied the requirements of the statute.<sup>101</sup> In doing so, “the Court chose to avoid [the Establishment Clause challenge] by a somewhat disingenuous interpretation of the statute.”<sup>102</sup>

The Court first held that by “using the expression ‘Supreme Being,’ rather than the designation ‘God,’”<sup>103</sup> Congress was showing its intent to “embrace all religions and to exclude essentially political, sociological, or philosophical views.”<sup>104</sup> But since Seeger’s views on war *were* philosophical rather than religious, the Court went on to blur the line between the religious and the secular. The Court, which routinely wields the “tool of language” in dealing with “fundamental”<sup>105</sup> questions of man’s predicament in life,<sup>106</sup> in death,<sup>107</sup> [and] in final judgment<sup>108</sup> and retribution,<sup>109</sup> held that it could not interpret the meaning of “Supreme Being” with precision because “in no field of human endeavor has the tool of language proved so inadequate in the communication of ideas as it has in dealing with the fundamental questions of man’s predicament in life, in death or in final judgment and retribution.”<sup>110</sup>

The Court then defined religion in a way that is pure Sixties. Focusing heavily on Eastern spirituality, the Court held that religion could be thought of as “a way of life envisioning . . . the day when all men can live together in perfect understanding and peace,” and that the “Supreme Being” could be conceived as “the transcendental reality which is truth, knowledge and bliss.”<sup>111</sup> In an astounding display of historical revisionism, the Court asserted that Congress intended this to be a broadly applicable

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<sup>97</sup> *Seeger*, 380 U.S. at 185–86.

<sup>98</sup> The doctrine was first elaborated by Justice Brandeis in his concurrence to *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring), which noted the “[t]he Court will not pass upon a constitutional question, although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.”

<sup>99</sup> *Seeger*, 380 U.S. at 189 (Douglas, J., concurring).

<sup>100</sup> *United States v. Seeger*, 326 F.2d 846, 848 (2d Cir. 1964).

<sup>101</sup> *Seeger*, 380 U.S. at 188.

<sup>102</sup> CONG. RESEARCH SERV., *supra* note 94, at 1054.

<sup>103</sup> *Seeger*, 380 U.S. at 165.

<sup>104</sup> The Supreme Court is a constitutional court, and as such it confronts the most “fundamental” questions of law.

<sup>105</sup> The Court hears cases concerning virtually every stage and aspect of human life, from conception to death.

<sup>106</sup> The Court hears cases concerning the death penalty.

<sup>107</sup> The Supreme Court is, of course, the court of “last resort.”

<sup>108</sup> The Court hears cases concerning the criminal law, which is partially retributive in nature.

<sup>109</sup> *United States v. Seeger*, 380 U.S. 163, 174 (1965).

<sup>110</sup> *Id.* at 174–75.

exemption because that would be in “keeping with its long established policy of not picking and choosing among religious beliefs,”<sup>111</sup> ignoring the 300-year-long tradition of limiting the CO exemption to members of historic peace churches.<sup>112</sup>

Though Seeger himself was not a hippie, the *Seeger* Court’s language could not have been more conducive to the counterculture. Suddenly, anyone who held even the haziest notions of spirituality could claim an exemption that previously had been limited to small, insular, deeply-conservative sects. Perhaps even a psychedelic vision of peace sign during an acid trip,<sup>113</sup> the “mellow feelings of warmth and safety” experienced after popping a “love drug,”<sup>114</sup> or the “consciousness-raising” powers of marijuana<sup>115</sup> could provide a basis for draft exemption, as some law professors quite persuasively asserted at the time.<sup>116</sup>

The anti-war movement quickly seized on the decision as a strategy for draft resistance. The Central Committee for Conscientious Objectors (“CCCO”), which was a support organization for secular COs,<sup>117</sup> encouraged draftees to “take full advantage of the opportunity to qualify which the Court has given them.”<sup>118</sup> They emphasized to atheistic CO applicants that “atheism was not at issue in the *Seeger* case, for *Seeger* had left the Supreme Being question unanswered,” and that they might still qualify if they “state affirmatively what they believe rather than what they do not.”<sup>119</sup>

For the military brass, the decision could not have come at a more inopportune time. Curtis Tarr, a director of the Selective Service during the Vietnam War, explained as follows:

Shock waves followed, thundering throughout Selective Service and in the armed services committees as well. The decision, handed down on March 8, 1965, came just a few months before President Johnson made his ominous pledge to send 50,000 men to Vietnam. [Draft c]alls increased, as did protests to the draft.<sup>120</sup>

The Selective Service was particularly concerned about dealing with additional administrative burdens as a result of *Seeger*. “A 1966-67 advisory panel headed by

<sup>111</sup> *Id.* at 175.

