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NOT THE SMALLEST GRAIN OF INCENSE: FREE EXERCISE AND CONSCIENTIOUS OBJECTION TO DRAFT REGISTRATION¹

I shall die, but that is all I shall do for Death;
I am not on his pay-roll.²

INTRODUCTION

America has long respected the beliefs of conscientious objectors to military service. States have exempted conscientious objectors from service in their militia since colonial times,³ and every federal conscription statute since the Civil War has exempted conscientious objectors from personally bearing arms.⁴ The historical accommodation to the demands of conscience suggests that, even in wartime, conscientious objectors make unique, positive contributions to the community and deserve respect and accommodation.⁵

1. "The early Christians refused to put a pinch of incense on the altar before Caesar's image, knowing that if they were to recognize the State in this way their lives might be spared." A. LYND, *WE WON'T GO: PERSONAL ACCOUNTS OF WAR OBJECTORS* 33 (1968).

2. E. ST. VINCENT MILLAY, *Conscientious Objector*, in *WINE FROM THESE GRAPES* 47 (1934).

3. See S. KOHN, *JAILED FOR PEACE: THE HISTORY OF AMERICAN DRAFT LAW VIOLATORS, 1658-1985* 5-15 (1986) [hereinafter *JAILED FOR PEACE*] (detailing provisions for conscientious objectors in pre-revolutionary American colonies). However, in some colonies the exemption was gained only after conscientious objectors engaged in civil disobedience. *Id.* at 6-7.

4. The first federal draft statute during the Civil War did not specifically exempt conscientious objectors. However, the statute permitted a person could avoid military service if he provided a substitute to serve in his place or paid \$300 for the hiring of a substitute. Act of March 3, 1863, ch. 75, § 13, 12 Stat. 731, 733 (1863). The law was amended in 1864 to exempt from the draft conscientious objectors who were "members of religious denominations ... prohibited from [bearing arms] by the rules and articles of faith and practice of said religious denomination." Act of Feb. 24, 1864, ch. 13, 13 Stat. 6, 9 (1864).

5. See Boulding, *The Pacifist as Citizen*, *FRIENDS JOURNAL*, Nov. 1989, at 14 (positive social functions of pacifists include providing critique of national policies in light of highest moral values of the civilization; providing checks and balances on state decisionmaking regarding war; providing concrete visions of what will happen when the war is over; and indicating an alternative way of dissenting from government policies while remaining loyal to the country); Freeman, *A Remonstrance for Conscience*, 106 U. PA. L. REV. 806, 827-30 (1958) (suggesting seven positive functions that conscience performs in civilized society); 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, 30 (1967) (suggesting that individual's acting consistently with conscience gives essential moral content to society's need to discern and give meaning to ultimate moral truths).

On the other hand, the legal accommodation of conscientious objectors has to a certain extent been grudging. Narrow eligibility requirements have excluded many conscientious objectors whose bases for objecting to war were deemed less worthy of protection.⁶ Similarly, the alternatives to military service required of conscientious objectors are often equally offensive to conscience and may require a sacrifice by the conscientious objector greater than that required of his arms-bearing brethren.⁷ Some conscientious objectors have been subjected to imprisonment and torture for exercising their beliefs.⁸

6. During the Civil War, for example, only members of religious denominations that prohibited members from bearing arms were exempted from serving in combat. Act of Feb. 24, 1864, ch. 13, 13 Stat. 6, 9 (1964). Similarly, during the First World War, only members of a "well-recognized religious sect ... whose creed or principles forbid its members to participate in war in any form" were exempted from combatant military service. Act of May 18, 1917, ch. 15, § 4, 40 Stat. 76, 78 (1917) (repealed 1919).

The draft laws from 1940 to the present day exempt only those who "by reason of religious training and belief, [are] conscientiously opposed to participation in war in any form." Act of June 24, 1948, ch. 625, § 6(j), 62 Stat. 604, 612-13 (1948) (codified at 50 U.S.C. app. § 456j (1988)); Act of Sept. 16, 1940, ch. 720, § 5(g), 54 Stat. 885, 889 (1940)).

Thus, one whose religious beliefs permit participation in a "just" war, but not an unjust one, is not protected by the statutory exemption. See *Gillette v. United States*, 401 U.S. 437 (1971) (denying claim that limiting conscientious objector exemption to objectors to all wars violates the Establishment Clause). See generally J. ROHR, *PROPHETS WITHOUT HONOR: PUBLIC POLICY AND THE SELECTIVE CONSCIENTIOUS OBJECTOR* 103-83 (1971).

7. See *supra* note 6 (alternatives available to conscientious objectors during the Civil War).

During the First World War, conscientious objectors were required to submit to induction into the military where they were assigned non-combatant roles. Act of May 18, 1917, ch. 15, § 4, 40 Stat. 76, 78 (1917) (repealed 1919). Those who refused to be inducted were imprisoned. L. SCHLISSEL, *CONSCIENCE IN AMERICA* 150-59 (1968).

From the Second World War to the present day, conscientious objectors were required to perform either non-combatant service in the military or work under civilian supervision "contributing to the maintenance of the national health, safety, or interest...." 50 U.S.C. app. § 456j (1980). See also 32 C.F.R. § 1656 (1990) (regulations relating to alternative service for conscientious objectors).

Conscientious objectors have generally been required to perform their alternative service away from their home communities and at very low or no pay. See L. BASKIR & W. STRAUSS, *CHANCE AND CIRCUMSTANCE: THE DRAFT, THE WAR, AND THE VIETNAM GENERATION* 41 (1978). During the Second World War, conscientious objectors were paid nothing for their labor and the burden of supporting them and their families fell to their churches. See M. SIBLEY & P. JACOB, *CONSCRIPTION OF CONSCIENCE* 216-24 (1952). For a critical discussion of why conscientious objectors were not paid for their service, see J. CORNELL, *CONSCIENCE AND THE STATE: LEGAL AND ADMINISTRATIVE PROBLEMS OF CONSCIENTIOUS OBJECTORS, 1943-44* 40-49 (1944).

Furthermore, even though the conscientious objector is required to perform the same two year term of alternative service as does the draftee, the conscientious objector is not eligible for federal veterans' benefits. See *Johnson v. Robison*, 415 U.S. 361 (1974) (upholding denial of veterans benefits to conscientious objector who had completed two years alternative service).

8. During the First World War, conscientious objectors who refused to submit to military discipline were imprisoned and some were tortured. See L. SCHLISSEL, *supra* note 7, at 150-59 (detailing specific instances of brutality towards conscientious objectors in prison); *JAILED FOR PEACE*, *supra* note 3, at 52-54 (detailing mistreatment of conscientious objectors in prison during the First World War).

As generally understood, conscientious objection to war describes a conscientious or religious belief incompatible with participation in war.⁹ Conscientious objection is not a monolithic ideology, however. Rather, the term describes a range of religious beliefs and attitudes that generally concern a person's relationship with the state in time of war.¹⁰ Precisely what conduct constitutes participation in war is an individual judgment that varies from objector to objector.

For many conscientious objectors, even the act of registering for the draft is morally incompatible with their religious beliefs opposing participation in war.¹¹ Despite these claims, the Military Selective Service Act requires all

9. In this note, the words "conscience" and "conscientious" will be used interchangeably with "religion" and "religious." The terms will be used to refer to "deeply held moral, ethical, or religious beliefs" that would give the holder of such beliefs "no rest or peace" if he or she acted contrary to them. *Welsh v. United States*, 398 U.S. 333, 344 (1970).

The belief that war is immoral may be based on the teachings of a recognized religious tradition or may develop in an individual's own conscience independent of any organized religious teaching. *See infra* text accompanying notes 110-117 (discussing various sources of religiously based opposition to war).

10. The philosophical basis of conscientious objection to war dates back at least to the time of Lao-tze, 500 B.C.E. For the first 250 years of the Christian era, Christians were almost without exception conscientious objectors not only because of their opposition to shedding blood, but also because military service was closely connected with the worship of idols and the emperor. M. SIBLEY & P. JACOB, *supra* note 7, at 1-2.

Professor Elise Boulding has identified at least four varieties of citizens who call themselves pacifists: Internationalists (who advocate international cooperation and nonviolent methods of conflict resolution but who support military action by their own government in wartime); selective pacifists (who object to participating in unjust wars but who are willing to fight in just wars); conscientious objectors (who cooperate with the government in wartime by participating in alternative service but who refuse military service or to take a life); and absolutists (who not only refuse to participate in war and violence but who also refuse to assist the government's war-making capacity in any way). Boulding, *supra* note 5, at 13-14.

The Department of Justice distinguished twelve classes of conscientious objectors during the Second World War: religious, moral or ethical, economic, political, philosophical, sociological, internationalist, personal, neurotic, naturalistic, "professional" pacifist, and Jehovah Witness objectors. Not all of these categories of conscientious objectors were eligible for exemption under the draft law. SELECTIVE SERVICE SYSTEM, SPECIAL MONOGRAPH NO. 11: CONSCIENTIOUS OBJECTION 3-4 (1950) [hereinafter SPECIAL MONOGRAPH NO. 11].

See also M. SIBLEY & P. JACOB, *supra* note 7, at 18-43 (discussing the "community of conscientious objectors" and describing in detail the idiosyncratic beliefs of seven religious and one "philosophical and political" group of objectors); Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 338 n.44 (1969) (psychological examination of Second World War conscientious objectors revealed many sources and commitments of conscientious objection).

11. One such conscientious objector described his belief in the following letter to the Selective Service System:

I am writing to inform you that I have violated the Military Selective Service Act by not registering. I feel that I must refuse to comply with this law because registering would force me to compromise my Christian faith.

young men, including conscientious objectors, to personally register regardless of their moral objection to doing so.¹² In the past, federal courts have held that the registration requirement is valid, even as applied to conscientious objectors, because registration is a necessary prerequisite for the orderly administration of the conscientious objector exemption.¹³ The Supreme Court, however, has never definitively decided whether requiring conscientious objectors to register for the draft violates their constitutional right to free exercise of religion.

After Congress abolished conscription in 1973,¹⁴ President Ford rescinded the registration requirement in 1975.¹⁵ Consequently, the constitutionality of requiring conscientious objectors to register for the draft, as well as other constitutional challenges to the draft, became dormant questions.¹⁶ When President Carter reinstated draft registration in 1980,¹⁷ however, thousands of

I believe that war in any form is wrong. Christ meant for Christians to love each other and to love their enemies. War is an expression of hatred and an institution that has legalized and encouraged types of violent conduct that no civilized country would allow within its borders during peacetime. The use of force to resolve disputes has created an atmosphere of coercion which directly conflicts with the message of love preached by Christ. A Christian must use truth, love, understanding, and equality to resolve any disputes in which he is involved. As a Christian, I feel that I must avoid participation in the conscription process by not registering because conscription is an inherent part of the war process....

I am not opposed to serving this great land of ours by working in a hospital, teaching, or by working at some other type of public service job. However, I can not participate, in any manner, with the armed forces.

Letter of Mark Schmucker (Aug. 19, 1980) reprinted in Reilly, "Secure the Blessings of Liberty": A Free Exercise Analysis Inspired by Selective Service Non-registrants, 16 N. KY. L. REV. 79, 85 (1988). See also *infra* text accompanying notes 205-44 (extensive discussion of Schmucker's case).

12. 50 U.S.C. app. § 453 (1988). "[I]t shall be the duty of every male citizen of the United States ... between the ages of eighteen and twenty-six, to present himself for and submit to registration ... as shall be determined by proclamation of the President by rules and regulations prescribed hereunder." *Id.*

13. See *infra* text accompanying notes 148-72 (discussing federal cases upholding draft registration requirement against free exercise challenges).

14. Pub. L. No. 92-129, 85 Stat. 353, 50 U.S.C. app. § 467(c) (1976 & Supp. V 1981).

15. Proclamation No. 4360, 32 C.F.R. 33 (1976), reprinted in 50 U.S.C.A. app. § 453 (1988).

16. One case, *Rostker v. Goldberg*, 453 U.S. 57 (1981), was filed in 1971 by young men challenging on the male-only draft on equal protection grounds. A district court panel was convened to hear the case in 1974 after Congress allowed Selective Service's authority to induct men into the military lapsed. The case languished for five years and was revived only when President Carter used his authority to reinstate draft registration in 1980. *Id.* at 60-61. *Rostker* eventually reached the Supreme Court which held that a male-only draft did not violate the equal protection. See *infra* notes 158-64 and accompanying text.

17. Proclamation 4771 of July 2, 1980, 45 Fed. Reg. 247 (1980). Statutory authority for the president to institute registration is found at 50 U.S.C. app. § 453 (1988) and the regulations at 32 C.F.R. §§ 1615 *et seq.* (1990).

young men refused to register¹⁸ reviving the question of whether conscientious objectors could be constitutionally required to register for the draft. More recently, the American-led war against Iraq and the commitment of 400,000 American troops to Saudi Arabia has made conscientious objection and the draft important matters of contemporary public debate.¹⁹

Although the threat of criminal prosecution has always made it difficult for conscientious objectors to refuse registration, prior to 1980 objectors could at least take solace in the fact that they could apply for and receive the conscientious objection exemption soon after registration.²⁰ By applying for conscientious objection status simultaneously with registration, the conscientious objector could provisionally remove himself from the pool of men eligible to be drafted.²¹ Registration could therefore be fairly characterized as an administrative process by which the conscientious objector could claim his exemption, thus justifying the infringement on free exercise as the least restrictive means consistent with the government's interest.²²

Selective Service procedures enacted after the 1980, however, made draft registration a more complicated moral decision for conscientious objectors. Under current Selective Service regulations, no provision exists for conscientious objectors to declare their opposition to military service at registration; they may

18. In 1982, an estimated 674,000 young men had failed to register as required. Two hundred seventy of these informed the government of their conscientious opposition to registration and were referred to the Justice Department for prosecution. Thirteen were subsequently indicted. The remainder either registered under pressure, were found to be not required to register, or were still under investigation. By 1984, three additional conscientious objector non-registrants had been indicted. *Wayte v. United States*, 470 U.S. 598, 604 n.3 (1985).

By 1986, however, Selective Service reported that 99.2% of those required to register have signed up. SELECTIVE SERV. SYS., SEMI-ANNUAL REPORT OF THE DIRECTOR OF SELECTIVE SERVICE TO THE CONGRESS OF THE UNITED STATES 5 (1986) [hereinafter SEMI-ANNUAL REPORT 1986].

19. See Seligman & de Llosa, *The Return of Conscience*, FORTUNE, Feb. 25, 1991, at 149 (reporting that Nexis news service offered eighty-seven stories about conscientious objection during the first twenty-six days of January, 1991). See also *The draft is ready for war*, POST-TRIBUNE (GARY, IND.), Dec. 16, 1990, at A8, col. 1 (citing questions by Sen. Nunn and Glenn whether the Pentagon would have enough personnel worldwide if a combat breaks out in a war against Iraq).

20. Kellett, *Draft Registration and the Conscientious Objector: A Proposal to Accommodate Constitutional Values*, 15 COLUM. HUM. RTS. L. REV. 167, 170 (1984).

21. *Id.* The conscientious objector applicant would remain ineligible for military service until his local draft board considered his application and placed him in the appropriate classification category.

