
THE CODIFICATION PROJECT: PROTECTING CONSCIENTIOUS OBJECTION AS SECULAR PROTEST

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ABSTRACT

This Article is part of a growing movement to codify extant rights that are at risk due to the jurisprudential revolution now underway at the Supreme Court. The Codification Project examines the precarious position of one such right—secular conscientious objection.

Conscientious objection serves a vital function in a liberal democracy. It allows individuals with sincerely held beliefs to reject the call of government-sanctioned violence. The law on conscientious objection is built on a patchwork of statutes and case law. The relevant statute, the Military Selective Service Act, provides for conscientious objector status to individuals who “by reason of religious training and belief, [are] conscientiously opposed to participation in war in any form,” but it excludes individuals with “essentially political, sociological, or philosophical beliefs, or a merely personal moral code.” Despite the statutory language, the Supreme Court has interpreted this provision to include individuals whose beliefs emanate from moral or ethical sources. Given the Court’s recent jurisprudential shift in its approach to statutory construction and religious liberty, this interpretation now stands on shaky ground.

Accordingly, Congress should amend the Military Selective Service Act to clarify that conscientious objector status is not limited to individuals motivated solely by religious training and belief. Recognition should extend to individuals whose beliefs emanate from moral or ethical sources. This statutory guardrail would protect the status and reach of conscientious objection—a fundamental and long-standing form of peaceful protest against government-sanctioned violence. It is the sincerely held belief, and not its religious origins, that matters. After all, the concept is referred to as “conscientious objection,” not “religious objection.”

The Codification Project is written to inspire and guide future efforts to protect essential rights. It offers a template for such efforts.

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INTRODUCTION

At the height of the Vietnam War, thousands of young men protested their induction into military service.¹ They marched, conducted sit-ins, attended demonstrations, and burned their draft cards.² They sang songs of protest and wrote elegies of a lost generation.³ Many sought conscientious objector status, and 170,000 petitions were eventually granted.⁴ Although each petitioner may have been motivated by different beliefs, they each engaged in a unique form of protest against government-sanctioned violence.⁵

For example, one man who applied for conscientious objector status opposed the Vietnam War on religious and political grounds.⁶ As a devout Muslim, his protest was driven by his belief in racial equality. He explained in stark terms, “[w]hy should they ask me to put on a uniform and go 10,000 miles from home and drop bombs and bullets on Brown people in Vietnam while so-called Negro people in Louisville are treated like dogs and denied simple human rights?”⁷ In more direct terms, he stated, “I ain’t got no quarrel with them Vietcong.”⁸

¹ See generally ELI GREENBAUM, *HELL, NO, WE DIDN’T GO!: FIRSTHAND ACCOUNTS OF VIETNAM WAR PROTEST AND RESISTANCE* 8 (2024); CHRIS LOMBARDI, *I AIN’T MARCHING ANYMORE: DISSENTERS, DESERTERS, AND OBJECTORS TO AMERICA’S WARS 165-98* (2020); MICHAEL S. FOLEY, *CONFRONTING THE WAR MACHINE: DRAFT RESISTANCE DURING THE VIETNAM WAR* 9 (2003).

² Hannah Natanson, *Protestors Shut Down D.C. Traffic Before. It Helped End the Vietnam War — and Reshaped American Activism*, WASH. POST (Sep. 23, 2019), <https://www.washingtonpost.com/history/2019/09/23/protesters-shut-down-dc-traffic-before-it-helped-end-vietnam-war-and-reshaped-american-activism/>; Douglas Robinson, *100,000 Rally at U.N. Against Vietnam War; Many Draft Cards Burned—Eggs Tossed at Parade*, N.Y. TIMES, Apr. 16, 1967, at 1.

³ See DOUG BRADLEY & CRAIG WERNER, *WE GOTTA GET OUT OF THIS PLACE: THE SOUNDTRACK OF THE VIETNAM WAR* 16 (2015); R. SERGE DENISOFF, *SONGS OF PROTEST, WAR AND PEACE: A BIBLIOGRAPHY AND DISCOGRAPHY*, at xiv-xvi, 42-52 (1973).

⁴ JAMES W. TOLLEFSON, *THE STRENGTH NOT TO FIGHT: AN ORAL HISTORY OF CONSCIENTIOUS OBJECTORS OF THE VIETNAM WAR* 6 (1993).

⁵ Ruth Fremson, *The Americans Who Left: Some of the United States’ Vietnam War Opponents Found Refuge in Canada. Fifty Years After the End of the War, They’re Still Worried About the Future*, N.Y. TIMES (May 3, 2025), <https://www.nytimes.com/2025/05/03/world/canada/vietnam-war-opponents-canada-america.html>. See generally Bill Raley, *How Conscientious Objectors Killed the Draft: The Collapse of the Selective Service During the Vietnam War*, 68 CLEV. ST. L. REV. 151 (2020).

⁶ See generally LEIGH MONTVILLE, *STING LIKE A BEE: MUHAMMAD ALI VS. THE UNITED STATES OF AMERICA, 1966-1971* (2017); HOWARD L. BINGHAM & MAX WALLACE, *MUHAMMAD ALI’S GREATEST FIGHT: CASSIUS CLAY VS. THE UNITED STATES OF AMERICA* (2000).

⁷ David Zirin, *“I Just Wanted to Be Free”: The Radical Reverberations of Muhammad Ali*, NATION (June 4, 2016), <https://www.thenation.com/article/archive/i-just-wanted-to-be-free-the-radical-reverberations-of-muhammad-ali> [<https://perma.cc/N2UH-AFD3>] (quoting Muhammad Ali’s speech at Louisville rally for fair housing).

⁸ Elliott J. Gorn, *“No Quarrel with Them Vietcong”: Muhammad Ali’s Cold War, in THE WHOLE WORLD WAS WATCHING: SPORT IN THE COLD WAR* 46 (Robert Edelman &

However, his claim for conscientious objector status was rejected by his local draft board and the Kentucky Appeal Board.⁹ When he refused to report for induction, he was prosecuted and convicted, resulting in the loss of his professional title and a lengthy prison term.¹⁰ This man was Muhammad Ali, formerly known as Cassius Clay. His appeal eventually landed at the Supreme Court.¹¹ In *Clay v. United States*,¹² the Court reversed the Appeal Board's decision in a per curiam order.¹³ Although Muhammad Ali would reclaim his world heavyweight title, his greatest triumphs would come as a civil rights advocate and global icon.¹⁴

Conscientious objection serves a vital function in a liberal democracy by safeguarding individual rights and freedoms in the face of collective state authority.¹⁵ Rooted in the foundational principles of individual liberty and personal autonomy, conscientious objection protects those whose deeply held moral, ethical, or religious convictions compel them to reject participation in government-sanctioned violence.¹⁶ Indeed, it recognizes an individual's commitment to the most basic human value—respecting life.¹⁷

Christopher Young eds., 2019); Bob Orkand, Opinion, “*I Ain’t Got No Quarrel with Them Vietcong*,” N.Y. TIMES (June 27, 2017), <https://www.nytimes.com/2017/06/27/opinion/muhammad-ali-vietnam-war.html>.

⁹ *Clay v. United States*, 397 F.2d 901, 905-06 (5th Cir. 1968). See generally Rhiannon Walker, *The Day Muhammad Ali Got Knocked Out by the Draft Board*, ANDSCAPE (Jan. 11, 2017), <https://andscape.com/features/muhammad-ali-got-knocked-out-by-the-draft-board> [<https://perma.cc/GKM6-YESK>]; Benjamin T. Harrison, *The Muhammad Ali Draft Case and Public Debate on the Vietnam War*, PEACE RSCH., Nov. 2001, at 69, 73, 76-79.

¹⁰ *Clay*, 397 F.2d at 906-07; Robert Lipsyte, “*Mr. Muhammad Ali Has Just Refused to Be Inducted*,” N.Y. TIMES (Apr. 29, 1967), <https://www.nytimes.com/2016/06/11/sports/mr-muhammad-ali-has-just-refused-to-be-inducted.html>.

¹¹ Marty Lederman, *Muhammad Ali, Conscientious Objection, and the Supreme Court’s Struggle to Understand “Jihad” and “Holy War”*: *The Story of Cassius Clay v. United States*, SCOTUSBLOG (June 8, 2016), <https://www.scotusblog.com/2016/06/muhammad-ali-conscientious-objection-and-the-supreme-courts-struggle-to-understand-jihad-and-holy-war-the-story-of-cassius-clay-v-united-states> [<https://perma.cc/7FBG-QE6R>].

¹² 403 U.S. 698 (1971).

¹³ *Id.* at 705.

¹⁴ See generally DAVID REMNICK, *KING OF THE WORLD: MUHAMMAD ALI AND THE RISE OF AN AMERICAN HERO* (1998).

¹⁵ See THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY 55-56 (Susanna Mancini & Michel Rosenfeld eds., 2018); Emanuela Ceva, *Political Justification Through Democratic Participation: The Case for Conscientious Objection*, 41 SOC. THEORY & PRAC. 26, 38-40, 47 (2015); Harrop A. Freeman, *The Right of Protest and Civil Disobedience*, 41 IND. L.J. 228, 242-46 (1966).

¹⁶ See KIMBERLEY BROWNLEE, *CONSCIENCE AND CONVICTION: THE CASE FOR CIVIL DISOBEDIENCE* 128-39, 167-69 (2012).

¹⁷ Protecting human life is characterized “as the supreme human right, since without effective guarantee of this right, all other rights of the human being would be devoid of meaning.” MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 121 (2d rev. ed. 2005); see also Yoram Dinstein, *The Right to Life, Physical*

Conscientious objection serves other functions. Allowing individuals to oppose government mandates based on their sincerely held beliefs reinforces the pluralistic nature of liberal democracies, where diverse beliefs are acknowledged and respected.¹⁸ Moreover, it counters the excesses of government power, reminding states that their authority must stem from the moral, ethical, and religious values of their citizens. This bolsters the legitimacy of democratic institutions by ensuring that coercive government mandates do not compromise the personal integrity of the individual. Building a counterpoise between collective responsibility and individual conscience is essential to the maintenance of a just and equitable democratic society.

The greatest civil rights leaders of the twentieth century—Mahatma Gandhi and Dr. Martin Luther King, Jr.—framed their protests against inequality and oppression through nonviolence and opposition to government-sanctioned violence.¹⁹ They recognized that rejecting violence was a powerful form of protest and essential to their calls for social and political change.²⁰ For this reason, conscientious objection has been an integral part of the Civil Rights Movement in the United States.²¹

The modern law on conscientious objection is built on a patchwork of statutes and case law. Currently, the Military Selective Service Act provides conscientious objector status to those who “by reason of religious training and belief, [are] conscientiously opposed to participation in war in any form.”²² However, “the term ‘religious training and belief’ does not include essentially political, sociological, or philosophical views, or a merely personal moral

Integrity, and Liberty, in THE INTERNATIONAL BILL OF RIGHTS 114, 114 (Louis Henkin ed., 1981) (“The inviolability or sanctity of life is, perhaps, the most basic value of modern civilization. In the final analysis, if there were no right to life, there would be no point in the other human rights.”).

¹⁸ See generally Jeremy K. Kessler, *The Legal Origins of Catholic Conscientious Objection*, 31 WM. & MARY BILL RTS. J. 361, 372-402 (2022); Jeremy K. Kessler, *The Invention of a Human Right: Conscientious Objection at the United Nations, 1947-2011*, 44 COLUM. HUM. RTS. L. REV. 753, 753 (2013).

¹⁹ MICHAEL J. NOJEIM, GANDHI AND KING: THE POWER OF NONVIOLENT RESISTANCE, at xi (2004). There are many reasons why individuals may object to military service, even if they support their government. See, e.g., Frank Abe, *Resistance, Resettlement, and Redress*, 68 CASE W. RES. L. REV. 1085, 1088-89 (2018) (discussing how Japanese Americans interned during Second World War refused being drafted until United States restored their civil rights).

²⁰ Erica Chenoweth & Maria J. Stephan, Opinion, *How the World Is Proving Martin Luther King Right About Nonviolence*, WASH. POST (Jan. 18, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/01/18/how-the-world-is-proving-mlk-right-about-non-violence>.

²¹ See generally Andrew J. Lanham, *Radical Visions for the Law of Peace: How W.E.B. Du Bois and the Black Antiwar Movement Reimagined Civil Rights and the Laws of War and Peace*, 99 WASH. L. REV. 433, 470-71 (2024); Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 COLUM. L. REV. 1083, 1111-13, 1118-23 (2014).

²² 50 U.S.C. § 3806(j).

code.”²³ Despite this language, the Supreme Court has interpreted this provision to include individuals whose beliefs emanate from moral or ethical sources.²⁴ Through this interpretation, secular beliefs are protected. Given the Court’s recent jurisprudential shift in its approach to statutory construction and religious liberty, this interpretation now stands on shaky ground. The Court’s key decisions on conscientious objection were issued between 1965 and 1971—an era when the Court promoted a more precise separation between religion and government as it sought to respect the country’s growing pluralism.²⁵

This Article examines the precarious position of conscientious objection as a form of secular protest.²⁶ It is part of a growing movement to codify extant rights in a time of transition.²⁷ A Codification Project is necessary due to the jurisprudential revolution underway at the Supreme Court.²⁸ Its ideological center has shifted to the right, with a corresponding change in judicial

²³ *Id.*

²⁴ *Welsh v. United States*, 398 U.S. 333, 340 (1970).

²⁵ *See generally infra* Sections I.B-C.

²⁶ In this Article, secular is treated as the counterpoise to religion. Similarly, moral and ethical beliefs are treated as distinct from religious beliefs, although religious beliefs can certainly be conveyed as moral or ethical beliefs. The Supreme Court has consistently framed the secular-religion distinction in this manner. *See, e.g., Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 (2022) (distinguishing secular “neutral and generally applicable” governmental action and governmental action “specifically directed at . . . religious practice”); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021) (same); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15-18 (1947) (same). Some legal scholars and moral philosophers have made a similar distinction. *See* JOHN RAWLS, *POLITICAL LIBERALISM* 9-11 (expanded ed. 2005). Others view religious and secular beliefs as similar concepts. ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* 171 (2013). Some even treat secularism as a “pagan religion.” *See generally, e.g., STEVEN D. SMITH, PAGANS AND CHRISTIANS IN THE CITY: CULTURE WARS FROM THE TIBER TO THE POTOMAC* (2018); T.S. ELIOT, *THE IDEA OF A CHRISTIAN SOCIETY* 15-17 (1949).

²⁷ *See, e.g., Nathaniel Weixel, Democrats Introduce Bill to Repeal Comstock Abortion Law, Guard Against Trump Actions*, HILL (June 20, 2024, at 16:33 ET), <https://thehill.com/policy/healthcare/4732234-democrats-abortion-comstock-act-repeal-bill> [<https://perma.cc/QV3Y-QWRS>]; Kaitlin Sullivan, *Congress to Vote on Federal Law That Would Protect Access to Birth Control*, NBC NEWS (June 5, 2024, at 08:25 ET), <https://www.nbcnews.com/health/womens-health/access-birth-control-safe-congress-vote-law-protect-contraception-rcna155451> [<https://perma.cc/DK2P-U8EG>]; Myah Ward & Eun Kyung Kim, *Biden Signs Historic Bill Codifying Same-Sex and Interracial Marriage*, POLITICO (Dec. 13, 2022, at 20:24 ET), <https://www.politico.com/news/2022/12/13/biden-s-codifying-same-sex-interracial-marriage00073762>.

²⁸ Thomas G. Donnelly, *The Roberts Court Revolution, Institutional Legitimacy, and the Promise (and Peril) of Constitutional Statesmanship*, 26 U. PA. J. CONST. L. 585, 585 (2024) (“Our nation is in the middle of a constitutional revolution.”); Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 97 (2022) (“Armed with a new, nearly bulletproof majority, conservative Justices on the Court have embarked on a radical restructuring of American law across a range of fields and disciplines.”).

philosophy.²⁹ The Court has weakened stare decisis and eroded decades of established precedent.³⁰ In just a few years, the Court has transformed its interpretation of several areas of law. The Due Process Clause has changed.³¹ The Free Exercise and Establishment Clauses are different.³² The Second Amendment has flourished.³³ Administrative law has been reconfigured.³⁴ Both constitutional and statutory interpretations, even longstanding interpretations, are now unsettled.³⁵ The Codification Project is a response to this extraordinary moment in American legal history. Preemptive statutory affirmations codify

²⁹ See, e.g., Jess Bravin, *Supreme Court Chief Justice John Roberts Takes Back Control*, WALL ST. J. (July 3, 2024, at 14:28 ET), <https://www.wsj.com/politics/policy/supreme-court-chief-justice-john-roberts-takes-back-control-5ba239ba>; Erwin Chemerinsky, Opinion, *The Supreme Court's Purely Ideological Reasoning Will Change Our Lives*, L.A. TIMES (June 28, 2024, at 12:50 PT), <https://www.latimes.com/opinion/story/2024-06-28/supreme-court-homelessness-chevron-grants-pass> [<https://perma.cc/7UGG-RTFM>].

³⁰ Michael Gentithes, *Janus-Faced Judging: How the Supreme Court Is Radically Weakening Stare Decisis*, 62 WM. & MARY L. REV. 83, 98-113 (2020); Thomas W. Merrill, Comment, *The Demise of Deference—and the Rise of Delegation to Interpret?*, 138 HARV. L. REV. 227, 234-47 (2024); Frederick Schauer, *Stare Decisis—Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121, 142; Morgan Johnson, Note, *Conservative Stare Decisis on the Roberts Court: A Jurisprudence of Doubt*, 55 U.C. DAVIS L. REV. 1953, 1985-86 (2022).

³¹ See, e.g., *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022) (ending heightened constitutional protection for abortion).

³² See, e.g., *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421-25 (2022). See generally Lee Epstein & Eric A. Posner, *The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait*, 2021 SUP. CT. REV. 315, 315-16. These decisions have generated even more litigation seeking to expand the role of religion in the United States. See, e.g., Ed Pilkington, *US Supreme Court Opened Pandora's Box . . . and Ten Commandments Law Flew Out*, GUARDIAN (June 21, 2024, at 06:00 ET), <https://www.theguardian.com/us-news/article/2024/jun/21/louisiana-ten-commandments-law> [<https://perma.cc/R3XZ-BNY4>]; John Fritze, *Supreme Court Flooded with Prayers for Relief from Groups Eager to Promote Religion*, CNN (Sep. 30, 2024, at 06:00 ET), <https://www.cnn.com/2024/09/30/politics/supreme-court-religious-freedom-church-state/index.html> 1 [<https://perma.cc/6CFK-GZ6Z>].

³³ See, e.g., *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2126-30 (2022) (applying “history and tradition” methodology for assessing constitutionality of restrictions on right to bear arms and rejecting traditional levels of scrutiny for such analysis).

³⁴ See, e.g., *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2265-66 (2024) (reversing long-established *Chevron* doctrine of judicial deference to administrative rulemaking).

³⁵ See, e.g., Lydia DePillis, *Who Won Big in the Supreme Court's Latest Term? The “Regulated Community,”* N.Y. TIMES (Aug. 9, 2024), <https://www.nytimes.com/2024/08/09/business/supreme-court-regulated-community.html>; Dylan Tokar, *Supreme Court's Agency Power Rulings Could Change Regulatory Landscape for Years to Come*, WALL ST. J. (July 3, 2024, at 05:30 ET), <https://www.wsj.com/articles/supreme-courts-agency-power-rulings-could-change-regulatory-landscape-for-years-to-come-cec2cfef>.

existing interpretations.³⁶ This protects them from change if the Court rejects its own precedent, something it is now doing with frequency.

This Article is a response to these developments.³⁷ Part I offers a brief overview of conscientious objection in American history.³⁸ It traces the evolution of the statutory language authorizing exemptions from military service for conscientious objectors and the Supreme Court's key decisions interpreting the exemption—*United States v. Seeger*³⁹ and *Welsh v. United States*.⁴⁰ It also

³⁶ See Aaron-Andrew P. Bruhl, *Statutory Backups for Endangered Constitutional Rights*, 111 IOWA L. REV. (forthcoming 2026) (“A statutory backup right is a statutorily created right that runs parallel to a constitutional right, particularly a constitutional right that the courts currently recognize but which is regarded as being under threat of judicial abrogation.”); Ethan J. Leib & James J. Brudney, *Legislative Underwrites*, 103 VA. L. REV. 1487, 1488 (2017) (“What we call ‘legislative overrides’ occur when a legislative body gives the judiciary a ‘hear, hear!’ signaling that its interpretation is right.”).

³⁷ In recent years, individuals have claimed conscientious objector status to protest other government mandates, such as those who oppose access to contraception or abortion. See, e.g., Dov Fox, *The Lopsided Law of Medical Conscience*, 25 J. CONTEMP. LEGAL ISSUES 115, 116 (2024); Doug McConnell & Robert F. Card, *Public Reason in Justifications of Conscientious Objection in Health Care*, 33 BIOETHICS 625, 625 (2019); Nadia N. Sawicki, *The Future of Health Care Conscience Laws Post-Dobbs*, 25 J. CONTEMP. LEGAL ISSUES 35, 44 (2024); Patricia L. Selby, *On Whose Conscience? Patient Rights Disappear Under Broad Protective Measures for Conscientious Objectors in Health Care*, 83 U. DET. MERCY L. REV. 507, 520 (2006); Ronit Y. Stahl & Ezekiel J. Emanuel, *Physicians, Not Conscripts—Conscientious Objection in Health Care*, 376 NEJM 1380, 1381-82 (2017); Mark R. Wicclair, *Conscientious Objection in Medicine*, 14 BIOETHICS 205, 217 (2000). While this Article does not address the application of conscientious objector status to areas beyond military service, its argument that moral and ethical beliefs also merit protection would extend to these areas.

³⁸ Conscientious objection is recognized throughout the world in both domestic law and international law. See generally Leigh Toomey, *The Right to Conscientious Objection to Military Service: Recent Jurisprudence of the United Nations Working Group on Arbitrary Detention*, 19 HUM. RTS. L. REV. 787 (2019); Andreas Yiannaros, *Refusing to Kill: Selective Conscientious Objection and Professional Military Duties*, 17 J. MIL. ETHICS 108, 112-18 (2018); WHEN SOLDIERS SAY NO: SELECTIVE CONSCIENTIOUS OBJECTION IN THE MODERN MILITARY (Andrea Ellner, Paul Robinson & David Whetham eds., 2014); Matthew Lippman, *The Recognition of Conscientious Objection to Military Service as an International Human Right*, 21 CAL. W. INT'L L.J. 31, 32 (1990).

³⁹ 380 U.S. 163 (1965).

⁴⁰ 398 U.S. 333, 340 (1970). *United States v. Seeger* and *Welsh v. United States* generated significant attention when they were decided. See, e.g., Note, *Right to Conscientious Objection Classification for Ethical Opposition to War*, 84 HARV. L. REV. 230, 230-34 (1970); Note, *Conscientious Objectors: Recent Developments and a New Appraisal*, 70 COLUM. L. REV. 1426, 1426-28 (1970) (critically evaluating Selective Service Act's requirements that conscientious objection stems from religious belief and applies to all war in light of *Welsh* decision); J. Morris Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 332 (1969) (discussing conscientious objection to military service in analysis of Free Exercise cases); Timothy G. Todd, Note, *Religious and Conscientious Objection*, 21 STAN. L. REV. 1734, 1734 (1969) (criticizing test developed in *Seeger* as “vague,” “difficult to apply,” and “unsatisfactory”); Comment, *Constitutionality of Requiring Belief in Supreme Being for Draft Exemption as Conscientious Objector*, 64 COLUM. L. REV. 938, 950 (1964) (proposing

considers how the *Seeger-Welsh* line of reasoning has been applied in subsequent cases. Part II then examines the perilous state of the broad protections provided to individuals opposed to military service. Under Chief Justice Roberts and a conservative majority, the Supreme Court has undergone a significant shift in its approach to statutory construction and its application of the First Amendment's Religion Clauses. Its commitment to hyper-textualism and its recognition of religious-based objections to government mandates may cause the Court to reject its own precedent that equates moral and ethical beliefs with religious training and belief. In recent years, the Court has also grown comfortable overturning precedent.⁴¹ Thus, individuals who were once granted conscientious objector status based on their moral or ethical beliefs may now be forced to violate their own sincerely held beliefs or risk criminal prosecution.

