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A Modern Analysis of How the United States Selective Service System Interacts with the Religion Clauses and Religious Freedom Restoration Act of 1993

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I. INTRODUCTION.

The United States of America currently uses an all-volunteer military force[1] to fulfill its ranks across all branches of the Military, including the Army,[2] Air Force, Navy, and Marines. However, an all-volunteer force has not always been the manner in which the United States raises its forces. Throughout its history, the United States has enacted several conscription laws to quickly increase the size of its military forces in a time of war. Compared to some modernized European countries that rely on conscription through peacetime, the United States has used conscription laws sparingly, only during wartimes.[3]

Presently the United States has the Military Selective Service Act (the "Act") as the current Selective Service system. Although it is inactive (not presently inducting registrants) it is codified as 50 U.S.C. § 3801.[4] As of this writing, no known objections or challenges have risen to the Supreme Court to challenge the Act for claims based on religious practices or observations.

The Act defines conscientious objectors as "anyone, who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."[5] Further, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code."[6]

Challenges have been made to previous Selective Service Acts, primarily in the time of the Vietnam War.[7] Those cases challenged the narrow interpretation of the definition of conscientious

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[1] 92 P.L. 129, 85 Stat. 348 (1971).
[2] Dixon, Alex, *July Marks 40th Anniversary of All-Volunteer Army*, (Jul. 2, 2013), https://www.army.mil/article/106813/july_marks_40th_anniversary_of_all_volunteer_army.
[3] *See* Finland Ministy of Defense, *Conscription Act*, (Jan. 1, 2008), *https://www.finlex.fi/en/laki/kaannokset/2007/en20071438.pdf*.
[4] 50 U.S.C. § 3801 *et seq.*
[5] 50 U.S.C.S. § 3806(j) (LexisNexis, Lexis Advance through Public Law 116-65, approved October 9, 2019).
[6] *Id*.
[7] *See e.g.,* (*United States v. Seeger*, 380 U.S. 163, 165 (1965); *Welsh v. United States*, 398 U.S. 333 (1970); *Gillette v. United States*, 401 U.S. 437 (1971).

objections, particularly that the exemptions should apply broadly.[8] However, what is seldom challenged, is whether those Selective Service Acts violated the Establishment and Free Exercise Clauses.[9] Further, no challenge has been brought under the Act to test the current construction of exemptions for conscientious objectors. This Note will assess the outcome of a challenge against the Military Selective Service Act as a violation of the Free Exercise and Establishment Clauses.

Additionally, the Religious Freedom Restoration Act ("RFRA") was introduced by Congress in 1993,[10] and no challenge has been brought under the RFRA asserting that the Act violates the RFRA. This Note will examine the hypothetical scenario in which a challenge is brought under the RFRA if no exception existed for conscientious objectors under the RFRA. The result will determine whether an exception for conscientious objectors is required under the RFRA, if an exemption had not existed at the outset.

This Note argues that the Act is constitutional under the Religion Clauses. It does not facially violate the Establishment Clause because the statute accommodates all religions and beliefs equally by not promoting or inhibiting any one religion. It also meets the requirements of the Free Exercise Clause and the RFRA. By incorporating different opportunities such as alternate service and noncombatant training, no individual, regardless of type of sincerely held belief, will have to choose between their religion and violating a federal law. Accordingly, the statute does not presently violate the RFRA as currently constructed. If no exception existed for conscientious objectors, the Act may in fact violate the RFRA for certain traditional or orthodox religions, but not for non-traditional claims. The RFRA would then require that an exemption be written into the Act.

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[8] *Id.*
[9] U.S. Const. amend. I.
[10] 42 U.S.C. § 2000bb *et seq.* (2019).

II. THE SELECTIVE SERVICE ACTS, HISTORICAL TO MODERN DAY.

It is important to first view the history of Selective Service in the United States to understand the evolution of the treatment of conscientious objectors. This historical view will highlight how conscientious objectors were defined, how they were treated, and who could qualify for the exemption from war to war, eventually ending with the current definition and exemption in the Act. With the evolution of the Selective Service laws and an understanding of how conscientious objectors have been defined, a thorough analysis can then be applied to the Act to determine if it violates pillars of First Amendment Jurisprudence.

A. The Historical Selective Service Acts.

The United States enacted its first conscription law in the Civil War during the Thirty-Seventh Congress in 1863.[11] The United States' first draft law[12] made all able-bodied males between the ages of twenty and forty-five eligible to be called on for military service.[13] If a male in that age-range was called on through conscription, they were required to report for armed service, or violate Federal Law.[14] The general proclamation did contain exceptions and exemptions for those called on to serve. None of the listed exemptions, however, noted or even referenced conscientious objectors, or those opposed to war.[15] It appears that the Enrollment Act of 1863 required even those opposing war based on their religious beliefs to partake in the draft and serve in the armed forces of the Union, if called upon.[16]

[11] 12 Stat. 731, 37 Cong. Ch. 75 (1863).
[12] Note that in 1863, this only constituted those residing in states within the Union during the Civil War.
[13] *See* 12 Stat. 731, 37 Cong. Ch. 75 (1863).
[14] Federal Law of the Union only.
[15] *Id*.
[16] One caveat, however, is that substitutions were allowed, and if a valid substitution was provided, that individual would be relieved of service duties while the substitution performed service.