22. See *infra* text accompanying notes 165-67 (describing court decisions holding draft registration a reasonable means of administering the conscientious objector exemption despite the infringement on free exercise).

apply for an exemption only if and when they receive induction notices.²³ Until that time, the conscientious objector is not differentiated from other registrants and is presumably available for induction.²⁴

This procedure subtly but profoundly transforms draft registration from being the first step of *withdrawing* from the military to the first step of *entering* military service. The procedure has led some conscientious objectors to refuse to register, even though they would be willing to register for the draft if there were some way to officially declare their opposition to war.²⁵

This note will explore two unsettled questions regarding the legal status of conscientious objectors. First, does the Constitution require that conscientious objectors be exempted from military service? Second, if the answer to the first question is yes, does the right extend to being exempted from draft registration? This note will argue that the history of the conscientious objector exemption and modern free exercise jurisprudence support the proposition that conscientious objection is protected as free exercise of religion under the Constitution. This note further argues that under current circumstances, the failure to exempt or otherwise accommodate conscientious objectors from draft registration violates their right to free exercise of religion. Finally, the note will discuss and evaluate several alternatives that would provide the constitutionally required accommodation of the conscientious objector.

Part I of this note will analyze how the Supreme Court has decided cases involving free exercise of religion challenges to other government regulations to determine the analytical framework within which conscientious objection should be examined.²⁶ Part II outlines the constitutional history of conscientious objection, applies the Court's free exercise analysis to conscientious objection to military service, and demonstrates that the Constitution requires that conscientious objectors be exempted from compulsory military service.²⁷ Part III examines draft registration under the Court's free exercise analysis to show that, as currently constituted, requiring conscientious objectors to register is an unconstitutional infringement on the free exercise of

23. 32 C.F.R. § 1636.2 (1990). Draftees have ten days from the time the induction notice is mailed within which to claim any exemptions for which they may be eligible, including conscientious objection. 32 C.F.R. § 1633.2 (1990).

24. 32 C.F.R. § 1633.3 specifies that "no document relating to any registrant's claims or potential claims will be retained by the Selective Service System and no file relating to a registrant's possible classification status will be established prior to that registrant being ordered to report for induction." *Id.*

25. See *infra* note 227 (reporting on one non-registrant who would have registered if afforded the opportunity to indicate his conscientious objection on the registration form).

26. See *infra* text accompanying notes 36-95.

27. See *infra* text accompanying notes 96-147.

religion.²⁸ Finally, Part IV will examine several ways in which the right to conscientious objection could be protected and will propose a policy change which would simultaneously protect the right to conscientious objection while meeting the government's needs purportedly served by draft registration.²⁹

PART I: FREE EXERCISE ANALYSIS

In a country such as the United States that is both highly regulated and religiously diverse, individual citizens often face conflicts between the demands of government and their consciences. The supporters of the Bill of Rights sought to restrain the government's natural tendency to assert its sovereignty over the individual's conscience by adopting the first amendment to the Constitution and forbidding the government from interfering with the free exercise of religion.³⁰

Despite the founders' intentions, the Free Exercise Clause has not prevented the state from making political, economic, and social demands that conflict with the consciences of individuals. The United States Supreme Court has had many occasions to resolve these conflicts, and, in doing so, has fashioned a considerable body of constitutional law and analysis regarding the meaning and limits of freedom of religion.³¹ Despite the unequivocal language of the amendment and its explicit reference to the *exercise* of religious beliefs, the Supreme Court has interpreted the Free Exercise Clause as absolutely prohibiting only government interference with or proscription of religious *belief* as such; the clause does not, the Court has repeatedly said, absolutely protect religiously motivated *conduct*.³²

Until recently, the Court has generally required the government to show a "compelling interest" in enforcing the law against a religious objector to justify the interference with religious practices.³³ In the recent case of *Employment*

28. See *infra* text accompanying notes 148-220.

29. See *infra* text accompanying notes 221-46.

30. "Congress shall make no law respecting establishment of religion or prohibiting the free exercise thereof." U.S. CONST. amend. I (emphasis added).

The Free Exercise Clause was made applicable to the states through the Fourteenth Amendment in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

31. See *infra* notes 36-95.

32. *Bowen v. Roy*, 476 U.S. 693, 699 (1986). "Our cases have long recognized a distinction between the freedom of individual belief, which is absolute, and the freedom of individual conduct, which is not absolute." *Id.* See also *Employment Div., Dept. of Human Res. of Oregon v. Smith*, 110 S. Ct. 1595, 1599 (1990) (*Smith II*) (emphasizing the same point).

33. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). The "compelling interest" in free exercise analysis is the same standard of review applied to cases involving classifications based on race and government restrictions on the content of speech. *Employment Div., Dept. of Human Res. of Oregon v. Smith*, 110 S. Ct. 1595, 1604 (1990) (*Smith II*).

Division, Department of Human Resources of Oregon v. Smith,³⁴ however, the Court refused to require a compelling interest to enforce a law that made the religious use of peyote illegal.³⁵ *Smith* suggests that the Court may take a radically different approach to free exercise claims in the future, an approach that reverses the historical presumption in favor of religious liberty. This section of the note will first describe the Court's historical approach to free exercise cases, and then will discuss *Smith* and how it may be reconciled with the Court's previous analysis.

A. Traditional Free Exercise Analysis

In *Sherbert v. Verner*³⁶ the Supreme Court adopted a three part test to determine whether a government statute or regulation may be enforced against a person religiously opposed to it. The first part of the test is to determine whether the regulation in fact burdens the exercise of a sincerely held religious belief.³⁷ Once the burden on free exercise is established, the government must demonstrate a sufficiently compelling interest in order to enforce the regulation against the religious objector.³⁸ Finally, even if the government's interest is compelling, the government must show that exempting the religious objector would "render the entire statutory scheme unworkable before it could enforce the statute or regulation."³⁹ The following sections discuss each part of the *Sherbert* test in detail.

1. Burden on Free Exercise

The first step is to demonstrate that such a conflict actually exists. An individual who seeks to be exempted from a generally applicable regulation must first prove that the regulation in fact restricts his or her right to freely exercise a sincerely held⁴⁰ religious or conscientious belief.⁴¹ The belief need not be

34. *Smith II*, 110 S. Ct. 1595 (1990).

35. See *infra* notes 76-85.

36. 374 U.S. 398 (1963). *Sherbert* involved a Seventh-Day Adventist who was denied unemployment compensation because she refused to work on Saturday, her Sabbath. *Id.* at 401.

37. *Id.* at 403-06.

38. *Id.* at 406-08.

39. *Id.* at 409.

40. The courts have generally conceded to religious objectors the sincerity of their beliefs, but have considered evidence demonstrating or challenging the objector's sincerity. See, e.g., *Quaring v. Peterson*, 728 F.2d 1121 (8th Cir. 1984), *aff'd by equally divided court per curiam sub nom.*, *Jensen v. Quaring*, 472 U.S. 478 (1985) (woman whose interpretation of the Second Commandment's prohibition against making graven images prevented her from having her photograph taken for a driver's license was allowed to show that she possessed no photographs of herself or her family, did not own a television set, refused to allow household decorations that depicted flowers or other natural objects, and removed or obliterated labels from food items that displayed pictures on them as evidence of the sincerity of her belief.); *Dobkin v. District of*

orthodox or traditionally religious to warrant protection, but it must be something more than a subjective "philosophical and personal" opinion.⁴² The Court has interpreted the phrase "by reason of religious training and belief" in the statute exempting conscientious objectors from the draft to mean beliefs that "function as a religion" in the person's life or are "deeply held moral, ethical, or religious beliefs [that] would give ... no rest or peace" to the holder of such beliefs if she acted contrary to them.⁴³

Once the objector demonstrates the sincerity and religious nature of the belief, she must then show that the problematic regulation in fact burdens the free exercise of that belief.⁴⁴ A burden on free exercise exists if the law tends to coerce the believer to act contrary to conscience. That is, a law may impose penalties for failing to perform an act that is contrary to one's religious beliefs,

Columbia, 194 A.2d 657 (D.C. App. 1963) (Court admitted evidence that lawyer worked in his office on Saturday to show insincerity of his claim of religious objection to appearing in court on the Sabbath.)

A belief is not insincere merely because other members of the same sect do not share it, *Thomas v. Review Bd., Ind. Employment Sec. Div.*, 450 U.S. 707, 715-16 (1981); is newly adopted, *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144 (1987); or because the person may be "struggling" with his or her beliefs, unable to articulate them with the "clarity and precision" of a more sophisticated person, *Thomas*, 450 U.S. at 715.

The courts may not, however, inquire whether the belief is in fact valid or true. See *United States v. Ballard*, 322 U.S. 78 (1944) (defendants charged with fraudulently representing that they were recipients of divinely inspired messages and solicited memberships in their religious movement based on those messages; Supreme Court held that the trial judge properly kept from the jury the question whether the defendants actually were divine messengers).

Men believe what they cannot prove. They may not be put to proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be suspect before the law.... The religious views espoused by [the defendants] might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the trier of fact undertake that task, they enter a forbidden domain.

Id. at 86-87.

41. *Thomas*, 450 U.S. at 713. "Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion." *Id.*

42. *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1971) (suggesting that Henry David Thoreau's rejection of contemporary social values were "philosophical" and did not "rest on a religious base").

43. *Welsh v. United States*, 398 U.S. 333, 344, 340 (1970). Although this case dealt with interpreting § 456(j) of the Military Selective Service Act, it is reasonable to assume that any definition of "religion" for purposes of the first amendment would have to, at least, include the functional equivalent of the definition in *Welsh*.

44. *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

coercing the believer to commit acts that violate conscience⁴⁵; or the law may impose penalties for performing an act compelled by religious belief but prohibited by law, coercing the believer to abstain from performing a religious duty.⁴⁶

The burden need not be a directly imposed penalty such as a fine or imprisonment. Conditions placed upon receipt of an important government benefit may be a burden on free exercise if the conditions tend to coerce the believer to compromise the religious belief in order to receive the benefit.⁴⁷ For example, in the landmark case of *Sherbert v. Verner*,⁴⁸ the Court recognized that denying a woman unemployment compensation for refusing to

45. See, e.g., *United States v. Lee*, 455 U.S. 252 (1982) (requiring Amish employers to pay social security taxes on their Amish employees in violation of the employer's religious beliefs that doing so implies a lack of trust in God); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (fining Amish parents for failing to send their children to school beyond the eighth grade when doing so would destroy a religiously based, agrarian way of life); *United States v. Seeger*, 380 U.S. 163 (1965) (requiring conscientious objector to serve in the military); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (expelling elementary school students who refuse to salute the flag in violation of the biblical prohibition against worshiping graven images); *United States v. Schmucker*, 815 F.2d 413 (6th Cir. 1987) (requiring a conscientious objector to register for the draft); *In re Janison*, 375 U.S. 14, *on remand*, 267 Minn. 136, 125 N.W.2d 588 (1963) (requiring jury duty of one religiously opposed to sitting in judgment of others).

46. See, e.g., *Employment Div., Dept. of Human Res. v. Smith*, 110 S. Ct. 1595 (1990) (using peyote as a sacrament in religious ceremonies contrary to state criminal law); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (using children to proselytize in obedience to biblical commands but contrary to child labor laws); *Reynolds v. United States*, 98 U.S. 145 (1878) (practice of polygamy demanded by religious teachings but contrary to state civil law); *People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (using peyote in religious ceremonies contrary to state criminal law).

47. See, e.g., *Bowen v. Roy*, 476 U.S. 693 (1986) (denying welfare benefits to a child whose parents who refuse to apply for a Social Security number because doing so would rob the child of her spiritual power); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (denying an income tax exemption to a college whose religious belief prohibits interracial dating); *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981) (denying unemployment compensation to a person who refuses to produce military equipment in violation of his religious belief); *Sherbert v. Verner*, 374 U.S. 398 (1963) (denying unemployment compensation to a person who will not work on her Saturday Sabbath); *Hamilton v. Regents*, 293 U.S. 245 (1934) (expelling students from a state university for refusing for religious reasons to enroll in mandatory military training); *Alexander v. Trustees of Boston University*, 766 F.2d 630 (1st Cir. 1985) (denying federal educational benefits to students who refused to certify that they were in compliance with the Military Selective Service Act due to their conscientious opposition to cooperating with the draft in any way); *Quaring v. Peterson*, 728 F.2d 1121 (8th Cir. 1984), *aff'd by equally divided court per curiam sub nom.*, *Jensen v. Quaring*, 472 U.S. 478 (1985) (denying a driver's license to a person refusing to have a photograph taken in violation of the biblical injunction against graven images).

48. 374 U.S. 398 (1963).

accept employment on her Sabbath was a sufficient infringement on free exercise of religion to warrant first amendment protection.⁴⁹

Thus, where civil or criminal penalties are imposed on religious practice, or where religiously offensive conditions are placed on important government benefits, the Court has generally found that the free exercise of religion has been burdened. A final category of burdens on free exercise arises when government practices offend the sensibilities of believers or makes a religious practice more difficult but do not impose a penalty or deny a benefit.⁵⁰ In these cases, the Court has distinguished between regulations that only incidentally affect an objector's "personal spiritual development"⁵¹ -- which are not afforded constitutional protection -- and those which tend to coerce the objector to compromise the beliefs, which are protected.⁵² Only coercive regulations are subject to first amendment scrutiny. Regulations that do not tend to coerce simply do not present a conflict with the free exercise of religion and are valid unless arbitrary or capricious.⁵³

49. Justice Brennan wrote:

The ruling [denying unemployment compensation] forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Id. at 404.

50. See, e.g., *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (building a road on government-owned land, destroying sacred lands essential to the religious practice of Native Americans); *Bowen v. Roy*, 476 U.S. 693 (1986) (allowing the government to assign and use a Social Security number to a child receiving welfare benefits against the religious beliefs of her parents); *Braunfeld v. Brown*, 366 U.S. 599 (1961) (requiring a person to close his shop on Sunday, when the person's religious community also requires his shop to be closed on Saturday).

51. *Bowen v. Roy*, 476 U.S. 693 (1986).

52. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

53. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 429, 450-51 (1988).

The Court's distinction between coercive and incidental infringements on free exercise was illustrated in *Bowen v. Roy*, 476 U.S. 693 (1986). Roy, a practitioner of a Native American religious tradition, objected to the requirement that he apply for a Social Security number for his infant daughter before she could get food stamps on the grounds that assigning her a unique number would "rob her of her spirit." *Id.* at 696. When a clerk at the welfare office administratively assigned a number to his daughter, he asked the federal district court to prohibit the government from using the number in administering the welfare benefits. *Id.*

On appeal, the Supreme Court held that the government's assignment and use of a Social Security number did not burden Roy's free exercise of religion. "Roy may no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets." *Id.* at 700.

However, at least five justices wrote that if the government had not assigned the number administratively, the father could not be constitutionally required to apply for a number as a

2. Compelling Government Interest

Under the traditional *Sherbert* free exercise analysis, when an individual has proven that a law burdens his or her free exercise of religion, the law cannot be enforced against the individual unless the government can demonstrate that doing so is necessary to accomplish a sufficiently important state interest.⁵⁴ The key to balancing an individual's religious liberty and a government regulation, therefore, is the nature and weight of the government's asserted interest in a regulation.⁵⁵

Unfortunately, the Court has not been consistent in defining or weighing the government's interests in free exercise cases.⁵⁶ Professor Tribe suggests that the Court's decisions can best be reconciled by considering the government's interests as falling into three categories.⁵⁷ In some cases, the Court has given great weight to the government's interest in maintaining the separation of powers and avoiding judicial interference with decisions made by other branches of government.⁵⁸ Thus, the Court deferred to Congress' decision to exempt Amish employees but not their Amish employers from paying Social Security taxes,⁵⁹ the Air Force's decision to require a Jewish psychiatrist to remove his yarmulke while on duty,⁶⁰ and a prison's work regulations that prevented

condition of receiving benefits. *Id.* at 724 (O'Connor, J., joined by Brennan and Marshall, JJ., concurring in part, dissenting in part); *Id.* at 733 (White, J., dissenting) (stating that Free Exercise Clause forbids the government from conditioning receipt of benefits on Roy's application for a number contrary to his religious beliefs); *Id.* at 722 (Stevens, J., concurring in part and concurring in the result) (holding that the issue of requiring the Roys to apply for a number before receiving benefits is moot due to the government's having assigned the Social Security Number but stating that recent free exercise cases suggest that benefits could not be denied based on religious objection to a condition).