Part III explains how social and political trends compound the risks facing individuals whose rejection of military service is not based on religious training and belief. In the United States, rising secularism means that more individuals may seek to claim conscientious objector status based on their secular beliefs. At the same time, religion retains a vital role in American life, and it now has significant partisan leanings.⁴² There is also the growing reality that the U.S. military will be deployed in U.S. territory by the Trump Administration, raising the likelihood that military personnel will be ordered to take action against

Congress broaden conscientious objector exemption to all sincere conscientious objectors); Note, *Conscientious Objectors*, 79 HARV. L. REV. 113, 115 (1965) (suggesting Court's expansive reading of supreme being requirement in *Seeger* was motivated by desire to "protect[] the conscientious objector provision from a constitutional crossfire"). In fact, these cases generated scholarly interest even before the Supreme Court issued its decisions. See Note, *Conscientious Objectors: Requirement of a Belief in a Supreme Being Held to Create an Unconstitutional Classification*, 1964 DUKE L.J. 901, 903 (1964).

⁴¹ Austin Sarat, *The Supreme Court Has Never in Its History Had This Much Disdain for Precedent*, SLATE (July 2, 2024, at 13:39 ET), <https://slate.com/news-and-politics/2024/07/supreme-court-john-roberts-alito-precedent-disdain-dobbs.html> [<https://perma.cc/B9ZG-NMD3>]; Jeffrey L. Fisher, Opinion, *The Other Way the Supreme Court Is Nullifying Precedent*, POLITICO (Sep. 16, 2022, at 04:30 ET), <https://www.politico.com/news/magazine/2022/09/16/supreme-court-cases-precedent-00056689>. But see Adam Liptak, *The Supreme Court's Mixed Record on Adhering to Precedent*, N.Y. TIMES (Jan. 29, 2024), <https://www.nytimes.com/2024/01/29/us/supreme-court-precedent-chevron.html> (arguing Roberts Court is overturning precedent at rate similar to earlier Courts).

⁴² GREGORY A. SMITH ET AL., *Religion, Partisanship, and Ideology, in DECLINE OF CHRISTIANITY IN THE U.S. HAS SLOWED, MAY HAVE LEVELED OFF*, PEW RSCH. CTR. (2025), <https://www.pewresearch.org/religion/2025/02/26/religion-partisanship-and-ideology> [<https://perma.cc/534B-VQBK>] ("The religious profiles of U.S. adults — how religious they are and what religion they identify with — are closely aligned with their partisan political identities.").

immigrants and even U.S. citizens.⁴³ On such occasions, the demands of conscience may conflict with military orders.⁴⁴

To address these threats, Part IV proposes amending the Military Selective Service Act to indicate that conscientious objector status is not limited to individuals motivated by religious training and belief. Recognition should extend to individuals whose beliefs emanate from moral or ethical sources. This would codify the *Seeger-Welsh* line of reasoning. This statutory guardrail would protect the status and reach of conscientious objection, a fundamental form of peaceful protest with a long history for those who oppose government-sanctioned violence.⁴⁵ This Article asserts it is the sincerely held belief, and not its origins, that matters and merits protection.⁴⁶

⁴³ C. Ryan Barber & Jimmy Vielkind, *Trump Suggests Using National Guard Against "Enemy From Within" on Election Day*, WALL ST. J. (Oct. 14, 2024, at 05:26 ET), <https://www.wsj.com/politics/elections/trump-says-he-will-use-the-national-guard-against-the-enemy-from-within-52fd4187>; Andrea Castillo, *Trump Confirms Deportation Strategy Will Include National Emergency Declaration and Military*, L.A. TIMES (Nov. 18, 2024, at 15:53 PT), <https://www.latimes.com/politics/story/2024-11-18/trump-deportation-strategy-military> [<https://perma.cc/D4CA-RHSY>]; Eric Schmitt, *Pentagon to Send 1,500 Additional Troops to U.S.-Mexico Border*, N.Y. TIMES (Jan. 22, 2025), <https://www.nytimes.com/2025/01/22/us/politics/troops-border-trump.html>; see also David E. Sanger & Helene Cooper, *Trump and the Military: A Mutual Embrace Might Dissolve on America's Streets*, N.Y. TIMES (June 4, 2022), <https://www.nytimes.com/2020/06/04/us/politics/trump-military-protests.html> (describing President Trump's threatened use of active-duty personnel against racial justice protestors).

⁴⁴ See Jennifer Nou, *Civil Servant Disobedience*, 94 CHI.-KENT L. REV. 349, 351 (2019); Keith A. Petty, *Duty and Disobedience: The Conflict of Conscience and Compliance in the Trump Era*, 45 PEPP. L. REV. 55, 58 (2018).

⁴⁵ Bruce Ledewitz, *The Vietnam Draft Cases and the Pro-Religion Equality Project*, 43 U. BALT. L. REV. 1, 3 (2014) ("No attempt to distinguish conscientious believers and conscientious nonbelievers should be made."). See generally CÉCILE LABORDE, *LIBERALISM'S RELIGION* 2 (2017); THE NEW CONSCIENTIOUS OBJECTION: FROM SACRED TO SECULAR RESISTANCE 3 (Charles C. Moskos & John Whiteclay Chambers II eds., 1993); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1248 (1994); William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 309 (1991); Comment, *The Legal Relationship of Conscience to Religion: Refusals to Bear Arms*, 38 U. CHI. L. REV. 583, 585 (1971).

⁴⁶ On the relationship between religion and other forms of belief, international law offers instructive guidance. Multiple international instruments recognize the similarities between freedom of religion and freedom of thought or belief. Each is recognized and protected. See, e.g., International Covenant on Civil and Political Rights art. 18(1), Dec. 16, 1966, 999 U.N.T.S. 171 ("Everyone shall have the right to freedom of thought, conscience and religion."); G.A. Res. 36/55, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, at 171 (Nov. 25, 1981) ("Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."); G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 74 (Dec. 10, 1948) ("Everyone has the right to freedom of thought, conscience and

I. CONSCIENTIOUS OBJECTION IN AMERICAN HISTORY

From ancient times and across religious and philosophical traditions, there have always been individuals who object to violence and reject the call of government-sanctioned violence.⁴⁷ In the United States, there is a history of granting relief to individuals who object to military service, although the recognition of conscientious objector status has also generated controversy.⁴⁸

A. *Building the Foundation of Conscientious Objection*

Members of recognized pacifist religions, including Quakers and Mennonites, appeared early in American colonial history.⁴⁹ During the Revolutionary War, many of these groups rejected the call to military service.⁵⁰ In fact, their beliefs were supported by the Continental Congress, which announced in 1775 that it would respect the beliefs of conscientious objectors:

As there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several

religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”). In 1986, the U.N. Commission on Human Rights established the Special Rapporteur on Religious Intolerance. Commission on Human Rights Res. 1986/20, U.N. Doc. E/CN.4/1986/65, at 67 (Mar. 10, 1986). While the Special Rapporteur’s title only addressed religious intolerance, its substantive mandate was much broader and included “intolerance or discrimination based on religion or belief.” *Id.* at 66. In 2000, the Special Rapporteur’s title was broadened to reflect its actual mandate: Special Rapporteur on Freedom of Religion or Belief. G.A. Res. 55/97, at 3 (Mar. 1, 2001). *See generally* ROUTLEDGE HANDBOOK OF FREEDOM OF RELIGION OR BELIEF 234-35 (Silvio Ferrari, Mark Hill QC, Arif A. Jamal & Rossella Bottoni eds., 2021).

⁴⁷ Charles C. Moskos & John Whiteclay Chambers II, *The Secularization of Conscience*, in *THE NEW CONSCIENTIOUS OBJECTION: FROM SACRED TO SECULAR RESISTANCE* 3 (Charles C. Moskos & John Whiteclay Chambers II eds., 1993) (“If the citizen soldier can be traced back to the origins of the modern Western state, an equally durable social type is the conscientious objector to military service.”).

⁴⁸ *See generally* Andrew J. Haile, *Reconsidering Selective Conscientious Objection*, 52 U. RICH. L. REV. 831, 832 (2018); Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 916 (1992); Ellis M. West, *The Right to Religion-Based Exemptions in Early America: The Case of Conscientious Objectors to Conscription*, 10 J.L. & RELIGION 367, 375 (1993); Note, *The History of Selective Service*, 17 IND. L.J. 301, 303 (1942).

⁴⁹ *See generally* CORNELIUS J. DYCK, AN INTRODUCTION TO MENNONITE HISTORY 195-97 (3d ed. 1993); JERRY WILLIAM FROST, THE QUAKER FAMILY IN COLONIAL AMERICA: A PORTRAIT OF THE SOCIETY OF FRIENDS 3 (1973).

⁵⁰ *See generally* LIBERTY AND CONSCIENCE: A DOCUMENTARY HISTORY OF THE EXPERIENCES OF CONSCIENTIOUS OBJECTORS IN AMERICA THROUGH THE CIVIL WAR 57-70 (Peter Brock ed., 2002); PETER BROCK, PACIFISM IN THE UNITED STATES: FROM THE COLONIAL ERA TO THE FIRST WORLD WAR 183 (1968).

colonies, and to do all other services to their oppressed Country, which they can consistently with their religious principles.⁵¹

Despite the support of the Continental Congress, individuals who refused to fight on behalf of the Colonies were often criticized and subjected to ostracism, imprisonment, and even banishment.⁵² Some conscientious objectors were subjected to corporal punishment for their refusal to join the state militias.⁵³ After the war, James Madison proposed adding a provision on conscientious objection to the Second Amendment, but it was ultimately rejected.⁵⁴ Because military service had not yet become federalized, statutory protection for conscientious objectors would remain a matter of state law for most of the country's first century.⁵⁵

Congress established the first national system of military conscription during the Civil War.⁵⁶ Adopted in 1863, the Enrollment Act initially provided no formal exemption to individuals who opposed military service on religious grounds.⁵⁷ Instead, it allowed individuals to purchase an exemption from military service for \$300 or "furnish an acceptable substitute to take his place in the draft."⁵⁸ In the face of significant opposition, Congress amended the statute to recognize an exemption from military service to "members of religious denominations, who shall by oath or affirmation declare that they are

⁵¹ Resolution of July 18, 1775, reprinted in 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 187, 189 (Worthington Chauncey Ford ed., 1905); see also Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1469 (1990).

⁵² NORMAN E. DONOGHUE II, PRISONERS OF CONGRESS: PHILADELPHIA'S QUAKERS IN EXILE, 1777-1778, at 23-24 (2023) (detailing banishment and imprisonment of eighteen Philadelphia Quakers for refusing conscription); R.R. Russell, *Development of Conscientious Objector Recognition in the United States*, 20 GEO. WASH. L. REV. 409, 414 (1952).

⁵³ STEPHEN M. KOHN, JAILED FOR PEACE: THE HISTORY OF AMERICAN DRAFT LAW VIOLATORS, 1658-1985, at 10 (1986).

⁵⁴ 1 ANNALS OF CONG. 451, 795-96 (1789) (Joseph Gales ed., 1834). Under Madison's proposal, the Second Amendment would have read: "The right of people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person." *Id.* at 451; see 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 (1967). A similar proposal was made by Madison to the Continental Congress, but that resolution was also rejected. 2 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 189 (Worthington Chauncey Ford ed., 1905). See generally Dru Stevenson, *Revisiting the Original Congressional Debates About the Second Amendment*, 88 MO. L. REV. 455, 463 (2023).

⁵⁵ Jeffrey Rogers Hummel, *The American Militia and the Origin of Conscription: A Reassessment*, 15 J. LIBERTARIAN STUD. 29, 33 (2001).

⁵⁶ Andrew M. Pauwels, *Mandatory National Service: Creating Generations of Civic Minded Citizens*, 88 NOTRE DAME L. REV. 2597, 2606 (2013).

⁵⁷ Enrollment Act of Mar. 3, 1863, ch. 75, § 13, 12 Stat. 731, 731 (amended 1864). The Enrollment Act was also referred to as the Conscription Act.

⁵⁸ *Id.* at 733.

conscientiously opposed to the bearing of arms, and who are prohibited from doing so by the rules and articles of faith and practice.”⁵⁹

The statutory exception for conscientious objection remained available into the twentieth century. In 1917, Congress adopted the Selective Service Act, which made several changes to military conscription. It limited eligibility for conscientious objector status to any person who is “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” as set forth in “the creed or principles” of their religious sect or organization.⁶⁰ While the statute clearly limited its application to individuals motivated by religious beliefs, President Wilson issued an executive order expanding its reach.⁶¹ Individuals “who object to participating in war because of conscientious scruples” but had failed to establish membership in a religious sect or organization would also be eligible.⁶² Despite several constitutional challenges, the Supreme Court upheld the statute in the *Selective Draft Law Cases*.⁶³ In a consolidated opinion involving six cases, the Court summarily rejected a First Amendment challenge to the statute “because we think its unsoundness is too apparent to require us to do more.”⁶⁴

After the First World War, the Supreme Court addressed conscientious objector status in several cases arising out of U.S. immigration law.⁶⁵ As a condition for naturalization, foreign nationals were required to indicate their willingness to “support and defend the Constitution and laws of the United States against all enemies.”⁶⁶ They were also required to indicate whether they were willing “to take up arms in defense of this country.”⁶⁷ Several applicants for

⁵⁹ Act of Feb. 24, 1864, ch. 13, § 17, 13 Stat. 6, 9.

⁶⁰ Selective Service Act of May 18, 1917, ch. 15, § 3, 40 Stat. 76, 78. *See generally* Laura M. Weinrib, *Freedom of Conscience in War Time: World War I and the Limits of Civil Liberties*, 65 EMORY L.J. 1051, 1065 (2016). Unlike the prior statute, the Selective Service Act no longer allowed individuals to purchase exemptions from military service.

⁶¹ U.S. WAR DEP’T, STATEMENT CONCERNING THE TREATMENT OF CONSCIENTIOUS OBJECTORS IN THE ARMY 18 (1919).

⁶² *Id.*; *see also* Haile, *supra* note 48, at 836-37; MULFORD Q. SIBLEY & PHILIP E. JACOB, CONSCRIPTION OF CONSCIENCE: THE AMERICAN STATE AND THE CONSCIENTIOUS OBJECTOR, 1940-1947, at 12-14 (1952).

⁶³ 245 U.S. 366 (1918). *See generally* Matthew Waxman, *Remembering the Selective Draft Law Cases*, LAWFARE INST. (Jan. 7, 2022, at 08:01 ET), <https://www.lawfaremedia.org/article/remembering-selective-draft-law-cases> [<https://perma.cc/DR88-K59S>].

⁶⁴ *Selective Draft Law Cases*, 245 U.S. at 390. In addition to rejecting the Free Exercise and Establishment Clause challenges, the Court also rejected a claim that a mandatory draft violated the Thirteenth Amendment, noting that military service in defense of the nation did not constitute “imposition of involuntary servitude.” *Id.*

⁶⁵ *See* United States v. Schwimmer, 279 U.S. 644, 652-53 (1929); United States v. Macintosh, 283 U.S. 605, 607-08 (1931).

⁶⁶ Naturalization Law of 1906, 8 U.S.C. § 381.

⁶⁷ *Schwimmer*, 279 U.S. at 647.

naturalization refused to make such an affirmation, and their applications were rejected. The Court upheld these decisions. While the Court appeared to acknowledge the right of conscientious objection, it also found that Congress had the authority to impose conditions on naturalization.⁶⁸ Significantly, the Court concluded that an applicant's refusal to take up arms in defense of the country and their willingness to influence others to refuse military service may signal a lack of belief in "the principles of the Constitution."⁶⁹ According to the Court, such actions disqualified an applicant from naturalization, and the courts were bound to reject their application.⁷⁰

In 1940, Congress enacted the Selective Training and Service Act, which established the first peacetime conscription system in the United States.⁷¹ In contrast to the prior statute, the Act did not attach any denominational requirement to conscientious objector status.⁷² It provided that no person would be subject to combatant training and service "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."⁷³ During the Second World War, approximately thirty-seven thousand individuals received conscientious objector status.⁷⁴ Many of these individuals served in noncombatant roles, such as medical personnel or religious positions. In addition, approximately twelve thousand individuals participated in the Civilian Public Service Program, which was established to provide public service opportunities to conscientious objectors who did not join the military.⁷⁵ On several occasions, the Supreme Court addressed procedural aspects of conscientious objector claims under the Selective Training and Service Act.⁷⁶ However, it did not address the substantive provisions of the statute.⁷⁷

⁶⁸ *Id.* at 650-52.

⁶⁹ *Id.* at 652.

⁷⁰ *Id.* at 653.

⁷¹ KRISTY N. KAMARCK, CONG. RSCH. SERV., R44452, THE SELECTIVE SERVICE SYSTEM AND DRAFT REGISTRATION: ISSUES FOR CONGRESS 5 (2021) [hereinafter CRS REPORT].

⁷² Selective Training and Service Act of 1940, Pub. L. No. 76-783, § 5(g), 54 Stat. 885, 889.

⁷³ *Id.*

⁷⁴ John Mascari, *U.S. Conscientious Objectors in World War II*, FRIENDS J. (Dec. 1, 2006), <https://www.friendsjournal.org/u-s-conscientious-objectors-world-war-ii> [<https://perma.cc/28P3-JDFC>]; ANN KRAMER, CONSCIENTIOUS OBJECTORS OF THE SECOND WORLD WAR: REFUSING TO FIGHT 3 (2013).

⁷⁵ ALBERT N. KEIM, THE CPS STORY: AN ILLUSTRATED HISTORY OF CIVILIAN PUBLIC SERVICE 8-9 (1969).

⁷⁶ See, e.g., *Estep v. United States*, 327 U.S. 114, 114-15 (1946); *Billings v. Truesdell*, 321 U.S. 542, 542-43 (1944); *Falbo v. United States*, 320 U.S. 549, 549-51 (1944).

⁷⁷ In contrast, several lower courts addressed the substantive aspects of the statute, including eligibility for conscientious objector status. See, e.g., *Berman v. United States*, 156 F.2d 377, 377-78 (9th Cir. 1946); *United States v. Kauten*, 133 F.2d 703, 707-08 (2d Cir. 1943) (evaluating whether registrant's beliefs qualified as "religious training and belief" and whether their conscientious objection was sincere). See generally Haile, *supra* note 48, at 845-49.

Following the Second World War, Congress adopted the Selective Service Act of 1948.⁷⁸ The new law provided a more extensive description of conscientious objector status. It also defined “religious training and belief.” The law is as follows:

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.⁷⁹

This amendment was significant in two respects. First, it added a requirement that “religious training and belief” must involve “an individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relation.”⁸⁰ Second, it added language to exclude “essentially political, sociological, or philosophical views or a merely personal moral code” from the definition of “religious training and belief.”⁸¹

In 1951, Congress amended the Selective Service Act by adopting the Universal Military Training and Service Act.⁸² The amendment made several procedural changes to the administration of the selective service system.⁸³ However, the new statute did not change the language setting out the standard for conscientious objector status. The statute would soon be subject to extensive litigation regarding the eligibility of individuals who did not appear to meet the statutory criteria for conscientious objector status.⁸⁴

⁷⁸ Selective Service Act of 1948, 80 Pub. L. No. 80-759, § 6(j), 62 Stat. 604.

⁷⁹ *Id.* at 612-13.

⁸⁰ *Id.* at 613.

⁸¹ *Id.*

⁸² Universal Military Training and Service Act, ch. 144, § 1(a), 65 Stat. 75, 75 (1951). *See generally* WILLIAM A. TAYLOR, EVERY CITIZEN A SOLDIER: THE U.S. ARMY’S CAMPAIGN FOR UNIVERSAL MILITARY TRAINING FOLLOWING WORLD WAR II (2010).

⁸³ *See* CRS REPORT, *supra* note 71, at 8-9.

⁸⁴ Before the Supreme Court’s seminal decisions in *Seeger* and *Welsh*, the Court addressed several procedural aspects under the statute. *See, e.g.,* *Gonzales v. United States*, 348 U.S. 407, 411-17 (1955) (holding not providing registrant copy of relevant documentation violated due process); *Simmons v. United States*, 348 U.S. 397, 404-06 (1955) (holding not providing registrant fair summary of adverse FBI information violated procedural fairness); *Witmer v. United States*, 348 U.S. 375, 382-83 (1955) (finding inconsistent statements provided factual basis for denying conscientious objector status). In *Sicurella v. United States*, however, the Supreme Court addressed a substantive issue under the statute—whether an individual’s willingness to use force in religious wars excluded him from eligibility for conscientious objector status. 348 U.S. 385, 385 (1955). The Court determined that it did not. *Id.*

B. United States v. Seeger

In *United States v. Seeger*, the Supreme Court considered whether the statutory authorization for conscientious objection in the Universal Military Training and Service Act extended to individuals who did not claim to be guided by a “belief in a relation to a Supreme Being” in their opposition to military service.⁸⁵

The Court in *Seeger* was confronted with three individuals who had refused military induction by claiming conscientious objector status. Daniel Seeger explained that his “skepticism or disbelief in the existence of God” did “not necessarily mean lack of faith in anything whatsoever.”⁸⁶ He cited several philosophers, including Plato, Aristotle, and Spinoza, as providing support for his ethical beliefs “without belief in God, except in the remotest sense.”⁸⁷ While Seeger was convicted by the district court, his conviction was reversed by the Second Circuit.⁸⁸ Arno Sascha Jakobson, another conscientious objector, defined religion as the “*sum and essence of one’s basic attitudes to the fundamental problems of human existence*.”⁸⁹ Jakobson had also been convicted by the district court, and his conviction was also reversed by the Second Circuit.⁹⁰ Forest Britt Peter, also a conscientious objector, indicated that he was not a member of any religious sect or organization and that he defined religion as “the consciousness of some power manifest in nature which helps man in the ordering of his life in harmony with its demands.”⁹¹ Peter was convicted by the district court, and his conviction was affirmed by the Ninth Circuit.⁹²

On appeal to the Supreme Court, the government argued that each defendant had failed to meet the statutory requirements contained in the Universal Military Training and Service Act.⁹³ In response, the defendants challenged the government’s refusal to recognize their conscientious objector status on constitutional grounds.⁹⁴ Specifically, they argued that the statute violated the Establishment Clause and the Free Exercise Clause for two reasons. First, the statute did “not exempt non-religious conscientious objectors.”⁹⁵ Second, the statute “discriminates between different forms of religious expression.”⁹⁶ While

⁸⁵ *United States v. Seeger*, 380 U.S. 163, 165-66 (1965) (quoting Universal Military Training and Service Act).

⁸⁶ *Id.* at 166.

⁸⁷ *Id.*

⁸⁸ *See United States v. Seeger*, 326 F.2d 846, 853-54 (2d Cir. 1964).

⁸⁹ *Seeger*, 380 U.S. at 168.

⁹⁰ *United States v. Jakobson*, 325 F.2d 409, 415-17 (2d Cir. 1963).

⁹¹ *Seeger*, 380 U.S. at 169.

⁹² *See Peter v. United States*, 324 F.2d 173, 176-77 (9th Cir. 1963).

⁹³ *Seeger*, 380 U.S. at 166-69.

⁹⁴ *Id.* at 165. Jakobson and Peter also argued their claims fell within the statutory language.

⁹⁵ *Id.*

⁹⁶ *Id.*

the parties raised constitutional challenges to the statute, the Court focused its analysis on the statutory text.⁹⁷

Writing for the majority, Justice Clark acknowledged the long-established principle of conscientious objection in American history. According to the Court, “[g]overnmental recognition of the moral dilemma posed for persons of certain religious faiths by the call to arms came early in the history of this country.”⁹⁸ The Court offered several reasons for such recognition. It noted that “in the forum of conscience, duty to a moral power higher than the State has always been maintained.”⁹⁹ Moreover, “both morals and sound policy require that the state should not violate the conscience of the individual.”¹⁰⁰

The Court then examined the legislative history of conscientious objection. It recognized that Congress had changed the statutory language on several occasions.¹⁰¹ For example, the Selective Draft Act of 1917 limited conscientious objector status to individuals who belonged to a “well-recognized religious sect or organization” that prohibited its members from participating “in war in any form.”¹⁰² In the 1940 Selective Training and Service Act, Congress revised that language so that conscientious objector status was available based on an individual’s “religious training and belief.”¹⁰³ Congress amended the statute again in 1948 by indicating that “religious training and belief” would be defined 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.”¹⁰⁴

While the parties had raised two constitutional challenges premised on the First Amendment, the Court declined to address them. Instead, it narrowed the scope of inquiry by focusing on the statutory language and examining which beliefs were clearly outside the statute’s reach. It noted that “[t]he section excludes those persons who, disavowing religious belief, decide on the basis of essentially political, sociological or economic considerations that war is wrong and that they will have no part of it.”¹⁰⁵ The section also excluded individuals “whose opposition to war stems from a ‘merely personal moral code.’”¹⁰⁶ In addition, the Court further narrowed its scope of inquiry by noting that “[n]o

⁹⁷ *Id.*

⁹⁸ *Id.* at 170.

