Florida State University Law Review

Volume 19 | Issue 1 Article 7

Summer 1991

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CONSTITUTIONAL RIGHT OR LEGISLATIVE GRACE? THE STATUS OF CONSCIENTIOUS OBJECTION EXEMPTIONS

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CONSCRIPTION is not currently used to fill the ranks of the United States military,[1] but the mechanism necessary to implement the draft stands ready to be set in motion. Males between the ages of eighteen and twenty-six are required to register with Selective Service.[2] The *Code of Federal Regulations* contains provisions for the induction of registered males to be used in the event that the draft is reactivated.[3] These regulations and the portions of the United States Code authorizing them[4] contain express provisions concerning the exemption of conscientious objectors from compulsory military service.[5]

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1. The draft ended on July 1, 1973. Act of Sept. 28, 1971, Pub. L. No. 92-129, § 101(a)(35), 85 Stat. 353 (codified at 50 U.S.C. app. § 467(c) (1988)).

2. Although no draft presently exists, President Carter reactivated the registration system in 1980. Proclamation No. 4771, 45 Fed. Reg. 45,247 (1980), *reprinted in* 50 U.S.C. app. § 453 at 1246-48 (1988). Because registration is restricted to males, this Comment will use the male pronoun throughout.

3. 32 C.F.R. §§ 1624-56 (1990).

4. 50 U.S.C. app. §§ 451-471(a); § 454(a) states, in pertinent part:

> The President is authorized, from time to time, whether or not a state of war exists, to select and induct into the Armed Forces of the United States for training and service in the manner provided in this title . . . such number of persons as may be required to provide and maintain the strength of the Armed Forces.

5. 50 U.S.C. app. § 456(j) (1988); 32 C.F.R. §§ 1630.16-.17, 1633.6, 1636.1-.10 (1990). The statute begins as follows:

> Nothing contained in this title . . . shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term "religious training and belief" does not include essentially political, sociological, or philosophical views, or a merely personal moral code.

For thorough discussion of the meaning of "religious training and belief," see United States v. Seeger, 380 U.S. 163 (1965) and Welsh v. United States, 398 U.S. 333 (1970). *Seeger* and *Welsh* were decided under an earlier version of the statute. Selective Service Act of 1948, ch. 625, § 6(j), 62 Stat. 604, 612 (current version at 50 U.S.C. app. § 456(j) (1988)). In that version, the first sentence was the same, but the second sentence read:

> Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.

Welsh, 398 U.S. at 336. The "Supreme Being" wording was rendered practically meaningless by *Seeger* and *Welsh* and was eliminated by Congress in 1967. Military Selective Service Act of 1967, Pub. L. No. 90-40 § 7, 81 Stat. 100, 104.

The problem of exempting conscientious objectors from compulsory military service results from the conflict[6] between the commitment to protection of religious beliefs exemplified by the free exercise clause[7] of the United States Constitution and the perceived necessity of a military force for national survival exemplified by constitutional delegation of power to Congress to "raise an army."[8] Because exemptions, in one form or another, for conscientious objectors[9] have been included in every federal statutory scheme authorizing compulsory military service in the United States since the Civil War,[10] the United States Supreme Court never has been presented squarely with the issue of whether conscientious objectors have a constitutional right under the free exercise clause to an exemption from compulsory military service.[11] Therefore, the Court's "suggestions" that conscientious ob-

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6. *See* Kellett, *Draft Registration and the Conscientious Objector: A Proposal to Accommodate Constitutional Values*, 15 COLUM. HUM. RTS. L. REV. 167, 168 (1984):

> This dilemma stems from the paradoxical situation arising from these premises: this country was founded in part to protect the free exercise of religion; some persons' religious beliefs include an opposition to bearing arms; at some time this country may be threatened such that bearing arms may be militarily necessary for national survival; and Congress' method of dealing with such threats has been and will be to "raise an army." (citations omitted).

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

8. U.S. CONST. art. I, § 8, cl. 12.

9. This Comment will deal primarily with the right to exemption of general conscientious objectors (objectors to war in all forms) as opposed to selective conscientious objectors (objectors to particular wars or particular means of warfare). The lack of a free exercise right to selective objection was dealt with—although in a very cursory manner—in Gillette v. United States, 401 U.S. 437, 454-55 (1971). *See infra* text accompanying notes 89-106. For a discussion of a number of issues relating to selective objection, see SELECTIVE CONSCIENTIOUS OBJECTION: ACCOMMODATING CONSCIENCE AND SECURITY (M. Noone, Jr., ed. 1989); *see also* Greenawalt, *All or Nothing at All: The Defeat of Selective Conscientious Objection*, 1971 SUP. CT. REV. 31.

