A Matter of Conscience: *United States v. Seeger* and the Supreme Court's Historical Failure to Define Conscientious Objector Status Under the First Amendment

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Protection of religious liberty is an important American value. Even in times of war, Congress has consistently protected religious devotees from participation in military service.[1] The history of conscientious objectors in the United States is unique because the First Amendment prohibits an establishment of religion and guarantees the free exercise of religion.[2] However, the Supreme Court has yet to address whether the First Amendment affords any protections for conscientious objectors to military service.

The Vietnam War was a pivotal period for conscientious objectors.[3] Between 1965 and 1973, a military draft was in full effect, and applications for conscientious objector status significantly increased.[4] During this time, the leading Supreme Court case addressing conscientious objectors was *United States v. Seeger*[5] In

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1. Note, *The Conscientious Objector and the First Amendment: There But for the Grace of God*, 34 U. CHI. L. REV. 79, 79 (1966).

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

3. STEPHEN M. KOHN, JAILED FOR PEACE: THE HISTORY OF AMERICAN DRAFT LAW VIOLATORS, 1658–1985, 93 (1987) (citing the U.S. Bureau of Census, *Historical Statistics of the United States Conscientious Objectors Special Monograph No. 11*

. *Id*

decision addressing the qualifications for conscientious objectors was *Welsh v. United*

, the Court attempted to define the kinds of religious beliefs that qualify for a conscientious objector exemption from military service.[6] Instead of addressing whether conscientious objectors deserve protection under the First Amendment, the Court chose to interpret the applicable conscientious objector statute in an overly broad manner in order to avoid addressing any constitutional issues.[7] This Note argues that the Court should have confronted the constitutional questions presented in because the traditional reasons for invoking the doctrine of avoidance did not justify issuing a weak test for lower courts and administrative agencies to administer.

Initially, a discussion of conscientious objectors to military service may appear irrelevant because the draft has ended and the military currently consists of an all volunteer force.[8] However, if the President chose to do so, the draft could quickly be reinstated.[9] In 2003, members of the House of Representatives proposed military conscription legislation if the United States declared war on Iraq.[10] American troops have been in Iraq for seven years, and there is an increased need for troops in Afghanistan.[11] Military recruiters have had a difficult time meeting their recruitment goals since the beginning of the Iraq war.[12] President Barack Obama has not indicated that the draft will be reinstated. However, a fatigued military, extensive U.S. military deployments around the world, and declining military recruits could force Congress to reinstate conscription.[13] If a draft is reinstated, Congress would be forced to address whether to exempt conscientious objectors from military

in 1970. Welsh v. United States, 398 U.S. 333 (1970). The Court also addressed conscientious objectors in , 401 U.S. 437 (1971).

6 , 380 U.S. at 173–85.

7 . at 166. Howard R. Lurie, *Questions*, 73 W. VA. L. REV. 138, 144 (1971); United States v. Levy, 419 F.2d 360, 365 (8th Cir. 1969).

8. Matthew G. Lindenbaum, Note, *Religious Conscientious Objection and the Establishment Clause in the Rehnquist Court: and §6(j) Revisited* OLUM. J. L. & SOC. PROBS. 237, 239 (2003).

9 . The Code of Federal Regulations contains provisions for the induction of registered males to be used in the event that the draft is reinstated. 32 CFR §§ 1624.1-1624.10 (2010). These provisions include conscientious objector exemptions to military service.

10. Lindenbaum, note 8, at 239.

11. Katherine Shaver, *Antiwar March in D.C. Draws Thousands* ASHINGTON POST, Mar. 21, 2010, at A3.

12. Lizette Alvarez, *More Americans Joining Military as Jobs Dwindle*

. *Id*

cases, the Justices have chosen to expand the scope of conscientious objector statutes rather than address the pressing First and Fifth Amendment problems.[15] By avoiding these constitutional issues, the Court evades its duty to interpret the law, and leaves open important questions for lower courts and draft boards to decide.