In 1917, for World War I, all male citizens between the ages of twenty-one and thirty were eligible to be drafted into the armed forces as part of the selective service system.[17] In this selective service law, religious exemptions first appeared. In 1917 exemptions existed for individuals "who [are] found to be a member of any well-recognized religious sect or organization at present organized and existing and whose creed or principles forbid its members to participate in war in any form."[18] However, conscientious objectors were not exempted from noncombatant service and training, and were required to serve in some capacity.[19]

In 1940, for World War II, all male citizens between the ages of twenty-one and thirty-six were eligible to be drafted into the armed forces as part of the selective service system.[20] In this 1940 law, exemptions existed for conscientious objectors who were defined as "any person … who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."[21] A notable change from the 1917 Act is that the exemption was no longer based on a well-recognized religion, but rather by assessing the individual's belief determined by the duties that God imposed upon a person in his everyday conduct; and that "there is a higher loyalty than loyalty to this country, loyalty to God."[22] This change in 1940 recognized a broader understanding of the exemption, but is still narrow as it requires an official God in a religion in order to recognize and exemption. As in 1917, a conscientious objector may be placed in a noncombatant role.[23]

[17] 65 P.L. 12, 40 Stat. 76, 65 Cong. Ch. 15 (1917).
[18] *Id*.
[19] *Id*.
[20] 76 P.L. 783, 54 Stat. 885, 76 Cong. Ch. 720 (1940); see also 50 U.S.C. Appendix, § 301 *et seq.* (1940) (repealed)
[21] *Id*.
[22] *Id*. See also *Seeger*, 380 U.S. at 171-172.
[23] *Id*.

In 1940 Herman Berman registered under the Selective Service Act of 1940 and requested to be classified as a conscientious objector.[24] Berman's views were not based on a traditional religious belief, but on his philosophical and political viewpoints.[25] Berman argued that a person's philosophical and political viewpoints caused him to be opposed to war in any form and he should therefore qualify as a conscientious objector under the Selective Service Act of 1940.[26] He further argued that his conscience and his devotion to human welfare should give him the classification of a conscientious objector under the Selective Service Act of 1940.[27] The Ninth Circuit, however, disagreed, finding that the phrase "by reason of religious training and belief" was clear in that it distinguished between a conscientious social belief or a sincere devotion to a high moralistic philosophy and an objection based upon an individual's belief in his responsibility to a higher authority.[28] The Ninth Circuit further stated that "there is not a shred of evidence in this case to the effect that appellant relates his way of life or his objections to war to any religious training or belief."[29] Here, it was clear that this objection was not from the basis of religious training in any manner, but was rather a philosophical view on life and war.[30] Although an anti-war belief may be sincere, that alone does not qualify the belief for the exemption, it must be based on religious training or belief,[31] which Berman could not produce any evidence of. Therefore, Berman was not granted an exemption a conscientious objector.[32]

[24] *Berman v. United States,* 156 F.2d 377 (9th Cir. 1946), 329 U.S. 795 cert. denied ; see also 50 U.S.C. Appendix, § 301 *et seq.* (1940) (repealed).
[25] *Berman*, 156 F.2d at 378 (9th Cir. 1946).
[26] *Id*.
[27] *Id*.
[28] *Berman*, 156 F.2d at 380.
[29] *Id*. at 381.
[30] *Id*. at 382.
[31] 50 U.S.C. Appendix, § 301(5)(g) (1940) (repealed).
[32] *Berman*, 156 F.2d at 382.

In the Vietnam War, all males residing in the United States between the ages of eighteen and twenty-six were required to register with the Selective Service system as part of the Universal Military Training and Service Act of 1948.[33] Section 456(j) of the 1948 Act exempted from combatant training and service in the armed forces of the United States those persons who by reason of their religious training and belief are conscientiously opposed to participation in war in any form.[34] However, the legislature went further to include that "the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal code."[35] Notably, Congress changed the language of 456(j) in the 1948 Act to include those whose religious training and belief was to be defined as "an individual's belief in a relation to a Supreme Being, involving duties superior to those arising from any human relation."[36] The change signified a move from the word God in the 1940 Act, to Supreme Being in the 1948 Act. The chronology shows that with each iteration of the law, the exemption was slowly being expanded, but it would require careful analysis by the courts to determine what Congress actually intended when it changed God to Supreme Being. Again in 1948, as in previous editions, a conscientious objector may be assigned to noncombatant service, or, if he is found to be conscientiously opposed to participation in such noncombatant service, will be ordered to such civilian work contributing to the maintenance of the national health, safety.[37]

Two decades after the passage of the Universal Military Training and Service Act, cases rose to the Supreme Court to resolve ambiguous language in the law as it relates to conscientious objectors.[38] Three prominent cases appeared on the Supreme Court's docket that would quickly

[33] 50 U.S.C. § 453 *et seq.* (1948) (repealed); *see also* 90 P.L. 40, 81 Stat. 104 (1967).
[34] 50 U.S.C. § 456(j) (1948) (repealed).
[35] *Id*.
[36] *Id*. See also *Seeger*, 380 U.S. at 172.
[37] *Seeger*, 380 U.S. at 165.
[38] 50 U.S.C. § 456(j) (1958 ed.) (repealed).

shape the understanding of how conscientious objectors would be defined moving forward by determining what Congress intended by the change from God to Supreme Being in the 1948 Act.