10. *See* Draft Act of 1864, ch. 13, § 17, 13 Stat. 6, 9 (substantially amending Act of Mar. 3, 1863, ch. 75, § 2, 12 Stat. 731), *cited in* Note, *The Right Not to Kill: A Critical Analysis of Conscientious Objection and the Problem of Registration*, 18 NEW ENG. L. REV. 655, 659 & n.36 (1983) ("The earlier act contained no express provision for conscientious objectors, while the 1864 Act contained the first federal military exemptions."); Selective Draft Act, ch. 15, § 4, 40 Stat. 76, 78 (1917), *cited in* Note, *supra*, at 659 & n.40; Selective Training and Service Act of 1940, Pub. L. No. 76-783, ch. 720, § 5(g), 54 Stat. 885, 889, *cited in* Note, *supra*, at 659-60 & nn.42-45; Selective Service Act of 1948, Ch. 625, § 6, 62 Stat. 604, 612-13 (codified as amended at 50 U.S.C. app. § 456(j) (1988)), *cited in* Note, *supra*, at 660 & nn.49-50; Military Selective Service Act of 1967, Pub. L. No. 90-40, 81 Stat. 100, 104 (codified as amended at 50 U.S.C. app. § 456(j) (1988), *cited in* Note, *supra*, at 662 & n.61 ("This form of the conscientious objector provision . . . is still current law."); *cf.* Welsh v. United States, 398 U.S. 333, 370 (1970) (White, J., dissenting) ("However this Court might construe the First Amendment, Congress has regularly steered clear of free exercise problems by granting exemptions to those who conscientiously oppose war on religious grounds."); Kellett, *supra* note 6, at 171 n.26 ("Congress has always granted . . . an exemption [for conscientious objectors].").

11. Gillette v. United States, 401 U.S. 437, 464-65 (1971) (Douglas, J., dissenting).

jectors do not have a constitutionally guaranteed right to exemption from compulsory military service[12] are nothing more than dicta and should not be relied upon as binding precedent.[13]

This Comment will analyze the cases used to support the contention that exemptions for conscientious objectors are merely a "legislative grace."[14] Because this analysis concludes there is no authoritative precedent regarding whether exemptions for conscientious objectors are mandated by the free exercise clause of the first amendment, the second part of this Comment will explore and analyze the Court's first amendment case law to discover whether the law supports the contention that free exercise exemptions are indeed constitutionally guaranteed. This analysis will include a critique of the Court's abdication of its duty carefully to weigh competing constitutional issues in this area of the law.

I. Is There Binding Precedent Regarding the Constitutional Right to Conscientious Objector Exemptions to Compulsory Military Service?

> 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.[15]
>
> The privilege of the native-born conscientious objector to avoid bearing arms comes, not from the Constitution, but from the acts of Congress. That body may grant or withhold the exemption as in its wisdom it sees fit; and, if it be withheld, the native-born conscientious objector cannot successfully assert the privilege. No other conclusion is compatible with the well-nigh limitless extent of the war powers as above illustrated, which include, by necessary implication, the power, in the last extremity, to compel the armed service of any citizen in the land, without regard to his objections or

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12. *See Gillette*, 401 U.S. at 461 n.23 (Marshall, J., for the majority) ("We note that the Court has previously *suggested* that relief for conscientious objectors is not mandated by the Constitution.") (emphasis added) (citations omitted).

13. *See infra* text accompanying notes 15-62. "'Dictum' or 'obiter dictum' is distinguished from the 'holding' of the court in that the so-called 'law of the case' does not extend to mere dicta, and mere dicta are not binding under the doctrine of stare decisis." 20 Am. Jur. 2d *Courts* § 74 (1965).

14. Note, *supra* note 10, at 663 (citing United States v. Macintosh, 283 U.S. 605, 624 (1931); Johnson v. Robison, 415 U.S. 361, 375 n.14 (1974)).

15. United States v. Macintosh, 283 U.S. 605, 623-24 (1931).

> his views in respect of the justice or morality of the particular war or of war in general.[16]

These passages are often cited for the proposition that exemptions from compulsory military service for conscientious objectors are a legislative grace.[17] The case from which these statements come, *United States v. Macintosh*, is the cornerstone of the contention that "[i]t is well settled that 'exemption from military service is a matter of legislative grace and not a matter of right.'"[18]

A. United States v. Macintosh

The statements quoted above leave no doubt that Justice Sutherland, writing for the *Macintosh* Court, did not believe there was a constitutional right to exemption from compulsory military service. These statements, however, are by no means dispositive of the issue. They are neither supported by precedent nor reached through any reasoned analysis. They are mere assumptions—premises in an argument about an issue quite different from the issue of whether a conscientious objector has a first amendment right to an exemption from compulsory military service.

As then-Chief Justice Hughes made clear in his dissent, *Macintosh* was not about "whether the Congress may in its discretion compel service in the army in time of war . . . ."[19] Rather, the issue in *Macintosh* was whether the respondent, Macintosh, met the statutory requirements of the Naturalization Act.[20]

Macintosh was born in Canada and moved to the United States in 1916.[21] He declared his intention to become a citizen of the United States in 1925, but his petition for naturalization was denied by the district court because he would not promise without qualification to bear arms in defense of the United States. He was, therefore, in the eyes of the court, not sufficiently committed to the principles of the

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16. *Id.* at 624.