This Note will argue that the Court should have addressed the First Amendment and Due Process issues presented in *United States v. Seeger*. Part I will discuss the history of conscientious objectors, which provides a background for *Seeger*. Part II will examine *United States v. Seeger*, and the unpublished opinions which address the constitutional issues. Part III will argue that the conventional rationale for invoking the doctrine of avoiding constitutional questions did not justify the Court's approach to . This Note will argue that the omitted concurring and dissenting opinions should have been included in the final opinion. Part IV will attempt to explain why the Justices ultimately decided to withdraw their opinions.

I. A Brief History of Conscientious Objectors

XPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES 80–81 (2d ed. 2006).

17 .

a desire to protect religious peoples' beliefs, and did so by including "rights of conscience" in the amendments.[18] An early draft of the First Amendment stated, "Congress shall pass no law establishing a religion or to prevent the free exercise of, or to infringe upon the rights of consciousness."[19] In the Senate, the provision protecting rights of conscience was deleted, and the final version became what is now known as the religion clauses of the First Amendment.[20]

Conscientious objectors have been exempted from military service since the Revolutionary War.[21] The Selective Service Act of 1917 authorized the first national draft during World War I.[22] Congress provided a limited exemption for conscientious objectors.[23] The first time the Supreme Court reviewed a claim for conscientious objection was in the *Selective Draft Law Cases*

CHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1107–09 (1971). Additionally, the bill of rights for many states included conscientious objector exemptions. *Id*. at 262, 277, 319.

19. *Id*. at 87 (quoting DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 3:159, 3:166 (Linda DePauw et al. eds., 1972)).

20. Schwartz, *supra* note 18, at 71–72.

21. *Seeger*, 380 U.S. at 170–71.

22. Selective Service Act of 1917, ch. 15, § 2, 40 Stat. 76, 77 (1917).

23. Selective Service Act of 1917, ch. 15, § 4, 40 Stat. 76, 78 (1917), *repealed by* Pub. L. No. 89-554, 80 Stat. 643 (1966). The statute provided an exemption for ordained ministers, students in divinity schools, and members of the Quakers, Mennonites, Amish, and other well-recognized religious sects whose tenets forbade its members from participating in war in any form. *Id*. *See also* Harlan F. Stone, *The Conscientious Objector*, 21 COLUMBIA UNIVERSITY QUARTERLY 253, 256 (1919).

24. Selective Draft Law Cases, 245 U.S. 366 (1918).

25. Leon Friedman, *Conscription and the Constitution: The Original Understanding*, 67 MICH. L. REV. 1493, 1495 (1969).

26. *Selective Draft Law Cases*

Id

Government Accommodation of Religious-Based Conscientious Objection

to take an oath to "[s]upport and defend the Constitution of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same."[29] In *United States v. Schwimmer*

United States v. Macintosh

Louis Brandeis, and Harlan Stone joined Chief Justice Evan Hughes in a passionate dissent.[34] Although he did not define religion, Chief Justice Hughes stated, "[t]he essence of religion is belief in a relation to God involving duties superior to those arising from any human relation."[35] Chief Justice Hughes believed that in the "forum of conscience, the duty to a moral power higher than the state has always been maintained."[36]

The Supreme Court reversed and in *Girouard v. United States*

. *See infra*

. *Id*

. *Id*

Id

. *Id*

. *Id*

. *Id*

. *Id*

. *Id*

Schwimmer *Macintosh* *Id*

sional intent in the Selective Service Act of 1940 to mean " . . . that even in times of war, one may truly support and defend our institutions though he stops short of using weapons of war."[40]

Congress amended the Selective Service Act in 1948.[41] The Act required every male citizen between the ages of eighteen and twenty-six to register with the Selective Service System.[42] Section 456(j) provided an exemption for conscientious objectors who "by reason of religious training and belief [were] conscientiously opposed to participation in war in any form."[43] Religious training and belief was defined as an ". . . individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological or philosophical views or a merely personal or moral code."[44] Local draft boards were set up to adjudicate conscientious objector exemption claims.[45] If an individual was denied conscientious objector status, he could bring his claim before an appeal board, which would refer the claim to the Department of Justice.[46] The Department of Justice would hold a hearing on the character of the applicant, investigate the applicant's personal background, and make a recommendation to the appeal board on whether to grant an exemption.[47] The appeal board would then make the final decision on the merits of the claim.[48] If an individual refused to submit to induction into the armed services, he could face criminal prosecution.[49] Upon conviction in federal court, the individual could be imprisoned for up to five years, and/or fined up to ten thousand dollars.[50]

40 . at 67.