The Court relied on the distinction it made in *Roy* in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). Recognizing the danger of "measuring the effects of a governmental action on a religious objector's spiritual development," the Court held that the Free Exercise Clause did not prevent the government from building a road on its own property even though the road destroyed the sacred lands of a Native American tribe. "[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Id.* at 451 (citation omitted).

54. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). ("It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation [on First Amendment rights].'" *Id.* (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

55. Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 429-31 (1986).

56. *Id.*

57. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1264-75 (1988).

58. *Id.* at 1264.

59. *United States v. Lee*, 455 U.S. 252 (1982).

60. *Goldman v. Weinberger*, 475 U.S. 503 (1986).

Muslims from attending weekly religious services,⁶¹ despite the interference these policies placed on individual religious liberty.⁶²

In a second category of cases, the Court analyzed the government's interest in the specific programmatic goals advanced by the particular regulation.⁶³ For example, the state's interest in protecting the health and safety of children was held as sufficiently compelling to justify giving blood transfusions to children against the religious beliefs of their parents.⁶⁴ Similarly, the Court has found the government's interest in eradicating racial discrimination sufficient to justify revoking a tax exemption from a religiously-affiliated university that prohibited interracial dating.⁶⁵

Finally, in a third group of cases, the Court merged its analysis of the government interest with the third part of the *Sherbert* test by inquiring whether the government had a compelling interest in universal enforcement of the regulation.⁶⁶ Under this narrow formulation, the judicial inquiry is whether exemption or accommodation of the religious objector would unacceptably burden the entire regulatory scheme. Accordingly, administrative difficulty,⁶⁷ speculative fears that an excessive number of religious objectors may apply for an exemption,⁶⁸ the desire to avoid detailed inquiry by employers into job applicants' religious beliefs,⁶⁹ and the fear that those exempted will become a burden on society,⁷⁰ have all been found insufficiently compelling to justify infringement on free exercise rights of individuals.

61. *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987).

62. The Court itself did not purport to weigh the government's interest in *Goldman* and *O'Lone*, however. In those cases, the Court said that military and prison contexts require special deference. Therefore, the Court said it will not hold the government to the compelling interest standard when military or prison regulations are challenged on free exercise grounds. See *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987); *Goldman v. Weinberger*, 475 U.S. 503 (1986).

63. *L. TRIBE*, *supra* note 57, at 1267-72.

64. *Jehovah's Witnesses v. King County Hospital*, 390 U.S. 598 (1968). See also *Prince v. Massachusetts*, 321 U.S. 158 (1944) (upholding conviction of Jehovah's Witness who violated child labor law by directing her daughter to sell literature in obedience to religious instruction).

65. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

66. *L. TRIBE*, *supra* note 57, at 1272-75.

67. *Quaring v. Peterson*, 728 F.2d 1121, 1127 (1984), *aff'd by equally divided court per curiam sub nom.*, *Jensen v. Quaring*, 472 U.S. 478 (1985) (administrative difficulty of finding alternative means of identifying a driver does not justify denying a drivers license to a woman who refused on religious grounds to have her picture taken).

68. *Thomas v. Review Bd., Ind. Employment Sec. Div.*, 450 U.S. 707, 718-19 (1981) (discussing unemployment compensation).

69. *Id.*

70. *Wisconsin v. Yoder*, 406 U.S. 205, 224-25 (1972) (regarding state requirement of schooling to age 16).

3. Effects of a Religious Exemption

Even if the government can show that its general interest in the regulation is compelling, the traditional analysis also requires the government to demonstrate that it could not accommodate the religious objection without jeopardizing the state's interest.⁷¹ One important factor in the Court's analysis is whether the state makes exceptions in enforcement of the regulation for reasons other than religion.⁷² Where the government exempts some persons from its regulation, it will have difficulty proving that exempting religious objectors would also frustrate its legitimate interests. A mere showing that exempting religious objectors would be difficult or expensive is insufficient. The government must show that exemption would "render the entirely statutory scheme unworkable."⁷³

Thus, under the traditional analysis, when a government regulation tends to coerce an individual to compromise a religious belief, the interests of the government must be weighed against the individual's interest in religious liberty. The balancing process always begins with a weighty presumption on the side of religious liberty. Whether religious liberty must give way to the state's interest depends on weight of the government's interest.⁷⁴ The government's interest in enforcing the regulation against the individual will not outweigh the individual's interest unless exempting religious objectors would unacceptably frustrate the regulatory scheme.⁷⁵

71. *Thomas*, 450 U.S. 707 (1981). "The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest." *Id.* at 718.

72. *Bowen v. Roy*, 476 U.S. 693 (1986). If a state creates a mechanism for individual exemptions from a regulation, "its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent." *Id.* at 708. See also *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 110 S. Ct. 1526, 1603 (1990) (compelling reason is required to refuse to accommodate persons for whom a regulation imposes a "religious hardship" when the state has in place a system of individualized exemptions); *Quaring v. Peterson*, 728 F.2d 1121 (1984), *aff'd by equally divided court per curiam sub nom.*, *Jensen v. Quaring*, 472 U.S. 478 (1985) (Nebraska's argument that requiring a photograph for a driver's license serves a compelling state interest is without merit since the state already exempts other classes of persons from having photographs on certain classes of driver's licenses).

73. *Sherbert v. Verner*, 374 U.S. 398, 409 (1963).

74. *Clark supra* note 10, at 344.

[T]he interest weighed on the individual's side of the balance in free exercise cases is always the same in kind, that is, the interest in avoiding punishment of an act which is compelled by conscience. However, the degree to which this interest exists—that is, the intensity of the compulsion—can be evaluated only as a factual matter of the belief at issue. Consequently, the law can measure only the weight of the government interest, and not the individual interest.

Id.

75. *Sherbert v. Verner*, 374 U.S. 398, 409 (1963).

B. The Smith Analysis

The continued vitality of the Court's traditional free exercise analysis was seriously challenged by the Court's 1990 decision in *Employment Division, Department of Human Resources of Oregon v. Smith*.⁷⁶ The *Smith* case concerned whether a state is required to pay unemployment benefits to members of a bona fide church who use peyote in their religious ceremonies when a state criminal statute prohibits possession of peyote.⁷⁷ The United States Supreme Court refused to apply the *Sherbert*-compelling interest analysis to the criminal statute prohibiting peyote.⁷⁸ The Court held that the Free Exercise Clause did *not* require an exemption for religious users of peyote and therefore affirmed the denial of unemployment benefits to the men who were fired for using the drug in religious ceremonies.⁷⁹

In an opinion authored by Justice Scalia, the Court rejected the *Sherbert*-compelling interest analysis in cases where a generally applicable, religiously neutral government criminal statute interfered with an individual's religious practices.⁸⁰ Justice Scalia noted that, despite the twenty-seven year history of the *Sherbert* analysis, the Court has never applied it to invalidate

76. 110 S. Ct. 1595 (1990).

77. *Id.* at 1598.

78. *Id.* Although the case was brought as an unemployment compensation claim, its tortured procedural history led the court to base its ultimate decision on the applicability of the criminal statute. The case began with a claim for unemployment benefits by two members of the Native American Church who were fired from their jobs in a private drug rehabilitation organization after they were discovered as having used peyote in religious ceremonies. The Employment Division of the Department of Human Resources denied the men unemployment benefits because their use of peyote was "work related 'misconduct'". 110 S. Ct. at 1597-98.

On appeal, the Oregon Supreme Court held that the United States Constitution's Free Exercise Clause prohibited Oregon from denying the benefits based on conduct which, although prohibited by state criminal law, was religiously motivated and for which no compelling reason to enforce the statute against religious users was found to exist. *Smith v. Employment Div., Dept. of Human Resources*, 301 Or. 209, 217-19, 721 P.2d 445, 449-50 (1986).

Oregon appealed to the United States Supreme Court. The Supreme Court remanded the case to determine whether Oregon's criminal statute prohibiting possession of peyote exempted religious users of the drug. *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 485 U.S. 660, 670 (1988) (*Smith I*).

On remand, the Oregon Supreme Court once again held that while the sacramental use of peyote was not explicitly exempted from the state criminal statute, the Free Exercise Clause of the United States Constitution prohibited enforcing the criminal statute against religious users of peyote. 307 Or. 68, 72-73, 763 P.2d 146, 148 (1988).

Oregon again appealed to the United States Supreme Court. The Court reversed. 110 S. Ct. 1595 (1990) (*Smith II*).

79. 110 S. Ct. at 1598. The Court reasoned that if the state is not required to exempt religious users of peyote from its criminal statute it need not exempt them from the "lesser burden" of denying them unemployment compensation. *Id.* (quoting *Smith I*, 485 U.S. 660, 670).

80. *Smith II*, 110 S. Ct. at 1603.

enforcement of a regulation against a purely free exercise claim outside of the unemployment context.⁸¹ Using the compelling interest test makes sense in unemployment cases, Justice Scalia noted, only because the statutory process itself requires an individualized governmental assessment of the applicant's eligibility for benefits.⁸² Aside from the unemployment context, Justice Scalia wrote, a compelling interest has been required only when a free exercise claim has been paired with another constitutional right such as free speech⁸³ or parental rights to educate children.⁸⁴ The Court held that only in these "hybrid" cases is the compelling interest test required.⁸⁵

C. Resolving *Sherbert and Smith*

Although the Court seemed to radically change its free exercise analysis in *Smith*, and although Justice Scalia's opinion evidenced little sensitivity for the importance of religious liberty as a paramount constitutional value,⁸⁶ the Court

81. *Id.* at 1602.

82. *Id.* at 1603.

83. *Id.* at 1601. The Court cited cases implicating both free speech and freedom of religion, including *Cantwell v. Connecticut*, 310 U.S. 296 (1940) and *Follett v. McCormick*, 321 U.S. 573 (1944) (licensing requirements for religious solicitation; *Murdock v. Pennsylvania*, 319 U.S. 105 (1944) (taxation of religious solicitation); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (mandatory flag salutes); and *Wooley v. Maynard*, 430 U.S. 705 (1977) (automobile license plates displaying religiously objectionable slogan).

84. *Smith II*, 110 S. Ct. at 1601. These cases included the right to send children to parochial schools (*Pierce v. Society of Sisters*, 268 U.S. 510 (1925)) and the right of parents to stop their children's formal schooling at the eighth grade (*Wisconsin v. Yoder*, 406 U.S. 205 (1972)).

85. 110 S. Ct. at 1602. See *infra* text accompanying notes 88-90.

86. Justice Scalia described the accommodation sought by the Native Americans in *Smith* as "a private right to ignore generally applicable laws" which is, in his words, "a constitutional anomaly." *Id.* at 1604.

Justice Scalia wrote that minority religious groups may rely on the legislative political process to protect their religious practices from infringement but that the Constitution does not require such accommodation. 110 S. Ct. at 1606. He then wrote:

It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

Id.

Earlier in the opinion, he characterized the presumption that a generally applicable regulation of conduct is invalid as applied to a religious objector unless the regulation protects an "interest of the highest order" as a "luxury" that "we cannot afford." *Smith II*, 110 S. Ct. at 1605.

Justice Blackmun, joined by Justices Brennan and Marshall, wrote in dissent: "I do not believe the Founders thought their dearly bought freedom from religious persecution a 'luxury,' but an essential element of liberty -- and they could not have thought religious intolerance 'unavoidable,' for they drafted the Religion Clauses precisely in order to avoid that intolerance." 110 S. Ct. at 1616 (Blackmun, J., dissenting).

did not explicitly overrule *Sherbert*. Therefore, *Smith* and *Sherbert* must be reconciled to determine the present free exercise analysis being used by the Court.

The Court explicitly retained the *Sherbert*-compelling interest analysis where a free exercise claim also implicates another constitutionally protected right, the so-called "hybrid" claim.⁸⁷ Because much religious conduct is expressive in nature, any regulation that regulates or forbids religious speech⁸⁸ or requires speech contrary to religious beliefs⁸⁹ is still subjected to the strict compelling interest test. Similarly, the *Smith* Court recognized that the fundamental right of parents to supervise the education and upbringing of their children is often intimately tied to religious belief, and in such cases the *Sherbert* test must be met.⁹⁰

The second area in which *Smith* leaves the *Sherbert* analysis intact is where the regulatory scheme was designed for individualized assessment of each applicant's eligibility.⁹¹ Unemployment compensation is perhaps the paradigmical example of statutory regimes that have built-in mechanisms for reviewing the eligibility of each applicant. To refuse to accommodate the religious objector who refuses to work on Saturday, for example, while providing benefits to one who cannot accept certain work for medical or familial reasons, would suggest an unconstitutional hostility towards religion.⁹² In contrast, the Court noted, are criminal laws which are generally applicable to everyone.⁹³ While the legislature may presumably accommodate the beliefs of religious minorities by granting a statutory exemption from otherwise generally applicable criminal statutes, the Court held that the Constitution does not require such an exemption.⁹⁴ Therefore, even after *Smith*, the government must demonstrate a compelling interest to enforce a regulation against a religious

87. See *supra* notes 83-85.

88. See, e.g., *Cantwell v. Connecticut*, 310 U.S. 900 (1940) (invalidating religious solicitation licensing system that gave administrator too much discretion to deny a license to any group he did not consider to be "religious" and therefore denied religious speech).

89. See, e.g., *Wooley v. Maynard*, 430 U.S. 705 (1977) (enjoining prosecution of a person who, for religious reasons, covered up religiously offensive slogan on automobile license plate on the grounds that the slogan constituted compelled speech); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (mandatory flag salute by school children).

90. *Smith II*, 110 S. Ct. at 1601-02 (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)).

91. *Smith II*, 110 S. Ct. at 1603.

92. *Id.* (citing *Bowen v. Roy*, 476 U.S. 693, 708 (1986)).

93. *Id.*

94. See *id.*, 110 S. Ct. at 1606 ("[A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. It is therefore not surprising that a number of States have made an exception to their drug laws for sacramental peyote use.").

objector when the regulatory scheme contains a system of individualized assessment.⁹⁵

Therefore, it may be said that after *Smith* the government need not show a compelling interest to enforce generally applicable laws against religious objectors where (1) the objection is based solely on free exercise of religion and does not implicate another constitutional right; and (2) the law does not provide for a system of individualized review and assessment. *Sherbert* would still control, however, where (1) the law interferes with free exercise of religion and at least one other constitutional right; or (2) the law provides for an individualized assessment of applicability. In such cases, the government may enforce the law only if it can show that the law is necessary to meet a compelling governmental interest of the highest order and exempting the individual conscientious objector would render the statutory scheme unworkable.