In *United States v. Seeger*, the Court took on the question of what sort of belief[s] can warrant consideration for a conscientious objection under the Universal Military Training and Service Act in section 456(j).[39] Specifically, the parties,[40] who did not hold traditional pacifist religious beliefs but rather moral beliefs about war in general,[41] argued that section 456(j) is unconstitutional because the conscientious objections exemption does not allow nonreligious conscientious objectors in violation of the Free Exercise and Establishment Clauses.[42] The Court stated that the expression "Supreme Being" rather than the designation "God" in the 1948 Act broadened the exemption to incude religious training and belief to embrace all religions whether traditional or not and to exclude political, sociological, or philosophical views.[43] The Court came to this understanding following a review of the Congressional intent of 50 U.S.C. § 456(j), where it was determined that Congress intended the phrase Supreme Being to replace God in the 1948 Act in order to reflect diverse sects in the United States and broaden the scope of conscientious objection exemptions.[44]

Further, the Court created and then emphasized the use of the "parallel belief" test in determining whether a person's sincere and meaningful belief(s) occupy a place in the life of its possessor a belief system that is parallel to that of an orthodox religion's belief to God.[45] The Court then found that the conscientious objector challengers did hold sincere religious beliefs, based on

[39] *Seeger*, 380 U.S. at 165.
[40] Seeger is a consolidated case of three separate actions raising the same legal question.
[41] Seeger in particular beliefs focused on ethical and moral opposition to war.
[42] *Seeger*, 380 U.S. at 165.
[43] *Id*.
[44] *Id*. at 174-176 (discussing *Berman v. United States,* 156 F.2d 377 (9th Cir. 1946)).
[45] *Id*. at 166.

religious training and belief in relation to God that were not essentially based on political, sociological, or philosophical views.[46] Importantly, the Court emphasized that this parallel belief test avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others in line with the Religion Clauses.[47]

Five years later, in *Welsh v. United States* the Court took on another case regarding the interpretation of sincerely held beliefs for conscientious objectors under section 456(j).[48] Here, Welsh argued that his belief, which is purely ethical and morally based, entitled him to conscientious objection exemption.[49] Welsh was opposed to war in any form based on his desire to benefit the welfare of humanity and that belief would be in opposition with military service which he viewed as futile and self-defeating, and that from a moral standpoint, war is unethical.[50] The Court returned to the parallel belief test that it created five years prior in *Seeger v. United States*.[51] In finding that Welsh's beliefs were sincere and were not essentially political, sociological, or philosophical, the Court stated that "those who fall outside the exemption are those whose beliefs are not deeply held and those whose objection to war does not rest on moral, ethical, or religious principle but policy, pragmatism, or expediency."[52] Welsh clearly did not base his objections on policy, pragmatism, or expediency when he stated that "human life is valuable, therefore I will not injure or kill another human being."[53] The Court elaborated that section 456(j) required no more than to demonstrate that a nonorthodox belief such as deeply held moral or ethical beliefs are held with the conviction of those with beliefs in an orthodox religion.[54] The importance

[46] *Id*. at 187-188.
[47] *Id*. at 176.
[48] *Welsh v. United States*, 398 U.S. 333 (1970).
[49] *Id*. at 335.
[50] *Id*. at 338.
[51] *Id*. at 339.
[52] *Id*. at 342-343.
[53] *Welsh*, 398 U.S. at 343.
[54] *Id*. at 343-344.

of *Welsh v. United States* highlights the practical effect of the parallel position test to God that even non-theistic or agnostic views can satisfy the conscientious objection exemption under the 1948 Act if there is a belief that holds a resemblance to the view and relation of God in a traditional belief.

Only one year later *Gillette v. United States*,[55] another consolidated case, appeared on the Court's docket regarding conscientious objectors under section 456(j)[56] of the Act.[57] Here, the petitioner's claimed they should be exempted from induction into military service as a conscientious objector because the Vietnam War was an unjust war, and they were therefore opposed to just this war.[58] The Court, however, was quick to differentiate between those with deeply held views based on religious training or belief that were opposed to all wars because of their religious belief or training and those who were simply opposed to a particular or singular war.[59] Reviewing Congressional intent, it was clear that section 456(j) was intended to protect conscientious objectors who opposed all war, not those involving opposition to a particular war only.[60] Here, it is clear and obvious that these petitioners' claims are not based on religious training or belief that put them in opposition with war in general, but rather only in opposition to the Vietnam War, which does not align with the exemptions in section 456(j).[61]

As the Vietnam War wound down, the need to induct individuals into military service decreased and the United States moved to an all-volunteer military force.[62] Although there are

[55] The petitioners additionally asserted claims that section 456(j) violated the free exercise and establishment clauses, which will be addressed in Section III.
[56] Note that under all three cases section 456(j) of the Act reflects the 1948 Act where Congress officially designated Supreme Being rather than God in the 1948 Act, leading to the challenge and decision in *United States v. Seeger*.
[57] *Gillette v. United States*, 401 U.S. 437 (1971).
[58] *Id*. at 437.
[59] *Id*. at 439.
[60] *Id*. at 446.
[61] *Id*. at 447.
[62] Public Law 19-129 (1971).

current laws regarding Selective Service, which include strong protections for conscientious objectors, cases have not come across the Supreme Court's docket since the Vietnam War.[63] That leaves the three prior cases as the last significant Supreme Court cases to clarify the treatment of conscientious objectors and how to determine if there is or is not a deeply and sincerely held belief held by an individual that warrants classification as a conscientious objector.

