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John T. Noonan, Jr., on the Catholic Conscience and War: Negre v. Larsen

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In his landmark work, *The Lustre of Our Country*, and in his casebook, *The Believer and the Powers that Are*, Judge John T. Noonan, Jr., examines the historical development of the relationship between the religious conscience and state power. Noonan makes clear that at the heart of James Madison's belief in religious liberty is the principle that the obligations of faith must have priority over the demands of the state. In this regard, Madison is taken as a linear descendant of St. Peter, who responded to the Sanhedrin when he was forbidden to teach in Christ's name, "We must obey God rather than man."

The demands of the state on conscience are rarely greater than in time of war, when the vital interests of the civil community, indeed, even its survival, may be threatened by external foes. Hans Morgenthau has referred to "the nation as the supreme authority . . . within a certain territory," and to those who see no higher good than the com-

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4 See NOONAN, supra note 1, at 61–91.
5 Acts 5:29.
munity’s own interests, it is assumed that the state has the final authority to call upon its citizenry to assist in the national defense. The religious believer, however, by virtue of the relationship he has with the Divine, must respond to a different set of authorities when deciding whether to take up arms.

Catholic just-war theory, throughout its long history, has required believers conscientiously to scrutinize the morality of state decisions in favor of war and to refrain from participating in conflicts that are unjust either as to ends or means. The American Catholic Bishops have taught that “[t]he Christian has no choice but to defend peace, properly understood, against aggression. This is an inalienable obligation.” But they have also “affirm[ed] the Catholic teaching that the state’s decision to use force should always be morally scrutinized by the citizens asked to support the decision or to participate in war.” This responsibility is particularly acute in representative democracies, in which the citizenry as a whole is obligated to be well-informed on matters of war and peace and should properly share in the guilt should they allow the governors to transgress moral norms.

The Vietnam War era case of *Negre v. Larsen* presents in particularly vivid fashion the clash between the military demands of a state at

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7 This is the significance of Oliver Wendell Holmes’s analogy to military service in his decision upholding forced sterilizations. “We have seen more than once that the public welfare may call upon the best citizens for their lives.” *Buck v. Bell*, 274 U.S. 200, 207 (1927).

8 John P. Langan, *The Good of Selective Conscientious Objection*, in *SELECTIVE CONSCIENTIOUS OBJECTION: ACCOMMODATING CONSCIENCE AND SECURITY* 89, 98 (Michael F. Noone, Jr. ed., 1989). The possibility of selective conscientious objection is built into the structure of just-war theory at least in the sense that it always contains the possibility of judging that a particular war is not morally justifiable because it fails to meet one or more of the norms laid down in the theory and that therefore an individual applying the theory will judge that it is not morally right for him or her to participate in the war, at least as a combatant.


war and the scruples of a Catholic conscientious objector. Louis Negre, the petitioner, took his case ultimately to the United States Supreme Court, where he was represented, in part, by John Noonan, who authored a brief articulating the demands made by Catholic just-war thought on the individual conscience. Not only states but also individual believers are bound by the requirement to scrutinize the morality of armed conflict, Noonan argued, and to object when the cause is seen to be unjust. This obligation of conscience, Noonan concluded, should accordingly be recognized as part of the American doctrine of religious liberty.

This Article examines Judge Noonan’s contribution to the late 1960s/early 1970s debate over the claim made by many Catholics of a right to object selectively to service in the Vietnam War on just-war grounds. The shape and substance of the Article draw inspiration from the methodology pioneered by Judge Noonan in his own path-breaking works of legal history. That methodology, which combines an intense interest in contextuality and contingency with a panoramic understanding of the way in which a given case or incident fits within a larger moral or legal tradition, informs in particular Judge Noonan’s later historical works, especially Power to Dissolve, Persons and Masks of the Law, The Antelope, Bribes, and Lustre of Our Country. In these works and others, Judge Noonan has sought to understand not only the development of doctrine, but also the role played by individuals—litigants and lawyers, policy-makers and judges, teachers, scholars, playwrights, and the literate public—in giving form and life to doctrine.