41. Selective Service Act of 1948, ch. 625, § 3, 62 Stat. 604 (1948).

42 . at 605.

43. Selective Service Act of 1948, ch. 625, § 6(j), 62 Stat. 604, 612 [hereinafter Section 6(j)]. A 1967 amendment to this statute struck out the phrase "an individual's belief in a relation to a Supreme being involving duties superior to those arising from any human relationship. Universal Military Training and Service Act, 81 Stat. 100, 104 (1967) (current version at 50 App. U.S.C.A. § 456(j) (2006)).

44. Selective Service Act of 1948, ch. 625, § 6(j) 62 Stat. at 604, 613.

45. Selective Service Act of 1948, ch. 625, § 10, 62 Stat. at 620 (1948) (current version at 50 App. U.S.C.A. § 460 (2006)).

46. Selective Service Act of 1948, ch. 625, § 6(j), 62 Stat. at 613 (1948) (current version at 50 App. U.S.C.A. § 456(j) (2006)).

47 .

48 .

49. Selective Service Act of 1948, ch. 625, § 12462(a), 62 Stat. at 622 (1948) (current version at 50 App. U.S.C.A. § 462(a) (2006)).

50 .

Throughout the early twentieth century, the Court gradually recognized the grave dilemma facing the conscientious objector. Initially, the majority of the Court did not view conscientious objectors favorably. Justice Holmes and Chief Justice Hughes sympathized with conscientious objectors, and established sound precedent for the Court's opinion in . The Court's progressively understanding view towards conscientious objectors would become a key factor in .

United States v. Seeger

A. The Opinion

Jakobson

Id

. *Seeger*
. *Id*
. *Id*

United States v. Macintosh

Macintosh

. *Id.*

. *Seeger*
. *Id*
. *Id*
. *Id*
. *Id*

See supra

. *Seeger*
. *Id*
. *Id*
. *Id*

Id

. *Id.*
. *Id.*
. *Id*
. *Id*

Id

. *Id*
. *Seeger*
. *Id*
. *Id.*
. *Id*
. *Id*
. *Id*
. *Seeger*

B. Unpublished Opinions

LACK AND HIS CRITICS, 156 (1988). Bernard Schwartz refers to Justice Goldberg's unpublished opinion in . Schwartz, note 93, at 571–72.

99. Namely, whether Section 6(j) runs afoul of the religious clauses of the First Amendment because it limits the conscientious objector exemption to those opposed to war in general because of theistic beliefs. , 398 U.S. at 345 (Harlan J., concurring).

constitutional issues,[100] the Court should have addressed the constitutional questions presented.

A draft of an unpublished concurring opinion by Justice Arthur Goldberg addressed whether Congress had "the constitutional right to limit the exemption by . . . discriminate[ing] between those religious persons who hold theistic beliefs and those who do not."[101] Justice Goldberg criticized the Court for reading out Congress' clear intention to restrict exemption to individuals holding a belief "in relation to a Supreme Being involving duties superior to those arising from any human relation."'[102] Justice Goldberg noted that clearly presented the issue of "whether under the First Amendment Congress had the constitutional right to limit the exemption among religious persons to those who hold theistic beliefs."[103] The Court "granted certiorari to determine this issue, a grave and important one involving the religious clause of the First Amendment."[104] The majority opinion reads out "the clear limitation on the conscientious objector exemption which Congress wrote."[105] Justice Goldberg disagreed with the majority's approach, and believed he was "compelled to face up to the constitutional issue clearly presented by Seeger's case and would hold the limitation in the statute unconstitutional under the First Amendment as preferring theistic over nontheistic religions."[106]

Justice Goldberg acknowledged that constitutionally questionable statutes are to be read so as to avoid constitutional objections, but "this does not mean that the Court is free to rewrite the statute for Congress."[107] In addressing the First Amendment challenges, Justice Goldberg believed that Section 6(j) unconstitutionally discriminates among religions, particularly in light

100 , 380 U.S. at 186, 188 (Douglas, J., concurring).