⁹⁹ *Id.* at 169-70 (quoting *United States v. Macintosh*, 283 U.S. 605, 633 (1931) (Hughes, C.J., dissenting)).

¹⁰⁰ *Id.* at 170 (quoting Harlan Fiske Stone, *The Conscientious Objector*, 21 COLUM. U. Q. 253, 269 (1919)).

¹⁰¹ *See id.* at 169-79.

¹⁰² Selective Draft Act of May 18, 1917, ch. 15, § 3, 40 Stat. 76, 78.

¹⁰³ Selective Training and Service Act of 1940, Pub. L. No. 76-783, § 5(g), 54 Stat. 885, 889.

¹⁰⁴ Selective Service Act of 1948, 80 Pub. L. No. 80-759, § 6(j), 62 Stat. 604, 612-13.

¹⁰⁵ *Seeger*, 380 U.S. at 173.

¹⁰⁶ *Id.*

party claims to be an atheist or attacks the statute on this ground.”¹⁰⁷ Thus, the case did not involve distinctions “between theistic and atheistic beliefs.”¹⁰⁸ By narrowing its scope of inquiry, the Court was able to sidestep the constitutional questions and focus solely on statutory interpretation: “Does the term ‘Supreme Being’ as used in § 6(j) mean the orthodox God or the broader concept of a power or being, or a faith, ‘to which all else is subordinate or upon which all else is ultimately dependent’?”¹⁰⁹

In analyzing the statutory language, the Court focused on two phrases. First, the Court examined the phrase “Supreme Being” to determine whether it meant “the orthodox God or the broader concept of a power or being, or a faith, ‘to which all else is subordinate or upon which all else is ultimately dependent’?”¹¹⁰ To answer this question, the Court noted that a multitude of faiths and creeds existed within the United States.¹¹¹ Confronted with this diversity, the Court believed that Congress sought to craft a statutory definition that would capture “[t]his vast panoply of beliefs.”¹¹² Second, the Court indicated that the phrase “religious training and belief” was also meant to have a broad interpretation that would capture “all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent.”¹¹³ The appropriate test for assessing this was to examine whether an individual has “a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption [] within the statutory definition.”¹¹⁴ Stated differently, “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?”¹¹⁵ The Court indicated that this construction was consistent with other provisions of federal law, such as the Immigration and Nationality Act.¹¹⁶ It also matched the “ever-broadening understanding of the modern

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 174.

¹¹⁰ *Id.* (quoting G. & C. MERRIAM CO., WEBSTER’S NEW INTERNATIONAL DICTIONARY (2d ed. 1937)).

¹¹¹ *Id.* at 174 (“Over 250 sects inhabit our land. Some believe in a purely personal God, some in a supernatural deity; others think of religion as a way of life envisioning as its ultimate goal the day when all men can live together in perfect understanding and peace.”).

¹¹² *Id.* at 175.

¹¹³ *Id.* at 175-76.

¹¹⁴ *Id.* at 176. According to the Court, “[t]his construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well-established congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets.” *Id.*

¹¹⁵ *Id.* at 184.

¹¹⁶ *Id.* at 180 & n.3 (citing Immigration and Nationality Act, 8 U.S.C. § 1448(a)).

religious community.”¹¹⁷ Finally, the Court acknowledged that an individual’s claim “that his belief is an essential part of a religious faith must be given great weight.”¹¹⁸ While some theologians might question whether an individual manifests religious beliefs, the Court noted that the government is foreclosed from raising such challenges.¹¹⁹

Applying this framework, the Court determined that each of the three defendants was eligible for conscientious objector status under the statute.¹²⁰ They did not claim that their beliefs were based “on a ‘merely personal moral code.’”¹²¹ In addition, they did not claim to be atheists.¹²² Instead, they each claimed that their objections to military service were based on religious beliefs to “which all else is ultimately dependent.”¹²³ Through this statutory analysis, the Court was able to avoid resolving the underlying constitutional challenges.

In concurrence, Justice Douglas agreed with the Court’s decision.¹²⁴ His opinion is significant because it reveals that several Justices were concerned about the constitutionality of the statute and chose to use the doctrine of constitutional avoidance to sidestep the issue.¹²⁵ He found the Court’s interpretation of the statute, while expansive, to be “no more so than other instances where we have gone to extremes to construe an Act of Congress to save it from demise on constitutional grounds.”¹²⁶ To hold otherwise would give

¹¹⁷ *Id.* at 180. The Court referenced several religious leaders whose views reflected the “broad spectrum of religious beliefs found among us.” *Id.* at 183.

¹¹⁸ *Id.* at 184.

¹¹⁹ *Id.* (“Some theologians . . . might be tempted to question the existence of the registrant’s ‘Supreme Being’ or the truth of his concepts. But these are inquiries foreclosed to Government.”).

¹²⁰ *Id.* at 187-88.

¹²¹ *Id.* at 186 (quoting Universal Military Training and Service Act, Pub. L. No. 759, ch. 625, 62 Stat. 604, 613 (1948) (codified as amended at 50 U.S.C. § 3806)) (“The use by Congress of the words ‘merely personal’ seems to us to restrict the exception to a moral code which 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.”).

¹²² *Id.* at 173-74.

¹²³ *Id.* at 176, 186. Seeger did not “disavow any belief ‘in a relation to a Supreme Being,’” and “stated that ‘the cosmic order does, perhaps, suggest a creative intelligence.’” *Id.* at 187. The Court found that both Jakobson’s and Peter’s beliefs could also be related to a Supreme Being. *Id.* at 187-88.

¹²⁴ *Id.* at 188 (Douglas, J., concurring).

¹²⁵ See Theodore F. Denno, *Welsh Reaffirms Seeger: From a Remarkable Feat of Judicial Surgery to a Lobotomy*, 46 IND. L.J. 37, 39-41 (1970); Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397, 438 n.246 (2005). See generally Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275, 1275 (2016); Brian G. Slocum, *Rethinking the Canon of Constitutional Avoidance*, 23 U. PA. J. CONST. L. 593, 593, 595 (2021).

¹²⁶ *Seeger*, 380 U.S. at 188 (Douglas, J., concurring). Justice Douglas added that “[i]n a more extreme case than the present one we said that the words of a statute may be strained ‘in

rise to significant constitutional concerns with the Free Exercise Clause of the First Amendment.¹²⁷ And, because a different interpretation would “result in a denial of equal protection by preferring some religions over others[,] . . . [such] an invidious discrimination [] would run afoul of the Due Process Clause of the Fifth Amendment.”¹²⁸

Following the Court’s decision in *Seeger*, Congress amended the Universal Military Training and Service Act. In response to constitutional concerns, Congress deleted the phrase “Supreme Being” from the eligibility criteria for conscientious objector status.¹²⁹ However, it retained the phrase “religious training and belief” and the corresponding restriction that the exemption did not include “essentially political, sociological, or philosophical views, or a merely personal code.”¹³⁰ The Court would soon consider the revised statute in a case arising out of objections to military service in the Vietnam War.

C. *Welsh v. United States*

In *Welsh v. United States*, the Supreme Court considered whether individuals could claim conscientious objector status even though they denied that their claim was based on religious training and belief.¹³¹

When Elliot Ashton Welsh applied for conscientious objector status, he explicitly rejected any religious basis for his beliefs. Significantly, he struck the words “religious training” from his application.¹³² In explaining his reasons for seeking conscientious objector status, Welsh wrote:

I can only act according to what I am and what I see. And I see that the military complex wastes both human and material resources, that it fosters disregard for (what I consider a paramount concern) human needs and ends; I see that the means we employ to “defend” our “way of life” profoundly change that way of life. I see that in our failure to recognize the political, social, and economic realities of the world, we, *as a nation*, fail our responsibility *as a nation*.¹³³

the candid service of avoiding a serious constitutional doubt.” *Id.* (quoting *United States v. Rumely*, 345 U.S. 41, 47 (1953)).

¹²⁷ *Id.*

¹²⁸ *Id.* While the Fifth Amendment lacked an Equal Protection Clause, Justice Douglas cited to the Court’s decision in *Bolling v. Sharpe*, which held that discrimination may violate the Due Process Clause. *Id.* (citing *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)).

¹²⁹ Military Selective Service Act of 1967, Pub. L. No. 90-40, § 7, 81 Stat. 100, 104. *See generally* CRS REPORT, *supra* note 71, at 12; Michael E. Tigar & Robert J. Zweben, *Selective Service: Some Certain Problems and Some Tentative Answers*, 37 GEO. WASH. L. REV. 510 (1969).

¹³⁰ § 7, 81 Stat. at 104; CRS REPORT, *supra* note 71, at 12 (noting Congressional amendment creating Military Selective Service Act of 1967). *See generally* Tigar & Zweben, *supra* note 129.

¹³¹ *Welsh v. United States*, 398 U.S. 333, 333 (1970).

¹³² *Id.* at 337.

¹³³ *Id.* at 342.

Welsh also explained his opposition to taking a human life. He articulated that “the taking of life—anyone’s life—[is] morally wrong.”¹³⁴ In the original application, he wrote:

This belief (and the corresponding “duty” to abstain from violence toward another person) is not “superior to those arising from any human relation.” On the contrary: it is essential to every human relation. I cannot, therefore, conscientiously comply with the Government’s insistence that I assume duties which I feel are immoral and totally repugnant.¹³⁵

Welsh’s application for conscientious objector status was rejected by his local draft board and appeal board.¹³⁶ When he refused to submit to military induction, he was prosecuted and convicted.¹³⁷ The federal district court concluded that Welsh could not claim conscientious objector status under the Universal Military Training and Service Act because he had rejected any religious basis for his beliefs.¹³⁸ On appeal, the Ninth Circuit affirmed the conviction.¹³⁹ The Supreme Court granted certiorari and reversed the conviction in a plurality decision.¹⁴⁰

Writing for the plurality, Justice Black argued Welsh’s conviction was inconsistent with the Court’s earlier decision in *Seeger*.¹⁴¹ Because the plurality viewed *Seeger* as factually similar and, therefore, controlling, it did not rule on the asserted constitutional challenges to the Universal Military Training and Service Act.¹⁴² Despite the plurality’s insistence that the controlling facts in both cases were “strikingly similar,” *Welsh* differed significantly from *Seeger*.¹⁴³ Concededly, both *Seeger* and *Welsh* shared similar upbringings and initial views toward religion. Similarly, “[t]heir views on war developed [] in subsequent years [] when their ideas did fully mature” and “both made application to their local draft boards for conscientious objector exemptions from military

¹³⁴ *Id.* at 343.

¹³⁵ *Id.*

¹³⁶ *Welsh v. United States*, 404 F.2d 1078, 1080 (9th Cir. 1968). Welsh was designated I-A-O by the draft board, which recognized his conscientious objector status but still required him to serve in the military in a non-combat role. Welsh objected to this designation. *Id.*

¹³⁷ *Id.* at 1081.

¹³⁸ *Id.* at 1080.

¹³⁹ *Id.* at 1086. The appellate court declined to address the constitutional challenge to the “religious training and belief” language because Welsh had not addressed it in his written submissions. *Id.* at 1082. The court noted, however, that this claim would fail in light of existing Ninth Circuit precedent. *Id.* In dissent, however, Judge Hamley argued that the constitutional challenge should have been considered and that Welsh’s claims raised significant concerns under the Establishment Clause. *Id.* at 1087, 1092 (Hamley, J., dissenting).

¹⁴⁰ *Welsh v. United States*, 398 U.S. 333, 343-44 (1970).

¹⁴¹ *Id.* at 335. For the plurality, Justice Black was joined by Justices Douglas, Brennan, and Marshall. Justice Blackmun did not participate in the Court’s deliberations.

¹⁴² *Id.*

¹⁴³ *Id.*

service.”¹⁴⁴ At this point, however, the similarities end. Seeger professed “religious belief” and “religious faith.”¹⁴⁵ He also “did not disavow any belief ‘in a relation to a Supreme Being.’”¹⁴⁶ In contrast, Welsh rejected any religious basis for his beliefs, striking the words “religious training” from his exemption application.¹⁴⁷

As in *Seeger*, the plurality sought to avoid assessing the constitutionality of the conscientious objector statute. It did so in two ways. First, the plurality found the “exclusion of those persons with ‘essentially political, sociological, or philosophical views or a merely personal moral code’ should [not] be read to exclude those who hold strong beliefs about our domestic and foreign affairs or . . . upon considerations of public policy.”¹⁴⁸ Second, the plurality stated that the exclusion of those persons whose objection to war “rests solely upon considerations of policy, pragmatism, or expediency” should not be read to exclude those “whose objections to war” rest “upon moral, ethical, or religious principle.”¹⁴⁹ Significantly, the Court characterized these exclusions as “definitional” and explained that they did not “restrict the category of persons who are conscientious objectors by ‘religious training and belief.’”¹⁵⁰

Building on the *Seeger* Court’s analysis of the conscientious objector statute, the plurality noted that “sincere and meaningful beliefs . . . need not be confined in either source or content to traditional or parochial concepts of religion.”¹⁵¹ An individual who holds deep and sincere beliefs “that are purely ethical or moral in source and content” is also eligible for conscientious objector status under the statute if those beliefs are “held with the strength of traditional religious convictions.”¹⁵² Significantly, the plurality found that ethical or moral beliefs essentially function as a religion to these individuals.¹⁵³ Therefore, an individual’s opposition to war based on moral or ethical beliefs “about what is right and wrong” falls within the statutory language as long as these beliefs are “held with the strength of traditional religious convictions.”¹⁵⁴

The Court’s willingness to describe Welsh’s beliefs as equivalent to religious beliefs, despite his own statements, reveals the expansive nature of the Court’s definition of religious training and belief, and the extent to which the Court sought to avoid the underlying constitutional question. Welsh had crossed out the words “religious training” on his application for conscientious objector

¹⁴⁴ *Id.* at 336.

¹⁴⁵ *United States v. Seeger*, 380 U.S. 163, 187 (1965).

¹⁴⁶ *Id.*

¹⁴⁷ *Welsh*, 398 U.S. at 337.

¹⁴⁸ *Id.* at 342.

¹⁴⁹ *Id.* at 342-43.

¹⁵⁰ *Id.* at 343.

¹⁵¹ *Id.* at 339.

¹⁵² *Id.* at 340.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

status.¹⁵⁵ He “characterized his beliefs as having been formed ‘by reading in the fields of history and sociology.’”¹⁵⁶ He stated to a hearing officer that he did not characterize his beliefs as “religious.”¹⁵⁷ Despite these statements and actions, the Court declined to attach “undue emphasis” to Welsh’s “interpretation of his own beliefs.”¹⁵⁸ The Court noted that few applicants for conscientious objector status are “fully aware of the broad scope of the word ‘religious’ as used” in the statute.¹⁵⁹ Accordingly, the Court explained that “a registrant’s statement that his beliefs are nonreligious is a highly unreliable guide.”¹⁶⁰

Welsh’s beliefs were found to be held “with the strength of more traditional religious convictions.”¹⁶¹ Thus, Welsh was “clearly entitled to a conscientious objector exemption.”¹⁶² In fact, the plurality determined that the statutory exemption applied to all individuals who were motivated by deeply held moral, ethical, or religious beliefs.¹⁶³

Writing separately, Justice Harlan concurred with the result, although he expressed strong reservations with the plurality’s interpretation of the conscientious objector statute.¹⁶⁴ While he had joined the Court’s earlier decision in *Seeger*, Justice Harlan now acknowledged this was a mistake. He argued that by seeking to interpret the statute to avoid any “constitutional infirmities,” the Court had strained the statutory language beyond its configuration.¹⁶⁵ As a result, the plurality “opinion makes explicit its total elimination of the statutorily required religious content for a conscientious objector exemption.”¹⁶⁶ In light of the plurality’s interpretation, Justice Harlan believed the statute now read: “‘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’ [] he qualifies for a § 6(j) exemption.”¹⁶⁷ Such an interpretation only works, Justice Harlan explained, if we “assume an Alice-in-

¹⁵⁵ *Id.* at 341.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 342.

¹⁵⁸ *Id.* at 341.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* The plurality’s willingness to discount Welsh’s interpretation stands in contrast to the *Seeger* decision, when the Court held that “the claim of the registrant that his belief is an essential part of a religious faith must be given great weight.” *United States v. Seeger*, 380 U.S. 163, 184 (1965).

¹⁶¹ *Welsh*, 398 U.S. at 343.

¹⁶² *Id.*

¹⁶³ *Id.* at 344.

¹⁶⁴ *Id.* (Harlan, J., concurring).

¹⁶⁵ *Id.* at 345.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*; cf. William J. Aceves, *Shadow Amendments*, 60 HARV. J. ON LEGIS. 27, 30-35 (2023) (examining how Supreme Court interpretations function as de facto amendments to statutes).

Wonderland world where words have no meaning.”¹⁶⁸ In more colorful language, he described the Court’s statutory analysis in both *Seeger* and *Welsh* as “a remarkable feat of judicial surgery” that “performed a lobotomy” by removing “the theistic requirement” from the statute.¹⁶⁹

While Justice Harlan recognized the value of interpreting statutes to avoid a constitutional question, he was unwilling to extend the avoidance canon further in this case. The majority decision in *Seeger* and the plurality decision in *Welsh* “exempting from military service all individuals who in good faith oppose all war” extended the statutory language far beyond its intended effect.¹⁷⁰ Justice Harlan believed the statutory language clearly intended to distinguish “between theistic and nontheistic religions” and that this was the only interpretation “consistent with the legislative history.”¹⁷¹ Refusing to ignore the plain text and unwilling to extend the doctrine of constitutional avoidance beyond its breaking point, Justice Harlan “turn[ed] to the constitutional question.”¹⁷² According to Justice Harlan, the statute’s explicit language limiting conscientious objector status to individuals expressing “religious beliefs” violated the Establishment Clause because it drew a line “between theistic or nontheistic religious beliefs on the one hand and secular beliefs on the other.”¹⁷³ The statute was underinclusive because it “not only accords a preference to the ‘religious,’ but also disadvantages adherents of religions that do not worship a Supreme Being.”¹⁷⁴

Despite these reservations, Justice Harlan found it possible to reverse the conviction. Confronted with an underinclusive statute, Justice Harlan argued the Court should interpret it “to include those who are aggrieved by exclusion.”¹⁷⁵ This would perpetuate the underlying policy of the statute, which was a “longstanding tradition in this country.”¹⁷⁶ It would also accord “recognition to what is, in a diverse and ‘open’ society, the important value of reconciling individuality of belief with practical exigencies whenever possible.”¹⁷⁷ This interpretation supported a reversal of *Welsh*’s conviction: “I am [thus] prepared to accept the prevailing opinion’s conscientious objector test, not as a reflection

¹⁶⁸ *Welsh*, 398 U.S. at 354 (Harlan, J., concurring).

¹⁶⁹ *Id.* at 351.

¹⁷⁰ *Id.* at 347.

¹⁷¹ *Id.* at 348.

¹⁷² *Id.* at 356.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 357.

¹⁷⁵ *Id.* at 361. According to Justice Harlan, the alternative would be to declare the entire statute “a nullity and order that its benefits not extend to the class that the legislation intended to benefit.” *Id.*

¹⁷⁶ *Id.* at 365.

¹⁷⁷ *Id.* at 365-66.

of congressional statutory intent but as patchwork of judicial making that cures the defect of underinclusion” in the statute.¹⁷⁸

In his dissent, Justice White rejected the plurality’s broad construction of the statute, and its decision to construe the statute as “extending draft exemption to those who disclaim religious objections to war and whose views about war represent a purely personal code arising not from religious training and belief as the statute requires but from readings in philosophy, history, and sociology.”¹⁷⁹ As a matter of statutory construction, he noted that the statute was clearly intended to exclude individuals such as Welsh, and “that conclusion should end this case.”¹⁸⁰ In addition, Justice White argued that Welsh had no constitutional basis to challenge his statutory exclusion from the exemption.¹⁸¹ He reasoned that even if the Establishment Clause prevented Congress from extending conscientious objector status to individuals on religious grounds, this would not compel extending this status to Welsh.¹⁸² Thus, he concluded “nothing in the First Amendment prohibits drafting Welsh and other nonreligious objectors to war.”¹⁸³

Even if Welsh could raise an Establishment Clause argument, Justice White would still have affirmed his conviction.¹⁸⁴ Congress may have decided to provide conscientious objector status to individuals opposed to war by reason of religious training and belief for two reasons.¹⁸⁵ First, Congress may have had legitimate reasons to adopt the exemption that were unrelated to furthering religious belief or practice.¹⁸⁶ For example, the statutory exemption “may represent a purely practical judgment that religious objectors, however admirable, would be of no more use in combat than many others unqualified for military service.”¹⁸⁷ Under the Court’s Establishment Clause jurisprudence, the statute would be constitutional if the exemption “has neither the primary purpose nor the effect of furthering religion.”¹⁸⁸ Second, Congress could have adopted

¹⁷⁸ *Id.* at 366-67. In fact, Justice Harlan suggested that this approach would be more manageable “than the arcane inquiry required to determine whether beliefs are religious or secular in nature.” *Id.* at 367 n.19.

¹⁷⁹ *Id.* at 367 (White, J., dissenting). Justice White was joined in dissent by Chief Justice Burger and Justice Stewart.

¹⁸⁰ *Id.* at 368.

¹⁸¹ *Id.*

¹⁸² *Id.* The dissent’s analysis was informed by the Court’s standing requirements: “[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional.” *Id.* at 368-69 (quoting *United States v. Raines*, 362 U.S. 17, 21 (1960)).

¹⁸³ *Id.* at 369.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

the exemption “because otherwise religious objectors would be forced into conduct that their religions forbid and . . . to deny the exemption would violate the Free Exercise Clause or at least raise grave problems in this respect.”¹⁸⁹ If Congress had determined that conscientious objector status was necessary to protect the “free exercise of religion,” Justice White was “reluctant to frustrate the legislative will by striking down the statutory exemption because it does not also reach those to whom the Free Exercise Clause offers no protection whatsoever.”¹⁹⁰

D. *Affirming the Seeger-Welsh Line of Reasoning*

Following the Supreme Court’s decision in *Welsh*, the Director of the Selective Service System issued Local Board Memorandum No. 107 to clarify the criteria for conscientious objector status.¹⁹¹ The Memorandum was issued to assist local draft boards that were tasked with selecting individuals for military service.¹⁹² It identified three core elements for establishing conscientious objector status under the Military Selective Service Act: “(a) That a registrant be opposed to participation in war in any form; (b) That his objection be founded on religious training and belief; and (c) That his position be something other than ‘essentially political, sociological, or philosophical views, or a merely personal moral code.’”¹⁹³ In order to comply with the *Seeger-Welsh* line of reasoning, the Memorandum then offered a detailed explication of “religious training and belief.”¹⁹⁴

Pursuant to Memorandum No. 107, “[t]he belief upon which conscientious objection is based must be the primary controlling force in the man’s life.”¹⁹⁵

¹⁸⁹ *Id.* at 369-70.

¹⁹⁰ *Id.* at 374.

¹⁹¹ Loc. Bd. Memorandum No. 107 from Selective Serv. Sys. (July 6, 1970) (on file with author) [hereinafter Memorandum No. 107]; see Jay R. Dingley, *Welsh v. United States: A New Substantive Definition for Conscientious Objectors*, 32 OHIO ST. L.J. 653, 665 (1971); Note, *Right to Conscientious Objection Classification for Ethical Opposition to War*, 84 HARV. L. REV. 230, 233 (1970).