In undertaking an examination of the Negre case, this Article will consider profound questions of constitutional law, involving, on the one hand, Congress’s power to raise armies and, on the other, the First Amendment’s guarantee of religious liberty. It will also consider questions of Catholic moral teaching. From earliest times, Catholic theologians and canonists cast a suspicious eye on warfare and sought

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13 See infra notes 443–80 and accompanying text.
14 Id.
15 Id.
20 NOONAN, supra note 1.
to put limits around its use. Deeply indebted to the lessons Judge Noonan has taught us on the proper way to write legal history, this Article will, above all, consider the interaction of persons with the requirements of conscience and the demands of law, in a leading anti-war case of the late 1960s.

I. "I MUST OBEY THE ORDER OF CONSCIENCE": THE FORMATION OF LOUIS NEGRE'S CONSCIENCE AND THE DEMANDS OF THE POWERS THAT ARE

Louis Auguste Negre was born in Nice, France in July 1947 and immigrated with his parents to the United States in 1952, where they settled in Bakersfield, California. Louis's parents, Auguste and Martha, had been opposed to France's involvement in the Indo-China War and decided to resettle in the United States in part to protect young Louis from participation in "such an atrocity." They provided a Catholic education for their son because they believed that only a proper religious formation would equip him for the responsibilities of adulthood. Young Louis graduated from Catholic grade school and Catholic high school and practiced his religion faithfully throughout adolescence and young adulthood. He was conscientious in his dealings with others, never running afoul of the law and impressing his employers with his reliability, courtesy, and punctuality. Negre himself emphasized his faithfulness to the Church's magisterium as the mainstay of his life: "I have always been taught and I firmly believe that teaching of the Popes of the Church in matters of religious faith

22 Id. at 10; see also Letter from Ronald K. Van Wert, Captain, Assistant Staff Judge Advocate United States Army, to Chief Overseas Replacement Station, United States Army Personnel Center (Jan. 28, 1969), reprinted in Appendix to Petition for Writ of Certiorari at 37, Negre (No. 325) (indicating that Negre's family left France "due to the 'atrocities' in Vietnam").
23 See Application for Request for Discharge as a Conscientious Objector Under AR 635-20, reprinted in Appendix to Petition for Writ of Certiorari at 33, Negre (No. 325) (letter from Auguste and Martha P. Negre).
24 Id. at 31 (letter from John E. Cottalorda (June 23, 1968)). An uncle, John Cottalorda wrote, "Louis has always given complete satisfaction to his parents, being [a] good worker, obedient, sincere, very reliable and above all very religious, he practices his religion very well, always attending Church Services and taking his communion regularly." Id.
25 Id. at 30 (letter from Mrs. Martin F. Jaussand).
and morals is binding upon all Catholics, clergy or laity, military or civilian."

Negre was inducted into the United States Army on August 30, 1967, and made clear during his training that he was opposed on religious reasons to the military involvement in Vietnam. On February 26, 1968, Negre "submitted an incomplete application for discharge as a conscientious objector," which was rejected by the Army. Negre subsequently filed a completed application on July 15 of that year. Negre acted after consulting with Fr. James Straukamp, SJ., of the University of San Francisco, who wrote in support of Negre's application that he had advised Negre "that under the beliefs and teaching of the Catholic Church he is obliged to examine and form his own conscience in respect to participating or refusing to participate in the war at this time." After examining his conscience, Fr. Straukamp advised him, he was obliged to follow it. Straukamp remembered Negre's response was that "after earnest and prayerful consideration after he had entered the Army, that it was clear to him that in conscience he could not in conformity to the Catholic training and belief participate in war in any form at this time."