PART II: APPLYING THE FREE EXERCISE ANALYSIS TO COMPULSORY MILITARY SERVICE BY CONSCIENTIOUS OBJECTORS

A. Supreme Court Consideration of Conscientious Objection

The Supreme Court first upheld Congress' power to draft citizens into a national army in *Selective Draft Law Cases*.⁹⁶ Even though that case contained a free exercise challenge to the draft, the Court denied the challenge without analysis. The Court simply dismissed the "unsoundness" of the free exercise

95. *Id.*

A third possible distinction between *Smith* and *Sherbert* is the difference between laws that require religiously offensive conduct and laws that prohibit conduct required by religion. *Smith* dealt with the latter: a law that forbade conduct that was required by claimants' religious beliefs. In a practical sense at least, a law *forbidding* persons to worship a golden calf is more onerous than a law *requiring* persons to worship a golden calf. In the first instance, true believers in the golden calf could presumably continue to worship in private and escape punishment, but in the second case failure to bow down could be more easily detected. By increasing the probability of being detected, the law requiring golden calf worship is more burdensome than the prohibitory law forbidding calf worship. While presumably the law should treat both types of infringement of free exercise identically, the increased burden of the compulsory law may require a higher burden on the part of the government to justify the infringement with free exercise.

96. 245 U.S. 366 (1918). The federal government's power to draft citizens into the army was first upheld in *Kneedler v. Lane*, 45 Pa. 295 (1864). *Kneedler* did not involve a free exercise challenge to the draft, however.

Selective Draft Law Cases combined six cases challenging the constitutionality of the federal draft. The Court focused most of its opinion on the challenge to Congress' authority to draft an army, the opponent's claim being that the reference to "armies" in article I, section 8 of the Constitution referred only to a professional standing army and not to calling out the militia which were creatures of the states. 245 U.S. at 382. The Court rejected this line of reasoning as "confounding the constitutional provisions concerning the militia with that conferring upon Congress the power to raise armies. [The argument] treats them as one while they are different." *Id.*

challenge as being too "apparent" to require anything more than its summary dismissal.⁹⁷

The next cases dealing with conscientious objection to war dealt with pacifists whose naturalization petitions were denied because they refused to promise to bear arms in defense of the country. These cases, known as the "*Macintosh* trilogy" after the leading case,⁹⁸ dealt primarily with the Court's interpretation of the Naturalization Act and not the Free Exercise Clause *per se*.⁹⁹ Though not necessary to its holding which rested on its interpretation of the statute, the Court stated in dictum that the conscientious objector exemption was not required by the Constitution; therefore, denying citizenship to pacifists certainly could not be unconstitutional.¹⁰⁰ The Court has subsequently cited the *Macintosh* dictum as supporting the conclusion that the conscientious

97. 245 U.S. at 389-90.

98. *United States v. Macintosh*, 283 U.S. 605 (1931). The other cases were *United States v. Schwimmer*, 279 U.S. 644 (1929) and *United States v. Bland*, 283 U.S. 636 (1931).

99. Among other things, the Naturalization Act required petitioners for naturalization to swear an oath promising to "support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same." *Macintosh*, 283 U.S. at 614.

The preliminary naturalization application form contained Question 22 which asked: "If necessary, are you willing to take up arms in defense of this country?" *Id.* at 617. *Macintosh* answered that there were some circumstances under which he would not bear arms. *Id.* at 617-18. His application was rejected on the grounds that his qualified answer to the question indicated that he could not in good faith take the statutory oath of allegiance to the United States. *Id.* at 613. The Supreme Court affirmed the District Court's decision interpreting the statute to require an unqualified promise to bear arms to become a naturalized citizen. *Id.* at 626-27.

100. In *Macintosh*, the petitioner argued that the first amendment guaranteed conscientious objectors the right to be exempted from military service, and that his qualified answer to Question 22 merely indicated that he might exercise that right. *Id.* at 618-19. The Court rebuked this argument:

This ... is an astonishing statement. Of course, there is no such principle of the Constitution.... The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him. The alien, when he becomes a naturalized citizen, acquires with one exception [the right to be elected president] every right possessed under the Constitution by those citizens who are native born; but he acquires no more.

Macintosh, 283 U.S. at 623-24.

Even more astonishing, perhaps, was the Court's holding in *Schwimmer* that the petitioner, a 48-year old woman who could not have enlisted in the army if she had tried, could be barred from citizenship because of her pacifism. Here, the Court held that Question 22 dealt with more than simply a willingness of the individual petitioner to bear arms but went to the political effect of granting citizenship to pacifists in general. "Whatever tends to lessen the willingness of citizens to discharge their duty to bear arms ... detracts from the strength and safety of the Government." *Schwimmer*, 279 U.S. at 650.

objector exemption instead exists solely by the grace of Congress and is not required by the Constitution.¹⁰¹

The Court expressly overruled *Macintosh* in *Girouard v. United States*,¹⁰² basing its decision on a different interpretation of the Naturalization Act. The Court did not, however, address the constitutional issue of whether the first amendment required conscientious objectors to be exempted from the draft.¹⁰³ Instead, the Court adopted the reasoning of Chief Justice Hughes' dissent in *Macintosh* and recognized that bearing arms was not the only way a citizen could defend the country.¹⁰⁴ Thus, while *Girouard* overruled *Macintosh's* interpretation of the Naturalization Act, it did not address the *Macintosh* dicta which said that the Constitution does not require the conscientious objector exemption from the draft.¹⁰⁵

101. Two subsequent cases dealing with conscientious objectors relied on the *Macintosh* dictum for their results and have never been explicitly overruled. In *Hamilton v. Regents*, the Court held that the Constitution did not prohibit a state university from expelling students who, for religious reasons, refused to enroll in mandatory courses of military training. 293 U.S. 245, 265 (1934). In *In re Summers*, the Court upheld an Illinois decision denying a law professor admission to the Illinois Bar because he had been a conscientious objector during the Second World War. 325 U.S. 561, 573 (1944).

Neither case can be accorded much persuasive value, however, since each was based on subsequently discredited precedent. *Hamilton* was based on the assumption that the Free Exercise Clause did not apply to the states. Six years later, in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the Court held that the Free Exercise Clause applied to the states through the Due Process Clause of the fourteenth amendment, implicitly overruling *Hamilton*.

Summers was solidly based on *Macintosh's* holding that an oath to defend the nation implied a promise to bear arms. Thus, after the *Macintosh* holding was overruled, *see infra* text accompanying notes 102-05, *Summers* lost its precedential power as well.

102. 328 U.S. 61 (1946).

103. *Girouard*, 328 U.S. at 64-65. *See also* *Gillette v. United States*, 401 U.S. 437, 444 n.9 (1971) (Court has never squarely decided whether Constitution requires the draft to exempt conscientious objectors).

104. *Macintosh*, 283 U.S. at 631 (Hughes, C. J., dissenting).

There are other and most important methods of defense, even in time of war, apart from the personal bearing of arms. We have but to consider the defense given to our country in the late war, both in industry and in the field, by workers of all sorts, by engineers, nurses, doctors and chaplains, to realize that there is opportunity even at such time for essential service in the activities of defense which do not require the overriding of such religious scruples.

Id.

The *Girouard* Court agreed:

Refusal to bear arms is not necessarily a sign of disloyalty or a lack of attachment to our institutions. One may serve his country faithfully and devotedly, though his religious scruples make it impossible for him to shoulder a rifle. ...[T]hose whose religious scruples prevent them from killing are no less patriots than those whose special traits or handicaps result in their assignment to duties far behind the fighting front.

Girouard, 328 U.S. at 64-65.

105. *Girouard*, 328 U.S. at 69-70.

Whatever persuasive power the *Macintosh* dictum may hold, in *Gillette v. United States*,¹⁰⁶ the Court explicitly recognized its failure to squarely face the question of whether the Constitution demands a conscientious objector exemption from the draft.¹⁰⁷ While the Court has suggested in subsequent opinions that the right is statutory and not constitutional in origin,¹⁰⁸ it has deftly avoided answering whether, absent a statutory exemption, one is required by the Free Exercise Clause.¹⁰⁹ Consequently, the question of whether conscientious objection is a constitutional right implied in the Free Exercise Clause is unsettled. The answer therefore lies in applying the Court's free exercise analysis to the question of the conscientious objector who faces the draft.

B. Drafting Conscientious Objectors and the Free Exercise Analysis

1. Military Service as a Coercive Burden on Free Exercise

There is no question that military service is contrary to the religious belief of many people. At least twenty-six American religious communities affirmatively teach their members to become conscientious objectors.¹¹⁰ Nearly every other religious body recognizes an individual's conscientious objection to military service as being a valid manifestation of its religious doctrines.¹¹¹ In addition, many persons claiming no formal religious affiliation

106. 401 U.S. 437 (1971). *Gillette* involved a draftee who claimed that he should be exempted from the draft as a conscientious objector. *Gillette* was conscientiously opposed to fighting in the war against the Vietnamese, but said he would be willing to participate in certain "just" wars such as United Nations peacekeeping operations. *Id.* at 439. Since the draft law granted a conscientious objector exemption only to those whose beliefs prevented them from participating in war "in any form," *Gillette's* application for an exemption was rejected. *Id.* at 440.

The Court explicitly did not reach the question of whether the Constitution required the exemption of conscientious objectors from military service. *Id.* at 461 n.23. Instead, the Court confined its decision to considering whether restricting the exemption to conscientious opponents to all wars violated either the Establishment Clause or the Free Exercise Clause. *Id.* at 448-62. *Gillette* is important in that it may be interpreted as limiting the constitutional right to conscientious objection, if such a right is ever explicitly recognized, to those who oppose participation in all wars.

107. *Id.* at 461 n.23. See also *id.* at 464 (Douglas, J., dissenting).

108. See *Gillette*, 401 U.S. at 461 n.23.

109. See, e.g., *Welsh v. United States*, 398 U.S. 333 (1970) and *United States v. Seeger*, 380 U.S. 163 (1965) (interpreting the phrase "religious training and belief" and "Supreme Being" expansively to avoid invalidating the exemption as being violative of the Establishment Clause).

110. For a list of these bodies, see Brown, Kohn & Kohn, *Conscientious Objection: A Constitutional Right*, 21 NEW ENG. L. REV. 545, 567 n.180 (1986). These religious organizations represent denominations in the Buddhist, Christian, Hindu, Islamic, and Jewish traditions.

111. *Id.* at 567 n.179.

express their deeply felt moral opposition to participation in war and refuse to serve in the military.¹¹²

The beliefs compelling this refusal to participate in war derive from many sources. For some, non-participation in war is a direct command of the Supreme Being or other authoritative spiritual teacher.¹¹³ For others, war is wrong because it violates natural law and is not harmonious with the true nature of the universe.¹¹⁴ Religious teachings about the necessity of social justice also imply values inconsistent with war.¹¹⁵ Still others emphasize the ultimate practicality of peace and the impracticality of war.¹¹⁶ Another important source of religiously-based opposition to war stems from the fact that military

112. 675 conscientious objectors assigned to Civilian Public Service camps during the Second World War indicated no church membership or preference. SPECIAL MONOGRAPH NO.11, *supra* note 10, at 320.

113. "Do not resist one who is evil. But if anyone strikes you on the right cheek, turn to him the other also.... You have heard that it was said, 'You shall love your neighbor and hate your enemy,' but I say to you, love your enemies and pray for those who persecute you." *Matthew 5: 39, 43-44* (RSV).

"The sanctity and absolute value of human life is upheld by the Qur'an which states: 'Take not life, which God/ Hath made sacred, except/ By way of justice and law' *Sura 6:151*," in HUMAN RIGHTS IN RELIGIOUS TRADITIONS 55 (A. Swidler ed. 1982).

The Quakers first expressed their peace testimony thus:

We utterly deny all outward wars and strife, and fightings with outward weapons, for any end, or under any pretense whatsoever;... The Spirit of Christ, by which we are guided, is not changeable, so as once to command us from a thing as evil, and again to move unto it; and we certainly know, and testify to the world, that the spirit of Christ, which leads us into all truth, will never move us to fight and war against any man with outward weapons, neither for the Kingdom of Christ nor for the kingdoms of this world ... Therefore, we cannot learn war any more.

Declaration to Charles II, 1660, PHILADELPHIA YEARLY MEETING OF THE RELIGIOUS SOC'Y OF FRIENDS, FAITH AND PRACTICE 34 (1972).

114. "If [Buddhism's] teaching is summarized in a single phrase, it is 'not to kill others'.... It is neither a treaty nor a law made by man. It is in itself a natural law. However, man must be taught this. For this reason, the Lord Buddha appeared and made *fusessho* (non-killing) a fundamental condition for human survival." N. FUJI, *BUDDHISM FOR WORLD PEACE* 25 (1980).

115. "Peace is not merely the absence of war.... Instead, it is rightly and appropriately called 'an enterprise of justice' (*Is. 32:17*). Peace results from the harmony built into human society by its divine founder and actualized by men as they thirst after ever greater justice." NATIONAL CONFERENCE OF CATHOLIC BISHOPS, *THE CHALLENGE OF PEACE: GOD'S PROMISE AND OUR RESPONSE* 21 (1983) (citation omitted).

116. See M.L. KING, *STRENGTH TO LOVE* 51-55 (1963) (offering practical answers to the question "Why should we love our enemies?"). See also *Id.* at 153 (expressing the view that the Christian Church cannot remain silent in the face of nuclear annihilation and must call for an end to the arms race).

service requires the believer to implicitly affirm the state's authority to take life, thereby denying the sovereignty of God in this area.¹¹⁷

This religiously based opposition to war is deeply rooted in American history.¹¹⁸ Compulsory military service was one of the primary reasons that religious dissenters migrated to America in the seventeenth century.¹¹⁹ By 1784, the bills of rights or constitutions of Pennsylvania,¹²⁰ Delaware,¹²¹ New York,¹²² Vermont,¹²³ and New Hampshire¹²⁴ and the militia statutes in a majority of states explicitly exempted religious pacifists from service in the militia.¹²⁵ Between the time the Constitution was drafted and its ultimate ratification, five of the original thirteen states indicated a desire that the federal Constitution exempt conscientious objectors from military service.¹²⁶ Thus,

117. "For the ancients a man was primarily a citizen of his State, first a member of a community and only afterwards a personality. If Christianity has done anything new for political science and jurisprudence, it has been to reverse this order." G.H.C. MACGREGOR, *THE NEW TESTAMENT BASIS OF PACIFISM* 109 (1936) (citation omitted).

118. See generally P. BROCK, *PACIFISM IN THE UNITED STATES—FROM THE COLONIAL ERA TO THE FIRST WORLD WAR* (1968).

119. See E. VIPONT, *THE STORY OF QUAKERISM*, 40-41 (1954).

120. PENNSYLVANIA DECLARATION OF RIGHTS § 8 (1776), now PA. CONST. art. III, § 16.

121. DELAWARE DECLARATIONS OF RIGHTS § 10 (1776).

122. N.Y. CONST. art. XL (1777).

123. VERMONT DECLARATION OF RIGHTS § 9 (1777), now VT. CONST. ch. 1, art. 9.

124. N.H. CONST. pt. 1, art. 13.

125. Fox, *Conscientious Objection to War: The Background and a Current Appraisal*, 31 CLEVE. ST. L. REV. 77, 79 (1982).

126. The states were Pennsylvania, Virginia, North Carolina, Maryland, and Rhode Island. *Id.* at 79. See also Brown, Kohn & Kohn, *supra* note 110, at 553.

The first Congress considered, but rejected, an amendment proposed by James Madison which would have prohibited the states from conscripting religious objectors into their militia. The proposed amendment read:

"The right of the 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.*"

B. SCHWARTZ, II *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 1026 (1971) (debate of the House of Representatives considering amendments to the Constitution) (emphasis added).

This amendment was directed towards the states because the Framers did not believe that the federal Constitution empowered the United States to draft soldiers into a national army. See generally Friedman, *Conscription and the Constitution: The Original Understanding*, 67 MICH. L. REV. 1493 (1969) (Framers of the Constitution did not intend to grant Congress power to conscript). But see Malbin, *Conscription, the Constitution and the Framers: An Historical Analysis*, 40 FORDHAM L. REV. 805 (1972) (Framers meant the power to raise armies to be construed broadly to include the power to conscript).