¹⁹² The Selective Service local boards were established to identify candidates for military service and to consider exemption claims. LESLIE STEVEN ROTHENBERG, *THE DRAFT AND YOU: A HANDBOOK ON THE SELECTIVE SERVICE SYSTEM* 9 (1968); Tigar & Zweben, *supra* note 129, at 511-14. In 1968, there were over four thousand local boards in the United States. Tigar & Zweben, *supra* note 129, at 511. The local boards were often criticized for the lack of consistency in their decision-making, as well as the lack of clarity in their decisions. Jay W. Luther, *Books*, 69 COLUM. L. REV. 1307, 1309 (1969) (book review); Edward A. Tomlinson, *Tigar: Selective Service Law Reporter*, 67 MICH. L. REV. 854, 855 (1969) (book reviews).

¹⁹³ Memorandum No. 107, *supra* note 191, at 1.

¹⁹⁴ The *Welsh* decision generated significant confusion and commentators suggested that further clarification from Congress or the Supreme Court would be needed. JOHNNY H. KILLIAN, LEGIS. REFERENCE SERV., CONSCIENTIOUS OBJECTION AND THE CONSTITUTION: *WELSH V. UNITED STATES* AND BEYOND 19-20 (1970).

¹⁹⁵ Memorandum No. 107, *supra* note 191, at 2.

While the Selective Service System distinguishes between religious and non-religious beliefs, it treats them similarly for purposes of establishing conscientious objector status. Thus, the “term ‘religious training and belief’ as used in the law may include solely moral or ethical beliefs, even though the registrant himself may not characterize these beliefs as ‘religious’ in the traditional sense, or may expressly characterize them as not ‘religious.’”¹⁹⁶ Memorandum No. 107 repeatedly uses “religious beliefs” to assess the validity of non-religious beliefs. Thus, a registrant’s objection to war “must stem from his moral, ethical, or religious beliefs about what is right and should be done and what is wrong and should be shunned, and he must hold these beliefs with the strength of traditional religious conviction.”¹⁹⁷ Similarly, “[t]he registrant must demonstrate that his ethical or moral convictions were gained through training, study, contemplation, or other activity, comparable in rigor and dedication to the processes by which traditional religious convictions are formulated.”¹⁹⁸ In addition, “[t]he registrant must show that these moral and ethical convictions, once acquired, have directed his life in the way traditional religious convictions of equal strength, depth, and duration have directed the lives of those whose beliefs are clearly founded in traditional religious conviction.”¹⁹⁹ Finally, Memorandum No. 107 instructs local draft boards that “[a]ll religions or beliefs are to be given equal consideration.”²⁰⁰

In subsequent decisions, the Supreme Court reaffirmed the *Seeger-Welsh* line of reasoning and its interpretation that the conscientious objector exemption did not violate the First Amendment.²⁰¹ In *Gillette v. United States*,²⁰² for example, the Court considered whether individuals who only objected to participation in particular wars met the statutory requirements for conscientious objector status.²⁰³ In an 8-1 decision, the Court determined these individuals were not exempt from military service, citing both *Seeger* and *Welsh* in support of its

¹⁹⁶ *Id.* Memorandum No. 107 also clarifies the nature and scope of “religious beliefs.” Thus, “[t]he registrant need not believe in a traditional ‘God’ or a ‘Supreme Being’ to be considered favorably.” *Id.* Similarly, the registrant is not required to “be a member of a ‘peace church’ or any church, religious organization, or religious sect, nor does the law require affiliation with any particular group in order to be classified as a conscientious objector.” *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 3.

²⁰¹ The Court’s decision in *Welsh* generated some controversy when it was issued. See generally, e.g., David M. Fitzgerald, *A Proposed Form for Local Board Consideration of Conscientious Objector Claims*, 5 U. MICH. J.L. REFORM 279 (1972); Curtis W. Tarr, *Selective Service and Conscientious Objectors*, 57 A.B.A. J. 976 (1971).

²⁰² 401 U.S. 437 (1971).

²⁰³ *Id.* at 437. *Gillette* was a consolidated case that involved the claims of two individuals, Guy Porter Gillette, who had failed to report for military induction, and Louis Negre, who had already been inducted and sought discharge from the military as a conscientious objector. *Id.*

reasoning.²⁰⁴ The Court found that the statutory language of the 1967 Military Selective Service Act required an applicant to oppose participation in all wars and that conscientious objector status was not available to those who only opposed participation in particular wars.²⁰⁵ The Court also rejected the argument that such restrictions violated the First Amendment.²⁰⁶ It found the statute was neutral toward religions and that secular needs justified the conscientious objection provision.²⁰⁷

While the majority opinion in *Gillette* did not directly address the meaning of “religious training and belief,” Justice Douglas addressed the term in his dissent.²⁰⁸ He noted the close relationship between religious faith and conscience, viewing conscience as “the echo of religious faith.”²⁰⁹ Acknowledging that the “First Amendment speaks of the free exercise of religion, [and] not of the free exercise of conscience or belief,” he found that “conscience and belief are the main ingredients of First Amendment rights” and that they represent “the bedrock of free speech as well as religion.”²¹⁰

Citing to the writings of Leo Tolstoy as well as the *Seeger-Welsh* line of reasoning, Justice Douglas concluded that the “constitutional infirmity” of the conscientious objector statute became “obvious once ‘conscience’ is the guide.”²¹¹ He found that the statute’s textual restriction of conscientious objection “in favor of religious persons and against others with like scruples” reflected “an invidious discrimination.”²¹²

Indeed, Justice Douglas argued that such discrimination violated both the First Amendment and the Fifth Amendment. Quoting from the Court’s recent unanimous decision in *Epperson v. Arkansas*,²¹³ Justice Douglas noted that “[t]he First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.”²¹⁴ Justice Douglas made his

²⁰⁴ *Id.* at 443, 445. At the same time, the Court indicated that the meaning of “religious training and belief” was not at issue in *Gillette*. *Id.* at 447.

²⁰⁵ *Id.* at 443.

²⁰⁶ *Id.* at 450-51.

²⁰⁷ *Id.* at 454-55.

²⁰⁸ *Id.* at 463 (Douglas, J., dissenting). Justice Douglas’s opinion addressed the consolidated cases separately in his dissent.

²⁰⁹ *Id.* at 466.

²¹⁰ *Id.* at 465-66.

²¹¹ *Id.* at 468. In *Writings on Civil Disobedience and Non-Violence*, Leo Tolstoy wrote that a person may object to military service, “not from religious motives, but from motives of the simplest kind, motives intelligible and common to all men, of whatever religion or nation.” LEO TOLSTOY, *TOLSTOY’S WRITINGS ON CIVIL DISOBEDIENCE AND NON-VIOLENCE* 12 (1967).

²¹² *Gillette*, 401 U.S. at 468 (Douglas, J., dissenting).

²¹³ 393 U.S. 97 (1968). In *Epperson*, the Court struck down an Arkansas statute that prohibited the teaching of evolution in public schools. *Id.* at 108-09. The Court held that the statute violated the Establishment Clause. *Id.* at 103.

²¹⁴ *Gillette*, 401 U.S. at 469 (Douglas, J., dissenting) (quoting *Epperson*, 393 U.S. at 103-04).

point even more directly by quoting from Justice Black's dissenting opinion in *Zorach v. Clauson*,²¹⁵ which stated that "[t]he First Amendment has lost much if the religious follower and the atheist are no longer to be judicially regarded as entitled to equal justice under law."²¹⁶ Justice Douglas acknowledged that such disparate treatment also violated the Due Process Clause of the Fifth Amendment, which prohibited "invidious classifications" such as segregation by race.²¹⁷ Ultimately, Justice Douglas concluded that a "classification of 'conscience' based on a 'religion' and a 'conscience' based on more generalized, philosophical grounds is equally invidious by reason of our First Amendment standards."²¹⁸

Three months after issuing its decision in *Gillette*, the Supreme Court considered the case of Muhammad Ali.²¹⁹ In *Clay v. United States*, the Court examined Ali's claim for conscientious objector status, which had been rejected by Ali's local draft board, the Kentucky Appeal Board, and the Fifth Circuit.²²⁰

Ali's arguments against military induction were clearer but also more complicated than either Seeger's or Welsh's arguments. In legal proceedings, Ali repeatedly argued that his decision to refuse induction was based on his religious beliefs: "I refuse to be inducted into the armed forces of the United States because I claim to be exempt as a minister of the religion of Islam."²²¹ In public, however, Ali also expressed an unwillingness to fight for an oppressive government engaged in racial discrimination.²²² "My conscience won't let me

²¹⁵ 343 U.S. 306 (1952). In *Zorach*, the Court upheld a New York statute that permitted public schools to allow children to leave school during the day in order to receive religious instruction off campus. *Id.* at 306. The Court held the statute did not violate the Establishment Clause. *Id.* at 314-15.

²¹⁶ *Gillette*, 401 U.S. at 468-69 (Douglas, J., dissenting) (quoting *Zorach*, 343 U.S. at 320).

²¹⁷ *Id.* at 469 (first citing *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954); and then citing *Schneider v. Rusk*, 377 U.S. 163, 168-69 (1964)).

²¹⁸ *Id.*

²¹⁹ This was the second case involving Muhammad Ali considered by the Supreme Court. Ali had previously challenged his conviction on the grounds that it had been achieved due to unlawful electronic surveillance. Both the district court and the Fifth Circuit affirmed Ali's conviction. *Clay v. United States*, 397 F.2d 901 (5th Cir. 1968). Ali then filed a petition for certiorari with the Supreme Court. In 1969, the Supreme Court issued a per curiam opinion remanding the case for further proceedings in light of its ruling in another case, *Giordano v. United States*, 394 U.S. 310 (1969), vacating and remanding *Clay*, 397 F.2d 901. The lower courts subsequently determined that Ali's prosecution was untainted by the electronic surveillance, and his conviction was again affirmed. *United States v. Clay*, 430 F.2d 165 (5th Cir. 1970); see Andres F. Quintana, *Muhammad Ali: The Greatest in Court*, 18 MARQ. SPORTS L. REV. 171, 186-88 (2007).

²²⁰ *Clay v. United States*, 403 U.S. 698 (1971).

²²¹ REMNICK, *supra* note 14, at 291; see also Samuel O. Regalado, *Clay, aka Ali v. United States (1971): Muhammad Ali, Precedent, and the Burger Court*, 34 J. SPORT HIST. 169, 170 (2007).

²²² Hampton Dellinger, *When Muhammad Ali Took on America*, SLATE (June 6, 2016, at 10:12 ET), <https://slate.com/news-and-politics/2016/06/what-muhammad-ali-won-in-his-sup>

go shoot my brother, or some darker people,” Ali asserted, “or some poor hungry people in the mud for big powerful America.”²²³ Ali’s public statements reflect how religion and conscience are related, overlap, and are yet distinct. Ali stated:

Some people thought I was a hero. Some people said that what I did was wrong. But everything I did was according to my conscience. I wasn’t trying to be a leader. I just wanted to be free. And I made a stand all people, not just black people, should have thought about making, because it wasn’t just black people being drafted. The government had a system where the rich man’s son went to college, and the poor man’s son went to war. Then, after the rich man’s son got out of college, he did other things to keep him out of the Army until he was too old to be drafted. So what I did was for me, but it was the kind of decision everyone has to make. Freedom means being able to follow your religion, but it also means carrying the responsibility to choose between right and wrong. So when the time came for me to make up my mind about going in the Army, I knew people were dying in Vietnam for nothing and I should live by what I thought was right. I wanted America to be America. And now the whole world knows that, so far as my own beliefs are concerned, I did what was right for me.²²⁴

After oral argument, the Court was initially prepared to rule against Ali’s claim.²²⁵ Because Justice Harlan was in the majority, he was tasked to write the opinion. As he began writing the opinion, he was approached by his clerks who were concerned with the Court’s proposed ruling against Ali.²²⁶ Justice Harlan’s clerks convinced him that Ali’s claim of conscientious objection was based on legitimate religious beliefs that were connected to his Islamic faith.²²⁷ Justice Harlan then shared his change of position with the other Justices. Further deliberations within the Court resulted in the other Justices switching their votes.²²⁸

reme-court -fight-over-the-vietnam-war-and-what-he-lost.html [https://perma.cc/3WBD-D3NL].

²²³ DeNeen L. Brown, “Shoot Them for What?” *How Muhammad Ali Won His Greatest Fight*, WASH. POST (June 16, 2018), <https://www.washingtonpost.com/news/retropolis/wp/2018/06/15/shoot-them-for-what-how-muhammad-ali-won-his-greatest-fight>.

²²⁴ THOMAS HAUSER, MUHAMMAD ALI: HIS LIFE AND TIMES 171-72 (1991).

²²⁵ At their conference, the initial vote was 5-3 against Ali. Justice Marshall recused himself from the case because he had been serving as the Solicitor General when the case was first brought against Ali. Bill Littlefield, *The SCOTUS Clerk Who Helped Muhammad Ali Avoid Prison*, WBUR (Sep. 8, 2017), <https://www.wbur.org/onlyagame/2017/09/08/muhammad-ali-supreme-court-vietnam-war> [https://perma.cc/TR57-8S7G]; Bob Woodward & Scott Armstrong, *The Inside Story of Ali’s Supreme Court Victory*, WASH. POST (Dec. 4, 1979), <https://www.washingtonpost.com/archive/politics/1979/12/04/the-inside-story-of-alis-supreme-court-victory/1a03eeb0-f8cf-4dfa-833d-bbc761908cff>.

²²⁶ BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 159 (1979).

²²⁷ *Id.*; see also Littlefield, *supra* note 225.

²²⁸ WOODWARD & ARMSTRONG, *supra* note 226, at 160.

In a per curiam decision, the Court reversed Ali's conviction.²²⁹ Relying on *Seeger* and *Welsh*, the Court outlined the three requirements for classification as a conscientious objector.²³⁰ According to the Court, applicants must: (1) be conscientiously opposed to war in any form; (2) hold "opposition . . . based upon religious training and belief, as the term has been construed in our decisions"; and (3) be sincere in their objection.²³¹ Applying this three-part test, the Court reversed Ali's conviction for refusing induction to military service. It found his beliefs to be no different than those of the applicants in *Seeger* and *Welsh*.²³² However, the Court's decision was more procedural than substantive. Under established precedent, the government was required to give the reasons for denying an applicant's claim for conscientious objector status.²³³ Because the government had not identified which of the three requirements Ali had purportedly failed to establish, his conviction was reversed.²³⁴

E. *The Modern Law on Conscientious Objection*

In 2026, the Military Selective Service Act requires all male U.S. citizens and male non-citizens living in the United States who are between the ages of eighteen and twenty-six to register with the Selective Service System.²³⁵ Even refugees, asylum seekers, and undocumented migrants residing in the United States must register.²³⁶ Significantly, registration is required in times of peace or war and regardless of whether there is a military draft. In 2023, over fifteen million men registered.²³⁷ The registration process is managed by the Selective Service System, which is an independent federal agency operated by a full-time staff and thousands of volunteer local board members.²³⁸

²²⁹ *Clay v. United States*, 403 U.S. 698, 705 (1971).

²³⁰ *Id.* at 700.

²³¹ *Id.*

²³² *Id.* at 703.

²³³ *Sicurella v. United States*, 348 U.S. 385, 392 (1955) ("[W]e feel that this error of law by the Department, to which the Appeal Board might naturally look for guidance on such questions, must vitiate the entire proceedings at least where it is not clear that the Board relied on some legitimate ground. Here, where it is impossible to determine on exactly which grounds the Appeal Board decided, the integrity of the Selective Service System demands, at least, that the Government not recommend illegal grounds. There is an impressive body of lower court cases taking this position and we believe that they state the correct rule.").

²³⁴ *Clay*, 403 U.S. at 705. In its briefing to the Court, the United States conceded that Ali's views were based on religious training and belief, and they were sincerely held. *Id.* at 702-03.

²³⁵ 50 U.S.C. § 3802(a). This provision does not apply to individuals who are lawfully admitted to the United States as nonimmigrants pursuant to 8 U.S.C. § 1101(a)(15).

²³⁶ *Selective Service - Who Must Register*, SELECTIVE SERV. SYS. (2024), https://www.sss.gov/wp-content/uploads/2024/01/WhoMustRegisterChart_1-16-24-1.pdf [<https://perma.cc/XW7U-8S6N>].

²³⁷ *About Selective Service*, SELECTIVE SERV. SYS., <https://www.sss.gov/about> [<https://perma.cc/N3E5-SFCX>] (last visited Apr. 29, 2026).

²³⁸ SELECTIVE SERV. SYS., ANNUAL REPORT TO THE CONGRESS OF THE UNITED STATES: CALENDAR YEAR 2022 (2023).

The Military Selective Service Act codifies both deferments and exemptions from military training and service. For example, individuals who previously served in the military and received an honorable discharge are not required to register.²³⁹ Individuals whose father, mother, brother, or sister were killed in action while serving in the Armed Forces are also not required to register.²⁴⁰ Certain federal and state officials are subject to deferment from registration while holding their offices.²⁴¹ The current provision on conscientious objection is nearly identical to the provision considered by the Supreme Court in *Gillette* and *Clay*.

(j) 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.²⁴²

Individuals who are granted conscientious objector status may be required to provide other forms of military service, such as noncombatant work.²⁴³ Individuals who are opposed to all forms of military service may participate in other forms of national service, “such civilian work contributing to the maintenance of the national health, safety, or interest.”²⁴⁴ This work is managed through the Selective Service Alternative Service Program.²⁴⁵ When an individual performs civilian service, they would be required to serve for the same time period that is required for military service.²⁴⁶

Conscientious objector status is not limited to individuals who are subject to military conscription. It is also available to active-duty military personnel.²⁴⁷

²³⁹ 50 U.S.C. § 3806(b)(4). This exemption would not apply in cases of a declaration of war or national emergency. *Id.*

²⁴⁰ *Id.* § 3806(o)(1). Individuals whose father, mother, brother, or sister are missing in action while serving in the Armed Forces are not required to register while their family member remains missing. *Id.* § 3806(o)(2). This exemption would not apply in cases of a declaration of war or national emergency. *Id.* § 3806(o). This provision contains an unusual limitation. The term “brother” or “sister” only applies to family members “of the whole blood,” which would presumably exclude adopted or “step” siblings. *Id.*

²⁴¹ 50 U.S.C. § 3806(f).

²⁴² *Id.* § 3806(j).

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *National Alternative Service Program*, SELECTIVE SERV. SYS., <https://www.sss.gov/register/alternative-service> [<https://perma.cc/X3YG-VPV6>] (last visited Mar. 7, 2026).

²⁴⁶ § 3806(j).

²⁴⁷ See U.S. DEP’T OF THE AIR FORCE, DEPARTMENT OF THE AIR FORCE GUIDANCE MEMORANDUM (DAFGM) TO DAFI 36-3211, MILITARY SEPARATIONS (Jan. 9, 2026) [hereinafter AIR FORCE C.O. INSTRUCTIONS], https://static.e-publishing.af.mil/production/1/af_a1/publication/dafi36-3211/dafi36-3211.pdf [<https://perma.cc/UDJ2-GEVU>]; U.S. DEP’T OF

While rare, there are situations when individuals who have volunteered for military service subsequently determine that they cannot engage in combat or otherwise participate in military service.²⁴⁸ Each branch of the military has adopted regulations for reviewing such requests. For example, the Air Force maintains two distinct classifications for in-service conscientious objectors.

29.1.1.1. Class 1-O. A member who, by reason of conscientious objection, sincerely opposes participation in combatant and non-combatant military training and service in war in any form and for whom such beliefs play a significant role in the member's life.

29.1.1.2. Class 1-A-O. A member who, by reason of conscientious objection, sincerely opposes participation only in combatant military training and service and for whom such beliefs play a significant role in the member's life.²⁴⁹

Consistent with the *Seeger-Welsh* line of reasoning, these regulations apply to individuals who are informed by moral, ethical, or religious beliefs. Service members who seek conscientious objector status have the burden of establishing each of the following elements by clear and convincing evidence.²⁵⁰

29.1.2.1. The nature or basis of the claim falls within the definition and criteria of conscientious objector prescribed in this publication and DoDI 1300.06.²⁵¹

29.1.2.2. The applicant's belief is firm, fixed, sincere, and deeply held.

THE ARMY, ARMY REGULATION 600—43: CONSCIENTIOUS OBJECTION (Mar. 22, 2023), <https://centeronconscience.org/wp-content/uploads/2023/03/Army-CO-regulation-2023.pdf> [<https://perma.cc/Z5UZ-Y43Y>]; U.S. DEP'T OF THE NAVY, MARINE CORPS ORDER 1306.16F (June 11, 2013), <https://nlgmltf.org/wp-content/uploads/2013/09/MCO1306.16F.pdf> [<https://perma.cc/RML2-7KKP>]. See generally William D. Palmer, *Time to Exorcise Another Ghost from the Vietnam War: Restructuring the In-Service Conscientious Objector Program*, 140 MIL. L. REV. 179 (1993); James T. Wood, *Constitutional Law—The In-Service Conscientious Objector*, *Goguen v. Clifford*, 304 F. Supp. 958 (D.N.J. 1969), 11 WM. & MARY L. REV. 778 (1970).

²⁴⁸ See, e.g., Alice Speri, 'I Had to Get Out': The U.S. Military Officers Filing for Conscientious Objector Status Over Gaza, *GUARDIAN* (Nov. 1, 2024, at 08:00 ET), <https://www.theguardian.com/us-news/2024/nov/01/military-officers-conscientious-objector-status-gaza> [<https://perma.cc/844H-2BTN>] (noting Air Force had granted thirty-six out of forty-two applications for conscientious objector status since 2021); U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-1196, MILITARY PERSONNEL: NUMBER OF FORMALLY REPORTED APPLICATIONS FOR CONSCIENTIOUS OBJECTORS IS SMALL RELATIVE TO THE TOTAL SIZE OF THE ARMED FORCES (2007) (reporting relatively few active-duty military personnel apply for conscientious objector status).

²⁴⁹ AIR FORCE C.O. INSTRUCTIONS, *supra* note 247, § 29.1.1.

²⁵⁰ *Id.* § 29.1.2.

²⁵¹ *Id.* § 29.1.2.1; see also U.S. DEP'T OF DEF., DoD INSTRUCTION 1300.06, CONSCIENTIOUS OBJECTORS (July 12, 2017), https://www.centeronconscience.org/files/DODI_2017.pdf [<https://perma.cc/CB87-KF2R>].

29.1.2.3. The applicant's belief is due to sincerely held moral, ethical, or religious beliefs, or a combination of such beliefs.

29.1.2.4. The applicant opposes participation in war in any form or the bearing of arms.²⁵²

Applications for conscientious objector status by active-duty personnel are subject to extensive procedures. For example, an individual who seeks conscientious objector status in the Air Force must submit a detailed application.²⁵³ They must undergo interviews with both a chaplain and a mental health professional.²⁵⁴ Their application and supporting materials are then reviewed by an investigating officer.²⁵⁵ Determinations are subject to final review by the Secretary of the Air Force.²⁵⁶ If their application is approved, the service member who opposes participation in combatant military training and service may be assigned noncombatant service or duties.²⁵⁷ One who opposes participation in combatant or noncombatant service may be discharged from the military.²⁵⁸

II. THE IMPACT OF JURISPRUDENTIAL DEVELOPMENTS ON CONSCIENTIOUS OBJECTION

A legal revolution is now underway at the Supreme Court.²⁵⁹ With a solid conservative majority, the Court is reinterpreting core constitutional

²⁵² Section 29.1.2.4 contains the following notation:

An applicant's willingness to bear arms in exclusively noncombatant or non-lethal contexts does not invalidate the applicant's claims or render the application insincere. An applicant's willingness to bear arms to protect themselves or family members does not invalidate the service member's claims or render the application insincere. An applicant's willingness to bear arms in first-person shooter video games shall be weighed against other relevant evidence.

AIR FORCE C.O. INSTRUCTIONS, *supra* note 247, § 29.1.2.4.

²⁵³ See generally *id.* § 29.1 (enumerating procedures for conscientious objector application).

²⁵⁴ *Id.* § 29.2.8.

²⁵⁵ *Id.* § 29.3.

²⁵⁶ *Id.* § 29.4.1.1 ("SecAF is the final decision authority for all applicants regarding conscientious objector status.").

²⁵⁷ *Id.* § 29.5.2.1.1.

²⁵⁸ *Id.* § 29.5.2.1.2.