B. The Military Selective Service Act.

Currently, the Act is codified as 50 U.S.C. § 3801.[64] Although the Selective Service system is not presently inducting individuals for military service, its provisions are in place in the event that a draft is implemented. This law allows conscientious objectors to be exempt from combat military service when:

> "a registrant's objection [is] founded on religious training and belief; it may be based on strictly religious beliefs, or on personal beliefs that are purely ethical or moral in source or content and occupy in the life of a registrant a place parallel to that filled by belief in a Supreme Being for those holding more traditionally religious views."[65]

As in prior Selective Service laws, conscientious objectors are allowed opportunities for noncombative service opportunities, labeled as alternative service options.[66]

This current Act is further laid out in Federal Regulations.[67] These regulations clarify the protections afforded to conscientious objectors and how their beliefs or views will be assessed to

[63] But see *Alhassan v. Hagee*, 424 F.3d 518 (7th Cir. 2005) (Denying an active servicemember's desire to be considered a conscientious objector before deployment when no mention of his religious beliefs or desire to be a conscientious objector existed before his orders to deploy); *Hanna v. Sec'y of the Army*, 513 F.3d 4 (1st Cir. 2008) (No basis in fact to deny conscientious objection exemption when claimants objections stem from religious convictions); Watson v. Geren, 569 F.3d 115 (2d Cir. 2009) (No basis in fact for a finding of a denial of a conscientious objection exemption).
[64] 50 U.S.C. § 3801 *et seq.*
[65] 32 C.F.R. § 1636.3 *et seq.*
[66] 32 C.F.R. 1630.11; 32 C.F.R. § 1630.16.
[67] 32 C.F.R. § 1636.6.

determine their future service.[68] The regulations also state the role of the Selection Board in determining how a conscientious objector is evaluated.[69]

An individual does not need to be a member of a traditional peace church or a specific religion to qualify.[70] However, if an individual does identify that their beliefs are those of a traditional church or religious organization that individual must show that his beliefs adhere to that specific church or religious organization, whether he is affiliated with the institution or not.[71] The Board may inquire into a specified church or organization if the individual identifies the church or religious organization when claiming a conscientious objection.[72]

When an individual is not claiming a conscientious objection based on a traditional claim,[73] but the claim is based primarily on moral or ethical principles, Federal Regulations adopted and continue to employ the parallel belief test created by the Supreme Court.[74] Further, the individual does not need to use any formal or conventional language when describing the non-traditional objection.[75] Finally, and importantly, the Board cannot reject beliefs and claims of conscientious objections because they find them incomprehensible or inconsistent with their own beliefs.[76]

The current construction of the Act was clearly guided by the Court's opinions and interpretations of the historical acts. The historical evolution demonstrates how the Act is and was guided by shortcomings of prior acts, particularly by defining religious beliefs too narrowly. Now, the exemptions for conscientious objectors are broad in scope. Even though Congress has not

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[68] *Id*.
[69] *Id*.
[70] *Id*. at § 1636.6(b); compare with Pub. L. 65–12, 40 Stat. 76 (1917) (requiring an individual to be a member of a well-recognized religious sect or organization whose principals oppose participation in war in any form).
[71] *Id*.
[72] 32 C.F.R. § 1636.3(d).
[73] *See* Pub. L. 65–12, 40 Stat. 76 (1917).
[74] See *Seeger*, 380 U.S. at 166.
[75] 32 C.F.R. § 1636.3(f).
[76] *Id*.

enacted the Act to induct individuals into service, litigation has been few and far between challenging the Act against the Religion Clauses showing that its construction may have struck the appropriate balance in defining conscientious objectors and their respective views.

III. THE ESTABLISHMENT CLAUSE

The treatment of Establishment Clause cases in the United States vary. Although the Religion Clauses can, and do, intersect, the Court has laid out different tests for the Free Exercise Clause and Establishment Clause. Establishment Clause cases are traditionally funneled through the test set forth in *Lemon v. Kurtzman*.[77] Free Exercise Clause cases are traditionally brought under the strict scrutiny standard of review under *Sherbert v. Verner*.[78] This section will address a hypothetical challenge to the Act claiming that it violates the Establishment Clause.

The Establishment Clause guarantees that Congress shall pass no law respecting an establishment of religion.[79] In *Lemon*, the Court was posed with the question of whether government aid to religious schools violated the Establishment Clause.[80] The Establishment Clause ensures no government sponsorship, financial support, or entanglement with religion.[81] The Court therefore set out a three-prong test to determine if the Establishment Clause was violated.[82] The three-prong test was created to assess whether the statute has a secular purpose, whether the principal or primary effect inhibits or advances religion, and whether there is government entanglement with religion.[83]

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[77] *See Lemon v. Kurtzman*, 403 U.S. 602 (1971).
[78] *See Sherbert v. Verner*, 474 U.S. 398, (1963). Note that the RFRA restored that primacy of this decision to be the controlling analysis for Free Exercise claims.
[79] U.S. Const. amend. I.
[80] *Lemon*, 403 U.S. at 606.
[81] *Id.* (citing *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664 (1970)).
[82] *Lemon*, 403 U.S. at 612-613.
[83] *Id.*