The House of Representatives passed Madison's proposed amendment despite criticism by states' rights advocates that the amendment usurped the power of the states to regulate their own militia. B. SCHWARTZ, *supra*, at 1107-08 (statement of Representative Gerry). The Senate, however, dropped the conscientious objector provision from its version of the amendment. *Id.* at 1149.

Americans have from the beginning understood that military service is incompatible with many religious teachings and has sought to accommodate those whose consciences will not permit them to kill.

Whatever the source, participation in war forces these believers to choose between imprisonment and denying their faith, precisely the choice that the Free Exercise Clause was designed to prevent. Thus, conscientious objectors may easily establish that compelling them under threat of fine or imprisonment to serve in the armed forces burdens their right to free exercise of religion and requires the government to justify the burden.

2. Government's Interest in Drafting Conscientious Objectors

Although the Court has shown a remarkable tendency to defer to Congressional decisions in military affairs,¹²⁷ this deference is not unqualified.¹²⁸ The question is how strong an interest the government should be required to demonstrate when a military policy infringes on a constitutional right. Under the traditional free exercise analysis, the government would be required to prove a compelling interest to draft conscientious objectors contrary to their religious beliefs.¹²⁹ After the *Smith* case, however, a compelling interest need be shown only if the objector's claim was a "hybrid" of free exercise plus another constitutional right, or if the statutory scheme involved provided exemptions for reasons other than religion.¹³⁰

The Senate debates were unrecorded, however, and the reason for dropping the conscientious objector exemption from the amendment regarding the militia and the right to bear arms cannot be known with certainty. However, because the Senate also removed all the House provisions that made the Bill of Rights applicable to the states, including the rights to freedom of conscience, speech, press, and trial by jury, it is likely that the Senate believed it inappropriate for the federal constitution to require the states to exempt conscientious objectors from their militia. *Id.* at 1145-47.

It would therefore be incorrect to view the failure of Madison's amendment as conclusive evidence that the Framers denied constitutional protection of the right of conscientious objection. Rather, the amendment's failure reflected their concern with the balance of military power between the federal government and the states and not antipathy towards or non-recognition of such a right.

127. *See, e.g.,* *Rostker v. Goldberg*, 453 U.S. 55, 64-65 (1981).

128. *Id.* at 89 (Marshall, dissenting). "[T]he phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. '[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.'" *Id.* (citations omitted).

129. *See supra* text accompanying notes 36-75 (discussing traditional free exercise analysis).

130. *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 110 S. Ct. 1595 (1990). *See supra* text accompanying notes 76-85 discussing the case.

Clearly the draft falls into the latter category.¹³¹ One of the essential functions of the Selective Service System is to select who should be pressed into military service and who should be exempted from such service.¹³² Selective Service has created many categories of draft exemptions and deferrals to enable it to meet not only the nation's military needs, but civilian needs as well.¹³³ The classification process is the means by which Selective Service identifies who should serve in the military and who can best serve the country in another capacity.¹³⁴ Among these categories of persons exempted from being drafted are conscientious objectors.¹³⁵ As the Court recognized in *Smith*,¹³⁶ whenever a regulatory scheme contains a mechanism for classifying and exempting some persons from its operation, the refusal to exempt religious objectors suggests an unconstitutional hostility towards religion.¹³⁷ Therefore, only a compelling government interest of the highest order would justify not exempting conscientious objectors from the draft.

The government may assert an interest in the draft in broad, general terms of providing for the common defense,¹³⁸ raising an army,¹³⁹ and national security.¹⁴⁰ This broad statement of the government's interest in conscription may be sufficiently compelling to empower Congress to draft citizens into the armed forces.¹⁴¹ However, when the government seeks to exercise a power that directly infringes an enumerated constitutional right, the government's interest should be framed more narrowly, in terms of its interest in drafting the

131. A strong argument could also be made that the right to not kill implicates a fundamental right of conscience that goes beyond free exercise of religion, thus becoming a 'hybrid' case that would also require a compelling interest even after *Smith*. The United Nations Commission on Human Rights has suggested that the right not to participate in war is a fundamental human right recognized by the *Universal Declaration of Human Rights*. See *The Role of Youth in the Promotion and Protection of Human Rights, Including the Question of Conscientious Objection to Military Service*, Commission on Human Rights (45th Sess.), U.N. Doc. E/CN.4/1989/59 (stating that "the right of everyone to have conscientious objections to military service as a legitimate exercise of the right of freedom of thought, conscience and religion"). The question of whether conscientious objection as a fundamental human right existing independent of the U.S. Constitution is beyond the scope of this note.

132. See L. BASKIR & W. STRAUSS, *supra* note 7, at 14-15.

133. See 32 C.F.R. § 1630 (1990) (exemptions and deferrals allowed by current regulations).

134. See 50 U.S.C. app. § 451 (c)(e) (1988). See also 50 U.S.C. app. § 454 (1988).

135. 50 U.S.C. app. § 456(j) (1988).

136. See *supra* text accompanying notes 91-95.

137. *Employment Div., Dept. of Human Res., v. Smith*, 110 S. Ct. 1595, 1603 (1990) (citing *Bowen v. Roy*, 476 U.S. at 708). See also *Quaring v. Peterson*, 728 F.2d 1121, 1127 (10th Cir. 1984), *aff'd by equally divided court per curiam sub nom.*, *Jensen v. Quaring*, 472 U.S. 478 (1985).

138. U.S. CONST. preamble.

139. U.S. CONST. art. I, § 8. See also *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981).

140. *Wayte v. United States*, 470 U.S. 598, 611 (1985).

141. See *Selective Draft Law Cases*, 245 U.S. 366 (1918). See also *supra* note 96 (discussing the case's holding).

individual conscientious objector.¹⁴² To draft conscientious objectors, the government must prove that accommodating their beliefs would render the draft "unworkable."¹⁴³

The government might demonstrate an unworkable burden on the draft if it could prove that the number of persons seeking to be exempted as conscientious objectors would be so large that the military would not be able to meet its personnel needs.¹⁴⁴ Nothing in our history suggests that this would happen, however. Historically, the percentage of registrants classified as conscientious objectors has been very low, never more than 1%, even at the height of the American war in Vietnam.¹⁴⁵ The long history of successful administration of the conscientious objector exemption demonstrates that there are no insurmountable difficulties to exempting conscientious objectors from military service.¹⁴⁶

142. See *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) ("Where fundamental claims of religious freedom are at stake" the government interest must be determined in terms of its interest in not exempting religious objectors from the regulation.) *Id.* See also Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 2 (1943) (citing need to evaluate competing interests on the same plane of generality).

143. *Sherbert v. Verner*, 374 U.S. 398, 409 (1963).

144. A limited survey conducted by the government in 1980 indicated that 42.9% of the men surveyed would seek a conscientious objector exemption and an additional 28.2% might request the exemption. Kellett, *supra* note 20, at 174 n.52 (citing *Judiciary Implications of Draft Registration—1980: Hearings before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 17 (1980)). The number of applicants for conscientious objector status has never approached this proportion in the past, however. See *infra* note 145.

145. Only .15% of all draft registrants were granted conscientious objector status during the Second World War. SPECIAL MONOGRAPH NO. 11, *supra* note 10, at 314. During the war against the Vietnamese (1964-73), approximately 171,700 (less than 1%) of all draft registrants applied for and were granted exemptions as conscientious objectors. An additional 570,000 men were estimated to have committed a draft offense such as failure to register or report for induction. Even if all of these resisters considered themselves conscientious objectors, only about 2.8% of the eligible draftees were conscientious objectors who would have been exempted from the draft on constitutional grounds. See L. BASKIR & W. STRAUSS, *supra* note 7, at 5, 30-31, and accompanying notes.

Significant social and community pressures also have kept the number of conscientious objectors relatively low. See Fox, *supra* note 125, at 104 (citing peer and parental opinion, the desire to prove manhood, and patriotism as influences that have prevented massive resistance to military service by Americans). Furthermore, the requirement that conscientious objectors perform two years of alternative service also discourages insincere claims.

146. L. TRIBE, *supra* note 57, at 1266.

The difficulties experienced with administering the conscientious objector exemption have been primarily caused by eligibility requirements that have limited the availability of the exemption to a small proportion of those who have sincere conscientious opposition to participation in war. If the statutory exemption were broadened to eliminate the distinction between "religious" and "political, ethical, or social" objectors, and to exempt those conscientiously opposed to fighting in some, but not necessarily all, wars, the exemption could be administered with much greater ease, though

Not only can the government show no compelling interest in forcing conscientious objectors to serve in the military, it has recognized an important interest in *not* drafting them. The military has clarified that conscientious objectors make ineffective soldiers and has tried to insulate itself from their disruptive influence.¹⁴⁷ No soldier would willingly go into combat with a comrade who he knows is willing to die rather than to kill. Because conscientious objectors do not make good soldiers, forcing them into the military does not advance the government's interest in maintaining an effective fighting force. Consequently, the government has no compelling interest in forcing conscientious objectors to bear arms. Without a compelling interest requiring that conscientious objectors be drafted, the government must accommodate their religious beliefs and exempt them from military service.

PART III: FREE EXERCISE AND DRAFT REGISTRATION

A. Registration as a Burden on Free Exercise

The Military Selective Service Act requires every male citizen to register with the Selective Service System at age eighteen.¹⁴⁸ Although some conscientious objectors claim that draft registration conflicts with their religious beliefs, federal courts have without exception upheld the constitutionality of requiring conscientious objectors to register for the draft against free exercise challenges.¹⁴⁹ In these cases, the courts have justified the infringement on free exercise for three basic reasons.

presumably more registrants would claim and be granted conscientious objector status. One commentator has suggested that the classification procedure could be further simplified by merely requiring the applicant to sign an affidavit affirming the sincerity of his belief. See Fox, *supra* note 125, at 103.

147. Fox, *supra* note 125, at 104.

148. 50 U.S.C. app. § 453 (1988). Failure to register may result in a prison sentence of up to five years and a fine up to \$10,000. 50 U.S.C. app. § 462 (1988).

Conscientious objectors who refuse to register are also denied certain federal education or job training assistance. Conscientious objectors (including those not required to register for the draft) must certify that they are in compliance with the draft registration law before they will be granted certain forms of federal aid under the Solomon Amendment. 50 U.S.C. app. § 462(f) (1988). Furthermore, non-registrants are ineligible for appointment to any position within an Executive agency if they have not been registered by age 26. 5 U.S.C. app. § 3328 (1988).

149. See *Detenber v. Turnage*, 701 F.2d 233, 234 (1st Cir. 1983); *United States v. Bertram*, 477 F.2d 1329, 1330 (10th Cir. 1973); *United States v. Koehn*, 457 F.2d 1332, 1334 (10th Cir. 1972); *United States v. Toussie*, 410 F.2d 1156, 1161 (2d Cir. 1969), *rev'd on other grounds*, 397 U.S. 112 (1970); *United States v. Bigman*, 429 F.2d 13, 15 (9th Cir.), *cert. denied*, 400 U.S. 910 (1970); *Richter v. United States*, 181 F.2d 591, 594 (9th Cir. 1950); *Michener v. United States*, 184 F.2d 712, 714 (10th Cir. 1950); *United States v. Henderson*, 180 F.2d 711, 713 (7th Cir. 1950); *Gara v. United States*, 178 F.2d 38, 40 (6th Cir. 1949), *aff'd by equally divided court*, 340 U.S. 857 (1950); *Warren v. United States*, 177 F.2d 596, 599 (10th Cir. 1949).

The Supreme Court has never squarely faced nor decided the question, however.

The first reason is that the conscientious objector exemption exists solely by legislative grace and is not a constitutional right; therefore, Congress may impose whatever conditions upon the exemption it wishes.¹⁵⁰ The cases following this rationale base their holdings on the dictum from *Macintosh*¹⁵¹ stating that the Constitution does not require an exemption of conscientious objectors. Although the holding in *Macintosh* was overruled in 1946,¹⁵² its orphaned dictum has survived to defeat the conscientious objectors' claims in these cases. However, the Court's interpretation of the Free Exercise Clause subsequent to *Macintosh* suggests that Congress could not constitutionally repeal the conscientious objector exemption.¹⁵³ Since conscientious objection is a constitutional right, Congress cannot place conditions upon its exercise except to achieve a compelling interest.¹⁵⁴

A second rationale for requiring conscientious objectors to register is that registration is only remotely related to military service and does not truly infringe on the conscientious objector's free exercise of religion.¹⁵⁵ This reasoning echoes Justice Cardozo's concurring opinion in *Hamilton v. Regents*, stating that military training at a state university was so distantly related to military service that it did not implicate pacifist students' religious beliefs against war.¹⁵⁶ The difficulty with this line of reasoning is that it requires courts to

150. See, e.g., *Michener v. United States*, 184 F.2d 712, 714 (10th Cir. 1950); *Richter v. United States*, 181 F.2d 591, 593 (9th Cir. 1950); *United States v. Henderson*, 180 F.2d 711, 715 (7th Cir. 1950); *Warren v. United States*, 177 F.2d 596, 598 (10th Cir. 1949).

151. *United States v. Macintosh*, 238 U.S. 605 (1931). See *supra* notes 98-101 discussing the case.

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

153. See *supra* text accompanying notes 36-95 (applying free exercise analysis to question of conscientious objection to draft).

154. *Thomas v. Review Bd., Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981). "The state may justify inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest." *Id.* See also *West Virginia St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943) (state regulation of right to worship may be infringed upon only by an "immediate danger to interests which the state may lawfully protect.").

155. "In any event, the [draft registration] requirement does not infringe or curtail religious freedom since registration is not religious interference." *United States v. Bertram*, 477 F.2d 1329, 1330 (10th Cir. 1973).

156. 203 U.S. 245 (1934) After reciting conscientious objector arrangements in prior draft laws which required conscientious objectors to furnish a replacement or the money with which to hire one, Justice Cardozo wrote:

For one opposed to force, the affront to conscience must be greater in furnishing men and money wherewith to wage a pending contest than in studying military science without the duty or the pledge of service. Never in our history has the notion been accepted, or even, it is believed, advanced, that acts thus indirectly related to service in the camp or field are so tied to the practice of religion as to be exempt, in law or morals, from regulation by the state.

Id. at 267 (Cardozo, J., concurring).

examine the objector's religious belief to determine if "mere" registration actually conflicts with the belief, an inquiry that courts are not permitted to make.¹⁵⁷

Whatever question there may have been regarding whether draft registration was closely or remotely related to military service was answered by the Supreme Court in *Rostker v. Goldberg*.¹⁵⁸ The issue in *Rostker* was the constitutionality of requiring only males to register for the draft.¹⁵⁹ Aware that the Court often gives great deference to military decisions, the plaintiffs argued that the impact of draft registration on the military was "indirect and attenuated";¹⁶⁰ therefore, their equal protection challenge should be analyzed with the scrutiny required of gender-based classifications in a civilian context.¹⁶¹ The Court disagreed, holding that draft registration was "the first step" of induction into military service.¹⁶²

We find these efforts to divorce registration from the military and national defense context, with all the deference called for in that context, singularly unpersuasive.... *Registration is not an end in itself in the civilian world but rather the first step in the induction process into the military one*, and Congress specifically linked its consideration of registration to induction.¹⁶³

157. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449-50 (1988).