17. *See, e.g.*, United States v. Burns, 450 F.2d 44, 46 (10th Cir. 1971); United States v. Boardman, 419 F.2d 110, 112 (1st Cir. 1969), *cert. denied*, 397 U.S. 991 (1970); United States v. Crouch, 415 F.2d 425, 430 (5th Cir. 1969); Korte v. United States, 260 F.2d 633, 635 (9th Cir. 1958), *cert. denied*, 358 U.S. 928 (1959); United States v. Bendik, 220 F.2d 249, 252 (2d Cir. 1955); Pomorski v. United States, 222 F.2d 106, 107 (6th Cir.), *cert. denied*, 350 U.S. 941 (1955); Note, *supra* note 10, at 663. *See also* Gillette v. United States, 401 U.S. 437, 461 n.23 (1971).

18. *Korte*, 260 F.2d at 635 (citations omitted).

19. 283 U.S. at 627 (Hughes, C.J., dissenting).

20. The Naturalization Act, ch. 3592, 34 Stat. 596 (1906).

21. 283 U.S. at 613.

Constitution.[22] The Naturalization Act required that before being admitted to citizenship, an alien had to prove "to the satisfaction of the court," *inter alia*, that he or she was "attached to the principles of the Constitution of the United States" and that he or she would "defend the Constitution and laws of the United States against all enemies, foreign and domestic . . . ."[23] Because of "important qualifications"[24] without which Macintosh would not take the oath of allegiance, the Supreme Court found that he would not "take the oath in accordance with the terms fixed by the law" and, therefore, was not eligible for United States citizenship.[25] The Court held:

> The burden was upon the applicant to show that his views were not opposed to "the principle that it is a duty of citizenship by force of arms when necessary to defend the country against all enemies, and that [his] opinions and beliefs would not prevent or impair the true faith and allegiance *required by the Act*." We are of the opinion that he did not meet this requirement.[26]

Despite the *Macintosh* majority's rhetoric about the unqualified nature of the duty to bear arms,[27] this duty was not at issue. The only issue in *Macintosh* was whether he sufficiently exhibited the allegiance "required by the Act."[28]

Furthermore, the only authority the *Macintosh* majority cited for the sweeping claim that there was no constitutional right to a consci-

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22. *Id.* ("[S]ince petitioner would not promise in advance to bear arms in defense of the United States unless he believed the war to be morally justified, he was not attached to the principles of the Constitution.").

23. The Naturalization Act, ch. 3592, §§ 3, 4, 34 Stat. 596, 598 (1906) (*quoted in Macintosh*, 283 U.S. at 605, 614).

24. 283 U.S. at 619. In a written addendum to his preliminary naturalization forms, Macintosh wrote:

> I am willing to do what I judge to be in the best interests of my country, but only in so far as I can believe that this is not going to be against the best interests of humanity in the long run. . . . I am not willing to promise beforehand, and without knowing the cause for which my country may go to war, either that I will or that I will not "take up arms in defense of this country," however "necessary" the war may seem to the Government of the day.
>
> It is only in a sense consistent with these statements that I am willing to promise to "support and defend" the Government of the United States "against all enemies, foreign and domestic."

Id. at 618.

25. *Id.* at 626-27.

26. *Id.* at 626 (emphasis added) (quoting United States v. Schwimmer, 279 U.S. 644, 653 (1929)).

27. *See supra* quote accompanying note 16.

28. *See supra* the emphasized portion of the quote accompanying note 26.

entious objector exemption from compulsory military service was *Jacobson v. Massachusetts*:

> [A]nd yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even *his religious or political convictions*, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense.[29]

The problem with using this statement from *Jacobson* to support the dicta in *Macintosh* is that this statement from *Jacobson* is also dicta. *Jacobson* involved the sole issue of the constitutionality of a Massachusetts statute mandating vaccinations for smallpox.[30] The Massachusetts statute in question was challenged as invalid under the privileges and immunities clause, the due process clause, and the equal protection clause.[31] The free exercise clause was never mentioned in the case. Indeed, the above-quoted statement marks the only time the Court ever mentioned religion, which it did without citation and only as an example of the great scope of the police power. The issue in *Jacobson* was neither the constitutional right of individuals to exemption from compulsory military service nor the constitutional authority of the Congress to compel military service.

Finally, besides the facts that a free exercise exemption to compulsory military service was not at issue in *Macintosh* and that *Macintosh*, therefore, is not binding precedent on that issue,[32] *Macintosh* was explicitly overruled in 1946—albeit on different grounds.[33] The "different grounds," however, are revealing. The Court in *Girouard v. United States* reiterated Chief Justice Hughes' dissenting admonition from *Macintosh* that *Macintosh* "involved, as does [*Girouard*], a question of statutory construction."[34] In concluding *Macintosh* was incorrectly decided,[35] the *Girouard* majority did not even mention *Macintosh*'s sweeping constitutional claim that "[t]he conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied . . . ."[36] Apparently,

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29. 283 U.S. at 624 (quoting Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905)) (emphasis added).