In assessing the secular purpose prong, the Court looked to legislative history to quickly conclude there was no legislative intent to advance religion and was rather to enhance the quality of secular education, thus the first prong was satisfied.[84] In assessing the effects prong of whether religion was advanced or inhibited, the Court again looked to the legislative history and concluded that there was no intent to advance or inhibit any religion.[85]

The entanglement prong[86] of the test required a more detailed assessment because total separation of church and state is not possible in an absolute sense, as some relationship between the two is inevitable.[87] Rather, "the objective is to prevent the intrusion of either the church or state into the precincts of the other."[88] Further explaining the aim of the excessive entanglement prong the Court stated that "we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."[89]

The Court had a prior opportunity to elaborate on the excessive entanglement analysis in *Walz v. Tax Comm'n of City of New York* in 1970.[90] In *Walz*, the Court stated the entanglement prong is a test of degree of entanglement.[91] There the Court reasoned that taking away tax exemptions for religious-held properties would actually increase government entanglement by giving rise to tax valuation of church property, tax liens, tax foreclosures, and direct conflicts with religious

[84] *Id*. at 613.
[85] *Id*.
[86] In *Lemon*, the Court found that both the Pennsylvania and Rhode Island statutes violate the third prong, and therefore the establishment clause, because there was clear entanglement between church and state aid, such as religious teachers teaching secular subjects, the handbook referring to the synodal law, and the school being presided over by a religious figure.
[87] *Lemon*, 403 U.S. at 614.
[88] *Id*. (citing *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664 (1970)).
[89] *Id*. at 615.
[90] *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664 (1970).
[91] *Id*. at 674.

establishments.[92] Further, the grant of a tax exemption is not government sponsorship of religion because no revenue is transferred to the church or religious institution, but rather abstains from demanding that the church support the state.[93] Finally, the Court concluded that although there is minimal and remote involvement between church and state, that relationship is fine here as it serves a purpose to restrict that relationship and reinforce the desired separation between the two, as separation does not require absence of all contact.[94]

A. The Conscientious Objection Exemption Does Not Violate the Establishment Clause

To assess whether the conscientious objection exemption violates the *Lemon* test, we first ask whether the exemption has a secular purpose.

Here, the secular purpose prong is clearly satisfied as the conscientious objection exemption promotes social stability as well as religious freedom, which is a civil right.

The second prong of the test slightly mirrors the first prong, in assessing whether the law at issue promotes or inhibits religion.[95] There is no promotion or inhibition of religion in the Military Selective Service Act. The Act's regulations make clear that the Board members are not free to reject beliefs because they find them incomprehensible or inconsistent with their own beliefs.[96] One of the possible ways in which a religion may be inhibited or promoted is if a Board member departs from their obligations and favors or disfavors one religion. In the event of that occurrence, the individual on the Board would be violating the challenger's First Amendment protections under the Establishment Clause.

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[92] *Id*.
[93] *Id*. at 675.
[94] *Id*. at 676.
[95] *Id*.
[96] 32 C.F.R. § 1636.6(f).

Individuals challenging prong two of the test may find difficulty, as all religions, religious training, or beliefs are considered, as long as they are sincere and in opposition to war and combat training in any form.[97] The law on its face does not discriminate against any one religion, nor does it promote any one religion. The law is carefully drafted to steer clear of Establishment Clause violations. In fact, the petitioner in *Gillette v. United States* attempted to make that very argument challenging that the 1948 Act violated the Establishment Clause by favoring traditional religions over his beliefs.[98] Not only did the petitioner fail on other grounds, the Court was quick to strike down that argument, noting that the objection must have a grounding in "religious training and belief," which he did not, but no particular sectarian affiliation or theological position is required,[99] therefore neither favoring or inhibiting any religion, and satisfying prong two of the test.

The third prong requires the assessment of whether the law excessively entangles the government and church. [100] Here, it is abundantly clear that allowing conscientious objectors to be placed into alternate service or noncombatant training serves the purpose of separating church and state, rather than entangling the two. If the Board had to treat each individual objector separately and individually, by placing restrictions on their military involvement and training once inducted under the Act, the government would quickly become excessively entangled in each respective objector's religion. By allowing exceptions for conscientious objectors to be placed into alternate service or noncombatant training, the spheres of influence of church and state only touch tangentially, not intertwine impermissibly.[101]

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[97] 50 U.S.C.S. § 3806(j).
[98] *Gillette*, 401 U.S. at 450.
[99] *Id.*at 451.
[100] *Lemon*, 403 U.S. at 614.
[101] One potential argument to be made is that allowing exceptions at all for conscientious objectors is a violation of the establishment clause in itself. That argument fails for two reasons. First, the *Walz* opinion already concluded that there can be minimal involvement of church and state if the purpose of the law is to restrict the two and reinforce the separation between them, which is clearly the purpose here. Second, there would be an overt violation of the free exercise clause and that argument would fail by violating the free exercise clause under *Sherbert*.

It is clear that the conscientious objection exemption of the Act does not violate the Establishment Clause. The Act satisfies the three-prong test and will not impermissibly promote or inhibit any one religion.