²⁵⁹ See, e.g., Adeola Adeosun, *Neil Gorsuch Leading "Revolution" in Supreme Court Ruling: Ex-Prosecutor*, NEWSWEEK (June 30, 2024, at 18:19 ET), <https://www.newsweek.com/neil-gorsuch-leading-revolution-supreme-court-ruling-shan-wu-1919288> [<https://perma.cc/TMR7-YWFT>]; Noah Feldman, *The Court's Conservative Constitutional Revolution*, N.Y. REV. BOOKS (Oct. 5, 2023), <https://www.nybooks.com/articles/2023/10/05/the-courts-conservative-constitutional-revolution-noah-feldman> [<https://perma.cc/R29P-QTJA>] (describing conservative Justices' strategy as overturning Burger-era landmark cases by using respective dissents); Adam Liptak, *In a Volatile Term, a Fractured Supreme Court Remade America*, N.Y. TIMES (July 2, 2024), <https://www.nytimes.com/2024/07/02/us/politics/supreme-court-term-decisions.html> (describing anecdotal and empirical evidence of conflict among Justices,

provisions.²⁶⁰ It has challenged established legal principles.²⁶¹ And it has shown comfort with rejecting precedent.²⁶² These jurisprudential developments emphasize the precarious nature of certain core constitutional provisions.²⁶³ Despite the Court's prior interpretation of the statutory language as authorizing conscientious objector status on moral and religious grounds, the *Seeger-Welsh* line of reasoning is now at risk.²⁶⁴

A. *The Growing Power of Religious Beliefs*

When the Supreme Court decided *Seeger* and *Welsh*, its approach to the First Amendment reflected a strong belief in government neutrality toward religion.²⁶⁵ This belief is conveyed explicitly in both cases.²⁶⁶ And it appears throughout the Court's analysis of the Free Exercise Clause and the Establishment Clause in other cases decided during that era.²⁶⁷ In contrast, the

irrespective of ideological lines); Morgan Marietta, *A Constitutional Revolution Is Underway at the Supreme Court, as the Conservative Supermajority Rewrites Basic Understandings of the Roots of US Law*, CONVERSATION (Sep. 13, 2023, at 12:49 ET), <https://theconversation.com/a-constitutional-revolution-is-underway-at-the-supreme-court-as-the-conservative-supermajority-rewrites-basic-understandings-of-the-roots-of-us-law-212944> [<https://perma.cc/4EK-C-VXHH>] (summarizing recent, impactful decisions regarding race, religion, and student loan forgiveness).

²⁶⁰ See, e.g., *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022) (holding “proper-cause” requirement for unrestricted concealed-carry license violates Second Amendment).

²⁶¹ See, e.g., *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (ending heightened constitutional protection of abortion).

²⁶² See, e.g., *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022) (effectively obviating *Lemon* test in certain Establishment Clause cases).

²⁶³ See generally Russell A. Miller, *The Purpose and Practice of Precedent: What the Decade Long Debate Over Stare Decisis Tells Us About the New Roberts Court*, 51 U.C. L. CONST. Q. 231 (2024) (analyzing Roberts Court's new *stare decisis* doctrine and formulating four-part spectrum of positions regarding *stare decisis*'s merit); Nina Varsava, *Precedent, Reliance, and Dobbs*, 136 HARV. L. REV. 1845 (2023) (arguing *Dobbs*'s refusal to recognize reliance interests undermines rule of law).

²⁶⁴ The Roberts Court has generated significant commentary on the constitutional avoidance canon and its role in statutory construction. See generally Anita S. Krishnakumar, *Passive Avoidance*, 71 STAN. L. REV. 513 (2019) (surveying Roberts Court's historically aggressive but recently passive use of avoidance). But see Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2112 (2015) (arguing Roberts Court uses avoidance to camouflage “judicial aggression”).

²⁶⁵ Matthew G. Lindenbaum, *Religious Conscientious Objection and the Establishment Clause in the Rehnquist Court: Seeger, Welsh, Gillette, and § 6(J) Revisited*, 36 COLUM. J.L. & SOC. PROBS. 237, 237-38 (2003).

²⁶⁶ *United States v. Seeger*, 380 U.S. 163, 188 (1965) (Douglas, J., concurring); *Welsh v. United States*, 398 U.S. 333, 357 (1970) (Harlan, J., concurring).

²⁶⁷ *Sherbert v. Verner*, 374 U.S. 398, 409 (1963) (noting Court's decision supporting appellant's claim for religious accommodation is “nothing more than the governmental obligation of neutrality in the face of religious differences”); *Walz v. Tax Comm'n*, 397 U.S.

Supreme Court's recent decisions on the First Amendment reflect a jurisprudential shift in its approach to the relationship between religion and government—from neutrality to accommodation.²⁶⁸ Religion is now a powerful force on the Roberts Court.²⁶⁹ In some cases, it is an unspoken consideration that informs the Court's decisions. In other cases, the Court makes clear its deference to religion. Yet, it is always treated in special terms.²⁷⁰ This change is evident in the Court's approach to both the Free Exercise Clause and the Establishment Clause.

In *Seeger* and *Welsh*, the Supreme Court used the constitutional avoidance canon to circumvent concerns regarding the statutory definition of conscientious objector status.²⁷¹ Several Justices believed that applying the statute as drafted, which limited the scope of conscientious objector status, would violate the Establishment Clause or the Free Exercise Clause. In *Seeger*, for example, there was concern that granting conscientious objector status to only those individuals “who embraced one religious faith rather than another” would violate the Free Exercise Clause.²⁷² In *Welsh*, there was concern that granting conscientious objector status to only “theistic or nontheistic religious belief systems” and not to “secular beliefs” would violate the Establishment Clause.²⁷³ For these reasons, the Court interpreted the statute broadly so that individuals whose beliefs were informed by morals or ethics would be eligible for conscientious

664, 676 (1970) (observing “benevolent neutrality toward churches and religious exercise” is “deeply embedded in the fabric of our national life”).

²⁶⁸ See generally Stephanie H. Barclay, *The Religion Clauses After Kennedy v. Bremerton Sch. Dist.*, 108 IOWA L. REV. 2097 (2023); Ira C. Lupu & Robert W. Tuttle, *The Remains of the Establishment Clause*, 74 HASTINGS L.J. 1763 (2023); Michael Stokes Paulsen, *Freedom for Religion*, 133 YALE L.J. F. 403 (2023).

²⁶⁹ Harry Bruinius, *How Religious Liberty Became the Roberts Court's North Star*, CHRISTIAN SCI. MONITOR (June 30, 2023, at 17:07 ET), <https://www.csmonitor.com/USA/Justice/2023/0630/How-religious-liberty-became-the-Roberts-court-s-North-Star> [<https://perma.cc/3UNZ-SRRM>]; Ian Prasad Philbrick, *A Pro-Religion Court*, N.Y. TIMES (June 22, 2022), <https://www.nytimes.com/2022/06/22/briefing/supreme-court-religion.html>.

²⁷⁰ See, e.g., *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 189 (2012) (noting First Amendment gives “special solicitude to the rights of religious organizations”); JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 43-45 (1996). See generally Christopher C. Lund, *Religion Is Special Enough*, 103 VA. L. REV. 481 (2017); Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159 (2013); Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2012).

²⁷¹ See Claire Marblestone, *A Matter of Conscience: United States v. Seeger and the Supreme Court's Historical Failure to Define Conscientious Objector Status Under the First Amendment*, 38 HASTINGS CONST. L.Q. 201, 217 (2010).

²⁷² *United States v. Seeger*, 380 U.S. 163, 188 (1965) (Douglas, J., concurring). Justice Douglas also expressed concerns that such an approach would result in “invidious discrimination that would run afoul of the Due Process Clause of the Fifth Amendment.” *Id.*

²⁷³ *Welsh v. United States*, 398 U.S. 333, 356 (1970) (Harlan, J., concurring); see also *Gillette v. United States*, 401 U.S. 437, 449 (1971) (explaining central purpose of Establishment Clause is to ensure “governmental neutrality in matters of religion”).

objector status. This approach allowed the Court to avoid confronting the apparent constitutional conflict between the statute and the First Amendment.

In 2026, however, the Court's approach to the First Amendment is far different. The Court's modern construction of the Establishment Clause is about the accommodation of religious beliefs and not neutrality.²⁷⁴ On several occasions, the Court has stated that the government does not violate the Establishment Clause when it accommodates religious practices.²⁷⁵ Even providing exemptions from existing laws does not violate the Constitution.²⁷⁶ And in fact, the Court has stated that "[r]eligious accommodations . . . need not 'come packaged with benefits to secular entities.'"²⁷⁷ The Court also attaches significance to "historical practices and understandings" in assessing whether government action violates the Establishment Clause.²⁷⁸ By recognizing that conscientious objector status can be traced "back to colonial times" and has long been acknowledged "in state and federal conscription statutes," the Court would be able to justify an exemption that is only available to individuals with religious training and belief.²⁷⁹ Individuals whose actions are informed by moral or ethical beliefs and who reject a religious designation could not claim the same historical justification. Finally, the Court's modern construction of the Establishment Clause considers whether removing a long-recognized practice could be interpreted as evidence of "hostility to religion."²⁸⁰ Withdrawing the long-recognized status of conscientious objection from individuals with religious training and belief could readily be interpreted in this manner.

The Court's approach to the Free Exercise Clause has also changed.²⁸¹ Robust protections of religious freedom may now require conscientious objector status

²⁷⁴ See generally Justin Collings & Anna Bryner, *Defining Religion and Accommodating Religious Exercise*, 99 IND. L.J. 515 (2024); Mark Tushnet, *Accommodation of Religion Thirty Years On*, 38 HARV. J.L. & GENDER 1 (2015).

²⁷⁵ See generally, e.g., *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

²⁷⁶ See, e.g., *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-45 (1987).

²⁷⁷ *Cutter*, 544 U.S. at 724 (quoting *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 338 (1987)).

²⁷⁸ *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022) (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)). See generally Marc O. DeGirolami, *Establishment as Tradition*, 133 YALE L.J.F. 372 (2023).

²⁷⁹ *Welsh v. United States*, 398 U.S. 333, 365 (1970) (Harlan, J., concurring).

²⁸⁰ *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2087 (2019). See generally Ronald J. Colombo, *The Repeal of Religious Accommodations—A Constitutional Analysis*, 73 AM. U. L. REV. 729 (2024); Mark Satta, *Unclear Hostility: Supreme Court Discussions of "Hostility to Religion" from Barnette to American Legion*, 68 BUFF. L. REV. 641 (2020).

²⁸¹ Compare *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 617 (2017) (holding civil rights commission's ruling was tainted by religious hostility in violation of business owner's free exercise rights), and *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1871 (2021) (holding religious foster care agency's free exercise rights were violated by Philadelphia's requirement that same-sex couples be accepted as foster parents), with *Locke v. Davey*, 540 U.S. 712, 712-13 (2004) (holding state does not violate Free Exercise Clause

for individuals with sincerely held religious beliefs. The Religious Freedom Restoration Act (“RFRA”) has changed how courts analyze the infringement on religious liberties by the federal government.²⁸² RFRA requires courts to apply strict scrutiny review whenever the federal government imposes a substantial burden on the exercise of religion.²⁸³ RFRA defines “exercise of religion” to include “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”²⁸⁴ There is little doubt that requiring an individual to enter military service when their religion prohibits such activity would constitute a substantial burden. Thus, the federal government would need to establish that such a burden was in furtherance of a compelling government interest and that it was the least restrictive means of furthering that interest. In contrast, individuals whose actions are informed by moral or ethical beliefs would not benefit from such protections under RFRA.²⁸⁵

In sum, the legal framework for assessing religious liberty claims under federal law has changed since the *Seeger-Welsh* line of cases was decided.²⁸⁶ Because the Court has revised its approach to the First Amendment, the constitutional concerns that informed those decisions are simply no longer relevant.

B. *The Rigors of Statutory Construction*

The *Seeger-Welsh* line of reasoning was premised on a desire to avoid addressing the significant constitutional questions surrounding the conscientious objector statute.²⁸⁷ In these cases, the constitutional avoidance canon was on full display. Thus, the Court interpreted the statute to allow moral and ethical views to be covered even though the statutory language would appear to exclude such beliefs.

However, the Justices in *Seeger* and *Welsh* who accepted this expansive approach to statutory construction conveyed some apprehension about their

when it refuses to allow theology students to participate in state-funded tuition scholarship program).

²⁸² The Religious Freedom Restoration Act (“RFRA”) was adopted by Congress in 1993. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb-1). Under RFRA, the federal government may not substantially burden an individual’s sincerely held religious beliefs even if the burden results from a rule of general applicability, unless the government’s actions further a compelling interest and are the least restrictive means available. 42 U.S.C. § 2000bb-1.

²⁸³ 42 U.S.C. § 2000bb-1(b); see also Michael Berry & Antony Barone Kolenc, *Born-Again RFRA: Will the Military Backslide on Its Religious Conversion?*, 87 MO. L. REV. 435 (2022).

²⁸⁴ 42 U.S.C. § 2000cc-5(7)(A).

²⁸⁵ William P. Marshall, *The Religious Freedom Restoration Act: Establishment, Equal Protection, and Free Speech Concerns*, 56 MONT. L. REV. 227, 247 (1995) (arguing RFRA’s application to individuals with non-religious claims would be “a stretch”).

²⁸⁶ Haile, *supra* note 48, at 832, 866.

²⁸⁷ Frickey, *supra* note 125, at 438 n.246; Denno, *supra* note 125, at 41, 51.

decision. While the outcome in *Seeger* was unanimous, the Court's internal deliberations reveal there were significant concerns with the reasoning.²⁸⁸ Indeed, Justice Douglas's concurrence reveals that the Court's strained interpretation was necessary to avoid "a serious constitutional doubt."²⁸⁹ There were other concerns on the Court. In an unpublished concurring opinion, Justice Goldberg was prepared to criticize the Court's decision to ignore "the clear limitation on the conscientious objector exemption which Congress wrote."²⁹⁰ Justice Black expressed similar concerns in his own unpublished concurring opinion, noting that conscientious objector status was an unconstitutional violation of the First Amendment.²⁹¹ Justice Harlan was even more critical and had initially prepared to submit a dissenting opinion, stating that "the constitutional issues presented by these cases cannot be avoided."²⁹²

These private disputes became public in *Welsh*. In his concurrence, Justice Harlan effectively renounced his earlier vote in *Seeger*, noting he had agreed with the decision "only with the gravest misgivings as to whether it was a legitimate exercise in statutory construction," and admitting that his vote was "a mistake which I should now acknowledge."²⁹³ He also recognized the flaws in the *Welsh* plurality opinion, and while he agreed with the outcome, he could not accept the Court's reasoning: "I cannot subscribe to a wholly emasculated construction of a statute to avoid facing a latent constitutional question, in purported fidelity to the salutary doctrine of avoiding unnecessary resolution of constitutional issues, a principle to which I fully adhere."²⁹⁴ The three dissenting Justices shared Justice Harlan's criticism that interpreting the statute "to include Welsh exempts from the draft a class of persons to whom Congress has expressly denied an exemption."²⁹⁵ As a matter of construction, they argued the statute was clearly intended to exclude individuals such as Welsh, and "that conclusion should end this case."²⁹⁶

²⁸⁸ Marblestone, *supra* note 271, at 211-15 (describing several unreleased draft opinions).

²⁸⁹ *United States v. Seeger*, 380 U.S. 163, 188 (1965) (Douglas, J., concurring).

²⁹⁰ Justice Arthur Goldberg, Unpublished Concurring Opinion 4, *United States v. Seeger*, No. 50 (Mar. 1965) (on file with Libr. of Cong., Manuscript Div., Arthur J. Goldberg Papers, Box II:11, Folder 6).

²⁹¹ Justice Hugo Black, Unpublished Concurring Opinion 1, *United States v. Seeger*, No. 50 (Mar. 1965) (on file with Libr. of Cong., Manuscript Div., Earl Warren Papers, Box 526, Folder 2).

²⁹² Justice John Harlan, Unpublished Dissenting Opinion 1, *United States v. Seeger*, No. 50 (Mar. 1965) (on file with Libr. of Cong., Manuscript Div., William J. Brennan Papers, Box I:120, Folders 64-50).

²⁹³ *Welsh v. United States*, 398 U.S. 333, 344 (1970) (Harlan, J., concurring).

²⁹⁴ *Id.* at 354.

²⁹⁵ *Id.* at 368 (White, J., dissenting).

²⁹⁶ *Id.*

Since the Court's approach to the First Amendment has changed, the concerns that informed those earlier decisions are no longer relevant.²⁹⁷ There would be no need to apply the constitutional avoidance canon to justify such a broad interpretation that provides conscientious objector status to individuals with moral or ethical beliefs.²⁹⁸ The statutory language clearly states that its protections only apply to individuals who oppose participating in war in any form "by reason of religious training and belief" and that this does not include "essentially political, sociological, or philosophical views, or a merely personal moral code."²⁹⁹ When the statutory language is clear, a court's analysis should end.³⁰⁰ This canon of statutory construction has been fully embraced by the Roberts Court, including its most liberal members.³⁰¹ Thus, individuals like Daniel Seeger and Elliot Ashton Welsh would not be covered by the statute and, therefore, they would be ineligible for conscientious objector status.

C. *Questioning Sincerely Held Beliefs*

Historically, the Supreme Court avoided addressing the veracity or depth of religious beliefs or suggesting that some beliefs were more favored than others.³⁰² Indeed, the Court's jurisprudence for much of the twentieth century

²⁹⁷ Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARV. L. REV. 515, 586-87 (2023).

²⁹⁸ See *id.* at 517 (noting whenever a substantive canon is utilized, it must lead court to outcome different than what court would have reached based only on textual language); Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 98 (suggesting constitutional avoidance doctrine is anything but judicial restraint and rather form of judicial intrusion under guise of mere statutory interpretation). But see Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 35-36 (2006) (finding even most committed textualists acknowledge statutes in at least some cases may be ambiguous and must be read in context and with statutory aims in mind).

²⁹⁹ 50 U.S.C. § 3806(j).

³⁰⁰ *Universal Health Servs. v. United States*, 579 U.S. 176, 192 (2016) ("[P]olicy arguments cannot supersede the clear statutory text."); *Est. of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) ("In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished."). See generally William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1082 (2017) ("Interpretation isn't just a matter of language; it's also governed by law.").

³⁰¹ HARVARD LAW SCHOOL, *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, at 08:28 (YouTube, Nov. 25, 2015), <https://www.youtube.com/watch?v=dpEtszFT0Tg> [<https://perma.cc/YH79-KNX4>] ("Well I think we're all textualists now in a way that just was not remotely true when Justice Scalia joined the bench."); see also Austin Peters, *Are They All Textualists Now?*, 118 NW. U. L. REV. 1201, 1201 (2024). But see Aaron-Andrew P. Bruhl, *The Jurisdiction Canon*, 70 VAND. L. REV. 499, 502 (2017) (arguing recent Supreme Court decisions have questioned this proposition).

³⁰² *United States v. Ballard*, 322 U.S. 78, 86 (1944). See generally Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 NOTRE DAME L. REV. 837 (2009); Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts Over Religious Property*, 98 COLUM. L. REV. 1843, 1844 (1998).

reflected a willingness to recognize and respect a multitude of faiths and beliefs.³⁰³ Recently, however, the Court has exhibited a troubling approach to addressing certain beliefs.³⁰⁴ Whether this represents skepticism about different belief systems or a fear of diluting the uniqueness of religious beliefs, this development represents a change in how claims involving sincerely held beliefs are considered.³⁰⁵

In *Dunn v. Ray*,³⁰⁶ for example, a death row inmate sought to have his religious minister accompany him to the execution chamber. Had the inmate been Christian, the prison policy would have allowed this.³⁰⁷ Domineque Ray, however, was Muslim, and his request to be accompanied by his imam was rejected by state officials.³⁰⁸ He challenged the prison's decision, arguing it violated the First Amendment. While the Eleventh Circuit granted a stay of execution to allow Ray's Establishment Clause claim to be fully considered, the Supreme Court vacated the stay without comment, thereby allowing Ray's execution to proceed.³⁰⁹ Four Justices dissented from the Court's decision, arguing the disparate treatment between religious beliefs "goes against the Establishment Clause's core principle of denominational neutrality."³¹⁰

³⁰³ See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (protecting adherents of Santeria); *Wisconsin v. Yoder*, 406 U.S. 205, 234-36 (1972) (protecting rights of Amish); *Marsh v. Alabama*, 326 U.S. 501, 508-09 (1946) (protecting rights of Jehovah's Witnesses). For an opinion that holds even individuals who professed no belief in God were protected by the Court under the First Amendment, see *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961).

³⁰⁴ Some lower courts have undertaken a more probing assessment on the nature of religious beliefs and have even rejected some claims. See, e.g., *Cavanaugh v. Bartelt*, 178 F. Supp. 3d 819, 824 (D. Neb. 2016) (finding FSMism is not religion but rather "a parody, intended to advance an argument about science, the evolution of life, and the place of religion in public education").

³⁰⁵ See generally Angela C. Carmella, *Progressive Religion and Free Exercise Exemptions*, 68 U. KAN. L. REV. 535 (2020) (examining rise of progressive religious groups and causes that seek faith-based exemptions); Adeel Mohammadi, *Sincerity, Religious Questions, and the Accommodation Claims of Muslim Prisoners*, 129 YALE L.J. 1836 (2020) (claiming in religious accommodation cases involving Muslim prisoners, courts regularly inquire into content of religious doctrines despite doctrinal prohibitions); Ashley Stamegna, Note, *Religious or Not Religious? That Is Not the Establishment Clause Question*, 108 CORN. L. REV. 701 (2023) (noting in Establishment Clause cases, courts have routinely evaluated veracity of claimants' religious beliefs). But see Michael Heise & Gregory C. Sisk, *Approaching Equilibrium in Free Exercise of Religion Cases? Empirical Evidence from the Federal Courts*, 64 ARIZ. L. REV. 989 (2022) (arguing religious liberty cases are increasingly decided on substance rather than on claimant's religious identity).

³⁰⁶ 139 S. Ct. 661, 661 (2019) (Kagan, J., dissenting) (mem.).

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ Adam Liptak, *Justices Allow Execution of Muslim Death Row Inmate Who Sought Imam*, N.Y. TIMES (Feb. 7, 2019), <https://www.nytimes.com/2019/02/07/us/politics/supreme-court-domineque-ray.html>.

³¹⁰ *Dunn*, 139 S. Ct. at 662 (Kagan, J., dissenting).

A few months after its decision in *Dunn*, the Court was confronted with another claim brought by a death row inmate who sought to have his Buddhist spiritual advisor present at his execution.³¹¹ In *Murphy v. Collier*,³¹² the Court granted a stay of execution.³¹³ Because the case was considered on the shadow docket and lacked full briefing, the Court did not explain its decision or the apparent inconsistency between *Dunn* and *Murphy*.³¹⁴ However, in *Murphy*, Justice Kavanaugh filed a separate statement arguing that the disparate outcomes in *Dunn* and *Murphy* could be explained because of the different constitutional arguments presented by the inmates and because Ray's claims were untimely.³¹⁵ Neither explanation proved convincing.³¹⁶ Even Justice Alito acknowledged the inconsistency in the Court's jurisprudence in his dissent.³¹⁷

In *Ramirez v. Collier*,³¹⁸ another death row inmate sought permission to have his Christian pastor present during his execution and be allowed to "lay hands" on him and "pray over" him.³¹⁹ His request was denied by state officials, and he filed suit in federal court, challenging their refusal as a violation of federal law and the Free Exercise Clause.³²⁰ Both the federal district court and the Fifth

³¹¹ *Murphy v. Collier*, 139 S. Ct. 1475, 1475 (2019) (mem.).

³¹² *Id.*

³¹³ *Id.*

³¹⁴ See Will Baude, *Death and the Shadow Docket*, REASON: VOLOKH CONSPIRACY (Apr. 12, 2019, at 15:30 ET), <https://reason.com/volokh/2019/04/12/death-and-the-shadow-docket> [<https://perma.cc/LAT2-4UTM>] (noting experts' observations on timing of requests for stay of execution in *Dunn* and *Murphy* were not much different and Ray actually filed his lawsuit sooner in *Dunn* than Murphy did in *Murphy*); Editorial Board, Opinion, *Is Religious Freedom for Christians Only?*, N.Y. TIMES (Feb. 9, 2019), <https://www.nytimes.com/2019/02/09/opinion/supreme-court-alabama-execution.html>.