30. *Jacobson*, 197 U.S. 11 *passim*.

31. *Id.* at 14 (statement of the case by Justice Harlan, who wrote the majority opinion).

32. *See supra* note 13.

33. Girouard v. United States, 328 U.S. 61, 69 (1946).

34. *Id.* at 63.

35. *Id.* at 69.

36. *Macintosh*, 283 U.S. at 623. Five justices comprised the majority in the *Girouard* decision (Justice Jackson did not take part, 328 U.S. at 70), and three justices dissented, 328 U.S. at 79. The dissenters did not mention *Macintosh*'s implication-laden dicta either.

the *Girouard* Court saw no reason to overrule—or mention, for that matter—mere dicta.

B. Hamilton v. Regents of University of California

Another case often cited with *Macintosh* for the proposition that there is no free exercise right to a conscientious objector exemption is *Hamilton v. Regents of University of California*.[37] *Hamilton*, however, like *Macintosh*, was not about a free exercise challenge to compulsory military service. The Court in *Hamilton* decided the case solely with regard to the "assertion that the due process clause of the Fourteenth Amendment as a safeguard of 'liberty' confers the right to be students in the State University free from obligation to take military training as one of the conditions of attendance."[38]

At issue in *Hamilton* were a California statute and an order promulgating that statute which required male students to take a prescribed number of courses in military science and tactics as a condition of attendance.[39] Hamilton and Reynolds, students at the University of California, sought an exemption from this military training "upon the ground of their religious and conscientious objection to war and military training."[40] The university denied the exemption and suspended Reynolds and Hamilton when they refused to participate in the training.[41] The Supreme Court of California upheld the denial of exemption; Reynolds and Hamilton appealed to the Supreme Court of the United States,[42] asserting, *inter alia*, that compelling conscientious objectors to take part in military training in order to attend the university deprived them of the free exercise of religion without due process of law.[43]

The *Hamilton* Court's analysis of the appellants' due process (freedom of religion) challenge consisted of a statement of the duty of every citizen "to support and defend government against all enemies"[44] and two paragraphs of quotes from *United States v.*

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37. 293 U.S. 245 (1934), *cited in* Gillette v. United States, 401 U.S. 437, 461 n.23 (1971). *See also In re* Summers, 325 U.S. 561, 572 (1945) ("[C]onscientious objectors to participation in war in any form now are permitted to do non-war work of national importance, this is by grace of Congressional recognition of their beliefs.") (citing *Hamilton*, 293 U.S. at 261-265).

38. 293 U.S. at 262.

39. *Id.* at 255-56 (citations omitted).

40. *Id.* at 253.

41. *Id.* at 253-54.

42. *Id.* at 257.

43. *Id.* at 248 (argument for appellants).

44. *Id.* at 262-63 (citing Selective Draft Law Cases, 245 U.S. 366, 378 (1918); Minor v. Happersatt, 88 U.S. (21 Wall.) 162, 166 (1874)).

Schwimmer,[45] *Macintosh*, and *Jacobson*.[46] The quotes from *Macintosh* and *Jacobson* were the ones that appear above.[47] The quote from *Schwimmer* was:

> That it is the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises is a fundamental principle of the Constitution. . . .
>
> Whatever tends to lessen the willingness of citizens to discharge their duty to bear arms in the country's defense detracts from the strength and safety of the government.[48]

On the basis of this precedent, the *Hamilton* Court held that no ground existed for the contention that the regulation at issue violated any constitutional right asserted by the appellants.[49]

C. United States v. Schwimmer *and* In re Summers

As the above discussion illustrates, *United States v. Schwimmer*[50] is also cited as precedent for the contention that there is no constitutional right to a conscientious objector exemption to compulsory military service.[51] *Schwimmer*, like *Macintosh*, was a naturalization case. In response to a question on a preliminary naturalization form, Schwimmer declared that she would not take up arms in defense of the United States because of her uncompromising pacifism.[52] She said that she would, however, be willing to do anything to serve the United States except fight.[53] The district court found that she would not take the prescribed oath and held that she was thus not sufficiently attached to the principles of the Constitution. The Supreme Court affirmed the district court.[54]

Unlike *Macintosh* and *Hamilton*, however, *Schwimmer* does not even mention the constitutional/legislative status of conscientious objector exemptions. Besides the above-quoted statements about the duty of citizens,[55] the only part of *Schwimmer* even remotely relevant

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45. 279 U.S. 644 (1929), *overruled by*, Girouard v. United States, 328 U.S. 61, 69 (1946).
46. *Hamilton*, 293 U.S. at 263-64.
47. *Supra* text accompanying notes 15, 16, & 26.
48. 279 U.S. at 650 (cited in *Hamilton*, 293 U.S. at 263).
49. *Hamilton*, 293 U.S. at 265.
50. 279 U.S. 644 (1929), *overruled by*, Girouard v. United States, 328 U.S. 61, 69 (1946).
51. *See, e.g.*, Korte v. United States, 260 F.2d 633, 635 (9th Cir. 1958), *cert. denied*, 358 U.S. 928 (1959).
52. 279 U.S. at 647-48.
53. *Id.*
54. *Id.* at 653.
55. *See supra* text accompanying notes 44 & 48.