IV. FIRST AMENDMENT PROTECTIONS IN STATUTE, THE RELIGIOUS FREEDOM RESTORATION ACT.

This section will assess whether the RFRA requires the conscientious objection exemption under the strict scrutiny analysis by examining a hypothetical challenge to the Act under the RFRA if there were no such exemption available under the Act.[102] The RFRA follows the traditional analysis the Supreme Court enacted to test whether the Free Exercise Clause has been violated.[103] Similar to the analysis of whether the Free Exercise Clause has been violated, the RFRA asks whether the law at issue substantially burdens an individual's ability to exercise their religion.[104] If the law does substantialy burden a person's exercise of religion, the next question is whether it furthers a compelling governmental interest and is the least restrictive means of accomplishing that interest. If the law does not further those interests then the law should be invalidated as a violation of RFRA.[105] In *Sherbert v. Verner*, the Court was posed with a challenge asserting that denying a person unemployment compensation benefits violated the Free Exercise Clause. The question was whether the state could burden an individual's exercise of religion without furthering a compelling government interest.[106] In *Sherbert v. Verner*, the Court stated that if there is a compelling government interest, such as public safety, peace or order, an individual's exercise of religion may be burdened.[107]

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[102] U.S. Const. amend. I.
[103] 42 U.S.C. § 2000bb *et seq.* (2019).
[104] *Id*.
[105] *Id*.
[106] *See Sherbert,* 474 U.S. 398.
[107] *Id*. at 403.

However, before diving into the challenge under the RFRA, it is important to take note of how and why the RFRA exists, as well as what would happen to this hypothetical challenge if the RFRA did not exist. In *Employment Div., Dep't of Human Res. of Oregon v. Smith*, the Court abandoned the strict scrutinty analysis in *Sherbert* and stated that if a law was facially neutral towards religion and generally applicable the government or state would be able to substantially burden a persons's exercise of religion.[108] Although the RFRA was created to overrule the *Smith* opinion, it is still essential to cover its breadth, as *Smith* was controlling law until 1993, and would be controlling if the RFRA was ever repealed or ruled unconstitutional in its entirety. For that occurrence, the analysis shifts to Justice Scalia's 1990 opinion in *Smith*.

A. Challenging the Act Under *Employment Div., Dep't of Human Res. of Oregon v. Smith*.

It is clear and obvious that a deeply held and sincere belief, based on a religion or religious training, that opposes an individual to combat training or participation in war in any form allows that individual to be classified as a conscientious objector under the Act.[109] It is further clear that if an individual qualifies as a conscientious objector, it would be a substantial burden to their exercise of religion to induct them into combat training regardless of their objections.

Imagine that the Act did not contain an exemption for conscientious objectors. Under *Smith*, a law that is facially neutral and generally applicable is constitutional even if it burdens a person's exercise of religion.[110] The implication of *Smith* would be that no court would have to require a conscientious objection exemption in the Act because it is facially neutral and generally applicable. In short, the only means of relief for conscientious objectors would be through the legislature.

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[108] *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 879 (1990).
[109] 50 U.S.C. § 3806(j).
[110] *Smith*, 494 U.S. at 879.

Theoretically, from the date of the *Smith* opinion in 1990, to the passage of the RFRA in 1993, and if the RFRA is ever repealed or deemed unconstitutional as a whole, *Smith* would be the controlling law for deferential reviews of religiously neutral laws of general applicability. Therefore, as a facially neutral law of general applicability, the Act would not be required to create exemptions for conscientious objectors. In this hypothetical world, and the real world from 1990 to 1993, a conscientious objector may have been required to abide by their induction into the military for the purpose of combat training if so ordered. Although there is a long historical precedent in the United States of respecting conscientious objectors and the law would have likely retained the exemptions for their objections, *Smith* would not have required exemptions for conscientious objectors at all.

Under *Smith*, the Act would likely be categorized as a neutral law of general applicability and would therefore receive a deferential review by the courts.[111] Under the deferential review, the Act would likely not need to include an exception for conscientious objectors. The law would be upheld because the government does not need a compelling interest as it does under *Sherbert*, but rather only a rational basis for justifying the law. Here, there is a strong argument for why the Act serves a rational basis for the United States for the purpose of the common defense of the country.[112]

However, in 2019, *Smith* is not controlling law, and the principals of stare decisis and the RFRA require that *Sherbert* is followed for Free Exercise claims.

B. The RFRA Was Created to Restore the Compelling Interest Test.

[111] See *Smith* 494 U.S. 872.

[112] *See* U.S. Const. Art. I, Sec. 8 (The Congress shall have Power To … provide for the common Defence and general Welfare of the United States), (To raise and Support Armies), (To make Rules for the Government and Regulation of the land and naval forces), and (To make all Laws which shall be necessary and proper).