<sup>112</sup> *Id.* at 188.

<sup>113</sup> NEIL HAMILTON, DICTIONARY OF 1960S COUNTERCULTURE IN AMERICA (ABC-CLIO COMPANION) 87 (1997) (noting the role that LSD played in the ambitions of hippies to “create a self-sufficient settlement around psychedelic visions of peace and love” in Haight-Ashbury).

<sup>114</sup> PHILIP JENKINS, SYNTHETIC PANICS: THE SYMBOLIC POLITICS OF DESIGNER DRUGS 87 (1999).

<sup>115</sup> ROBERT ROSKIND, MEMOIRS OF AN EX-HIPPIE: SEVEN YEARS IN THE COUNTERCULTURE 74 (2004).

<sup>116</sup> See generally Joel Jay Finer, *Psychedelics and Religious Freedom*, 19 HASTINGS L. J. 667 (1968).

<sup>117</sup> SCOTT H. BENNETT, RADICAL PACIFISM: THE WAR RESISTERS LEAGUE AND GANDHIAN NONVIOLENCE IN AMERICA, 1915-1963 145 (2003).

<sup>118</sup> J. BARTON HARRISON ET AL., HANDBOOK FOR CONSCIENTIOUS OBJECTORS 39 (1968).

<sup>119</sup> *Id.*

<sup>120</sup> TARR, *supra* note 78, at 83.

General Mark W. Clark warned that *Seeger* would generate ‘an ever-increasing number of unjustified appeals for exemption from military service.’<sup>121</sup> These fears were well-founded, as appeals of draft classifications rose from 4 per 1,000 in 1965 (the year *Seeger* was decided) to 102 per 1,000 in 1969.<sup>122</sup>

The Selective Service apparently decided that the best strategy was to not call attention to the *Seeger* decision. Former Director Tarr noted in a memoir that the Selective Service “never had published instructions to its boards following the landmark ruling in 1965.”<sup>123</sup> In addition, the “Selective Service provided quite literally no information to registrants on . . . conscientious objection,”<sup>124</sup> and President Ford’s clemency board discovered a decade later that many potential COs did not file an application because they were uninformed about *Seeger*.<sup>125</sup> Some applicants even “claimed that they had been discouraged from applying.”<sup>126</sup>

Despite the Selective Service’s reluctance to implement the decision, “*Seeger* led to a major increase in the number of CO applications.”<sup>127</sup> In 1966, the first full year that the *Seeger* decision was in effect, the ratio of CO exemptions to actual inductions rose to an astounding 40 times higher than it was during WWII.<sup>128</sup>

In 1967, Congress debated how to amend the CO exemption in response to *Seeger* and, as one congressman put it, “go[] back to the oldtime religion.”<sup>129</sup> The military advised Congress that, against the background of that Supreme Court decision, removing the Supreme Being clause would have to be clearly recognized as Congressional intent to narrow the standard.<sup>130</sup> Congress followed the military’s advice and removed the “Supreme Being” language while leaving the “religious training and belief” requirement.<sup>131</sup>

#### B. Welsh and the Collapse of the Selective Service System

In 1970, the Supreme Court again returned to the CO exemption issue in *United States v. Welsh*. The *Welsh* Court noted that the “controlling facts in this case are strikingly similar to those in *Seeger*,” with the main difference being that “Welsh could sign [the CO exemption form] only after striking the words ‘my religious training,’”

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<sup>121</sup> Tarr, *supra* note 88, at 977.

<sup>122</sup> Seeley, *supra* note 87, at 4.

<sup>123</sup> TARR, *supra* note 78, at 85.

<sup>124</sup> Seeley, *supra* note 87, at 4.

<sup>125</sup> U.S. PRESIDENTIAL CLEMENCY BOARD, *supra* note 89, at 38.

<sup>126</sup> *Id.*

<sup>127</sup> Seeley, *supra* note 87, at 4.

<sup>128</sup> Chambers, *supra* note 6, at 42.

<sup>129</sup> *Extension of the Universal Military Training and Service Act: Hearings Before the House Comm. on Armed Services*, H.R. Rep. No. 12, 90th Cong., 1st Sess. (1967).