101. Arthur Goldberg, draft of concurring opinion to , 4, Feb. 8, 1965, Box A171, Folder 1, The Tarlton Law Library, University of Texas at Austin, Papers of Justice Tom C. Clark.

102. .

103 . at 2.

104 .

105 .

106 .

supra *Aptheker v. Sec'y of State*

Moore Ice Cream Co. v. Rose

Id

Torcaso v. Watkins *Everson v. Board of Education*

Seeger

Torcaso

Id

supra *See also,* *Everson*

supra

. *See* *supra*

supra

. *Id*

. *Id.*

. *Id.*

. *Id*

. *Id.*

Id

United States v. Seeger

. *Id.*
. *Id.*
. *Id.*
. *Id*
. *Id.*
. *Id.* *Torcaso v. Watkins* *West Virginia State Board of Education v. Barnette* *Id*
. *Id*

United States v. Seeger

An Argument Against Avoidance

Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court

The Warren Court and the Religion Clauses of the First Amendment in

supra

Marbury v. Madison

Ashwander v. TVA

. *See* *supra*
Avoiding Constitutional Questions,

ex rel

Avoiding Constitutional Questions as a Three-Branch Problem

Id

Ex parte

. *Id*

. *Id*

supra

. *Id*

. *Id*

. *See e.g.*

Speaking in a

Seeger *Seeger*

Seeger

Judicial Voice *Forward: A Political Court*

. *See e.g.* *Public Values in Statutory Interpretation* *supra* *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statues Raising Free Speech Concerns* *supra* *Delaware Hudson Revisited*

supra

. *Id*

. *Id*

. *Id*

. *Id*

. *Id*

Id

Id

Countermajoritarian Justification

Kauten

Id

. *See Kauten supra*

Seeger

Seeger

Seeger

. *Seeger*
. *Jakobson*

Id
. *See* *supra*
. *See* *supra*
Subtle Vices of the Passive Virtues–A Comment on Principle and Expediency in Judicial Review
. *Id*

B. Separation of Power Justification

Seeger,

.

Seeger

Seeger

Seeger

C. Judicial Restraint Justification

intent; hardly an "exercise in judicial restraint." The test produced an unworkable standard, which the Court could have reasonably anticipated would be difficult for draft boards to administer.[201]

When the Court avoids constitutional pronouncements and distorts the meaning of Congressional statutes, lower courts and administrative agencies are forced to apply the distorted law.[202] For conscientious objectors, this meant that the magnitude of their First Amendment concerns were not clearly conveyed to the lower courts, which can lead to nonuniformity in protection of these rights.[203] As a result, conscientious objectors suffer a loss of liberty because their First Amendment rights are not fully protected by the Court's evasive opinion. Since one of the Court's primary functions is to guard individual liberties and minority interests,[204] the use of the avoidance canon in meant that the constitutional liberties of conscientious objectors were left unprotected.[205]

In his concurring opinion in , Justice Harlan noted that the Court should refrain from deciding constitutional questions when there is good reason to believe the case before them presents an unintended unconstitutional consequence.[206] Nevertheless, it is impermissible "to take a lateral step that robs legislation of all meaning in order to avert the collisions between its plainly intended purpose and the commands of the Constitution."[207] In an earlier opinion outlining the avoidance canon, Justice Benjamin Cardozo noted that "avoidance of a difficulty will not be pressed to the point of disingenuous evasion."[208] While judges should use the canon to

201. The " test" refers to Justice Clark's command that the trier of fact (and local draft boards) in conscientious objector cases determine whether "the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption." , 380 U.S. at 184.

202 discussion Part II.A, and Part III.C.

203. Kloppenberg, note 136, at 1034. Dean Kloppenberg argues, "It is not obvious, however, that rights are more secure under a flexible system in which the Court can determine the necessity of reaching a constitutional issue in a particular case. In fact, a system in which federal courts reject the last resort rule to render more constitutional decisions may better secure federal rights."