to the exemption issue is a paragraph expounding the theme, "The common defense was one of the purposes for which the people ordained and established the Constitution."[56] This paragraph culminates with the following statement: "[T]he very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need . . . ."[57] Accordingly, *Schwimmer* is even weaker precedent than *Macintosh* for the proposition that conscientious objector exemptions are a matter of legislative grace. *Schwimmer* does not even make this assertion in dicta. Moreover, *Schwimmer*, like *Macintosh*, was a naturalization—not a free exercise—case and was overruled by *Girouard*.[58]

In re Summers[59] also has been cited to support the suggestion that "relief for conscientious objectors is not mandated by the Constitution."[60] *Summers*, however, suffers from the same defects as *Hamilton*. The issue in *Summers* was not whether there was a constitutionally guaranteed right to conscientious objector exemptions, and the only precedents cited by the *Summers* Court for its assertion that conscientious objectors received exemptions "by grace of Congressional recognition of their beliefs" are *Hamilton* "and cases cited."[61]

Macintosh, *Hamilton*, *Schwimmer*, and *Summers* are the bases for the misapprehension that it is a settled matter of law that conscientious objector exemptions to military service are not constitutionally mandated. These cases, and cases citing them, appear to be *the only* precedent for this proposition. Although "[i]t has been repeatedly recognized that exemption for military service is a matter of Congressional grace rather than constitutional compulsion,"[62] this recognition was premature. The matter has not been settled.

II. Does the Court's First Amendment Case Law Support the Contention That There Is a Free Exercise Right to Exemption from Compulsory Military Service?

Although attempting to divine the meaning of the free exercise clause from the record left to us by the Framers of the Constitution is

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56. 279 U.S. at 650.

57. *Id.* (quoting the Selective Draft Law Cases, 245 U.S. 366, 378 (1918) (citing VATTEL, LAW OF NATIONS (1863))).

58. 328 U.S. 61, 69 (1946).

59. 325 U.S. 561 (1945).

60. Gillette v. United States, 401 U.S. 437, 461 n.23 (1971). *See also* United States v. Boardman, 419 F.2d 110, 112 (1st Cir. 1969), *cert. denied*, 397 U.S. 991 (1970); United States v. Bendik, 220 F.2d 249, 252 (2d Cir. 1955).

61. 325 U.S. at 572.

62. *Boardman*, 419 F.2d at 112.

currently a popular enterprise,[63] this Comment will attempt no such divination. Instead, this section will analyze the issue of conscientious objector exemptions from compulsory military service in relation to the Court's first amendment case law. A natural place to begin is with an examination of the Court's rulings pertaining to first amendment challenges to the draft. This analysis will be followed by a brief discussion of the case law concerning the more general issue of free exercise challenges to generally applicable, neutral laws.

As mentioned in the introduction, two factors in draft law make the possibility of a free exercise challenge to compulsory military service coming before the Court rather unlikely in the near future. First, although registration is currently required of men between eighteen and twenty-six, no actual draft now exists.[64] Second, since 1864 Congress always has included a statutory exemption for conscientious objectors,[65] and the current statutes (and regulations promulgating them) that would be put into effect if the president reactivated the draft contain such an exemption.[66] Armed services experts, however, have called for the reinstatement of the draft on a number of occasions,[67] a majority of the American public seems to support a draft,[68] and a revived draft might not allow conscientious objector exemptions.[69]

Given the possibility of a revived draft that does not contain an express provision for conscientious objector exemptions, the following analysis will proceed on the assumption that a free exercise challenge seeking exemption for a conscientious objector from compulsory military service is possible.[70]

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63. *See, e.g.*, McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990). *Cf.* L. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT (1986).

64. *See supra* note 1.

65. *See supra* note 10.

66. *See supra* note 5.

67. *See Experts Disagree on the Draft*, Tallahassee Democrat, Nov. 30, 1990, at 1A, col. 5 (former top Pentagon official James Webb and Senators John Glenn, D-Ohio, and Sam Nunn, D-Georgia, agreed the draft should be imposed if U.S. troops were ordered to drive Iraq from Kuwait); *Military Draft Ready, But Leaders Vow Not to Use It*, Tallahassee Democrat, Dec. 15, 1990, at 1A, col. 2.

68. *Military Draft Ready, But Leaders Vow Not to Use It*, *supra* note 67, at 1A, col. 4 (citing an NBC/Wall Street Journal poll finding that 58% of Americans favored and 38% opposed reinstituting the draft "if the United States goes to war in the Persian Gulf").

69. *See id.* at 3A, col. 4 (noting that few exemptions would be allowed if the draft were reinstituted). Although the current statutes contain a conscientious objector exemption, Congress would have to authorize a revived draft, and in doing so it could leave out any or all exemptions.

70. I will not consider the free exercise arguments that could be made against compulsory registration (as opposed to induction). These arguments have been considered in Kellett, *supra* note 6, and Note, *supra* note 10.