Justice Cardozo may perhaps be forgiven for doing this in *Hamilton* since the Court did not forbid this sort of inquiry until *United States v. Ballard*, 322 U.S. 78 (1944), ten years after *Hamilton* (see *supra* note 32 for discussion of *Ballard*). However, the courts after *Ballard* which have taken it upon themselves to deny that draft registration interferes with conscientious objectors' beliefs cannot be so easily understood.

158. 453 U.S. 57 (1981).

159. *Id.* at 60-61.

160. *Id.* at 68.

161. *Id.*, quoting Brief for Appellees at 19 (emphasis omitted). Had the plaintiffs in *Rostker* been successful in their argument, their challenge would have been subject to a heightened scrutiny which invalidates gender-based classifications unless the classification is substantially related to achieving an important government interest. *Id.* at 87 (Marshall, J., dissenting) (citing *Craig v. Boren*, 429 U.S. 190 (1976)).

162. *Rostker*, 453 U.S. at 68.

163. *Id.* (citations omitted) (emphasis added).

Consequently, the Court merely inquired whether registering males bore a rational relationship to the legitimate government interest advanced by draft registration. The Court reviewed the legislative history of the appropriation bill funding draft registration. It found that Congress seriously considered whether women should be required to register and concluded that registering women was not necessary and did not appropriate funds to register them. Given Congress' careful consideration of the issue, the Court held that there was a rational reason to register males only. "The purpose of registration was to prepare for a draft of combat troops. Since women are excluded from combat, Congress concluded that they would not be needed in the event of a draft, and therefore decided not to register them." *Id.* at 78. By this logic, the Court concluded that requiring males only to register was rationally related to the government's interest in draft registration and did not deny men equal protection of the law.

Rostker gives legitimacy to the conscientious objectors' long disparaged claim that registration constitutes a form of military service. Since draft registration is now recognized as "the first step" into the military world,¹⁶⁴ registration can no longer be dismissed as only remotely associated with military service. As "first step" into military life, draft registration indeed does constitute a form of participation in war, and as such is a direct infringement on the religious beliefs of conscientious objectors.

The third and most plausible rationale upholding draft registration against free exercise challenges was that draft registration is a necessary condition to granting the conscientious objector exemption, despite its infringement of free exercise.¹⁶⁵ Similarly, mandatory registration is also justified by the government's interest in identifying and scrutinizing the claims of individual conscientious objectors in order to grant the exemption.¹⁶⁶ The cases following this rationale adhere more closely to the Court's free exercise analysis because they recognize the conscientious objector's right to have his beliefs accommodated. These cases suggest that the conscientious objector has already been accommodated by the statutory exemption from actual military service; all the conscientious objector must do is to let the government know who he is so he can be exempted from the draft.¹⁶⁷

This justification was persuasive as long as the registrant could apply for conscientious objector status immediately upon registration. However, the argument lost much of its force when President Carter reinstated draft registration without classifying registrants in 1980.¹⁶⁸ Prior to 1980, registrants could apply for the conscientious objector exemption immediately upon registration.¹⁶⁹ After 1980, however, the Selective Service decided to postpone classification of registrants until Congress authorized inductions¹⁷⁰ on the grounds that filing a claim in advance of induction would require the System to process claims which might not be pertinent until the time of

164. *Id.* at 68.

165. *United States v. Toussie*, 410 F.2d 1156, 1161 (2d Cir. 1969), *rev'd on other grounds*, 397 U.S. 112 (1970). "The government's ability to carry out this statutory scheme for conscientious objectors clearly depends in large measure on identification of those holding such beliefs." *Id.*

166. *Gara v. United States*, 178 F.2d 38, 40 (6th Cir. 1949), *aff'd by an equally divided court*, 340 U.S. 857 (1950).

167. *Toussie*, 410 F.2d at 1161.

168. Proclamation No. 4771, 3 C.F.R. 82 (1981), *reprinted in* 50 U.S.C.A. app. § 453 (1988).

169. Spak & Valentine, *Objectors Without Recourse: The Rights of Conscience and Military Draft Registration*, 13 SETON HALL L. REV. 667, 678-79 (1983).

170. Current regulations require conscientious objectors to wait until they receive an induction notice to submit their application for an exemption. They have ten days from receipt of the notice in which to submit their application. 32 C.F.R. § 1636.2. (1990).

induction.¹⁷¹ Selective Service regulations specifically prohibit accepting any document concerning a registrant's claim of conscientious objection prior to the registrant being sent an induction notice.¹⁷²

These new regulations subtly but profoundly change the nature of draft registration for conscientious objectors. Before 1980, registration for conscientious objectors was the first step *out* of the draft; now, it is the first step *into* the military system with no meaningful opportunity to withdraw. The interference with free exercise is no longer justifiable as a necessary requirement for accommodating the conscientious objector's religious beliefs, since there is no accommodation until induction.

Thus, the courts that have heard free exercise challenges to draft registration have generally not appreciated the burden registration places on the conscience of conscientious objectors. Those courts that have recognized the burden on free exercise upheld the registration requirement as a necessary procedure for administering the conscientious objector exemption and thereby avoid an even greater burden. However, the nature of the free exercise infringement posed by registration has changed with the change in draft regulations after 1980. Therefore, a new analysis must be made of the government's interest in requiring conscientious objectors to register for the draft to determine whether doing so violates the Free Exercise Clause of the United States Constitution.

B. The Government's Interest in Draft Registration

1. Is a Compelling Interest Necessary to Require Conscientious Objectors to Register for the Draft?

The *Smith* case¹⁷³ now requires an analysis of whether the government must demonstrate a compelling interest in not exempting conscientious objectors from draft registration or whether a mere rational basis is sufficient. On first glance, draft registration appears to be a generally applicable government regulation the *Smith* Court held enforceable against religious objectors, even absent a compelling government interest. A closer analysis, however, reveals that *Smith* does not preclude application of the traditional compelling interest test to draft registration.

171. 46 Fed. Reg. 436 (1981) (quoted in *United States v. Schmucker*, 815 F.2d 413, 418 (6th Cir. 1987)).

172. 32 C.F.R. § 1633.3 (1990).

173. *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 110 S. Ct. 1595 (1990).

As noted above,¹⁷⁴ *Smith* signalled a significantly lowered government burden when generally applicable laws are challenged as infringing on free exercise of religion. Nevertheless, the Court recognized two circumstances in which the traditional requirement that the government demonstrate a compelling interest in the challenged law would be applied.¹⁷⁵ The circumstance most clearly applicable to draft registration is where the free exercise infringement also violates another constitutional right, the so-called "hybrid" case.¹⁷⁶

While draft registration most obviously infringes on the religious beliefs of conscientious objectors, it also is a form of forced speech. Without an opportunity to register his religious objection to military service, registration requires an unqualified, indefinite statement that one is available for military service. It is precisely this statement that many nonregistrants have refused to make. Thus, requiring conscientious objectors to register for the draft implicates both free speech -- the right not to be forced to speak -- and free exercise of religion. Thus, as a "hybrid" claim, the government should be required to demonstrate a compelling interest in abridging those constitutional rights.¹⁷⁷

2. Is the Government's Interest in Draft Registration "Compelling"?

Draft registration arguably advances three possible governmental interests. First it facilitates speedy inductions if a draft becomes necessary and thus has a military preparedness goal. Second, draft registration enables the government to deploy the civilian workforce in wartime. Finally, draft registration serves the government's propaganda interest by imposing upon young men the states claim of sovereignty and its power to compel obedience. This section of the note examines each interest to determine if any are sufficiently compelling to justify infringing on the free exercise of religion of conscientious objectors.

174. See *supra* notes 76-85 (discussing *Smith II*).

175. *Smith II*, 110 S. Ct. at 1601-03.

176. *Smith II*, 110 S. Ct. at 1601-02. The second circumstance where a compelling interest is still required is where the law or statutory scheme contains a mechanism for exempting persons for reasons other than religion. *Id.* at 1603. While drafting conscientious objectors would be analyzed in the context of the Selective Service's extensive classification policy (see *supra* notes 131-137 and accompanying text) because the current registration system does not classify or exempt registrants from the registration requirement, it does not seem to help conscientious objectors in this context. But see *United States v. Schmucker*, 815 F.2d 413, 419-20 (6th Cir. 1987) (discussing Congress' policy of exempting women from registration by reason of their gender and Selective Service's policy of administratively exempting severely mentally handicapped men from registration).

177. *Smith II*, 110 S. Ct. at 1601-02.

a. The Interest in Facilitating a Draft

While national defense is indeed a compelling government function, it does not follow that every government policy regarding national defense is equally compelling.¹⁷⁸ For example, preparing for a draft in peacetime by requiring registration may be important, but not as compelling as actual conscription in wartime would be. Therefore, the general interest in national defense may be important enough to justify requiring young men in general to register, but it is not necessarily important enough to justify infringing on the religious liberty of conscientious objectors. Both the relatively small number of potential conscientious non-registrants¹⁷⁹ and the ease of collecting the information by other means¹⁸⁰ suggests that the government's interest in requiring conscientious objectors to register could not be characterized as compelling. Until Congress decides that the national defense requires conscription, registration cannot be fairly said to be sufficiently compelling to justify denial of religious liberty to conscientious objectors.

If conscription is resumed, however, it is unclear whether the government even then would have a compelling interest in requiring conscientious objectors to register. *Rostker* held that the government's primary interest in draft registration is to facilitate a draft of *combat* troops and therefore justified discriminating between men -- who are eligible for combat -- and women, who are not.¹⁸¹ *Rostker* did not address whether the government had an interest in requiring conscientious objectors to register for the draft, but the case implies that since conscientious objectors cannot be drafted into combatant roles, requiring them to register is no more necessary to meet military needs than registering women would be.

b. The Interest in Deploying the Civilian Workforce

At a broader level, the government may claim that draft registration serves other important interests besides aiding the drafting of combat troops. One of these might be to facilitate deployment of the civilian workforce during a national emergency. Indeed, the Military Selective Service Act¹⁸² lists several reasons for the draft other than maintaining adequate armed forces. Among

178. See Reilly, *supra* note 11, at 110 (weight of government's interest should be limited to the precise obligation which burdens free exercise of religion).

179. See *supra* note 145 (discussing the number of conscientious objectors in past wars).

180. See *infra* note 192 (discussing Selective Service's effectiveness at getting information about non-registrants from other sources).

181. *Rostker v. Goldberg*, 453 U.S. 57, 78 (1981). See also *supra* notes 158-164 (discussing *Rostker*).

182. Act of June 24, 1948, 62 Stat. 604, codified at 50 U.S.C. app. §§ 451 *et seq.* (1988).

these are the equitable sharing of the obligation to defend the nation;¹⁸³ the maintenance of an effective national economy;¹⁸⁴ securing maximum scientific research;¹⁸⁵ and development and full utilization of the nations' manpower resources.¹⁸⁶ To achieve these goals, the government may reasonably assert that it needs a universal register of the nation's workforce.

While plausible on its face, this assertion does not constitute a compelling interest that justifies requiring conscientious objectors to register for the draft. First, by excluding women from the registration requirement, the government suggests that only the talents and abilities of males are required for national defense.¹⁸⁷ If draft registration was truly intended to maintain an up-to-date inventory of the national workforce, the need would require universal registration of all citizens, women as well as men.¹⁸⁸

Second, if the government has a compelling need for a national personnel inventory, this goal could be achieved by means other than personal registration for the draft. In the past, draft regulations allowed local draft board clerks to register individuals for whom the board has the necessary information without requiring the person to personally sign the registration card.¹⁸⁹ In addition, the government could compile its national personnel inventory with information from other sources, such as social security or tax records, that provide the same data required by draft registration.¹⁹⁰ Clearly the need for a national personnel

183. 50 U.S.C. app. § 451(c) (1988).

184. *Id.*

185. 50 U.S.C. app. § 451(e) (1988).

186. *Id.*

187. See *Rostker v. Goldberg*, 452 U.S. 57, 95-96 (1981) (Marshall, J., dissenting) (distinguishing between the differing goals of registration and actual induction into military service, the goal of registration being to provide an inventory of available strength within the military qualified pool in the country).

188. This asserted interest also implies that all citizens, not only young ones, should be registered in anticipation of a national emergency.

189. 32 C.F.R. § 1613.13(c) (1990).

If the registrant is unable or refuses to sign the registration card ... the registrar shall sign such registrant's name ... and the act of the registrar in doing so shall have the same force and effect as if the registrant had signed the Registration Card ... and such registrant shall thereby be registered.

Id. (emphasis added) (cited in *United States v. Koehn*, 475 F.2d 1332, 1333 n.1 (1972)).

The court did not interpret this regulation to require Selective Service to register an uncooperative conscientious objector, however, nor did it preclude his conviction for failure to register. *United States v. Koehn*, 457 F.2d 1332 (10th Cir. 1972).

190. Selective Service has gained access to several large data bases, enabling it to cross-check its records to identify non-registrants. 84% of the records in its Registration Compliance Program come from state driver's license records. Selective Service also receives lists of high school seniors and registered voters from communities where it suspects there to be a large number of non-registrants. Finally, Selective Service is provided information by the Federal Aviation Agency,

inventory could be met without requiring conscientious objectors to personally register for the draft.

c. The Interest in Reminding Citizens of the State's Sovereignty

Finally, the government may claim that draft registration advances its interest in reminding young citizens of their patriotic obligation to defend the state and the state's power to compel their cooperation. The government's interest in educating the young to its claim of supremacy best explains why the government has been so insistent in exercising its power to compel registration of conscientious objectors.¹⁹¹ Registration of conscientious objectors is not necessary to accomplish the primary goal of drafting combat troops since they cannot serve in combat. Similarly, personal registration is not essential to achieve the data-collection function of draft registration since the government already has access to the information it asks the registrant to supply.¹⁹² However, the government's interest in asserting its sovereignty would be frustrated without the requirement of personal draft registration. In this sense, registration more resembles a symbolic act of allegiance by which the registrant indicates his submission to the authority of the state than an administrative necessity.¹⁹³

While the Constitution does not forbid the government from using draft registration as a vehicle to teach patriotic values, the first amendment does protect those who conscientiously oppose the ritual from being forced to

Social Security Administration, and the Departments of Defense, Transportation, Veterans Affairs and Education and matches the records against its own list of draft registrants. Once identified, Selective Service sends letters to the non-registrants reminding them of their obligation to register. If there is no response, the names are turned over to the Justice Department for criminal investigation. SEMIANNUAL REPORT 1986, *supra* note 18, at 5.

191. In the early 1980s, the United States targeted non-registrants who informed the government of their conscientious objection to registration for prosecution, eventually indicting sixteen of them. Although at least one United States Attorney sought permission to decline prosecution of a conscientious objector, permission was denied. Instead, Justice Department authorities advised local United States Attorneys to handle conscientious objector non-registrants on a priority basis. The government's decision to prosecute only conscientious objectors who informed the government of their decision, and not other classes of non-registrants indicates that conscientious objectors presented a particular threat to the government's authority. See Reilly, *supra* note 11, at 85-88. The policy of prosecuting only vocal non-registrants reflects the government's willingness to "tolerate[] evasive non-compliance, but not forthright dissent." *Id.* at 112-13.