³¹⁵ *Murphy*, 139 S. Ct. at 1476-77 (Kavanaugh, J., Statement). See generally Nicholas Tomaino, *Even on Death Row, Religious Liberty Must Be Protected*, NAT'L REV. (Mar. 7, 2021, at 06:30 ET), <https://www.nationalreview.com/2021/03/even-on-death-row-religious-liberty-must-be-protected> [<https://perma.cc/7G37-CG87>]; Ian Millhiser, *The Supreme Court Just Backed Away from One of Its Cruellest Death Penalty Decisions*, VOX (Feb. 12, 2021, at 15:40 ET), <https://www.vox.com/22279878/supreme-court-death-penalty-religious-liberty-dunn-ray-smith-elena-kagan-amy-coney-barrett> [<https://perma.cc/W2T3-CJFS>].

³¹⁶ Isaac Green, *A Cruel and Unusual Docket: The Supreme Court's Harsh New Standard for Last Minute Stays of Execution*, 16 HARV. L. & POL'Y REV. 623, 633 (2022) (arguing distinction between constitutional arguments was formalistic and noting Ray had actually filed his lawsuit earlier than Murphy).

³¹⁷ *Murphy*, 139 S. Ct. at 1480 (Alito, J., dissenting).

³¹⁸ 142 S. Ct. 1264 (2022).

³¹⁹ *Id.* at 1268-69. See generally Note, *Religious Land Use and Institutionalized Persons Act — Religious Liberty — Death Penalty — Ramirez v. Collier*, 136 HARV. L. REV. 470 (2022).

³²⁰ *Ramirez*, 142 S. Ct. at 1273. The statutory analysis was informed by the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). 42 U.S.C. §§ 2000cc-2000cc-5. RLUIPA requires the application of strict scrutiny review when the government imposes a substantial burden on the religious exercise of a person confined in an institution. §§ 2000cc-2000cc-1(a).

Circuit rejected his claim; the Supreme Court reversed.³²¹ While the majority did not question the inmate's sincerely held beliefs, Justice Thomas issued a lengthy dissent expressing skepticism toward the inmate's religious claim, referring to it as "abusive" and "manipulative."³²² He questioned the inmate's sincerity by noting the "last-minute" nature of his request.³²³ He also pointed out how the inmate changed the nature of his request throughout the litigation.³²⁴ Justice Thomas conveys his disdain for the inmate's religious claim throughout his opinion.³²⁵

These cases suggest that the Court favors some beliefs more than others.³²⁶ They also reflect a more critical approach to assessing the sincerity of beliefs.³²⁷ This phenomenon will only grow as the Court extends the power of religious beliefs over government mandates and more individuals seek refuge in the protections afforded by laws that are textually limited to individuals who hold religious beliefs.³²⁸ In fact, the Court has already recognized that religious liberty claims are different from other claims. For example, it has repeatedly indicated that the Free Exercise Clause only protects religious claims: "There is

³²¹ *Ramirez*, 142 S. Ct. at 1284.

³²² *Id.* at 1293, 1296 (Thomas, J., dissenting). Justice Thomas's twenty-three-page dissent exceeds the length of the majority opinion.

³²³ *Id.* at 1296.

³²⁴ *Id.*

³²⁵ *Id.* at 1297 ("The evidence that demonstrates Ramirez is bringing abusive litigation to delay his execution also strongly suggests that he does not sincerely believe that his pastor needs to touch him in the execution chamber.").

³²⁶ See generally, e.g., Caroline Mala Corbin, *The Supreme Court's Facilitation of White Christian Nationalism*, 71 ALA. L. REV. 833 (2020); Kate Shaw, Opinion, *The Supreme Court's Disorienting Elevation of Religion*, N.Y. TIMES (July 8, 2023), <https://www.nytimes.com/2023/07/08/opinion/supreme-court-religion.html> (explaining since Justice Barrett joined Court, there has been "essentially unbroken streak of wins for Christian plaintiffs").

³²⁷ Assessing the sincerity of beliefs raises significant challenges. See generally, e.g., Linda Greenhouse, *Should Courts Assess the Sincerity of Religious Beliefs?*, ATLANTIC (May 5, 2022), <https://www.theatlantic.com/ideas/archive/2022/05/supreme-court-sincere-religious-belief-coach-kennedy/629737>; Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185 (2017); Adam Liptak, *An Extraordinary Winning Streak for Religion at the Supreme Court*, N.Y. TIMES (Apr. 5, 2021), <https://www.nytimes.com/2021/04/05/us/politics/supreme-court-religion.html>.

³²⁸ See Note, *Pandora's Box of Religious Exemptions*, 136 HARV. L. REV. 1178, 1178 (2023); Xiao Wang, *The Supreme Court Is Making Religion an All-Purpose Excuse for Ignoring the Law*, L.A. TIMES (June 18, 2023, at 03:00 PT), <https://www.latimes.com/opinion/story/2023-06-18/supreme-court-303-creative-colorado-gay-wedding-website-religious-liberty> [<https://perma.cc/R4KU-25XU>]. For example, advocates of abortion rights are beginning to challenge restrictions by grounding their claims in the Free Exercise Clause. See generally Caroline Mala Corbin, *Religion Clause Challenges to Early Abortion Bans*, 104 B.U. L. REV. ONLINE 37 (2024); Micah Schwartzman & Richard Schragger, *Religious Freedom and Abortion*, 108 IOWA L. REV. 2299 (2023); Ari Berman, Note, *The Religious Exception to Abortion Bans: A Litigation Guide to State RFRA's*, 76 STAN. L. REV. 1129 (2024).

no doubt that '[o]nly beliefs rooted in religion are protected by the Free Exercise Clause[.]' Purely secular views do not suffice."³²⁹

Each of these jurisprudential developments has placed the *Seeger-Welsh* line of reasoning at risk. If accommodation of religious beliefs and longstanding tradition now protects the conscientious objector statute from constitutional challenges, the Court will have no need to apply the canon of constitutional avoidance to justify an expansive interpretation. At the same time, the Court is more inclined to protect religious beliefs and has shown little interest in protecting comparable moral or ethical beliefs.³³⁰ Thus, the language of exclusion contained in the Military Selective Service Act can be reactivated by the Court when the issue is presented in the future.

III. THE IMPACT OF SOCIAL AND POLITICAL DEVELOPMENTS ON CONSCIENTIOUS OBJECTION

In addition to these jurisprudential developments, there are demographic, sociological, and political trends that compound the risks facing individuals whose rejection of military service is not based on religious training and belief.

A. *The Rise of a Secular Nation and the Evolution of a Religious Court*

In recent years, there has been a gradual and consistent trend toward secularization in the United States.³³¹ As a percentage of the overall population, fewer Americans identify with any religious denomination.³³² In 2025, the

³²⁹ *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 833 (1989) (citations omitted). Significantly, the Court in *Frazee* cited to *Seeger* for this fundamental principle of interpretation. *Id.*

³³⁰ See Andrew Koppelman, *The Increasingly Dangerous Variants of the "Most-Favored-Nation" Theory of Religious Liberty*, 108 IOWA L. REV. 2237, 2285 (2023).

³³¹ Michelle Boorstein, *American Secularism Is Growing—and Growing More Complicated*, WASH. POST (Jan. 14, 2022), <https://www.washingtonpost.com/religion/2022/01/14/secularism-atheism-religion-nones/>; Derek Thompson, *Three Decades Ago, America Lost Its Religion. Why?*, ATLANTIC (Sep. 26, 2019), <https://www.theatlantic.com/ideas/archive/2019/09/atheism-fastest-growing-religion-us/598843/> (exploring three primary causes as catalysts for shift toward secularization in 1990s onward: "the association of the Republican Party with the Christian right, the end of the Cold War, and 9/11"); see Justin Ray, *Black, Atheist and Unapologetic: The Rise of Secularism in African American Communities*, GUARDIAN (Feb. 15, 2025, at 09:00 ET), <https://www.theguardian.com/us-news/2025/feb/15/black-non-religious-atheists> [<https://perma.cc/XD8G-3MKH>]. But see GREGORY A. SMITH ET AL., PEW RSCH. CTR., *DECLINE OF CHRISTIANITY IN THE U.S. HAS SLOWED, MAY HAVE LEVELED OFF* (2025), <https://www.pewresearch.org/religion/2025/02/26/decline-of-christianity-in-the-us-has-slowed-may-have-leveled-off/> [<https://perma.cc/84LW-K9AE>] (indicating decline of individuals who describe themselves as Christian has leveled off).

³³² See, e.g., Jessica Grose, Opinion, *The Largest and Fastest Religious Shift in America Is Well Underway*, N.Y. TIMES (June 21, 2023), <https://www.nytimes.com/2023/06/21/opin>

number of Americans who identify as atheists or agnostics has reached approximately 28% of the population.³³³ As the number of Americans who do not claim any religious belief rises, fewer people will be eligible for religious-based conscientious objector status. While this does not affect individuals who claim conscientious objector status on religious grounds, it heightens the consequences for individuals who do not qualify for statutory exemptions. In the event of a military draft, this forces an unwilling person “into military service,” where they may face “injury or death.”³³⁴ Those whose objections to military service are informed by moral or ethical beliefs are uniquely affected.³³⁵ Ignoring the legitimacy of their claims devalues their sincerely held beliefs. If their claims are rejected, they will be forced into military service or risk criminal prosecution if they refuse to serve.³³⁶ These concerns also extend to individuals who are currently performing military service and who develop moral or ethical beliefs in opposition to government-sanctioned violence.

While religious-based beliefs certainly merit protection, it does not follow that moral and ethical beliefs do not.³³⁷ Moral, ethical, and religious beliefs share

ion/religion-dechurching.html. See generally RYAN P. BURGE, *THE NONES: WHERE THEY CAME FROM, WHO THEY ARE, AND WHERE THEY ARE GOING* (2021); JIM DAVIS, MICHAEL GRAHAM & RYAN BURGE, *THE GREAT DECHURCHING: WHO’S LEAVING, WHY ARE THEY GOING, AND WHAT WILL IT TAKE TO BRING THEM BACK?* (2023); ISABELLA KASSELSTRAND, PHIL ZUCKERMAN & RYAN T. CRAGUN, *BEYOND DOUBT: THE SECULARIZATION OF SOCIETY* (2023).

³³³ GREGORY A. SMITH ET AL., PEW RSCH. CTR., *RELIGIOUS ‘NONES’ IN AMERICA: WHO THEY ARE AND WHAT THEY BELIEVE* (2024), <https://www.pewresearch.org/religion/2024/01/24/religious-nones-in-america-who-they-are-and-what-they-believe> [https://perma.cc/TM2H-UW4L].

³³⁴ Carl H. Esbeck, *When Religious Exemptions Cause Third-Party Harms: Is the Establishment Clause Violated?*, 59 J. CHURCH & STATE 357, 376 (2017). However, some scholars argue there is no meaningful shift in the burden of military service because conscientious objectors are simply not capable of serving. 1 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS* 49, 52 (2006).

³³⁵ See generally Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343 (2014); Christopher C. Lund, *Religious Exemptions, Third-Party Harms, and the Establishment Clause*, 91 NOTRE DAME L. REV. 1375 (2016); William P. Marshall, *Third-Party Burdens and Conscientious Objection to War*, 106 KY. L.J. 685 (2018); Mark Storslee, *Religious Accommodation, the Establishment Clause, and Third-Party Harm*, 86 U. CHI. L. REV. 871 (2019).

³³⁶ Kent Greenawalt points out that these individuals have another option: flee to another country. GREENAWALT, *supra* note 334, at 53 n.20.

³³⁷ VINCENT P. MUÑOZ, *RELIGIOUS LIBERTY AND THE AMERICAN FOUNDING* 56 (2022) (arguing Founders agreed purpose of religious freedom was to ensure government could not “hurt, molest, or restrain individuals on account of their religious worship, beliefs, or affiliation”); Eisgruber & Sager, *supra* note 45, at 1248 (“We need to abandon the idea that it is the unique value of religious practices that sometimes entitles them to constitutional attention. What properly motivates constitutional solicitude for religious practices is their distinct vulnerability to discrimination, not their distinct value . . .”).

much in common.³³⁸ They can each serve as a foundation for human behavior, offering guidance and inspiration. Moral and ethical beliefs can be as constructive or destructive as any religious belief.³³⁹ These beliefs may be idiosyncratic or orthodox, shared by none or by many.³⁴⁰ Moreover, individuals who are motivated by moral or ethical beliefs need not be agnostics or atheists, even if they are not motivated by religious beliefs.³⁴¹ They need not be anarchists or nihilists. Assuming they are sincerely held, moral or ethical beliefs can be as meaningful and powerful as any religious belief.³⁴² As explained by Douglas Laycock:

³³⁸ There are countless definitions of religion, and many refer to moral and ethical beliefs as religious beliefs. *See, e.g.*, GREENAWALT, *supra* note 334, at 139-40 (defining religion in numerous distinct ways, including “belief in a spiritual domain that transcends everyday life;” “a comprehensive view of the world and human purposes;” and “a particular perspective on moral obligations that is derived from a moral code or from a conception of a divine nature”); *see also* PAUL HORWITZ, *THE AGNOSTIC AGE: LAW, RELIGION, AND THE CONSTITUTION* 192-98 (2011) (discussing difficulties of defining “religion” in appropriate way that is neither too broad or too narrow). *See generally* George C. Freeman, III, *The Misguided Search for the Constitutional Definition of “Religion,”* 71 GEO. L.J. 1519 (1983); Eduardo Peñalver, Note, *The Concept of Religion*, 107 YALE L.J. 791 (1997); Nelson Tebbe, *Nonbelievers*, 97 VA. L. REV. 1111 (2011); Christopher L. Eisgruber & Lawrence G. Sager, *Does It Matter What Religion Is?*, 84 NOTRE DAME L. REV. 807 (2009) (arguing insofar as concrete definitions of “religion” are needed at all, conventional, common-sense definitions will suffice). *But see* *Welsh v. United States*, 398 U.S. 333, 352 (1970) (Harlan, J., concurring) (“That it is difficult to plot the semantic penumbra of the word ‘religion’ does not render this term so plastic in meaning that the Court is entitled, as matter of statutory construction, to conclude that any asserted and strongly held belief satisfies its requirements.”).

³³⁹ Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 313-14 (1996) (“Religious liberty does not presuppose that religion is a good thing, nor that faith is bad or subordinate to reason. . . . Religious liberty does not view religion as a good thing to be promoted, nor as a dangerous force to be contained.”). As William F. Buckley conveyed in graphic terms: “[T]he great constitutions larded with religious sycophancy have failed in and of themselves to promulgate a free society, let alone a noble society. If we can have bad popes and corrupt Vaticans, surely we can have bad civil societies even if God is cited in their constitutions.” JEROME E. COPULSKY, *AMERICAN HERETICS: RELIGIOUS ADVERSARIES OF LIBERAL ORDER* 333 (2024); *see also* Andrew Koppelman, *Divine Madness*, LAWFARE INST. (Nov. 27, 2024, at 10:00 ET), <https://www.lawfaremedia.org/article/divine-madness> [<https://perma.cc/Z5FC-KZG2>].

³⁴⁰ *But see* Mark L. Movsesian, *The New Thoreaus*, 54 LOY. U. CHI. L.J. 539, 565 (2022) (arguing existence of community is crucial factor in definition of religion and distinguishes it from moral and ethical beliefs); Steven D. Collier, Comment, *Beyond Seeger/Welsh: Redefining Religion Under the Constitution*, 31 EMORY L.J. 973, 997 (1982) (arguing definition of religion should include four elements of morality, cosmology, practices, and organization).

³⁴¹ BURGE, *supra* note 332, at 120-21.

³⁴² *But see* Abner S. Greene, *Liberalism and the Distinctiveness of Religious Belief*, 35 CONST. COMMENT. 207, 210 (2020) (“For many religious people, belief in God and what follows from that is not comparable to anything”); *see also* Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 3 (2000); Douglas Laycock, *Formal,*

The nontheist's belief in transcendent moral obligations—in obligations that transcend his self-interest and his personal preferences and which he experiences as so strong that he has no choice but to comply—is analogous to the transcendent moral obligations that are part of the cluster of theistic beliefs that we recognize as religious.³⁴³

There is also an equity and fairness concern about disparate treatment. “In a society that values equality of persons,” Kent Greenawalt has explained that “making a privilege turn on a person's religious views is intrinsically unfair, when significant numbers of nonreligious persons have similar reasons to be accorded the privilege.”³⁴⁴

Refusing to protect moral and ethical beliefs in the same way that religious beliefs are protected risks creating a theocratic hierarchy that privileges religious-based beliefs and discounts other beliefs of equal significance.³⁴⁵ The Roberts Court's increasing recognition of religious-based objections to government policies amplifies the consequences of this disparate treatment.³⁴⁶ From healthcare requirements regarding reproductive care to quarantine restrictions during the COVID-19 pandemic, individuals asserting religious-based beliefs have been granted exemptions from numerous state and federal laws through the Free Exercise Clause.³⁴⁷ In fact, the Court's new approach to the Free Exercise Clause has created “an unbounded principle, placing religion in such a privileged position that any exemption at all can be justified.”³⁴⁸ At the

Substantive, and Disaggregated Neutrality Toward Religion, 39 DEPAUL L. REV. 993, 1001-06 (1990); Mark Storslee, *On Religion's Specialness*, 81 REV. POL. 656, 661 (2019).

³⁴³ Laycock, *supra* note 339, at 336.

³⁴⁴ GREENAWALT, *supra* note 334, at 56.

³⁴⁵ Marshall, *supra* note 45, at 322 (“Exempting religious beliefs and organizations from neutral laws enhances religion's ability to influence social norms and the political process. If the religious exemption works to insulate religious beliefs from social forces, . . . those beliefs will enjoy a false vitality in the political arena relative to competing secular beliefs that must stand or fall on their own accord.”); *see also* Lupu & Tuttle, *supra* note 268, at 1766 (“Equality lifts religious entities up, and then privilege lifts them up further still.”); Zalman Rothschild, Essay, *The Impossibility of Religious Equality*, 125 COLUM. L. REV. 453, 453 (2025) (arguing principle of religious equality enunciated by Supreme Court is “inherently unworkable” and results in “religious superiority”).

³⁴⁶ *See* Dina Francesca Haynes, *Rule of Law Chronicles: America's Shadow Theocrats*, JURIST (Apr. 5, 2023, at 12:12 ET), <https://www.jurist.org/features/2023/04/05/rule-of-law-chronicles-americas-shadow-theocrats> [<https://perma.cc/8XP2-BVAP>]; Renee Loth, Opinion, *The Threat of Theocracy in the United States*, BOS. GLOBE (Mar. 7, 2024, at 03:00 ET), <https://www.bostonglobe.com/2024/03/07/opinion/theocracy-united-states> (warning of dangers of growing Christian nationalist movements and disparity in Christian representation between Republicans and Democrats).

³⁴⁷ *See, e.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (upholding religious objections to pandemic restrictions); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (upholding religious objections to contraceptive mandate in Affordable Care Act).

³⁴⁸ Koppelman, *supra* note 330, at 2296. *See generally, e.g.*, Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555 (1998) (arguing religious exemptions cannot be justified when

same time, the Court's approach to the Establishment Clause has expanded the cooperative realm between religion and government. The consequences of these developments have unsettled many core aspects of American law.³⁴⁹ They call to mind Justice O'Connor's admonition in a case involving the role of religion in American society: "Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?"³⁵⁰

B. *The Growing Connection Between Religion and Politics*

Concerns about a theocratic hierarchy are heightened because growing secularization is not a uniform phenomenon in the United States.³⁵¹ Some regions of the country have experienced a significant decline in religious life.³⁵² In other regions, religion remains vibrant.³⁵³ Similarly, religious beliefs are distributed differently across the political spectrum.³⁵⁴ On average, Republicans are more likely to self-identify as religious than Democrats.³⁵⁵ Similarly, Democrats are more likely to self-identify as having no religious affiliation than Republicans.³⁵⁶ Thus, the protections that inure to individuals whose objections to military service are based on religious training and belief will have political consequences.

There is another partisan development that merits concern. Not all religions are treated equally. For decades, the Republican Party has shared a close relationship with Christian spiritual leaders.³⁵⁷ There is now a clear connection

comparable exemptions are not offered to individuals based on their moral commitments); William P. Marshall, *What Is the Matter with Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 IND. L.J. 193 (2000) (arguing equal treatment of religion and nonreligion is essential for promoting equality).

³⁴⁹ See generally, e.g., Barclay, *supra* note 268; Wayne Batchis, *The Discriminatory Religion Clauses*, 97 S. CAL. L. REV. 367 (2024).

³⁵⁰ *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 882 (2005) (O'Connor, J., concurring). See generally Deborah Jones Merritt & Daniel C. Merritt, *The Future of Religious Pluralism: Justice O'Connor and the Establishment Clause*, 39 ARIZ. ST. L.J. 895 (2007).

³⁵¹ Ryan Burge, *The Religious Landscape Is Undergoing Massive Change. It Could Decide the 2024 Election*, POLITICO (May 14, 2023, at 07:00 ET), <https://www.politico.com/news/magazine/2023/05/14/democrats-religion-census-secular-00095858>.

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ See Perry Bacon, Jr., Opinion, *Why Religion Is Becoming an Even Stronger Force Within the Republican Party*, WASH. POST (Apr. 16, 2024), <https://www.washingtonpost.com/opinions/2024/04/16/religion-politics-republicans-abortion-trump>.

³⁵⁵ Frank Newport, *The Politics of Religion*, GALLUP (Sep. 1, 2023), <https://news.gallup.com/opinion/polling-matters/510464/politics-religion.aspx> [<https://perma.cc/5H3C-8HZC>].

³⁵⁶ *Id.*

³⁵⁷ Randall Balmer, *The Real Origins of the Religious Right*, POLITICO (May 27, 2014), <https://www.politico.com/magazine/story/2014/05/religious-right-real-origins-107133>; Clyde Haberman, *Religion and Right-Wing Politics: How Evangelicals Reshaped Elections*,

between Christianity and the Republican Party.³⁵⁸ This connection has grown in recent years.³⁵⁹ For example, the 2024 Republican Party Platform indicates that the Party will defend religious liberty.³⁶⁰ It states that “[o]ur ranks include men and women from every Faith and Tradition, and we respect the Right of every American to follow his or her deeply held Beliefs.”³⁶¹ Yet, the Republican Platform quickly pivots to convey a clear mandate in support of Christianity. The Platform calls for a “new Federal Task Force on Fighting Anti-Christian Bias that will investigate all forms of illegal discrimination, harassment, and persecution of Christians in America.”³⁶² The Platform asserts that “Republicans will use existing Federal law to keep foreign Christian-hating Communists, Marxists, and Socialists out of America.”³⁶³ No other religious group is offered the same protection. The Platform states that “Republicans will champion the First Amendment Right to Pray and Read the Bible in school.”³⁶⁴ No other religious text is recognized.

Project 2025, with its close connection to the Republican Party, includes several references to Judeo-Christian values and discounts other religions and belief systems.³⁶⁵ The document states that “[t]he Judeo-Christian tradition, stretching back to Genesis, has always recognized fruitful work as integral to human dignity, as service to God, neighbor, and family.”³⁶⁶ It asserts that “God ordained the Sabbath as a day of rest, and until very recently the Judeo-Christian tradition sought to honor that mandate by moral and legal regulation of work on

N.Y. TIMES (Oct. 28, 2018), <https://nytimes.com/2018/10/28/us/religion-politics-evangelicals.html>.

³⁵⁸ See, e.g., Ross Douthat, Opinion, *The Americanization of Religion*, N.Y. TIMES (Dec. 21, 2022), <https://www.nytimes.com/2022/12/21/opinion/america-religion-christianity.html>; David French, Opinion, *Why Fundamentalists Love Trump*, N.Y. TIMES (Dec. 7, 2023), <https://www.nytimes.com/2023/12/07/opinion/donald-trump-fundamentalists-evangelical.html>. See generally DAVID A. HOLLINGER, *CHRISTIANITY’S AMERICAN FATE: HOW RELIGION BECAME MORE CONSERVATIVE AND SOCIETY MORE SECULAR* (2022).