A. Case Law Concerning the Draft

The *Selective Draft Law Cases*,[71] although actually addressing the issue of compulsory military service—unlike *Macintosh*, *Hamilton*, *Summers*, and *Schwimmer*—are no more instructive than these four cases regarding the issue of a free exercise right to a conscientious objector exemption. These cases involved, *inter alia*, a first amendment[72] challenge to Congress' power to compel military service.[73] The opinions in these cases, however, amounted to no more than a historical and constitutional justification for the power of Congress to compel military service.[74]

The appellants were prosecuted for failing to present themselves for registration for a selective draft[75] authorized by an act of Congress.[76]

> They all defended by denying that there had been conferred by the Constitution upon Congress the power to compel military service by a selective draft and [asserted that even] if such power had been given by the Constitution to Congress, the terms of the particular act for various reasons caused it to be beyond the power and repugnant to the Constitution.[77]

The Court, then, began its review of the constitutional questions[78] with the statements:

> The possession of authority to enact the statute must be found in the clauses of the Constitution giving Congress power "to declare war; . . . to raise and support armies, ..." And of course the powers conferred by these provisions like all other powers given carry with them as provided by the Constitution the authority "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."[79]

Although the Court did not at this point explicitly mention the free exercise clause, the Court did consider the argument that:

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71. 245 U.S. 366 (1918). Six appeals from district court convictions for not registering for the draft were argued before the Supreme Court at the same time. *Id.* at n.1.

72. *See infra* text accompanying note 85.

73. 245 U.S. at 376-77.

74. *Id.* at 376-89.

75. *Id.* at 376.

76. *Id.* at 375 (citing Act of May 18, 1917, ch. 15, 40 Stat. 76).

77. *Id.* at 376.

78. *Id.* at 376-77.

79. *Id.* at 377 (quoting U.S. CONST. art. I, § 8).

> [B]ecause as compelled military service is repugnant to a free government and in conflict with all the great guarantees of the Constitution as to individual liberty, it must be assumed that the authority to raise armies was intended to be limited to the right to call an army into existence counting alone upon the willingness of the citizen to do his duty in time of public need . . . .[80]

The Court then attempted to demonstrate that "the premise of this proposition is so devoid of foundation that it leaves not even a shadow of ground upon which to base the conclusion."[81]

This demonstration consisted of more than ten pages of history of the government's right to compel military service and citizens' duty to render military service.[82] In the last two paragraphs the Court finally considered the challenges to the draft based on the "repugnancy to the Constitution supposed to result" from the act authorizing the draft.[83] After briefly addressing a few challenges to the act's delegation of power,[84] the Court dismissed the first amendment challenge with one conclusory sentence:

> And we pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act to which we at the outset referred because we think its unsoundness is too apparent to require us to do more.[85]

Although at least one of the Court's later cases apparently gave more consideration to free exercise claims about the draft,[86] it is questionable whether the Court has ever really "pass[ed] without anything but statement" free exercise challenges to the draft.[87]

Of the Supreme Court's three famous conscientious objector cases—*United States v. Seeger*,[88] *Welsh v. United States*,[89] and *Gillette v. United States*[90]—only *Gillette* actually considered a free exercise

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80. *Id.* at 378.
81. *Id.*
82. *Id.* at 378-89.
83. *Id.* at 389.
84. *Id.*
85. *Id.* at 389-90.
86. Gillette v. United States, 401 U.S. 437 (1971).
87. *See infra* text accompanying notes 88-106.
88. 380 U.S. 163 (1965).
89. 398 U.S. 333 (1970).
90. 401 U.S. 437 (1971).

challenge to compulsory military service.[91] *Seeger*'s first paragraph mentioned a "constitutional attack . . . launched under the First Amendment's Establishment and Free Exercise Clauses,"[92] but did not mention these attacks again;[93] *Welsh* was decided strictly on the basis of statutory construction and never even mentioned a free exercise issue.[94]

Gillette involved the "question whether conscientious objection to a particular war, rather than objection to war as such, relieves the objector from responsibilities of military training and service."[95] The Court held, "Congress intended to exempt persons who oppose participating in all war—'participation in war in any form'—and that persons [like Gillette] who object solely to participation in a particular war are not within the purview of the exempting section . . . ."[96] Thus, in *Gillette* the Court had occasion to go beyond the statutory questions upon which *Seeger* and *Welsh* were decided. After rejecting[97] an establishment clause challenge that claimed the exemption "impermissibly discriminate[d] among types of religious belief and affiliation,"[98] the Court considered the claim that "Congress interferes with the free exercise of religion by conscripting persons who oppose a particular war on grounds of conscience and religion."[99] Although the free exercise claim in *Gillette* was "examined in some isolation from the circumstance that Congress has chosen to exempt those who conscientiously object to all war,"[100] the Court's treatment of the challenge is instructive of how the Court might handle a free exercise claim by a general (as opposed to a selective)[101] conscientious objector.