192. See *supra* note 190.

193. The government itself referred to registration as a mere "symbolic" act on the part of the conscientious objector non-registrant. Reilly, *supra* note 11, at 113 n.202. "What the government wanted was to force [conscientious objector non-registrants] to succumb, to bow down to the superior power of civil authority, to abandon conscience for obeisance." *Id.* at 113. See also Kellett, *supra* note 20, at 172, 178.

participate.¹⁹⁴ The Constitution's protection of religious liberty is precisely designed to prevent the state from extracting symbolic statements of loyalty or patriotism.¹⁹⁵ Whatever the wisdom of maintaining draft registration as a unifying, patriotic rite of passage for young men, the first amendment protects conscientious objectors from being punished for refusing to participate.¹⁹⁶

No compelling government interest in registration justifies requiring conscientious objectors to register for the draft. The government's primary interest in drafting combat troops is not advanced by requiring conscientious objectors to register since they cannot serve in combat.¹⁹⁷ Its interest in maintaining a national personnel inventory from which to draft troops can be achieved through means that do not require an the conscientious objector to act contrary to his conscience.¹⁹⁸ Finally, the government's interest in draft registration as a means of indoctrinating young people with its claim to sovereignty is an impermissible infringement upon the religious liberty of one who denies the state sovereignty over his conscience.¹⁹⁹ Consequently, no compelling government interest exists in requiring conscientious objectors to register for the draft that could not be achieved by means that did not infringe on free exercise. The Constitution therefore prohibits punishing conscientious objectors who refuse to register for the draft.

C. Free Exercise Challenges to Registration Since 1980

Despite the foregoing, no federal court has upheld a free exercise challenge to draft registration. Only one reported appellate case since 1980 has analyzed whether the Free Exercise Clause exempts conscientious objectors from the registration requirement. In *United States v. Schmucker*,²⁰⁰ a Mennonite college student informed Selective Service of his refusal to register for the draft on religious grounds.²⁰¹ After refusing subsequent opportunities to register, Schmucker was indicted, convicted, and sentenced for violating the Military

194. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that Jehovah's Witnesses could not be expelled from school for refusing to participate in a daily flag salute ceremony).

195. "We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Id.* at 642.

196. *Id.* at 640.

197. See *supra* text accompanying notes 178-81.

198. See *supra* text accompanying notes 182-90.

199. See *supra* text accompanying notes 191-96.

200. 721 F.2d 1046 (6th Cir. 1983), *cert. granted, vacated and remanded*, 471 U.S. 1001, *rev'd*, 815 F.2d 413 (6th Cir. 1987). For a detailed analysis of this case by one of Schmucker's lawyers, see generally Reilly, *supra* note 11.

201. 721 F.2d at 1048.

Selective Service Act.²⁰² Schmucker defended on equal protection and free exercise grounds.²⁰³

202. *Id.*

203. Schmucker alleged that the government's "passive enforcement" policy violated his right to equal protection of the law. The passive enforcement system relied upon self-reporting of conscientious non-registrants or upon reports from third parties that a person had not registered. Once identified, these persons were given a series of government demands to register, beginning with a form letter from Selective Service and ending with an indictment for non-registration. Reilly, *supra* note 11, at 87-88. This policy had the effect of punishing vocal non-registrants for exercising their first amendment rights because those who did not publicize their non-compliance were not sought out for prosecution. *Schmucker*, 712 F.2d at 1049.

Schmucker had requested a hearing by the trial court to present evidence that the passive enforcement policy singled out vocal opponents to draft registration for prosecution. The district court denied the request on the grounds that even if the passive enforcement policy was proven, it would not be a valid defense. *Id.* at 1048.

On his first appeal, the Court of Appeals for the Sixth Circuit reversed holding that if Schmucker could prove that the government initiated his prosecution because he exercised his first amendment right to free exercise of religion, such a prosecution would violate the Constitution. "It [the selective prosecution policy] selects for prosecution only those who speak out against the [draft] law. It selects people based on their expression of beliefs and the strength of their convictions.... It discourages dissenters from expressing their criticisms of government policy." *Id.* at 1049. Although the appellate court acknowledged that Schmucker's opposition to registration was religiously based, most of its analysis dealt with whether the selective prosecution policy infringed on his rights of free speech and expression and did not carefully examine the free exercise claim. *See id.* at 1048, 1049-52.

The government appealed to the United States Supreme Court which granted certiorari. *United States v. Schmucker*, 471 U.S. 1001 (1985). Before oral arguments, however, the Court vacated the Sixth Circuit's reversal of the conviction and remanded to the district court with instructions to reconsider in light of *Wayte v. United States*, 470 U.S. 598 (1985).

Like *Schmucker*, *Wayte* involved a challenge of the passive enforcement policy on equal protection and first amendment grounds. The Supreme Court held that *Wayte* had not proven that the selective prosecution policy had the effect of discriminating between him and others "similarly situated" and, even if he had proven a discriminatory effect, that he had not shown that the government's policy was motivated by a discriminatory purpose. *Wayte v. United States*, 470 U.S. at 609-10 (1985).

Instead of considering whether *Wayte* had been treated differently than non-registrants in general, the Court analyzed whether he had been treated differently than other vocal non-registrants. Since other vocal non-registrants were also facing prosecution, the Court concluded that *Wayte* was being treated the same as others similarly situated and that his equal protection claim was therefore without merit. *Id.*

The Court also upheld the passive enforcement policy against a direct First Amendment challenge. *Wayte* claimed that prosecuting him because he informed the government of his refusal to register effectively punished him because he exercised his free speech rights. Utilizing the analysis used for regulations that incidentally impact speech first articulated in *United States v. O'Brien*, 391 U.S. 367 (1968), the Court held that draft registration was within the government's power and advanced substantial government interests unrelated to regulating speech. First, the policy helped the government identify and prosecute non-registrants without delay. Second, the letters vocal non-registrants sent to the government provided evidence of their intent to not register, an essential element of the crime. Finally, the Court said that failing to prosecute vocal non-registrants would encourage others to violate the law. The Court ruled that since the passive

In considering his free exercise claim, the court weighed three factors: the magnitude of the burden on Schmucker's free exercise of religion; the importance of the state's interest justifying the burden; and the extent to which accommodation of Schmucker's beliefs would impede the government's interests.²⁰⁴ The court concluded that the impact of registration on Schmucker was minimal and that the government's interest in requiring Schmucker to register was compelling. The government's interest therefore outweighed Schmucker's right to free exercise of religion,²⁰⁵ and no accommodation was required.²⁰⁶

In reaching this conclusion, the court misapplied the Supreme Court's free exercise analysis in several ways. First, the court decided that draft registration placed only a "minimal" burden on Schmucker's free exercise of religion.²⁰⁷ To reach this conclusion, the court attempted to measure the extent to which draft registration interfered with Schmucker's beliefs, despite the legal inappropriateness and the metaphysical impossibility of doing so.²⁰⁸ The

enforcement policy was a temporary policy until the government was able to identify more non-registrants by matching draft registration rolls with state driver's license lists and Social Security files, the policy was the least restrictive method of meeting those interests. Therefore, the passive prosecution policy did not violate the first amendment. 470 U.S. at 610-14.

On remand, the district court reconsidered Schmucker's equal protection challenge based on the selective prosecution of vocal non-registrants. *Schmucker*, 815 F.2d 413, 418-19. The district court again denied Schmucker's motion for an evidentiary hearing to prove that he was selected for prosecution because of his free exercise of religion.

Schmucker appealed again to the Sixth Circuit. *Id.* at 417. The court relied on the Supreme Court's holding in *Wayte* that vocal non-registrants were not being prosecuted because they exercised their first amendment rights, but because they provided the government with evidence essential to convict them. The Court said that another reason for prosecuting vocal non-registrants was that the passive registration policy was only temporary until other methods of identifying non-registrants were available. *Wayte*, 470 U.S. 598, 612-14 (1985). Therefore, prosecuting vocal non-registrants did not punish them for exercising free speech. *Id.* at 609-10; *Schmucker*, 815 F.2d at 419.

Schmucker's lawyers attempted to distinguish *Wayte* as being a free speech case where *Schmucker* involved free exercise. Reilly, *supra* note 11, at 103. The distinction was important since registration did not affect *Wayte*'s free speech in the same way that it affected Schmucker's free exercise of religion. *Wayte* could still protest draft registration without penalty even after he registered. Schmucker's free exercise and the government's registration requirement could not coexist however; if he registered, he violated his religious tenets. *Id.* at 104. Nevertheless, the *Schmucker* court followed *Wayte* and rejected his equal protection claim based on the selective prosecution policy. *Schmucker*, 815 F.2d at 418-19.

204. *United States v. Schmucker*, 815 F.2d 413, 417 (6th Cir. 1987).

205. *Id.* at 417-18.

206. *Id.* at 417.

207. *Id.*

208. *See Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449-50 (1988) (Court may not weigh the "adverse effects" of a regulation on one set of religious objectors and compare to the effect on others). *See also United States v. Ballard*, 322 U.S. 78, 86 (1944) (holding that courts may not inquire into the truth of a religious belief, only whether the belief is sincerely

damage done by forcing a person to do something he thinks is wrong is not quantifiable and cannot be "measured" in any sensible way. Mark Schmucker's statement of the depth of his opposition to the act,²⁰⁹ corroborated by his behavior consistent with that statement,²¹⁰ should have been considered as conclusive proof that draft registration was a significant burden on his free exercise of religion.²¹¹ By holding that registration only "minimally" interfered with Schmucker's free exercise, the court substituted its perception of his religious beliefs, despite his uncontradicted testimony to the contrary.²¹²

The court also exaggerated the importance of the government's interest in requiring Schmucker to register for the draft. The court uncritically accepted the government's interest in draft registration as part and parcel of its national defense program and concluded that this interest outweighed the infringement on Schmucker's free exercise rights.²¹³ Moreover, the court did not require the government to show that requiring Schmucker to register was the least restrictive means of achieving its interest in draft registration. In his brief, Schmucker suggested several ways in which the government could have met its defense needs without requiring him to personally register.²¹⁴ The court ignored these alternatives and simply stated that Congress was entitled to broad deference in military matters and upheld the registration requirement.²¹⁵

The *Schmucker* decision demonstrates how institutional pressures to defer to military authorities and Congress can overcome legal precedent and

held).

209. See *supra* note 11 (text of Schmucker's letter to Selective Service).

210. Schmucker was ordered to serve two years at a home for severely and profoundly mentally retarded adults, during which time he was confined to the premises and was not permitted to visit the library or even to accompany residents and staff on field outings. Schmucker refused to authorize his attorneys to request a suspension of his sentencing pending appeal. He served approximately thirteen months when the district court suspended his sentence following the Sixth Circuit's reversal of his conviction. Reilly, *supra* note 11, at 92 n.61.

211. Even the district court judge recognized the sincerity of Schmucker's belief that registering for the draft was immoral. She specifically stated that he was not required to register for the draft as a condition of his probation. Reilly, *supra* note 11, at 92.

212. *Id.*

213. *Schmucker*, 815 F.2d at 417-18.

214. Reilly, *supra* note 11, at 114.

215. *Schmucker*, 815 F.2d at 718.

The court specifically rejected Schmucker's claim that the Free Exercise Clause required the government to evaluate his claim as a conscientious objector prior to or immediately after registering. The court noted that since a conscientious objector's objection to participating in war was already accommodated by the statutory exemption from actual military service, the government was under no obligation to further accommodate the objector by immediately classifying him. Furthermore, since Congress had not appropriated funds to classify registrants, the court held that the legislative decision to defer classification should be given great deference since it dealt with military and national security matters. *Id.*

reasoning.²¹⁶ Despite ample evidence and legal analysis supporting Schmucker's claims, the court failed to require proof that prosecuting Mark Schmucker was the least restrictive way the government could meet its national defense interests. This failure suggests that the courts may not be reliable guardians of individual liberty when infringed upon by military authorities. If the *Schmucker* court had not impermissibly measured the extent to which registration infringed on Mark Schmucker's beliefs,²¹⁷ if it had weighed the government's interest in requiring Schmucker to register rather than the government's interest in national defense in general,²¹⁸ and if it had required the government to meet its interest in a way that did not interfere with Schmucker's free exercise,²¹⁹ his conviction could not have been affirmed. The case demonstrates that the courts are unwilling to protect the religious liberty of conscientious objectors when asserted against military authorities, and the necessity of legislative or administrative reform.

PART IV: PROPOSALS TO ACCOMMODATE FREE EXERCISE RIGHTS OF CONSCIENTIOUS OBJECTORS TO DRAFT REGISTRATION

Although the courts have sufficient legal precedent and theory to protect the right of conscientious objectors to be exempted from draft registration, the *Schmucker* decision demonstrates the reluctance of the courts to exercise that power. The courts have repeatedly refused to subject military-imposed infringements of first amendment liberties to the strict scrutiny used in other cases of government interference with constitutional rights.²²⁰ This failure to closely examine military-related regulations suggests that the courts are not reliable sources to protect individual liberty from military infringement. Therefore, either Selective Service policies or Congressional legislation are necessary to better protect the rights of conscientious objectors.

Any reform aimed at protecting the rights of conscientious objectors should satisfy three criteria. First, since Congress believes that draft registration is necessary, a current data base of potential draftees must be maintained in the event that an emergency requires immediate conscription. Second, any reform should protect as many conscientious objectors as possible without jeopardizing the government's need for a sufficient pool of potential draftees. Finally, the reform should be simple and inexpensive to administer. The following proposals

216. Reilly, *supra* note 11, at 80-82.

217. See *supra* notes 207-12 and accompanying text.

218. See *supra* note 213 and accompanying text.

219. See *supra* notes 214-15 and accompanying text.

220. See, e.g., *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986); *Rostker v. Goldberg*, 453 U.S. 55, 64-65 (1981).

suggest various reforms that aim at protecting the conscientious objector's rights without jeopardizing national security.

A. Legislative Proposals

1. Abolish Registration

The most obvious method of protecting conscientious objector's religious objections to war would be to abolish registration and the draft altogether.²²¹ This method could probably be accomplished without jeopardizing national security. Draft registration was reintroduced in 1980 as much as a political statement as a necessary measure for national defense.²²² The national commitment to and experience with the all-volunteer force has demonstrated that in peacetime, at least, no draft is necessary to meet the nation's defense needs.²²³ The military has estimated that peacetime draft registration speeds up the induction process only by six to seven weeks.²²⁴ Past experience suggests that volunteers could be counted on to meet any military emergency during that time without having conscription in place beforehand.²²⁵ Therefore, abolishing draft registration would solve the conscientious objector's dilemma, save money, and not inflict any significant harm on the nation's defense posture.

However, even if registration were abolished, conscientious objectors would not necessarily be protected from a registration requirement in a future draft. The history of the modern draft suggests that future drafts will include a registration procedure requiring individuals to personally provide information to Selective Service. Abolition of registration would therefore only postpone, not resolve, the conscientious objector's dilemma.

2. Immediate Declaration or Classification upon Registration Form

221. See Kellett, *supra* note 20, at 179-80.

222. "We are deeply concerned about the unwarranted and vicious invasion of Afghanistan by the Soviet Union.... We have taken a series of steps—economic, diplomatic, political, military steps—in order to convince the Soviet Union that their action is ill advised." Remarks on Signing Proclamation 4771, 16 WEEKLY COMP. PRES. DOC. 1274 (July 2, 1980).

223. President Carter said "I am not in favor of a peacetime draft.... The only time that I envision a mandatory draft law being advocated to the Congress would be in time of war or in time of national emergency." *Id.*

224. *Hearings on Military Posture and H.R. 5965 [H.R. 6030], Department of Defense Authorization for Appropriations for Fiscal Year 1983 and 1984 Before the Committee on Armed Services, House of Representatives, 97th Cong., 2d Sess. 831, 851 (1982).*

225. After the bombing of Pearl Harbor, for example, 200,000 men volunteered for the military within two months, far more than could be trained in that time. More recently, the military reported a surge of voluntary enlistments following the U.S. invasion of Grenada and the attack on U.S. Marines in Lebanon. Kellett, *supra* note 20, at 179 nn.84, 85.