<sup>130</sup> Tarr, *supra* note 88, at 978.

<sup>131</sup> Universal Military Training and Service Act, 50 U.S.C. § 3801-3820 (1967).

while Seeger's case turned on his lack of belief in a "Supreme Being."<sup>132</sup> *Welsh*, therefore, was a perfect test case for the 1967 revision to the CO exemption.

Like Seeger, Welsh asserted that the religious component of the CO exemption violated the Establishment Clause. And like it did in *Seeger*, the Court applied the "constitutional avoidance" doctrine in *Welsh* to avoid confronting the Establishment Clause claim. "Knowing the intent of Congress when it enacted the 1967 amendments," Selective Service Director Tarr explained, "the Court still preferred to interpret 'religious training' broadly rather than to discard the entire section of the law as defective under the First Amendment."<sup>133</sup>

The *Welsh* Court held that "[i]f an individual deeply and sincerely holds [anti-war] beliefs that are purely ethical or moral in source and content," those beliefs qualify as "religious" under the statute, even though the statute explicitly stated that "religious belief . . . does not include . . . a merely personal moral code."<sup>134</sup> Though the Court recognized that "Welsh was far more insistent and explicit than Seeger in denying that his views were religious," it dismissed his characterizations of his own beliefs as irrelevant because "very few registrants are fully aware of the broad scope of the word 'religious'."<sup>135</sup> The Court concluded by essentially writing a secular morals and ethics exemption into the statute, holding that it "exempts from military service all those whose consciences, spurred by deeply held *moral, ethical, or religious beliefs*," have led them to pacifism.<sup>136</sup>

It is hard to tell why the Court chose to ignore Congress's obvious intentions and adopt such an implausible interpretation of the statute. Though "the words of a statute may be strained 'in the candid service of avoiding a serious constitutional doubt,'"<sup>137</sup> under the "constitutional avoidance" doctrine, the *Welsh* Court went far beyond "strain[ing]" the statute's language and directly contradicted the statute's plain text.<sup>138</sup> The *Welsh* interpretation—that the statute defines atheism as religion, and that an "individual['s] deeply and sincerely h[e]ld . . . beliefs" do not constitute a "merely personal moral code"—is simply too far-fetched to believe. In his concurrence, Justice Harlan described the majority opinion as being a product of an "Alice-in-Wonderland world where words have no meaning."<sup>139</sup>

The most likely explanation is that the Court was reluctant to overturn a 300-year-old exemption by judicial fiat, as this could undermine confidence in the rule of law.<sup>140</sup>

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<sup>132</sup> *Welsh v. United States*, 398 U.S. 333, 338 (1970).

<sup>133</sup> Tarr, *supra* note 88, at 979.

<sup>134</sup> *Welsh*, 398 U.S. at 340.

<sup>135</sup> *Id.* at 341.

<sup>136</sup> *Id.* at 340–44 (emphasis added).

<sup>137</sup> *United States v. Seeger*, 380 U.S. 163, 188 (1965) (Douglas, J., concurring).

<sup>138</sup> See *Welsh*, 398 U.S. at 345 (Harlan, J., concurring) ("[T]he liberties taken with the statute . . . cannot be justified in the name of the familiar doctrine of construing federal statutes in a manner that will avoid possible constitutional infirmities in them. There are limits to the permissible application of that doctrine, and . . . those limits were crossed.").

<sup>139</sup> *Id.* at 354.

<sup>140</sup> The Court is a deeply conservative institution, as many of its doctrines (such as *stare decisis*) seek to preserve the status quo. Even supposedly "progressive" decisions, such as *Roe v. Wade* and *Obergefell v. Hodges*, are couched as preserving time-tested practices and

It may have been trying to signal to Congress that the exemption was unconstitutional, as concurring justices in both *Seeger*<sup>141</sup> and *Welsh*<sup>142</sup> spelled out. The Court may have been trying to force Congress to abolish the exemption itself, thus taking care of the constitutional problem in a democratic fashion.