The Supreme Court's free exercise analysis in *Gillette* began with the statement, "Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an ob-

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91. *See infra* text accompanying notes 95-106.

92. 380 U.S. at 165.

93. This is apparently because the Court construed the statute at issue, Universal Military Training and Service Act, 50 U.S.C. app. § 456(j) (1958), to include the petitioners—Seeger, Jakobson, and Peter—within the statute's exemption for conscientious objectors, thus avoiding the constitutional question. 380 U.S. at 186-88.

94. 398 U.S. at 343-44. *Welsh*, like *Seeger*, was solely concerned with construing section 6(j) of the Universal Training and Service Act. *See supra* note 93.

95. *Gillette*, 401 U.S. at 439.

96. *Id.* at 447.

97. *Id.* at 449-460.

98. *Id.* at 449.

99. *Id.* at 461.

100. *Id.*

101. *See supra* note 9.

jector from any colliding duty fixed by a democratic government."[102] After briefly discussing the effect of the free exercise clause on the direct regulation of religious beliefs,[103] although such direct regulation was not at issue in the case, the Court continued:

> And even as to neutral prohibitory or regulatory laws having secular aims, the Free Exercise Clause may condemn certain applications clashing with imperatives of religion and conscience, when the burden on First Amendment values is not justifiable in terms of the Government's valid aims. . . . However, the impact of conscription on objectors to particular wars is far from unjustified. . . . The incidental burdens felt by persons in petitioners' position are strictly justified by substantial governmental interests that relate directly to the very impacts questioned.[104]

The Court was thus analyzing the free exercise claim in *Gillette* according to the balancing test used in *Sherbert v. Verner*.[105] The Court's consideration of the respective interests in *Gillette*, however, was extremely superficial. A conscientious objector who is forced into military service could quite conceivably be placed in a situation in which he must act either entirely against his conscience by taking a human life or in accord with his conscience at the risk of losing his own life. The Court in *Gillette* did not make the slightest effort even to identify the burdens on free exercise that resulted as an incident of the conscription laws.[106]

The "substantial governmental interests" to which the *Gillette* Court refers are "the Government's interest in procuring the manpower necessary for military purposes"[107] and "the interest in maintaining a fair system for determining 'who serves when not all serve.'"[108] This first interest is recognized in the first article of the United States Constitution.[109] It is difficult to imagine, however, that this interest is furthered by forcing a person into the military even if that person believes that the objective of the military, either in general or with respect to a particular war, is unconscionable. The probability that a conscientious objector would refuse to participate in military

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102. 401 U.S. at 461 (citations omitted).
103. *Id.* at 462.
104. *Id.* (citing Sherbert v. Verner, 374 U.S. 398 (1963); Braunfeld v. Brown, 366 U.S. 599 (1961)) (other citation omitted).
105. 374 U.S. 398 (1963). *See infra* text accompanying note 124.
106. *See* 401 U.S. at 461-63.
107. *Id.* at 462.
108. *Id.* at 455.
109. U.S. CONST. art. I, § 8, cl. 12.

exercises should be enough at least to call into question the benefits to "procuring the manpower necessary for military purposes" by drafting conscientious objectors. The efficacy of drafting conscientious objectors is further challenged by the probability that a pacifist not only will "refuse[] or [be] unwilling for any purpose to bear arms because of conscientious considerations" but also will be "disposed to *encourage others in such refusal.*"[110]

Indeed, as the Court has recognized in dicta, "The influence of conscientious objectors against the use of military force in defense of the principles of our government is apt to be more detrimental than their mere refusal to bear arms."[111] Is the government's interest in "procuring the manpower necessary for military purposes" furthered by drafting someone who not only will refuse to fight but also will try to discourage other draftees from fighting? Would not the presence within the military of pacifists preaching nonviolence be more of a hindrance to, rather than a furtherance of, military purposes?

Of course, the administrative interest in "maintaining a fair system" for exempting people from compulsory military service is subservient to and an integral part of the broader interest in procurement of manpower. The conclusion, however, that this broader interest is served by a system in which conscientious objectors are forced into military service is subject to the above criticisms of drafting conscientious objectors. In holding that the "incidental burdens felt by persons in petitioners' position are strictly justified by substantial governmental interests,"[112] the Court did not even question whether the draft act as applied to the petitioners would achieve the government interests asserted.

The Court's custom of giving such minimal scrutiny to first amendment challenges to military priorities has been roundly criticized.[113] In the context of a free exercise challenge to a military regulation in which the Court upheld the regulation, Justice Brennan dissented with this admonition:

> Today the Court eschews its constitutionally mandated role. It adopts for review of military decisions affecting First Amendment rights a subrational-basis standard—absolute, uncritical "deference

110. Macintosh v. United States, 42 F.2d 845, 847 (2d Cir. 1930), *rev'd*, 283 U.S. 605 (1931) (quoting United States v. Schwimmer, 279 U.S. 644, 652 (1929) (emphasis added).