Several contemporary commentators propose that conscientious objectors be permitted to indicate their intention to apply for a conscientious objector exemption by on the registration form.²²⁶ This simple reform has the advantage of providing the conscientious objector with an opportunity to declare his intention while simultaneously meeting his obligation under the draft registration law. Many non-registering conscientious objectors would register if this option were available.²²⁷ The cost of this reform would be negligible since the only cost would be to redesign the registration form.

While superficially attractive, this proposal has several disadvantages. First, the reform does not accommodate the religious beliefs of conscientious objectors who would not register for the draft even with the opportunity to be exempted.²²⁸ The proposal would still require conscientious objectors to act affirmatively in cooperation with military authorities. This objection is not necessarily a fatal flaw, however. The Constitution does not require complete accommodation of every individual's religious belief; even the *Sherbert* compelling interest standard allows infringement on free exercise if the government can show that doing so would render the statutory scheme "unworkable."²²⁹ Thus, if Congress adopted the checkoff method of declaring one's conscientious objection to war, the government would have a strong argument of reasonable accommodation with religious belief without jeopardizing its legitimate interest.

Second, a mere declaration of intent to apply for an exemption on the draft registration form has little or no legal effect.²³⁰ At the most, it might constitute evidence of the registrant's sincerity if and when he receives an induction notice and applies for conscientious objector status. Until formal

226. One proposal suggests that the draft registration form contain the statement:

By means of my completion of this draft registration form, I am complying with my legal obligation to register for possible military service. By placing my initials in the box provided for at left, however, I state that if military conscription is commenced at such time at which I am eligible for it, I intend to apply for conscientious objector status because I object, by virtue of my religious training and belief, to all forms of war. I understand, though, that if I choose not to place my initials in the box at left I will not be waiving such right to apply for conscientious objector status.

Spak & Valentine, *supra* note 169, at 679-80; See also Kellett, *supra* note 20, at 180.

227. The first non-registrant conscientious objector to be convicted under the present system, Enten Eller, stated that he would have registered if the registration form would have allowed him to tentatively register his conscientious objection. Kellett, *supra* note 20, at 171 n.23.

228. Mark Schmucker, for example, testified at his trial that he would not register for the draft even if offered the opportunity to indicate his intention to apply for conscientious objector status. Testimony of Mark Schmucker, *quoted in* Reilly, *supra* note 11, at 90.

229. *Sherbert v. Verner*, 374 U.S. 398 (1963).

230. The statement might be as evidence of the sincerity of the belief in a later hearing or classification procedure, however.

classification, which does not occur until the registrant receives an induction notice, the registrant is presumably considered available for military duty. A check-off therefore would do nothing to achieve the legal separation from the military authorities many conscientious objectors seek.

This drawback could be neutralized if Selective Service formally classified anyone who indicated on the registration form that he was a conscientious objector. Doing so would officially recognize the registrant's conscientious objection and legally exempt the objector from later military service. However, unless Selective Service is willing to accept a simple declaration on the registration form as sufficient evidence of the sincerity and religious nature of his objection, the registrant would still have to be examined at some point to determine the validity of his claim.²³¹

It is also possible that if the conscientious objector exemption were made this easy to receive, many more persons would apply. Even though the number of persons applying for conscientious objector status has historically been minute,²³² if the exemption were granted based on an unexamined statement by the registrant, the possibility of fraudulent claims would increase. Consequently, public support for the draft and for exempting conscientious objectors might be decreased.²³³ This concern suggests that the conscientious objector application should be verified before the exemption were legally granted. However, verification would require additional administrative organization and costs, negating the proposals' chief advantage.

3. Separate Register of Conscientious Objectors

A more comprehensive legislative reform would be to establish an alternative register of conscientious objectors, separate from the Selective Service register, similar to the system England used before it abolished conscription.²³⁴ This proposal would require all young men and/or women at

231. Selective Service currently requires local draft boards to examine and evaluate classification requests of conscientious objectors before granting the exemption. 32 C.F.R. § 1605 (1990).

232. See *supra* note 145 (citing numbers of conscientious objectors in recent history).

233. See *Gillette v. United States*, 401 U.S. 437, 460 (1971) (suggesting that if the public perceives that those drafted are chosen unfairly or capriciously, bitterness and cynicism might corrode the spirit of public service).

234. See National Service Act, 1948, 11 & 12 Geo. 6 c.64, § 17-19. These sections of the act allowed persons who held conscientious objections to (a) combatant military service, (b) any active military service, or (c) registering for military service to register on an alternative register of conscientious objectors. After being provisionally registered on the register of conscientious objectors, the individual was required to appear before a local tribunal to offer evidence of the sincerity of this belief. If sincere, the tribunal would register the conscientious objector as being

a designated age to register either upon the Selective Service System's register or on a separately administered Register of Conscientious Objectors (ROCO). ROCO would be entirely separate from Selective Service and would be administered by a civilian agency unconnected to the military.²³⁵ Until a national emergency caused Congress to initiate inductions into the military, the registrants on both rolls would simply be required to report changes in their address.

Only when inductions were begun would registrants on both rolls be classified. Conscientious objectors would be examined and classified, according to the nature of their objection, as either being available for non-combatant military service or for alternative civilian service, or unavailable for any compulsory service whatsoever.²³⁶ If a registrant on ROCO was found to be insincere in his opposition to war, he would be administratively registered with Selective Service and liable to the military draft. Conscientious objectors would be called up for civilian service by procedures similar to and for the same duration as registrants with Selective Service were called.²³⁷

This scheme's greatest advantage is that it grants legal status and institutional recognition to conscientious objectors. It recognizes that the decision to make oneself available for military service has a profoundly moral dimension and should not be made by default. It would lessen the coercion placed on young men who are uncertain of their position regarding war by giving them a reputable alternative to registering for the military draft. The

unconditionally exempt from military service, available for civilian alternative service, or available for non-combatant service under military command, depending on the nature of the applicant's opposition.

Furthermore, the Minister of Labour and National Service had authority to add the name of any person he reasonably believed to be a conscientious objector to the register, effectively protecting even those who were unwilling to personally register on the alternative roll.

235. Although Selective Service is technically a civilian agency, it is so closely related to the military that cooperation with it is deemed by many conscientious objectors cooperation with the military.

In England, the register was administered by the Minister for Labour and National Service. National Service Act, *supra* note 234. In the United States, the Department of Labor would similarly be a logical place to situate a ROCO.

236. Currently, American law only recognizes two categories of conscientious objectors. Those classified I-A-O are conscientious objectors who refuse to bear arms but are willing to serve in the military in a non-combatant role. 32 C.F.R. § 1630.11 (1990) Those classified I-O are unwilling to serve in any capacity in the military. 32 C.F.R. § 1630.16 (1990). These registrants are still required to perform a term of civilian-administered public service equal to the length of time draftees are required to serve, currently two years. 32 C.F.R. § 1656.19 (1990). England's scheme, on the other hand, permits those with more absolutist beliefs to refuse to perform even compulsory civilian service.

237. For Selective Service Regulations regarding random selection procedures for induction, *see* 32 C.F.R. § 1624 (1990).

proposal would encourage young people to seriously consider their position regarding war and the taking of life, rather than presuming that every citizen is willing to kill at the government's request.

The scheme has at least two serious drawbacks, however. First, the availability of the alternative roll may encourage more persons to register as conscientious objectors. Although there is no evidence in our history to suggest that enough young men would so register to significantly harm the military's manpower needs,²³⁸ the uncertainty of whether enough men would enroll with Selective Service to make an effective draft possible would have to be resolved before ROCO would be established. This is a particular problem since there is little concrete data on the relative number of "closet" conscientious objectors who have managed to avoid the draft by other means but who would qualify as conscientious objectors and would register on the ROCO.²³⁹

This problem may be less daunting than it seems, however. First, because registrants on ROCO would be drafted to perform two years of civilian alternative service just as draftees serve two years in the military, signing up on ROCO would not give any particular advantage to someone not acting conscientiously. Conscientious objectors would still be required to interrupt their education and career plans to provide alternative service similar to military draftees. Furthermore, the government could provide incentives to enrolling on the military register to discourage insincere registrants on ROCO.²⁴⁰ Finally, the eventual examination and classification of conscientious objectors would identify unqualified registrants and make them available for military service. Knowing this, there would be no advantage to registering as a conscientious objector unless one was sincerely opposed to participation in war.²⁴¹

238. See *supra* note 145 (discussing number of conscientious objectors in recent history).

239. See generally L. BASKIR & W. STRAUSS, *supra* note 7 (detailing the many ways in which young men avoided military service during the war against the Vietnamese). However, assuming most of these persons were legitimately exempted from the draft, their being exempt as conscientious objectors would not affect the number of men available for military service.

240. These could include veterans education and medical benefits. The Supreme Court has upheld denying these benefits to conscientious objectors who performed alternative service as permissible inducements to young people to become eligible for the draft. *Johnson v. Robison*, 415 U.S. 361 (1974).

241. The question of whether conscientious opponents to particular wars should be eligible to for register on ROCO is a complex one beyond the scope of this note. However, if ROCO was made available to those who sincerely oppose participating in some, but not all, wars, then the number of conscientious objectors would probably increase significantly. This is because of the teachings of the majority of American Christian and Jewish denominations that allow participation in "just" wars but forbid fighting in unjust wars. See generally J. ROHR, *supra* note 6; A CONFLICT OF LOYALTIES: THE CASE FOR SELECTIVE CONSCIENTIOUS OBJECTION, (J. Finn ed. 1968).

A second obvious disadvantage to setting up an alternative register would be its expense and administrative complexity. While a register of conscientious objectors may not have to parallel to Selective Service's register in every detail, the mere fact that fewer conscientious objectors would be registered may not significantly reduce the cost of the alternative roll which would have to duplicate many of Selective Service's functions.²⁴² Not only would Congress be unlikely to approve the funds to establish a register of conscientious objectors, public sentiment may not support establishing another government agency, especially in peacetime when registration and the draft are not the volatile political issues they are in time of war. Such a proposal is even less likely to be approved during wartime, however, and should be considered in the relatively more rational atmosphere of peacetime.

B. Administrative Reform

In the absence of more comprehensive legislative reforms, Selective Service could adopt administrative policies that would protect conscientious objectors while maintaining a list of draft age men available to be called in an emergency. One feasible method is for Selective Service to adopt a policy of administrative registration.²⁴³ This policy would authorize Selective Service personnel to add the names of conscientious objector non-registrants to its files without requiring the registrant to personally provide the information.²⁴⁴ The apparatus required to administratively register non-registrants is already in place. For several years, Selective Service has had authorization from the states to match driver's license records with Social Security files and uses this method to identify non-registrants.²⁴⁵ This matching process provides Selective Service with the information it needs from the registrant and could be used to add data about the registrant to its files without requiring him to act contrary to conscience. Administrative registration would meet the government's interest in compiling an inventory of all draft-age men from which to base future induction needs without requiring a religiously offensive, affirmative act on the part of the conscientious objector.

Administrative registration would delay conscientious objectors from having to affirmatively cooperate with Selective Service until inductions resumed. As

242. President Bush requested \$26 million to fund the Selective Service System for fiscal year 1990. OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT FY 1990, 5-16.

243. See *supra* note 189 (discussing similar provision in previous draft regulations).

244. Current regulations require the registrant to personally supply his name, permanent and current addresses, telephone number, sex, date of birth, telephone number, Social Security Number, signature and date signed. 32 C.F.R. § 1615.4(a) (1990).

245. See *supra* note 190 (detailing Selective Service's extensive data collection program to identify non-registrants).

long as the conscription apparatus is on standby, conscientious objectors would not have to take any action and would be purged from the registration list when they reached their twenty-sixth birthday. If conscription were resumed, the conscientious objector could be required to provide necessary information to be classified in order to qualify for the exemption. If at that point the conscientious objector failed to personally provide information needed to classify him, Selective Service could investigate and classify the person as a conscientious objector if it were convinced that the non-registrant was sincere in his objection to cooperating with the military and would qualify for the conscientious objector exemption if registered. If not, the conscientious objector should be allowed to raise his religious objection as a defense at his trial.

Because Selective Service could adopt administrative registration as its policy without Congressional action, it is the most feasible immediate solution to the conscientious objector's dilemma.²⁴⁶ There is no longer any compelling need to require the conscientious objector to take the affirmative act of going to the post office to give the government information it already has. The cost of administrative registration would be minimal, since Selective Service is already checking its registration records with other government files to discover non-registrants. In fact, it may prove to be less costly to register conscientious objectors than to prosecute them.

Administrative registration does not require Selective Service to abandon draft registration altogether. The Constitution does not forbid the government from requiring citizens to provide it with information; the Constitution requires only that the government have a compelling reason to force religious objectors to provide information. Non-registrants who fail to register for reasons other than conscientious objection may therefore still be prosecuted if they fail to register. Only conscientious objectors have the constitutional right to be administratively registered in this manner.

Each of these proposals would offer more protection of the conscientious objector's free exercise than is now available. The choice of which one to adopt will reflect how the nation views conscientious objectors. If conscientious objection is viewed as an admirable moral position to which all should aspire, the ROCO proposal would best reflect the high value given to conscience and

246. The Supreme Court is likely to uphold administrative registration against a constitutional challenge. The Court has held that administratively assigning a Social Security number to a child in order for her to receive welfare benefits does not interfere with her parents' free exercise rights. See *Bowen v. Roy*, 476 U.S. 693, 700 (1986).

The case for administrative registration is more compelling where, as in draft registration, failure to accommodate the religious objector may result in imprisonment than where the failure to accommodate free exercise results in loss of welfare benefits.

peacemaking. If, however, conscientious objection is viewed with suspicion as inherently cowardly, self-serving, or subversive, it should be discouraged. The current policy of ignoring conscientious objectors' free exercise reflects this second view.

Classification at registration and administrative registration are more neutral positions. They neither encourage nor discourage conscientious objection. They do recognize its existence, however, as a valid expression of religious belief. Of these two neutral reforms, administrative registration is the more advantageous. Administrative registration would protect more conscientious objectors and would not require an extensive classification system just for conscientious objectors. The information required for administrative registration is already in Selective Service's hands and would not create any additional costs to the agency. Administrative registration, because of its feasibility, is the best policy to adopt at the present time.

CONCLUSION

Despite the long history of conscientious objection in America, the Supreme Court has never definitively decided whether a conscientious objection exemption from military service is guaranteed by the Constitution. Nevertheless, the Court's free exercise decisions, at least until recently, suggests that conscientious objectors to military service must be exempted from the draft under the Free Exercise Clause. Even though the Supreme Court has recently made it easier for the government to infringe on free exercise of religion, the elaborate system of classifications and exemptions that characterizes the draft suggests that the government's burden is still to demonstrate a compelling interest of the highest order before conscientious objectors could be drafted. Because of the historical success of the exemption, the government could not meet this burden.

Whether the right to conscientious objection extends to draft registration is not so clear. Selective Service regulations denying registrants the opportunity to have their conscientious objections officially recognized strengthens the argument that registration is a coercive burden on the free exercise of religion. Furthermore, because registration implicates free speech by requiring objectors to speak, the government must demonstrate that registration not only serves a compelling government interest but that exempting conscientious objectors would make that interest impossible to accomplish.

Because conscientious objectors can be accommodated without seriously impacting the purposes of draft registration, the government is obligated to accommodate those beliefs. Of the methods of accommodation available to the government discussed in this note, the most immediately feasible is for Selective

Service to administratively register conscientious objectors without requiring them to personally register. Institution of such a policy would be a reasonable and inexpensive way to meet military needs without unnecessarily infringing on the free exercise rights of conscientious objectors.

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