³⁵⁹ Robert Downen, *At Texas GOP Convention, Republicans Call for Spiritual Warfare*, TEX. TRIB. (May 28, 2024, at 05:00 CT), <https://www.texastribune.org/2024/05/28/texas-gop-convention-elections-religion-delegates-platform> [<https://perma.cc/6ZHM-Z95T>]; Amanda Marcotte, *Commentary: How Republicans Convinced Themselves America Was Meant to Be a “Christian Nation,”* SALON (Dec. 13, 2023, at 06:00 ET), <https://www.salon.com/2023/12/13/how-convinced-themselves-america-was-meant-to-be-a-christian-nation> [<https://perma.cc/X8FW-UA5M>]; Henry Olsen, Opinion, *Trump’s GOP Revival Isn’t Sectarian*, WALL ST. J. (Nov. 14, 2024, at 17:20 ET), <https://www.wsj.com/opinion/trumps-gop-revival-isnt-sectarian-expanding-republican-coalition-pious-and-the-nones-aefb1d8b>.

³⁶⁰ THE 2024 REPUBLICAN PLATFORM: MAKE AMERICAN GREAT AGAIN! 15 (2024).

³⁶¹ *Id.*

³⁶² *Id.*

³⁶³ *Id.* at 8.

³⁶⁴ *Id.* at 13.

³⁶⁵ See generally THE HERITAGE FOUNDATION, *MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE* (Paul Dans & Steven Groves eds., 2024).

³⁶⁶ *Id.* at 581.

that day.”³⁶⁷ In contrast, secular values and beliefs are treated as harmful.³⁶⁸ While Judeo-Christian values are highlighted and celebrated, other belief systems are either marginalized or ignored. Every reference to Islam is in the context of terrorism or Iranian theocracy.³⁶⁹ No reference is made to Hinduism, Buddhism, or any other non-Western belief system.

The Supreme Court’s Christian majority reinforces the relationship between religious beliefs and political affiliation.³⁷⁰ In both public and private pronouncements, the Justices have conveyed a clear affirmation of religious values and a critical view of secularism. In legal opinions, several Justices have noted the essential role of religion in American life and the Court’s corresponding obligation to protect religious beliefs.³⁷¹ Under the Roberts Court, the Religion Clauses have also been used to protect mainstream Christian values.³⁷² Outside of the Court, several Justices have made even more explicit statements about protecting religion.³⁷³ Throughout these pronouncements, Christianity has been treated as the default religion, meaning assessments of sincerely held religious beliefs are often viewed and framed through a Christian lens.³⁷⁴ These developments will amplify national tensions by promoting the

³⁶⁷ *Id.* at 589.

³⁶⁸ *Id.*

³⁶⁹ *Id.* at 121, 180-81, 185, 275.

³⁷⁰ Leah M. Litman, *Disparate Discrimination*, 121 MICH. L. REV. 1, 11 (2022); Zalman Rothschild, *Free Exercise Partisanship*, 107 CORN. L. REV. 1067, 1108 (2022); James Carroll, *The Sins of the High Court’s Supreme Catholics*, NEW YORKER (Aug. 19, 2022), <https://www.newyorker.com/news/daily-comment/the-sins-of-the-high-courts-supreme-catholics> [<https://perma.cc/6MVH-UZP5>]; Maureen Dowd, Opinion, *Too Much Church in the State*, N.Y. TIMES (May 14, 2022), <https://www.nytimes.com/2022/05/14/opinion/catholic-roe-abortion-supreme-court.html>.

³⁷¹ See, e.g., *Hosana-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 199 (2012) (Alito, J., concurring) (“[I]t is easy to forget that the autonomy of religious groups, both here in the United States and abroad, has often served as a shield against oppressive civil laws.”).

³⁷² Epstein & Posner, *supra* note 32, at 315-16.

³⁷³ See, e.g., Jess Bravin, *Justice Alito Warns of Secular Threats to Religious Liberty*, WALL ST. J. (July 29, 2022, at 17:56 ET), <https://www.wsj.com/articles/justice-alito-warns-of-secular-threats-to-religious-liberty-11659131775>; Adam Liptak, *Justice Alito Warns of Threats to Freedom of Speech and Religion*, N.Y. TIMES (May 11, 2024), <https://www.nytimes.com/2024/05/11/us/politics/justice-alito-freedom-speech-religion.html>; Margaret Talbot, *Justice Alito’s Crusade Against a Secular America Isn’t Over*, NEW YORKER (Aug. 28, 2022), <https://www.newyorker.com/magazine/2022/09/05/justice-alitos-crusade-against-a-secular-america-isnt-over> [<https://perma.cc/6P6H-G6C4>].

³⁷⁴ Steve Kennedy, *It Sure Seems Like the Courts Have Placed Christianity Above Other Faiths*, SLATE (Mar. 12, 2024, at 05:50 ET), <https://slate.com/news-and-politics/2024/03/supreme-court-and-religion-judges-christianity.html> [<https://perma.cc/J3G8-J4HQ>]; Mark Tushnet, *Religion and the Roberts Court: The Limits of Religious Pluralism in Constitutional Law*, in THE RISE OF CORPORATE RELIGIOUS LIBERTY 465, 465-66 (Micah Schwartzman, Chad Flanders & Zoë Robinson eds., 2016); Carl T. Bogus, *Is This a Christian Nation?: An Introduction*, 26 ROGER WILLIAMS U. L. REV. 237, 242 n.31 (2021). The view that the United

privileged position of some religions while generating questions about other religions as well as discounting equivalent moral and ethical belief systems.³⁷⁵

Finally, there is a racial dynamic.³⁷⁶ Within the Christian majority, there is a small but vocal movement in support of Christian nationalism and, troublingly, White Christian nationalism.³⁷⁷ This is a movement of exclusion—of racial and religious exclusion. In its most aggressive form, it justifies repression and even persecution of minority groups as an affirmation of Christian values.³⁷⁸ To be clear, this is a gross distortion of core Christian values.³⁷⁹ Yet, a legal system that protects White Christian nationalists and marginalizes all others will only further amplify national tensions.³⁸⁰

C. *Military Service in Modern America*

The disparate impact of military service will be felt in other ways. History reveals that individuals from poor or low-income families are more likely to perform military service than individuals from higher income levels, either because they voluntarily enlist or because they are subject to military

States was “a Christian nation” was asserted by the Supreme Court in the nineteenth century. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892). *But see generally* Erwin Chemerinsky, *No, It Is Not a Christian Nation, and It Never Has Been and Should Not Be One*, 26 ROGER WILLIAMS U. L. REV. 404 (2021) (arguing United States is not a Christian nation).

³⁷⁵ Other countries have struggled with this issue. *See generally* Charlotte Lawson, *Israel’s Ultra-Orthodox Military Draft Crisis, Explained*, DISPATCH (Apr. 4, 2024), <https://thedispatch.com/article/israels-ultra-orthodox-military-draft-crisis-explained> [<https://perma.cc/Y8YH-83VB>]; Dov Lieber & Carrie Keller-Lynn, *Israel’s Military Draft Exempts Ultra-Orthodox Jews. The War in Gaza Is Testing That Pact*, WALL ST. J. (Feb. 23, 2024, at 00:00 ET), <https://www.wsj.com/world/middle-east/israels-military-draft-exempts-ultra-orthodox-jews-the-war-in-gaza-is-testing-that-pact-b13ae05a>. For decades, ultra-Orthodox Jews were exempt from military service. This generated significant tension in the country. Secular Jews, Arab citizens, and others not subject to the exemption argued it was unfair that they were forced to shoulder the burdens of military service while ultra-Orthodox Jews were exempted. In June 2024, the Israeli Supreme Court held that there was no legal basis for the exemption. Aaron Boxerman, *Israeli Military Must Draft Ultra-Orthodox Jews, Supreme Court Rules*, N.Y. TIMES (June 25, 2024), <https://www.nytimes.com/2024/06/25/world/middleeast/israel-military-ultra-orthodox-jews-supreme-court.html>.

³⁷⁶ Black Americans are also part of the growing movement of secular Americans. *See* Anthony B. Pinn, *The Black Practice of Disbelief: An Introduction to the Principles, History, and Communities of Black Nonbelievers*, HUMANIST, Apr. 17, 2024, at 13.

³⁷⁷ PHILIP S. GORSKI & SAMUEL L. PERRY, *THE FLAG AND THE CROSS: WHITE CHRISTIAN NATIONALISM AND THE THREAT TO AMERICAN DEMOCRACY* 7 (2022).

³⁷⁸ Kelefa Sanneh, *How Christian Is Christian Nationalism?*, NEW YORKER (Mar. 27, 2023), <https://www.newyorker.com/magazine/2023/04/03/how-christian-is-christian-nationalism> [<https://perma.cc/8SDE-FHU5>].

³⁷⁹ David French, *Opinion, What Is Christian Nationalism, Exactly?*, N.Y. TIMES (Feb. 25, 2024), <https://www.nytimes.com/2024/02/25/opinion/christian-nationalism.html>.

³⁸⁰ Corbin, *supra* note 326, at 836.

induction.³⁸¹ During the Vietnam War, for example, the largest percentage of military personnel were individuals from working-class families.³⁸² Even when the United States shifted to an all-volunteer military force, those who volunteered were also more likely to come from working-class backgrounds.³⁸³ In essence, military service reflects economic inequality. In discussing military service, David Bell offered a candid and poignant observation about its inequitable nature: “If you are reading this article, you have likely never served in the military. You may well not have any immediate family members who have served, either (at least during the past forty years or so). And you probably do not know anyone who has been killed in Iraq.”³⁸⁴

To be clear, these are not abstract concerns. Although the draft ended in 1973, all male U.S. citizens and even male non-citizens living in the United States between the ages of eighteen and twenty-six are still required to register with the Selective Service System.³⁸⁵ Failure to register can generate significant criminal

³⁸¹ Natalie Bareis & Briana Mezuk, *The Relationship Between Childhood Poverty, Military Service, and Later Life Depression Among Men: Evidence from the Health and Retirement Study*, 206 J. AFFECTIVE DISORDERS 1, 1 (2016) (“Men raised in poverty had greater odds of draft and all-volunteer military service.”); Amy Lutz, *Who Joins the Military? A Look at Race, Class, and Immigration Status*, 36 J. POL. & MIL. SOCIO. 167, 178 (2008) (“However, there is an association between family income and military service: as family income increases, the likelihood of having ever served in the military decreases.”); Matthew Ivey, *The Broken Promises of an All-Volunteer Military*, 86 TEMP. L. REV. 525, 527 n.20 (2014) (citing DAVID CORTRIGHT, *PEACE: A HISTORY OF MOVEMENT AND IDEAS* 164 (2008)) (“[T]he wealthy and well connected could obtain deferments, the burdens of conscription fell disproportionately on the poor and working class.”).

³⁸² *Resistance and Revolution: The Military Draft During the Vietnam War*, MICH. IN THE WORLD, https://michiganintheworld.history.lsa.umich.edu/antivietnamwar/exhibits/show/exhibit/draft_protests/the-military-draft-during-the- [https://perma.cc/W49W-AEP2] (last visited Apr. 29, 2026) (“Of the 2.5 million enlisted men who served during Vietnam, 80 percent came from poor or working-class families.”); Lutz, *supra* note 381, at 172-73 (“As poor people and [Black people] made up a large portion of the troops during the Vietnam War, allegations were made that ‘[Black people] and the poor were serving as cannon fodder.’”).

³⁸³ Bareis & Mezuk, *supra* note 381, at 2 (“Prior research indicates that individuals who experienced poverty and other ACEs [adverse childhood experiences] in childhood are more likely to enroll in military service.”); Jeffrey A. Cooper, *Soldiers with Fortunes? Rethinking the Tax Treatment of Fallen Combatants*, 9 COLUM. J. TAX L. 113, 138 (2017). *But see* Dave Philipps & Tim Arango, *Who Signs Up to Fight? Makeup of U.S. Recruits Shows Glaring Disparity*, N.Y. TIMES (Jan. 14, 2020), <https://www.nytimes.com/2020/01/10/us/military-enlistment.html> (indicating familiarity with military and geographic location are best indicators for military recruitment trends).

³⁸⁴ David A. Bell, *When the Levee Breaks: Dissenting from the Draft*, 170 WORLD AFFS. 59, 59 (2008); *see also* Nick Martin, *The Military Views Poor Kids as Fodder for Its Forever Wars*, NEW REPUBLIC (Jan. 7, 2020), <https://newrepublic.com/article/156131/military-views-poor-kids-fodder-forever-wars> [https://perma.cc/63VK-K4XJ].

³⁸⁵ 50 U.S.C. § 3802(a).

and civil penalties.³⁸⁶ Sanctions can include fines of up to \$10,000 and imprisonment for up to five years.³⁸⁷ Individuals who fail to register may also become ineligible for numerous federal programs and services.³⁸⁸

Today, there is no draft. Yet, the world remains a violent and conflicted place, with the U.S. military regularly deployed overseas.³⁸⁹ Approximately two million individuals serve in the U.S. military, which consists of both active-duty personnel and the military reserve.³⁹⁰ Currently, over seventy thousand U.S. military personnel are deployed in South Korea and Japan alone.³⁹¹ U.S. military personnel are also located in Israel, Saudi Arabia, Kuwait, and throughout Asia, Europe, and North Africa.³⁹²

The United States is itself not free of conflict.³⁹³ Recently, military force has been used and threatened against civilians in the United States. During the height of the 2020 racial justice movement, President Trump used the National Guard to clear demonstrators near the White House.³⁹⁴ He also threatened to deploy the U.S. military against domestic protestors pursuant to the Insurrection Act.³⁹⁵ In

³⁸⁶ *Benefits & Penalties*, SELECTIVE SERV. SYS., <https://www.sss.gov/register/benefits-and-penalties> [<https://perma.cc/MZ3E-AHF3>] (last visited Nov. 12, 2025).

³⁸⁷ 50 U.S.C. § 3811(a), *amended by*, 18 U.S.C. § 3571; *see also* § 3571(e).

³⁸⁸ For example, registration with the Selective Service System is a prerequisite for many federal jobs. 5 U.S.C. § 3328(a) (providing failure to register shall result in ineligibility for appointment to any executive agency position).

³⁸⁹ Hope O'Dell, *Where in the World Are US Military Deployed?*, CHI. COUNCIL GLOB. AFFS.: BLUE MARBLE (Oct. 25, 2023), <https://globalaffairs.org/bluemarble/us-sending-more-troops-middle-east-where-world-are-us-military-deployed> [<https://perma.cc/L5R8-XPHR>].

³⁹⁰ Press Release, U.S. Dep't of Def., Def. Dep't Rep. Shows Decline in Armed Forces Population While Percentage of Military Women Rises Slightly (Nov. 6, 2023).

³⁹¹ *Where Are US Troops Stationed?*, USAFACTS, <https://usafacts.org/articles/where-are-us-military-members-stationed-and-why> [<https://perma.cc/RE7C-SC7H>] (Mar. 4, 2026).

³⁹² *Id.*

³⁹³ Countries engaged in military operations often struggle to balance the rights of conscientious objectors with national security concerns. *See, e.g.*, Andrii Nekoliak, *As Ukraine Struggles for Troops, Its Constitutional Court Considers the Rights of Conscientious Objectors*, JUST SEC. (Nov. 12, 2024), <https://www.justsecurity.org/104728/ukraine-constitution-conscientious-objectors> [<https://perma.cc/2MS2-QBEG>] (discussing Seventh Day Adventist who abstained from service for religious reasons in face of troop shortages in Ukraine's war with Russia).

³⁹⁴ Michael S. Schmidt & Maggie Haberman, *Trump Aides Prepared Insurrection Act Order During Debate Over Protests*, N.Y. TIMES (June 25, 2021), <https://www.nytimes.com/2021/06/25/us/politics/trump-insurrection-act-protests.html>.

³⁹⁵ William A. Galston, *Donald Trump's Insurrection Act Gambit*, WALL ST. J. (Nov. 14, 2023, at 12:40 ET), <https://www.wsj.com/articles/donald-trumps-insurrection-act-gambit-military-police-protest-riot-b04b54a4>; Charlie Savage, Jonathan Swan & Maggie Haberman, *Deploying on U.S. Soil: How Trump Would Use Soldiers Against Riots, Crime and Migrants*, N.Y. TIMES, <https://www.nytimes.com/2024/08/17/us/politics/trump-2025-insurrection-act.html> (Jan. 23, 2026); Jonathan Swan, Maggie Haberman & Charlie Savage, *How Trump Plans to Wield Power in 2025: What We Know*, N.Y. TIMES (Dec. 26, 2023), <https://www.nytimes.com/article/trump-2025-second-term.html>.

2025, the new Trump Administration has deployed U.S. military personnel in the United States.³⁹⁶ The Administration has called for the use of military force to remove undocumented migrants from the United States.³⁹⁷ Military personnel already maintain a regular presence at the U.S.-Mexico border, and these numbers have increased under the Trump administration.³⁹⁸ Military personnel have also been deployed in several U.S. cities to allegedly combat crime.³⁹⁹

Profound harms arise when the U.S. military is deployed on U.S. soil.⁴⁰⁰ There are certainly significant legal consequences.⁴⁰¹ Yet, the moral and ethical

³⁹⁶ Michael R. Gordon & Shelby Holliday, *Trump Tells Generals the Military Will Be Used to Fight "Enemy Within,"* WALL ST. J. (Sep. 30, 2025, at 16:27 ET), <https://www.wsj.com/politics/national-security/pete-hegseth-trump-quantico-military-speech-80ffabe5?>; Chris Hippensteel, *Trump Is Expanding the National Guard's Role. Some Former Generals Worry,* N.Y. TIMES (Sep. 21, 2025), <https://www.nytimes.com/2025/09/21/us/national-guard-crime-washington-cities.html>; Zolan Kanno-Youngs, Hamed Aleaziz & Eileen Sullivan, *Trump Starts Immigration Crackdown, Enlisting the Military and Testing the Law,* N.Y. TIMES (Jan. 20, 2025), <https://www.nytimes.com/2025/01/20/us/politics/trump-starts-immigration-crackdown-enlisting-the-military-and-testing-the-law.html>.

³⁹⁷ Michelle Hackman & Andrew Restuccia, *Trump Advisors Ramp Up Work on Mass Deportation Push,* WALL ST. J. (Nov. 8, 2024, at 21:00 ET), <https://www.wsj.com/politics/policy/trump-mass-deportation-immigrants-plan-348eaa91>.

³⁹⁸ Michelle Hackman & Alicia A. Caldwell, *Biden to Send 1,500 Troops to Mexican Border as Fears of Migrant Surge Grow,* WALL ST. J. (May 2, 2023, at 20:58 ET), <https://www.wsj.com/articles/biden-to-deploy-active-duty-troops-to-southern-border-for-end-of-titl-e-42-edd78577>; Meghann Myers, *The Military's Federal Border Mission Set to Continue Into 2024,* DEF. NEWS (Dec. 23, 2023), <https://www.defensenews.com/news/your-military/2023/12/23/the-militarys-federal-border-mission-set-to-continue-into-2024> [<https://perma.cc/4ACM-DCZT>].

³⁹⁹ Julie Bosman & Eric Schmitt, *Trump Administration Will Deploy 100 National Guard Troops to Illinois,* N.Y. TIMES (Sep. 29, 2025), <https://www.nytimes.com/2025/09/29/us/trump-national-guard-chicago.html>; Jennifer Calfas & Robbie Gramer, *Trump Says He Is Ordering Troops to Portland, Escalating Domestic Use of Military,* WALL ST. J. (Sep. 27, 2025, at 18:19 ET), <https://www.wsj.com/us-news/trump-says-he-is-ordering-troops-to-portland-escalating-domestic-use-of-military-0a473152>; Brett Samuels, *Trump Suggests Using 'Dangerous' U.S. Cities as 'Training Grounds' for Military,* HILL (Sep. 30, 2025, at 10:41 ET), <https://thehill.com/homenews/administration/5528730-trump-military-training-cities-crime-crackdown>.

⁴⁰⁰ See Mark Nevitt, *Deploying Soldiers on American Soil: Operational Risks & Considerations,* LAWFARE INST. (Oct. 3, 2024, at 09:53 ET), <https://www.lawfaremedia.org/article/deploying-soldiers-on-american-soil--operational-risks---considerations> [<https://perma.cc/CE8K-XNND>]. See generally, e.g., WILLIAM C. BANKS & STEPHEN DYCUS, *SOLDIERS ON THE HOME FRONT: THE DOMESTIC ROLE OF THE AMERICAN MILITARY* (2016); CLAYTON D. LAURIE & RONALD H. COLE, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1877-1945* (1997); PAUL J. SCHEIPS, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1945-1992* (2005).

⁴⁰¹ Anthony J. Ghitto, *Defending Against the Military: The Posse Comitatus Act's Exclusionary Rule,* 11 HARV. NAT'L SEC. J. 359, 382-85 (2020); Elizabeth Goitein & Joseph Nunn, *An Army Turned Inward: Reforming the Insurrection Act to Guard Against Abuse,* 13 J. NAT'L SEC. L. & POL'Y 355, 368-71, 373-75 (2023).

consequences are even more profound.⁴⁰² The presence of military personnel changes the dynamic of domestic confrontations, escalating tensions and the potential for violence. Military personnel are trained to use force against foreign militaries and international terrorists. They will now be confronted with the possibility of using force against fellow citizens. They will be compelled to consider the reasons for such use of force—are they being deployed to confront a legitimate national security threat, or are they being used to suppress legitimate political discourse?⁴⁰³ If protests involve social justice movements, the moral and ethical conflicts will be even more pronounced.⁴⁰⁴ When blood is shed, it will be American blood on American soil.⁴⁰⁵ U.S. history has shown the consequences of using military force against U.S. citizens and the harm it creates for the military, the public, and the nation.⁴⁰⁶ Protests may begin in the streets, but streets can often become battlefields. At the extremes of political discourse, civil war is not just history; it is a possibility.⁴⁰⁷

⁴⁰² The psychological consequences are also significant. Eric Chastain, *The Patrol That Haunts Me Wasn't in Baghdad; It Was in Dupont Circle*, L.A. TIMES: VOICES (Sep. 3, 2025, at 15:00 PT), <https://www.latimes.com/opinion/story/2025-09-02/washington-dc-national-guard-deployment> [<https://perma.cc/7TK2-C72X>]. See generally DAVE GROSSMAN, ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY (1996).

⁴⁰³ Kolby Hanson & Austin Knappe, *Who Would Support Deploying the Military to Domestic Protests?*, LAWFARE INST. (Nov. 10, 2024, at 09:00 ET), <https://www.lawfaremedia.org/article/who-would-support-deploying-the-military-to-domestic-protests> [<https://perma.cc/SYY4-LRDY>]; Jessica Blankshain, Lindsay P. Cohn & Danielle L. Lupton, *I'm From the Government, and I'm Here to Help: Public Perceptions of Coercive State Power*, 119 AM. POL. SCI. REV. 384, 384-89 (2024), <https://www.cambridge.org/core/journals/american-political-science-review/article/abs/im-from-the-government-and-im-here-to-help-public-perceptions-of-coercive-statepower/F457F8B166339189ADBCF4E2A73195E4> [<https://doi.org/10.1017/S0003055424000339>].

⁴⁰⁴ Ailee Katz, Note, *Insurrection by Any Other Name? Race, Protest, and Domestic Military Intervention*, 55 COLUM. J.L. & SOC. PROBS. 145, 153-55 (2021).

⁴⁰⁵ This is not meant to suggest that the lives of U.S. citizens are more valuable than foreign citizens. They are not. However, there is a tendency to attach greater attention and significance to the death of U.S. citizens, in both peacetime and war. See generally Jacoba Urist, *Which Deaths Matter?*, ATLANTIC (Sep. 29, 2014), <https://www.theatlantic.com/international/archive/2014/09/which-deaths-matter-media-statistics/380898> (discussing how media report deaths differently); JOHN TIRMAN, THE DEATH OF OTHERS: THE FATE OF CIVILIANS IN AMERICA'S WARS (2011) (examining how death of foreign civilians in U.S. military conflicts is rarely discussed).

⁴⁰⁶ See generally, e.g., BRIAN VANDEMARK, KENT STATE: AN AMERICAN TRAGEDY (2024); David E. Engdahl, *Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 IOWA L. REV. 1, 2 (1971).

⁴⁰⁷ Ross Douthat, Opinion, *The Real Path to an American Civil War*, N.Y. TIMES (Apr. 17, 2024), <https://www.nytimes.com/2024/04/17/opinion/trump-civil-war.html>; Toluse Olorunnipa, *Civil War Talk in Presidential Race Reveals Fresh Divisions on Race*, WASH. POST (Jan. 13, 2024), <https://www.washingtonpost.com/politics/2024/01/13/haley-trump-civil-war-history>.