When Negre persisted in asserting his conscientious objector claims, he was temporarily put under arrest, threatened with judicial proceedings, and finally subjected to court martial. When not imprisoned, Negre continued to serve the Army in non-combatant roles. Sergeant Robert Land, his supervisor at the Presidio, where Negre worked as a clerk in the fall of 1968, wrote that he found Negre

26 Id. at 10.
28 Application for Request for Discharge as a Conscientious Objector Under AR 635-20, reprinted in Appendix to Petition for Writ of Certiorari at 2, Negre (No. 325).
30 Application for Request for Discharge as a Conscientious Objector Under AR 635-20, reprinted in Appendix to Petition for Writ of Certiorari at 27, Negre (No. 325) (letter from James E. Straukamp, SJ., dated May 2, 1968).
31 "I counseled Private Negre that he was obliged to form his own conscience after giving all deference to the information and advice of the duly constituted government authorities and other persons, and that under Catholic doctrine he would be in religious duty bound to act in conformity to his conscience . . . ." Id.
32 Id. at 28.
33 Id. at 2-3.
34 Id. at 12.
"to be of the highest caliber, his efficiency and his devotion to duty also to be of the highest caliber."^{35}

Negre’s second application for conscientious objector status, of July 1968, was rejected on August 9.^{36} He was then ordered to Vietnam, and when he refused that order “based upon his religious training and belief,”^{37} “[g]eneral court martial charges were preferred against petitioner for disobedience of orders.”^{38} At court martial, Negre was represented by Richard Harrington, of the San Francisco firm of Athearn, Chandler, and Hoffman, a general civil practice firm specializing in corporation, probate, and tax law.^{39} Negre had been referred to Harrington by a relative who had previously retained him.^{40} Harrington himself had graduated from Harvard Law School in 1953 and had also served in the Army Judge Advocates General Corps from 1954 to 1957.^{41} Unsure of the theological foundations of Negre’s claim, Harrington consulted John Noonan, an acquaintance of his from the Harvard Law Review and a 1954 graduate of Harvard Law School then teaching at Boalt Hall.^{42} Noonan referred him to the writings of Thomas Aquinas and other Catholic sources on just war.^{43}

At trial Harrington contended “that Negre had a privilege to refuse to participate in war crimes, and that his belief that participation in war in Vietnam would constitute a crime would be privileged as a mistake of fact if reasonably based upon reported facts, even if mistaken.”^{44} Harrington “also relied upon Negre’s conscientious objection defense and relied upon the findings of Negre’s religious sincerity by the Army chaplain who had interviewed Negre.”^{45} Assisting Harrington at trial were Richard Buxbaum, a professor of Boalt Hall, and Frank Newman, Boalt Hall’s dean.^{46} Negre was acquitted of the charges on January 22, 1969, “the first acquittal by a general court

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^{35} Id. at 36 (deposition of Robert R. Land (Jan. 25, 1969)).
^{36} Petition for Writ of Habeas Corpus, Negre v. Larsen (N.D. Cal. 1969), reprinted in Appendix to Petition for Writ of Certiorari at 43, Negre (No. 325).
^{37} Id.
^{38} Id.
^{40} Letter from Richard Harrington to Dr. Charles J. Reid, Jr. 2 (Nov. 8, 2000) (on file with author).
^{42} Letter from John T. Noonan, United States Circuit Judge, to Dr. Charles J. Reid, Jr. (Nov. 28, 2000) (on file with author).
^{43} Letter from Richard Harrington to Dr. Charles J. Reid, Jr., supra note 40, at 2.
^{44} Id.
^{45} Id.
^{46} Id.
martial at the Presidio within the memory of the people [Harrington] spoke with." Negre's application for discharge, however, was once again denied, and he was ordered to report to the Overseas Replacement Station at Oakland, California, "for transshipment to Vietnam," even though he had not been "give[n] . . . written orders to that effect." Negre responded by seeking his release from the Army by writ of habeas corpus.

In his application for conscientious objector status, Negre based his objection on two pillars: the sacrosanct nature of conscience, as found in the Catholic tradition; and the teaching of the Church on the subject of just and unjust war, particularly in light of the new moral situation brought about by the development of weapons of mass destruction in the modern age.