111. United States v. Macintosh, 283 U.S. 605, 621 (1931) (quoting *Schwimmer*, 279 U.S. at 651).

112. Gillette v. United States, 401 U.S. 437, 462 (1971).

113. *See, e.g.*, Dienes, *When the First Amendment Is Not Preferred: The Military and Other "Special Contexts,"* 56 U. CIN. L. REV. 779 (1988).

> to the professional judgment of military authorities." If a branch of the military declares one of its rules sufficiently important to outweigh a service person's constitutional rights, it seems that the Court will accept that conclusion, no matter how absurd or unsupported it may be.[114]

The majority in this case, *Goldman v. Weinberger*, began its free exercise analysis with the statement that "review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society."[115] In its two-page "analysis" the Court made no effort to discern any burden the regulation might have had on the individual asserting the free exercise claim. Apparently, the Court uses the same standard for evaluating free exercise challenges to Congress' decisions relating to securing personnel for the military.

The Court has stated that "judicial deference to . . . congressional exercise[s] of authority is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged."[116] Although the Court followed this conclusion with the statement that "deference does not mean abdication,"[117] with respect to first amendment challenges to Congress' power to raise and support an army the Court's "regimen of judicial deference to abstract governmental interests [in place of] a weighted balancing of the competing interests"[118] amounts to an abdication of the Court's "constitutionally mandated role."[119]

B. The Demise of the Sherbert *Test's Applicability to Neutral, Generally Applicable Laws*—Employment Division v. Smith

The prospect of a Supreme Court decision upholding opposition to compulsory military service as a free exercise right became even dimmer in 1990 with the delivery of *Employment Division v. Smith*.[120] Before *Smith*, it was generally assumed[121] that free exercise challenges to neutral, generally applicable laws would be analyzed according to the balancing test enunciated in *Sherbert v. Verner*.[122] The Court used

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114. Goldman v. Weinberger, 475 U.S. 503, 515 (1986) (Brennan, J., dissenting) (citation omitted) (*cited in* Dienes, *supra* note 113, at 808 n.108.).

115. *Id.* at 507 (Rehnquist, J., for the majority).

116. Rostker v. Goldberg, 453 U.S. 57, 70 (1981).

117. *Id.*

118. Dienes, *supra* note 113, at 827.

119. *See supra* text accompanying note 114.

120. 110 S. Ct. 1595 (1990).

121. *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-13, at 1255-74 (2d ed. 1988).

122. *See infra* text accompanying note 124.

this test in *Gillette*, as discussed above.[123] *Sherbert* held that if a statute infringes on an individual's constitutional right to free exercise of religion, then the state must demonstrate that "any incidental burden on the free exercise of [that individual's] religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . . .'"[124]

In *Smith*, however, the Court held that this test was "inapplicable"[125] in such cases because:

> The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"—permitting him, by virtue of his beliefs, "to become a law unto himself,"—contradicts both constitutional tradition and common sense.[126]

Justice Scalia, writing for the majority in *Smith*,[127] discounted the previous uses of the compelling interest balancing test to analyze generally applicable laws that were challenged on the grounds of free exercise with the statement that:

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections . . . .[128]

The Court then said, "[W]e have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation. Although we have sometimes *purported* to apply

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123. *See supra* text accompanying notes 102-06.

124. 374 U.S. at 403 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

125. 110 S. Ct. at 1603.

126. *Id.* (citations omitted).

127. Six justices—Scalia, Kennedy, White, Stephens, Rehnquist, and O'Connor—comprised the majority. Justice O'Connor, however, concurred only with the judgment and adamantly refused to accept the majority's "disregard [of] our consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct." *Id.* at 1607 (O'Connor, J., concurring in judgment). Justices Brennan, Blackmun, and Marshall agreed with Justice O'Connor on this point, but did not join in the majority's judgment. *Id.* at 1606 n.*.

128. *Id.* at 1601.

the *Sherbert* test in contexts other than that, we have always found the test satisfied . . . ."[129] Justice Scalia cited *Gillette* as one of the cases in which the Court "purported" to use the test.[130]

III. CONCLUSION

Although no binding precedent exists on the specific issue of whether conscientious objector exemptions from compulsory military service are guaranteed by the free exercise clause, the Court probably would hold that such exemptions are not constitutionally mandated. Judging from its other first amendment cases involving Congress' power to raise and support armies, the Court likely would simply defer to Congress with little or no consideration of the burdens that compulsory military service would place on the individual challenging compulsory service on conscientious grounds.

The likelihood of the Court holding that there is a constitutional right to conscientious objector exemptions is further diminished by the Court's holding in *Smith*. Although it is conceivable that a free exercise challenge to compulsory military service could be "conjoined" with another constitutional challenge, thus triggering a balancing test analysis, the Court's deference to Congress' decisions involving the armed forces would probably lead the Court to rule against even such a "reinforced" challenge.[131]

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129. *Id.* at 1602 (citations omitted) (emphasis added).

130. *Id.*

131. Justice Scalia used the word "reinforced" in *Smith*: "And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns." *Id. Smith* leaves open the question of whether, and to what extent, a free exercise concern would add any "weight" to another constitutional challenge.