IV. THE CODIFICATION PROJECT: A LEGISLATIVE PROPOSAL TO PROTECT
CONSCIENTIOUS OBJECTION AS SECULAR PROTEST

Congress should amend the Military Selective Service Act to clarify that conscientious objector status is not limited to individuals who are motivated by religious training and belief.⁴⁰⁸ Recognition should be extended to individuals whose beliefs emanate from moral or ethical sources. This would codify the *Seeger-Welsh* line of reasoning.⁴⁰⁹ Accordingly, the following revisions should be made to the relevant statutory provisions of the Military Selective Service Act:⁴¹⁰

(j) 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 *or whose beliefs emanate from moral or ethical sources*, 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.~~

Consistent with current law, the statute would apply to both active-duty military personnel as well as future inductees. While an all-volunteer force mitigates situations where service members may need to request conscientious objector status, it does not eliminate the possibility that these situations will arise. Even active-duty military personnel have requested conscientious objector status after volunteering for military service.⁴¹¹ For this reason, the U.S. military

⁴⁰⁸ A similar legislative proposal was made after the Supreme Court’s decision in *Seeger*. In 1969, for example, Representative Allard Lowenstein of New York introduced H.R. 12743 to amend the Military Selective Service Act of 1967 to “clarify the definition of conscientious objection to military service” by removing “the requirement of religious training and belief” from the statute. H.R. 12743, 91st Cong., 1st Sess. (1969); *see also* John H. Schlegel, *The Conscientious Objector and the First Amendment: There but for the Grace of God . . .*, 34 U. CHI. L. REV. 79, 105 (1966).

⁴⁰⁹ In fact, this language mirrors Justice Harlan’s understanding of how the statute should be read in light of the *Seeger-Welsh* line of reasoning: “‘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’ . . . , he qualifies for a § 6(j) exemption.” *Welsh v. United States*, 398 U.S. 333, 345 (1970) (Harlan, J., concurring).

⁴¹⁰ The italicized text represents additions to the statute, and the strikethrough text represents what should be removed.

⁴¹¹ Katherine Doyle & Courtney Kube, *U.S. Military Members Discuss Seeking Conscientious Objector Status Over Support of Israel in Gaza*, NBC NEWS (June 21, 2024, at 19:04 ET), <https://www.nbcnews.com/politics/politics-news/us-military-members-conscientious-objector-status-israel-gaza-war-rcna158265> [<https://perma.cc/K56K-7Z9S>]; Rowan Moore Gerety, Opinion, *The Way of the Conscientious Objector*, N.Y. TIMES (May 29, 2021), <https://www.nytimes.com/2021/05/29/opinion/conscientious-objector-military.html>; Transcript, *Soldiers Who Oppose Second Tour of Duty in Iraq and Afghanistan*, PBS NEWS (May 25, 2005, at 00:00 ET), <https://www.pbs.org/newshour/show/soldiers-who-oppose-second-tour-of-duty-in-iraq-and-afghanistan> [<https://perma.cc/82SJ-43SC>]. *See generally*

recognizes in-service requests for conscientious objector status. Under existing procedures, individuals who are serving in the military and determine that their service can no longer continue because of their sincerely held beliefs may request separation from the military or re-assignment.⁴¹²

If a military draft is initiated, individuals who receive conscientious objector status may be placed in noncombatant roles within the military.⁴¹³ Individuals who oppose all forms of military service would not be required to join the military. Instead, they would be required to participate in other forms of national service, “such civilian work contributing to the maintenance of the national health, safety, or interest.”⁴¹⁴

Statutory relief is necessary because extant protections offered to conscientious objectors whose beliefs emanate from moral or ethical sources are based solely on the Supreme Court’s interpretation of the relevant statute. This protection will continue as long as the Supreme Court’s interpretation does not change.⁴¹⁵ Such continuity would make a statutory amendment unnecessary. Indeed, the National Advisory Commission on Selective Service (“Commission”) took this position in 1967 when it reviewed the Selective Service Act and its provisions on conscientious objection.⁴¹⁶ In light of the *Seeger* decision, the Commission considered “the technical question of whether the statute should be amended to assure as a matter of orderly form that the Supreme Court’s interpretation of the law as set forth in the *Seeger* decision would be followed.”⁴¹⁷ After studying the issue, the Commission determined that an amendment was unnecessary “since the Court itself is the final authority for statutory interpretation.”⁴¹⁸ In light of the Supreme Court’s status as “the highest Court of the Land” and its “construction of the law,” it is the obvious duty of the Selective Service System to follow that construction.⁴¹⁹ The Commission also declined an amendment to the statute that would “eliminate the requirement that conscientious objection be lodged against war in all forms”

Brent D. Thomas, Comment, *The Impact of the Gulf War on Conscientious Objectors*, 61 UMKC L. REV. 67 (1992).

⁴¹² See *supra* notes 247-58 and accompanying text.

⁴¹³ 50 U.S.C. § 3806(j).

⁴¹⁴ *Id.*

⁴¹⁵ KILLIAN, *supra* note 194, at 54 (describing confusion surrounding conscientious objector exception and need for action by either Congress or Supreme Court).

⁴¹⁶ In 1966, President Johnson established the National Advisory Commission on Selective Service to study the operation of the Selective Service System and offer recommendations for developing a more equitable and efficient system of military service. Exec. Order No. 11,289, 31 Fed. Reg. 9265 (July 2, 1966).

⁴¹⁷ NAT’L ADVISORY COMM. ON SELECTIVE SERV., REPORT OF THE NATIONAL ADVISORY COMMISSION ON SELECTIVE SERVICE, IN PURSUIT OF EQUITY: WHO SERVES WHEN NOT ALL SERVE? 48 (1967).

⁴¹⁸ *Id.*

⁴¹⁹ *Id.*

so that individuals who objected to only some wars would be eligible.⁴²⁰ The Commission held that “conscientious objection must be based on moral opposition to war in all its forms.”⁴²¹

In 2026, however, relying on Supreme Court precedent carries great risk. Recent examples highlight the perils of relying on the Court to protect extant rights when these rights run counter to the Court’s ideological and jurisprudential beliefs. In *Dobbs v. Jackson Women’s Health Organization*,⁴²² for example, the Court overturned decades of precedent and rejected a constitutional right to abortion.⁴²³ The decision immediately activated dozens of state laws that had laid dormant due to the Court’s earlier decision in *Roe v. Wade*.⁴²⁴ Since these laws were never rescinded, they were activated once the Court changed its interpretation regarding the constitutional right to abortion.⁴²⁵ The consequences were immediate and profound.⁴²⁶ The *Dobbs* experience reveals the risk of relying on the Court’s interpretations when they run counter to the revolutionary values of the Roberts Court.⁴²⁷ This risk is most significant when the Court’s interpretations are contrary to the plain text of federal statutes that have not been revised or rescinded. Unless that legislation is amended or renounced by Congress, it can readily be reactivated if the Court changes its earlier interpretations.⁴²⁸

These concerns are even more pronounced with the *Seeger-Welsh* line of reasoning. While the Court has historically applied a heightened form of stare decisis to statutory interpretations, *Seeger* and *Welsh* were influenced by

⁴²⁰ *Id.* at 48-51.

⁴²¹ *Id.* at 50.

⁴²² 142 S. Ct. 2228 (2022).

⁴²³ *Id.* at 2242.

⁴²⁴ 410 U.S. 113, 162 (1973); Michael L. Smith, *Constitutional Interpretation and Zombie Provisions*, 40 GA. ST. U. L. REV. 603, 610 (2024) (many “unenforceable zombie laws” remain on books). See generally Maureen E. Brady, *Zombie State Constitutional Provisions*, 2021 WIS. L. REV. 1063.

⁴²⁵ Leonard M. Fleck, *Editorial: Abortion and “Zombie” Laws: Who is Accountable?*, 32 CAMBRIDGE Q. HEALTHCARE ETHICS 307, 307 (2023); William J. Aceves, *The Problem with Dobbs and the Rule of Legality*, 111 GEO. L.J. ONLINE 75, 90-92, 100 (2022).

⁴²⁶ See generally William J. Aceves, *Abortion Costs and the Language of Torture*, 72 UCLA L. REV. DISCOURSE 96, 111 (2024); David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 3, 99 (2023); Hillary A. Schneller, Diana Kasdan, Risa E. Kaufman & Alexander Wilson, *Dobbs v. Jackson Women’s Health Organization: Reckoning with Its Impact and Charting a Path Forward*, 25 U. PA. J. CONST. L. 1002 (2023); Varsava, *supra* note 263, at 1846.

⁴²⁷ See Donnelly, *supra* note 28, at 610 (describing constitutional revolution generated by Roberts Court).

⁴²⁸ See Ebba Brunnstrom, *Abortion and the Mails: Challenging the Applicability of the Comstock Act Laws Post-Dobbs*, 55 COLUM. HUM. RTS. L. REV. 1, 25 (2024); Aaron Tang, *After Dobbs: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, 75 STAN. L. REV. 1091, 1129 (2023).

constitutional concerns.⁴²⁹ Thus, the added deference offered by the Court to statutory *stare decisis* would be reduced. Moreover, *Welsh* was a plurality opinion, which means the Court would be even less inclined to follow its earlier ruling.⁴³⁰ For these reasons, this Article proposes a statutory amendment to the Military Selective Service Act.

There is no indication that codifying the *Seeger-Welsh* line of reasoning would adversely impact military readiness or national security.⁴³¹ Moreover, granting individuals conscientious objector status based on moral or ethical beliefs does not mean these individuals would not have national service obligations.⁴³² To be fair, the problems raised by the statutory language on conscientious objection and the *Seeger-Welsh* line of reasoning could be addressed in other ways. As discussed in Part III, however, these solutions would generate greater challenges and confront a deeply skeptical Court.

One potential solution would have the Court accept that “religious training and belief,” as set forth in the statute, includes moral and ethical beliefs.⁴³³ Essentially, this would perpetuate the status quo and the current interpretation of the *Seeger-Welsh* line of reasoning. This approach would mitigate potential concerns that a conscientious objection provision limited to individuals with religious beliefs violates the Establishment Clause.⁴³⁴ It would also limit the scope of this interpretation to the conscientious objector statute in the Military Selective Service Act. As noted, however, this interpretation would confront the preclusive language in the statute, which excludes “essentially political, sociological, or philosophical views, or a merely personal moral code.”⁴³⁵ The historical record reveals that the Justices found this to be a strained interpretation

⁴²⁹ See Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 319-21 (2005); William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1427-39 (1988); Joseph A. Greenaway, Jr., *Reflections on Stare Decisis*, 83 MD. L. REV. 1, 3 (2023).

⁴³⁰ See Richard M. Re, *Beyond the Marks Rule*, 132 HARV. L. REV. 1943, 1952 (2019); Ryan C. Williams, *Questioning Marks: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 821 (2017).

⁴³¹ See Haile, *supra* note 48, at 874-76; see also GREENAWALT, *supra* note 334, at 54.

⁴³² 50 U.S.C. § 3806(j).

⁴³³ *Id.*

⁴³⁴ During the Vietnam War, at least one federal district held that the Free Exercise Clause prohibited the government from requiring a nonreligious conscientious objector to enter military service. See *United States v. Sisson*, 297 F. Supp. 902, 910 (D. Mass. 1969). The district court also held that the Military Selective Service Act would violate the First Amendment if it granted conscientious objector status to religious objectors but rejected objector status to nonreligious objectors. *Id.* at 911. See generally *Constitutional Law: Selective, Nonreligious Conscientious Objector Is Exempt from Combatant Military Service*, 54 MINN. L. REV. 708, 708-20 (1970). While the U.S. government appealed the district court’s decision, the Supreme Court held the lower court’s decision was unappealable under the federal Criminal Appeals Act. See *United States v. Sisson*, 399 U.S. 267, 302-03 (1970). Accordingly, the Supreme Court did not address the merits of the lower court’s decision.

⁴³⁵ § 3806(j).

that was only justified by their desire to avoid a potential constitutional conflict.⁴³⁶ Only a plurality of the *Welsh* Court was prepared to accept this interpretation.⁴³⁷ In his concurrence in *Welsh*, Justice Harlan saw a clear distinction between religious beliefs and political, sociological, and philosophical beliefs.⁴³⁸ He even referred to the exceptions in the statutory language as “the statutory boundary, the ‘asymptote,’ of the word ‘religion.’”⁴³⁹ The Roberts Court, with its commitment to textualism, would be even more skeptical of a statutory interpretation equating moral and ethical beliefs with religious beliefs.

Another solution would be more expansive and, therefore, more controversial. The Court could interpret the word “religion” in the First Amendment to include moral and ethical beliefs.⁴⁴⁰ And, regardless of any statutory provision, the Court could assert that the Free Exercise Clause requires an exemption from military service to conscientious objectors and that this includes individuals who sincerely hold religious, moral, or ethical beliefs.⁴⁴¹ This interpretation would face substantial opposition.⁴⁴² The Court has previously stated that “to have the protection of the Religion Clauses, the claims must be rooted in religious

⁴³⁶ See *supra* Part I.

⁴³⁷ *Welsh v. United States*, 398 U.S. 333, 335 (1970).

⁴³⁸ *Id.* at 352 (Harlan, J., concurring).

⁴³⁹ *Id.*

⁴⁴⁰ Some commentators argue that secularism is a form of religion. See Julia E. Fay, “Religious” Secularism and Legitimacy in American Democracy, 57 COLUM. J.L. & SOC. PROBS. 215, 237 (2024) (discussing debate over whether secularism constitutes form of religion); see also Nelson Tebbe, *The Principle and Politics of Liberty of Conscience*, 135 HARV. L. REV. 267, 272 (2021) (“[F]ree exercise exemptions properly protect not just religion as such but a broader class of beliefs and practices . . .”). Debates surrounding the relationship between secularism and religion are longstanding, deeply polemic, passionately argued, and yet remain unresolved. See, e.g., Christine L. Niles, *Epistemological Nonsense? The Secular/Religious Distinction*, 17 NOTRE DAME J.L. ETHICS & PUB. POL’Y 561, 561 (2003).

⁴⁴¹ While beyond the scope of this Article, rejecting protection for individuals whose beliefs stem from moral or ethical beliefs may violate other constitutional provisions, including the Equal Protection Clause, the Due Process Clause, and the Speech Clause of the First Amendment. See, e.g., Mark L. Rienzi, *The Constitutional Right Not to Kill*, 62 EMORY L.J. 121, 121 (2012); Eisgruber & Sager, *supra* note 45, at 1271; Marshall, *supra* note 45, at 312; see also Spencer E. Davis, Jr., *Constitutional Right or Legislative Grace? The Status of Conscientious Objection Exemptions*, 19 FLA. ST. U. L. REV. 191, 195-96 (1991) (arguing no constitutional right to conscientious objection under Religion Clauses).

⁴⁴² This solution would confront the intractable problem of defining religion. See Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831, 1905 (2009) (“Religion is a category that is hard to delimit.”).

belief.”⁴⁴³ Thus, the word “religion” cannot be “simply wave[d] away.”⁴⁴⁴ Indeed, the Court has consistently treated religion as unique.⁴⁴⁵

The Roberts Court has also interpreted the First Amendment through a historical lens, and so it has looked to see how religion was defined at the time of ratification.⁴⁴⁶ The historical record supports a narrow interpretation of religion. For example, the Virginia Declaration of Rights defined religion as a duty owed “to our Creator” and “that it is the mutual duty of all to practice Christian forbearance.”⁴⁴⁷ Religion and conscience were also seen as distinct concepts. During the drafting of the Bill of Rights, an amendment was proposed that would protect the “rights of conscience.”⁴⁴⁸ This was rejected in preference to protecting the free exercise of religion.⁴⁴⁹ Given the historical record, there would be insufficient support for interpreting the Religion Clauses to include moral and ethical beliefs.⁴⁵⁰

⁴⁴³ *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972). In *Yoder*, the Court considered whether the value system established by Henry David Thoreau could have received recognition and protection under the Religion Clauses. According to the Court, “Thoreau’s choice was philosophical and personal rather than religious, and such belief [did] not rise to the demands of the Religion Clauses.” *Id.* at 216. In dissent, however, Justice Douglas disagreed. *Id.* at 247-49 (Douglas, J., dissenting) (arguing Court’s interpretation of Thoreau’s beliefs ran counter to earlier rulings in *Seeger* and *Welsh*); see also *Movsesian*, *supra* note 340, at 548-54 (analyzing whether beliefs of individuals like Henry David Thoreau would qualify for recognition and protection under Religion Clauses).

⁴⁴⁴ *Movsesian*, *supra* note 340, at 566; see also *HORWITZ*, *supra* note 338, at 192-93 (acknowledging challenges of defining religion).

⁴⁴⁵ Justice Alito has been a prominent advocate of the unique role of religion. See Maria Wiering, *U.S. Needs Founding Fathers’ Religious Liberty Vision, Alito Tells MD Lawyers*, ARCHDIOCESE OF BALT. (Oct. 31, 2014), <https://www.archbalt.org/u-s-needs-founding-fathers-religious-liberty-vision-alito-tells-md-lawyers> [<https://perma.cc/E4QC-GM3Q>] (“While a great many people believe very strongly that there are rights that government must respect, our understanding of the source of those rights has been obscured. That we understand that they come from our creator has become obscure, and it’s questionable as to whether they’ll be able to endure without their historical roots.”). See generally Gabrielle Girgis, *An Architect of Religious Liberty Doctrines for the Roberts Court*, 46 HARV. J.L. & PUB. POL’Y 825 (2023).

⁴⁴⁶ *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022) (“An analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some ‘exception’ within the ‘Court’s Establishment Clause jurisprudence.’”); *Town of Greece v. Galloway*, 572 U.S. 565, 577 (2014) (“Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change.”); *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2087 (2019) (noting importance of history in interpreting Religion Clauses).

⁴⁴⁷ VA. CONST. art. I, § 16 (1776).

⁴⁴⁸ 1 ANNALS OF CONG. 783 (1789) (Joseph Gales ed., 1834).

⁴⁴⁹ *Id.* at 948.

⁴⁵⁰ See MICHAEL W. MCCONNELL, THOMAS C. BERG & CHRISTOPHER C. LUND, *RELIGION AND THE CONSTITUTION* 673 (5th ed. 2020) (noting historical record “strongly suggests the terms were not regarded as synonymous”). But see James Toomey, “*Religion*,” *Before Darwin*, 101 WASH. U. L. REV. 661, 661 (2024) (arguing concept of religion was far more

Interpreting religion to include moral and ethical beliefs would also generate broader consequences that would extend far beyond the realm of conscientious objection to military service.⁴⁵¹ With respect to the federal government, RFRA requires the application of strict scrutiny whenever the government substantially infringes the free exercise of religion.⁴⁵² If religious beliefs now include moral or ethical beliefs, they presumably would be subject to the same heightened degree of protection under RFRA.⁴⁵³ With respect to state and local governments, the Roberts Court has made clear that the infringement on the free exercise of religious beliefs requires strict scrutiny unless the government action constitutes a valid and neutral law of general applicability.⁴⁵⁴ The Court's recent jurisprudence indicates that only laws without exceptions or exemptions constitute valid and neutral laws of general applicability.⁴⁵⁵ If a law contains any exceptions or exemptions that exclude religious beliefs, strict scrutiny is required.⁴⁵⁶ This approach for assessing government regulations has been referred to as a "most favored nation" standard that makes almost any law subject to heightened scrutiny.⁴⁵⁷ Extending the protections of "most favored nation" status to individuals who hold moral or ethical beliefs will result in even more individuals being able to challenge government regulations through the most rigorous form of judicial scrutiny.

In sum, a statutory amendment that codifies the *Seeger-Welsh* line of reasoning offers the most effective solution for the threatened loss of conscientious objector status to individuals who oppose participation in government-sanctioned violence. It is also preferable to an ex post congressional override.⁴⁵⁸ In the past, Congress has adopted legislation in response to Supreme

expansive in late-eighteenth century and included "accounts of the nature of the universe and foundations of ethics").

⁴⁵¹ Movsesian, *supra* note 340, at 566-67.

⁴⁵² 42 U.S.C. § 2000bb-1.

⁴⁵³ This interpretation presumes that the Court would apply the same interpretation of religious beliefs to both the Free Exercise Clause and RFRA. *See id.*

⁴⁵⁴ *See* *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876-77 (2021).

⁴⁵⁵ *Id.* at 1879; *see also* *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67-68 (2020) (per curiam).

⁴⁵⁶ *See* *Fulton*, 141 S. Ct. at 1872 ("A law is not generally applicable [if it provides] a mechanism for individualized exemptions.").

⁴⁵⁷ Koppelman, *supra* note 330, at 2285; *see also* Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 22-23 (2016); Note, "A Law Unto Himself": *Free Exercise, (Un)equal Value, and the Future of Public Accommodations*, 137 HARV. L. REV. 1447, 1448 (2024).

⁴⁵⁸ *See* Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 862 (2012) (describing challenges faced by legislative overrides); Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 512 (2009) (arguing courts narrowly construe legislative overrides of judicial decisions).

Court decisions when there is disagreement with the Court's ruling.⁴⁵⁹ However, it may take years for Congress to act. A problematic interpretation would remain in effect until new legislation is enacted to override the Court's decision. In contrast, this Codification Project proposes preemptive statutory affirmations of existing Supreme Court interpretations.⁴⁶⁰ This action would have an immediate impact. Unlike ex post congressional overrides, the law is not changed because of a problematic judicial interpretation. Rather, the Court's existing interpretation of a statute is codified and confirmed by Congress *before* the Court has an opportunity to change its interpretation. This offers significant protection when there is support for the Court's original interpretation. Finally, the Codification Project is consistent with the separation of powers. It is, in fact, the archetype of legislative authority over statutory law. Preemptive statutory affirmations are the counterpoise to judicial revolutions.

CONCLUSION

There are many forms of protest—some are communal and open; others are individual and private. Muhammad Ali participated in countless street marches in support of racial equality. He denounced poverty on radio and television. He publicly demonstrated and spoke out against war. Yet, one of his most significant acts of protest was his most personal. In a sport filled with violence, Ali was its champion. However, he chose pacifism in his fight as a conscientious objector to government-sanctioned violence.

Conscientious objection is a vital form of protest. It offers legitimacy to objections over government-sanctioned violence and a mechanism for communicating these concerns in public.⁴⁶¹ At one time, it was limited to individuals who professed religious beliefs. It was subsequently extended to include individuals whose beliefs emanate from moral or ethical sources. Congress should codify this understanding in recognition of the country's growing pluralism, rising secularism, and the Supreme Court's jurisprudential

⁴⁵⁹ In 1994, for example, Congress adopted RFRA to require heightened scrutiny in cases where the federal government imposes significant burdens on the free exercise of religion. See Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488. The law was adopted in response to the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). In 2009, Congress adopted the Lilly Ledbetter Fair Pay Act to extend the time available for individuals to file equal pay claims under the Civil Rights Act. See Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5. The statute was adopted in response to the Supreme Court's *Ledbetter v. Goodyear Tire & Rubber Co.* decision, 550 U.S. 618 (2007).

⁴⁶⁰ See, e.g., David S. Cohen & Rachel Rebouché, *Repealing Comstock*, 104 B.U. L. REV. ONLINE 265 (2024) (proposing repeal of certain provisions of Comstock Act which could prohibit distribution of abortion medication); Douglas Laycock, Thomas C. Berg, Carl H. Esbeck & Robin Fretwell Wilson, *The Respect for Marriage Act: Living Together Despite Our Deepest Differences*, 2024 U. ILL. L. REV. 511 (2024) (addressing adoption of Respect for Marriage Act to codify protections offered by Supreme Court's decision in *Obergefell v. Hodges*).

⁴⁶¹ See MARGARET LEVI, CONSENT, DISSENT, AND PATRIOTISM 168 (1997).

shift on the relationship between religion and government. While religion reflects a profound personal belief with constitutional significance, this should not diminish the rights of individuals who object to government-sanctioned violence on other grounds. To those who share Ali's commitment to pacifism, it is the belief and not its origins that truly matters. After all, the concept is referred to as "conscientious objection" and not "religious objection."⁴⁶²

⁴⁶² I am grateful to Daniel Yeager for this observation.