In 1993, Congress passed the RFRA in response to *Smith*.[113] The RFRA provides that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise; and governments should not substantially burden religious exercise without compelling justification."[114] Further, the purpose of the Religious Freedom Restoration Act is to "restore the compelling interest test[115] and to provide a claim or defense to persons whose religious exercise is substantially burdened by the government."[116]

The RFRA provides that the government shall not substantially burden a person's exercise of religion even if the burden results from a rule of generally applicability.[117] However, the government may substantially burden a person's exercise of religion only if it demonstrates that the application of the burden to the person (1) is in furtherance of a compelling government interest and (2) is the least restrictive means of furthering that compelling government interest.[118]

Two seminal cases by the Court control when a person's exercise has been burdened, thus triggering a violation of the RFRA.[119] In *Wisconsin v. Yoder*, a person's exercise of religion is burdened when the state or government "compel[s] an individual, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenants of their religious beliefs."[120] For the purposes of this Note, the burden discussed in *Yoder*, facing criminal sanctions or choosing person's exercise of religion, is on point for the current discussion of the Act.

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[113] 42 U.S.C. § 2000bb *et seq.* (2019).
[114] 42 U.S.C. § 2000bb(a)(2)-(3).
[115] *Id*. § 2000bb(b)(1); *see also Sherbert v. Verner*, 374 U.S. 398 (1963) (holding that a law must be narrowly tailored and further a compelling interest of the government before the government may burden a person's religious freedom).
[116] 42 U.S.C. § 2000bb(b)(2).
[117] 42 U.S.C. § 2000bb-1(a); *see* 42 U.S.C. § 2000bb(b)(1).
[118] 42 U.S.C. § 2000bb-1(b).
[119] In *Sherbert v. Verner*, the Court ruled that a person's religion is burdened when they are required "to choose between following between following the precepts of [their] religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of [their] religion in order to accept work, on the other hand."
[120] *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972).

The first part of the analysis under the RFRA requires a court to determine whether an individual's exercise of religion has been burdened. In *Thomas v. Review Bd. of Ind. Emp't Sec. Div.* a Jehovah's Witness claim for unemployment benefits was denied when he claimed that he could not participate in the manufacture of steel that would lead to the production of arms and weapons for military use.[121] In overturning the denial of unemployment benefits the Court stated that the State will be found to have placed a substantial burden on an individual's exercise of religion when they pressure an individual to violate his beliefs or modify his behavior and beliefs to conform to the law.[122] The Court found that Thomas' exercise of his religion was substantially burdened by denying him unemployment compensation or requiring him to modify his pacifist beliefs in order to receive the unemployment benefits.[123]

The next step is to address whether there is a compelling government interest to justify burdening a person's exercise of religion. The Court has had limited opportunities to determine whether the government interest is compelling. In *Burwell v. Hobby Lobby*, the Court stated that the government must demonstrate that the compelling interest test is satisfied through the application of the challenged law to the person.[124] However, the Court then stated that they assumed the issue was satisfied and would not dive further into the requirement of compelling government interests.[125] For the purposes of this Note, it is also assumed that inducting individuals through selective service is a very compelling government interest.[126]

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[121] *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981).
[122] *Id*. at 717-718.
[123] *Id*. at 707.
[124] *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726 (2014).
[125] *Id*. at 728.
[126] *See* U.S. Const. Art. I, Sec. 8 (The Congress shall have Power To … provide for the common Defence and general Welfare of the United States), (To raise and Support Armies), (To make Rules for the Government and Regulation of the land and naval forces), and (To make all Laws which shall be necessary and proper).

The third step in the analysis is to make a determination of whether the government has employed the least restrictive means in substantially burdening a person's religion through their compelling interest. The Court has elaborated on the least restrictive means standard.[127] In *Burwell v. Hobby Lobby*, the Department of Health and Human Services (HHS) had already implemented other means to provide contraceptives, as it already provides nonprofit entities with a workaround to avoid the contraceptive mandate.[128] Simply, if other means exist, such as subsidizing the cost as in *Burwell v. Hobby Lobby* that are less restrictive on a person's exercise of religion, the government will fail to meet its burden under the second prong of the Religious Freedom Restoration Act.[129]

C. The RFRA Requires an Exception for Conscientious Objectors.

As the hypothetical case study described earlier, imagine the scenario in which a challenge is brought under the RFRA if no exception existed for conscientious objectors under the RFRA. For this scenario to exist, an individual would have to be inducted for military service under the Act.[130] That individual would then be required to report for military service regardless of any religious training or beliefs that oppose them to all war.[131] The question is thus posed in this hypothetical challenge under the RFRA as whether inducting any individual into military service under the Act violates the RFRA because it substantially burdens a person's religion.

To establish a claim under the RFRA a Plaintiff must demonstrate that the activities substantially burdened by the government must be an exercise of religion and that burden must be substantial.[132] To get out of the gate, a Plaintiff must show that they have religious beliefs and

[127] *Burwell*, 573 U.S. at 728.
[128] *Id*.
[129] *Id*. at 728-730.
[130] 50 U.S.C.S. § 3805 (LexisNexis, Lexis Advance through Public Law 116-65, approved October 9, 2019).
[131] *See* 50 U.S.C.S. § 3806.
[132] 42 U.S.C. § 2000bb-1(a).

practices and that their exercise of religion has been substantially burdened as set out in *Hobby Lobby* and *Thomas*. If a Plaintiff can satisfy those two elements, the burden shifts to the government to prove that the government action is in furtherance of a compelling interest and it is the least restrictive means of achieving that compelling interest.[133]

There are two ways this challenge can proceed, one with an orthodox religious claim and one with a non-orthodox claim. For the former orthodox claim, the hypothetical challenger will be a Quaker,[134] a member of a traditional peace church. For the non-orthodox claim, the facts of *Gillette* will be used.[135]