If that was indeed the Court's strategy, Congress did not take the bait. The exemption stayed on the books, and vast numbers of draftees took advantage. "In the first month after *Welsh*, Selective Service received 100,000 applications for CO status,"<sup>143</sup> which rivaled the number of CO exemptions issued over the previous *five years*.<sup>144</sup>

CO applicants who had their applications denied after *Welsh* were (quite reasonably) far more likely to appeal. "By 1971, the number of appeals had far outstripped the Selective Service's ability to process them. The system was on the verge of breakdown from the sheer weight of perfectly legal paperwork."<sup>145</sup>

*Welsh* also provided draft law violators with a silver-bullet defense. In 1970, the first year that the *Welsh* ruling was available as a defense, acquittals of defendants charged with Selective Service Acts violations outnumbered convictions for the first time in the Vietnam War era.<sup>146</sup> Acquittals would continue to outnumber convictions until the draft was abolished.<sup>147</sup>

Perhaps the most astounding statistical evidence of *Welsh*'s impact is the ratio of CO exemptions to actual inductions into the military. In 1972, after the Selective Service issued revised CO exemption guidelines to draft boards that incorporated *Welsh*, "more registrants were classified as COs than were inducted into the army."<sup>148</sup> To say that "[s]uch a phenomenon was unprecedented in American history" would be

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principles. *Roe*, for example, went to extraordinary lengths to show that the West has historically permitted abortion, with a historical review that reached all the way back to the Achaemenid Empire. *Roe v. Wade*, 410 U.S. 113, 130 (1973). *Obergefell* took pains to demonstrate that same-sex marriage was consistent with "essential attributes of th[e] right [to marry] based in history [and] tradition." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).

<sup>141</sup> *Seeger*, 380 U.S. at 188 (Douglas, J., concurring) ("If I read the statute differently from the Court, I would have difficulties. For then those who embraced one religious faith rather than another would be subject to penalties; and that kind of discrimination, as we held in *Sherbert v. Verner*, would violate the Free Exercise Clause of the First Amendment.").

<sup>142</sup> *Welsh*, 398 U.S. at 356 (Harlan, J., concurring) ("[H]aving chosen to exempt, [Congress] cannot draw the line between theistic or nontheistic religious beliefs on the one hand and secular beliefs on the other. Any such distinctions are not, in my view, compatible with the Establishment Clause of the First Amendment.").

<sup>143</sup> Seeley, *supra* note 87, at 4.

<sup>144</sup> Chambers, *supra* note 6, at 42 (stating that there were 170,000 CO exemptions issued between 1965-1970).

<sup>145</sup> Seeley, *supra* note 87, at 4.

<sup>146</sup> ROSS GREGORY, COLD WAR AMERICA, 1946 TO 1990 277 (2014).

<sup>147</sup> *Id.*

<sup>148</sup> Chambers, *supra* note 6, at 42.

an understatement, as there were only 1.5 exemptions *per thousand* inductees during WWI and WWII.<sup>149</sup>

After *Welsh*, “[t]he draft had, for all practical purposes, broken down.”<sup>150</sup> Robert A. Seeley, the executive director of CCCO during the Vietnam War, asserted that *Seeger* and especially *Welsh* “[a]rguably . . . broke the back of the draft.”<sup>151</sup> In January 1973, two and a half years after *Welsh* was handed down, the draft was abolished.<sup>152</sup>

### C. Part II Conclusion

The Court’s broadening of the CO exemption, and Congress’s failure to follow up by revoking the exemption, clearly played a major role in the abolition of the Selective Service System, and possibly even the U.S. pullout from Vietnam two months later. If *Seeger* had not breathed life into the draft resistance movement in 1965, and if *Welsh* had not strained the Selective Service to the breaking point in the early 1970s, it is possible that the war might have plodded on even longer than it did, and it is also possible that the draft system might have emerged from Vietnam intact.

## III. WELSH AND THE POST-VIETNAM MILITARY

Even after the end of U.S. involvement in Vietnam, *Welsh* would deliver one final blow to the draft. After the U.S. pulled out of Vietnam, the conversation turned to what to do about draft evaders, many of whom were living abroad to avoid prosecution. Some began arguing that “[t]hose moral and ethical pacifists who went into exile or were convicted for refusing to submit to induction prior to 1970,” when *Welsh* was handed down, “should certainly receive amnesty.”<sup>153</sup>

In 1974, President Ford announced a controversial conditional amnesty program for draft evaders.<sup>154</sup> A clemency board system was established to determine if draft law violators were eligible to receive a presidential pardon.<sup>155</sup> The clemency boards would go on to cite *Welsh* in liberally offering pardon to violators who cited conscience as their motive for evading the draft.<sup>156</sup>

In a report written for the president one year after the program was instituted, the Presidential Clemency Board highlighted the major role *Welsh* was playing as a “Mitigating Factor” in clemency cases.<sup>157</sup> The Board reported that nearly half of draft

<sup>149</sup> *Id.*

<sup>150</sup> Seeley, *supra* note 87, at 5.