204. Lisa Kloppenberg, , 32 U. DAYTON L. REV. 349, 356 (2007).

205 . Kloppenberg, note 136, at 1066.

206. Welsh v. United States, 398 U.S. 333 (1970) (Harland, J., concurring).

207

208. Moore Ice Cream Co. v. Rose, 289 U.S. 373, 379 (1933).

restrain themselves from addressing issues not before them, the canon becomes ineffective when the Supreme Court appears to be running from a reoccurring constitutional problem.

Justice Clark's opinion in is an example of the Court avoiding a difficult issue to the point of "disingenuous evasion." The Court completely misinterprets Congressional intent in order to avoid reaching First and Fifth Amendment issues.[209] Justice Clark's definition of religion is nowhere near what Congress had in mind when writing Section 6(j), but the Court overlooks this in order to dodge addressing constitutional questions presented.

According to the test, when draft boards review a conscientious objector's application, they are to determine "whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."[210] asked draft boards to embark on a nearly impossible task. First, draft boards must determine the "place" a belief in God occupies in the mind of an individual who would clearly qualify as a conscientious objector.[211] Then, the board must determine the "place" an opposition to participation in war occupies in the life of the applicant.[212] Finally, the test asks draft boards to compare the role these beliefs occupy in the lives of an unambiguous conscientious objector and the applicant before them.[213] What standards are draft boards to use in making these determinations? How, exactly, does one compare the role a belief system occupies in the lives of two individuals? Justice Clark did not provide any guidance on these issues.

Additionally, the Court almost certainly understood that draft boards were comprised of a wide range of individuals. Studies on the makeup of local boards revealed that the majority of them were white, middle-class conservatives, and many members were military veterans.[214] The Court acknowledged that defining a religious belief is

209 discussion Part II.A, and Part III.A.

210 , 380 U.S. at 166.

211 at 184. Justice Clark most likely meant conscientious objectors who were historically exempt from service, like the Quakers, Amish, and Mennonites. Stone, note 23.

212 , 380 U.S. at 184.

213 Although the test does not explicitly require lower courts and draft boards to compare these beliefs, the test implies such a requirement.

214. Michael E. Tigar and Robert J. Zweben, , 37 GEO. WASH. L. REV. 510, 527 n. 116 (1969). Tigar and

a difficult task for religious scholars.[215] Despite this difficulty, the test asks draft board members—who were generally not religious scholars—to engage in the nearly impossible task of defining and comparing individual's belief systems.

If Justices Goldberg, Black, and Harlan had not withdrawn their opinions in , the majority's judicial activism would have been apparent. The Justices' opinions draw attention to Justice Clark's overly aggressive interpretation of Section 6(j), and the flaws of the test.[216] Justices Goldberg and Black's concurring opinions stress the delicacy of evaluating an individual's religious beliefs. Including these opinions would have acknowledged the tremendous First Amendment issues that arise when draft boards consider conscientious objector applications. Justices Goldberg, Black, and Harlan's opinions demonstrate that the Court could have approached this constitutional issue in a restrained manner because the Justices' opinions did not misconstrue Congressional intent or announce a faulty test. Including Justices Goldberg, Black, and Harlan's opinions would have demonstrated that addressing the constitutional questions was a more restrained method of statutory interpretation, protected the liberty interest of conscientious objectors, and provided guidance to the lower courts in future conscientious objector cases.

IV. Potential Reason for Withdrawal: The Political Realities of Vietnam

New York Times

. *Seeger*
. *Text of U.S. White Paper on North Vietnam's Growing Role in War in the South*
,
. *Id.*

. *Id.*
3,500 U.S. Marines Going to Vietnam to Bolster Base

supra

New York Times

Seeger

Harvard Law Review Supreme Court Statistics

. *See supra*
. *See, e.g.*

Draft Resistance: An Old Problem

Seeger

Seeger

Seeger

Seeger

Seeger

. *See generally* *The First Amendment, The Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate* *The Supreme Court During Crisis: How War Affects Only Nonwar Cases*

supra

supra

. *See* *supra*

Seeger

Seeger

Seeger