Starting with the Quaker challenger, it is assumed that being inducted into selective service would put the individual in direct conflict with their religious training and beliefs,[136] as a member of a traditional and historic peace church. Under *Wisconsin v. Yoder*, a person's exercise of religion is burdened when the government "compel[s] an individual, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenants of their religious beliefs."[137] As it is clear that this individuals exercise of religion will be burdened and that this burden will be substantial,[138] the burden will shift to the government to prove that the government action is in furtherance of a compelling interest and is the least restrictive means of achieving that compelling interest.[139]

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[133] 42 U.S.C. § 2000bb-1(b).
[134] See BBC, *Quakers*, (Jul. 3, 2009), https://www.bbc.co.uk/religion/religions/christianity/subdivisions/quakers_1.shtml
[135] *Gillette v. United States*, 401 U.S. 437 (1971).
[136] 50 U.S.C. § 3806(j).
[137] *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972).
[138] 42 U.S.C. § 2000bb-1(a).
[139] 42 U.S.C. § 2000bb-1(b).

It is undeniable that Congress has the authority to enact the Act.[140] It is further clear that inducting individuals into military service in a time of war is a compelling government interest, possibly even stronger than providing contraceptives in *Burwell*.[141] However, the issue that arises here, in this hypothetical challenge, is whether inducting individuals into military service regardless of their religious beliefs is the least restrictive means of achieving that compelling interest. The answer, unequivocally, must be no. The United States has strong First Amendment protections, and in conjunction with the RFRA, Congress must manufacture a less restrictive way to burden an individual's exercise of religion. Here, the Quaker challenger would likely succeed because the least restrictive means of achieving the compelling state interest would be to place the individual in alternative service or noncombatant training.[142] Therefore, in the hypothetical scenario in which no exceptions for conscientious objectors existed, a challenge under the RFRA would require Congress to include exceptions and exemptions for conscientious objectors in the Act.

Moving to the latter of the two scenarios, in which a non-orthodox challenge is brought under the RFRA, such as in *Gillette*,[143] where no exceptions exist for conscientious objectors, the result may be different. Using the facts from *Gillette*, the individual claims they should be exempted from induction into military service as a conscientious objector because the war is an unjust war, and they were therefore opposed to just this war.[144] However, because this claim of conscientious objection is based off of a moral belief to one war in particular this may not satisfy the first prong

[140] *See* U.S. Const. Art. I, Sec. 8 (The Congress shall have Power To … provide for the common Defence and general Welfare of the United States), (To raise and Support Armies), (To make Rules for the Government and Regulation of the land and naval forces), and (To make all Laws which shall be necessary and proper).
[141] *Burwell*, 573 U.S. at 682.
[142] *See* 32 C.F.R. § 1630.16 (Noncombatant Training) and 32 C.F.R. § 1630.18 (Class 1-W Alternate Service).
[143] *Gillette*, 401 U.S. at 437.
[144] *Id*.

of an RFRA claim.[145] Additionally, conscientious objectors are defined as anyone, who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.[146] Using that definition and construction, as seen in the *Gillette* opinion, a non-orthodox claim for classification as a conscientious objector would still fail, even with additional protections of the RFRA, because the claim is only based upon a moral belief in opposition to one war, not war in any form.

There is an opportunity for wiggle room, however. If a challenger came forward with an RFRA claim against the Act for burdening their exercise of religion that was sincere and not based on moral views to one war alone as in *Gillette*, they would likely fall into the same result as the Quaker challenger, as opposed to the latter challenge.[147] In that situation, as long as the moral belief is in opposition to all war, the burden would switch to the government and the result would likely be that a less restrictive means of raising a military force is available, by including exceptions for conscientious objectors. Therefore, even non-traditional or historic religious beliefs would force the RFRA to require an exemption, as in the hypothetical challenge from a member of the Quakers.

The outcome here is that under the RFRA, the Act must include an exception for conscientious objectors. If there was no exceptions available, Congress would be required to write an exception for conscientious objectors into Act because it is clearly the least restrictive means available to achieve the government's compelling government interest of raising a military force for the defense of the country.[148]

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[145] 42 U.S.C. § 2000bb-1(a).
[146] 50 U.S.C. § 3806(j) (LexisNexis, Lexis Advance through Public Law 116-65, approved October 9, 2019).
[147] See *Welsh* 398 U.S. at 333.
[148] Another argument could potentially be made that the least restrictive means is to not use selective service at all, considering the success and duration of the all-volunteer force used by the United States since the end of the Vietnam War.

V. CONCLUSION

The Act is constitutional under the Religion Clauses. It does not facially violate the Establishment Clause because the statute accommodates all religions and beliefs equally by not promoting or inhibiting any one religion. It also meets the requirements of the Free Exercise Clause and RFRA. By incorporating different opportunities such as alternate service and noncombatant training, no individual, regardless of type of sincerely held belief will never have to choose between their religion and violating a federal law. Accordingly, the statute does not violate the RFRA because no individual is coerced to act contrary to their religious belief by the threat of civil or criminal sanctions under this federal law, because exceptions such as alternative service options exist for conscientious objectors. However, if no exception existed for conscientious objectors, the Act may in fact violate the RFRA and the First Amendment.