<sup>151</sup> *Id.* at 4.

<sup>152</sup> Andrew Glass, *U.S. Military Draft Ends, Jan. 27, 1973*, POLITICO (Jan. 27, 2012) <https://www.politico.com/story/2012/01/us-military-draft-ends-jan-27-1973-072085>.

<sup>153</sup> James S. Childress, *The Amnesty Argument*, 23 CROSSCURRENTS 310, 322 (1973).

<sup>154</sup> The Learning Network, *Sept. 16, 1974 | Conditional Amnesty for Vietnam Draft Dodgers and Military Deserters*, THE LEARNING NETWORK (Sept. 16, 2011), <https://learning.blogs.nytimes.com/2011/09/16/sept-16-1974-conditional-amnesty-for-vietnam-draft-dodgers-and-military-deserters/>.

<sup>155</sup> COMPTROLLER GENERAL OF THE U.S., FPCD-76-64, THE CLEMENCY PROGRAM OF 1974, at 4–5 (1977).

<sup>156</sup> See, e.g., *Armstrong v. Laird*, 456 F.2d 521, 522–23 (1st Cir. 1972).

<sup>157</sup> U.S. PRESIDENTIAL CLEMENCY BOARD, *supra* note 89, at 99.

law violators cited ethical oppositions to war as at least a partial motive for evading the draft, and that 90% of violations occurred before *Welsh* was decided.<sup>158</sup> “Although the court decision was not retroactive,” the Board reported, “we felt it only fair to give credit to applicants who received convictions simply because they were brought to trial before *Welsh*.<sup>159</sup>

With Ford’s clemency program having established a precedent for granting amnesty for draft evaders, President Carter would eventually issue a blanket pardon for all Vietnam draft violations in 1977.<sup>160</sup> Though the nation as a whole was ready to move on at that point, the pardon of “draft dodgers” was understandably unpopular with Vietnam veterans.<sup>161</sup> Why, after all, should they have suffered through the horrors of the war when they could have defied their draft orders and later received a pardon?

After the mass amnesty for draft violations, it is very difficult to imagine the draft being reinstated. What little institutional credibility the draft had left after Vietnam was likely lost as a result of the presidential pardons. As one of the major justifications for amnesty, *Welsh* helped steer the U.S. down an irrevocable course towards a permanently all-volunteer military.

#### IV. CONCLUSION

In a haunting echo of Rep. Scott’s 1789 prophesy,<sup>162</sup> former Selective Service director Tarr predicted that, with the breakdown of established religion and the rise of individualistic moral development, it will be impossible to separate sincere conscientious objectors from the opportunistic:

I cannot imagine conscientious objection becoming easier to define in the future. Although traditional beliefs in God are less widely accepted, more young people worry about the problems of conscience. Boards, even those composed of professional people, would have difficulty determining who really passes the tests handed down thus far by the courts.<sup>163</sup>

Faced with this impossible task, if the U.S. government ever wishes to reinstate the draft while avoiding a repeat of the post-*Welsh* mass exemptions, it will have to completely abolish the CO exemption.

<sup>158</sup> *Id.* at 39.

<sup>159</sup> *Id.* at 99.

<sup>160</sup> Andrew Glass, *President Carter Pardons Draft Dodgers, Jan. 21, 1977*, POLITICO (Jan. 21, 2018) <https://www.politico.com/story/2018/01/21/president-carter-pardons-draft-dodgers-jan-21-1977-346493>.

<sup>161</sup> *President Carter Pardons Draft Dodgers - Jan 21, 1977*, HISTORY, (Jan. 21, 2009), <https://www.history.com>this-day-in-history/president-carter-pardons-draft-dodgers>.

<sup>162</sup> See Gales, *supra* note 18 (recounting Rep. Scott’s testimony against the inclusion of CO exemption in the Bill of Rights as follows: “It has been urged that religion is on the decline. If so, the argument is more strong in my favor, for when the time comes that religion shall be discarded, the generality of persons will have recourse to these pretexts to get excused from bearing arms.”).

<sup>163</sup> TARR, *supra* note 78, at 147 (1981).