For his understanding of the obligations of the Catholic conscience, Negre relied on Austin Fagotthey's treatment of the subject in his *Right and Reason*, a popular introduction to Catholic moral philosophy then in its fourth edition. Negre included excerpts from this work in his application for conscientious objector status, beginning with the section "Always Obey a Certain Conscience." By "certain conscience," Fagotthey meant not an objectively correct assessment of the morality of a given situation, but "the subjective state of the person judging, how firmly he holds to his assent, how thoroughly he has excluded fear of the opposite." Following traditional principles, Fagotthey distinguished between vincible error, where the actor has reason to believe he might be wrong, and invincible error, where the actor is subjectively convinced of the correctness of his conscientiously-made decision, even though his conclusions might objectively be in error. An actor in a state of invincible error is obliged to follow the dictates of conscience, since he is in a state of conscientious

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47 Id. at 3 n.3.
49 See id.
50 See Application for Request for Discharge as a Conscientious Objector Under AR 635-20, reprinted in Appendix to Petition for Writ of Certiorari, Negre (No. 325).
52 Application for Request for Discharge as a Conscientious Objector Under AR 635-20, reprinted in Appendix to Petition for Writ of Certiorari at 15, Negre (No. 325).
54 Id. at 38.
certitude; "If a man is firmly convinced that his action is right, he is choosing the good as far as he can . . . ."

The doctrine of invincible error, however, does not mean that one is excused from examining the morality of a proposed course of action. Catholics are obliged to show the same seriousness in scrutinizing moral matters that businesspersons or lawyers use in charting courses of professional dealings. Through a process of inquiry that involves determining the facts of a case at hand and the principles to be applied to that case one forms one’s conscience. Two principles to be employed in forming one’s conscience are: "(1) Take the morally safer course. (2) A doubtful law does not bind." Fagothey explains what is meant by doubtful law: "Law imposes obligation, which is usually burdensome, and he who would impose an obligation or restrict the liberty of another must prove his right to do so." Subsequently, in a section on civil disobedience and the right of revolution, Fagothey added and Negre quoted: "What may a private citizen do when he is unjustly oppressed? Unjust laws are not laws at all and can impose no moral obligation. Injustice in a law must not lightly be presumed but clearly established."

Negre also looked to recent Church teaching on the inviolability of conscience. He cited Gaudium et Spes:

In the depths of his conscience, man detects a law which he does not impose on himself, but which holds him to obedience. Always summoning him to love good and avoid evil, the voice of conscience when necessary speaks to his heart: do this, shun that. For man has in his heart a law written by God; to obey it is the will and dignity of man; according [to] it he will be judged. Conscience is the most secret core and sanctuary of man. There he is alone with God, whose voice echoes in his depths. In a wonderful manner conscience reveals that law which is fulfilled by love of God and neighbor.

55 Id.
56 See id. at 39.
57 See id. at 39-40.
58 Id. at 40.
59 Id. at 41.
60 Id. at 346; see also Application for Request for Discharge as a Conscientious Objector Under AR 635-20, reprinted in Appendix to Petition for Writ of Certiorari at 24, Negre v. Larsen, 401 U.S. 437 (1971) (No. 325) (containing Negre’s summary of Fagothey’s teaching on “rebellion and revolution”).
This background shaped Negre's own decision to disobey when ordered to proceed to Vietnam. As a Catholic, Negre asserted, he was under a duty to form and shape his conscience so as to remove doubt.62 "I cannot be willing to commit evil by acting with a doubtful conscience, merely hoping that my conduct is not contrary to conscience."63 Negre conceded that other Catholics might reach a conclusion opposite his own and that he might be in a state of invincible error, but he emphasized that his obligation was to remain true to the moral conclusions he had reached.64 As Negre put it, "I must obey the order of conscience."65

For his moral conclusions about warfare, Negre drew, for the most part, on then-recent teachings of the Second Vatican Council, the Bible, as well as Pope John XXIII, Pope Paul VI, and Alfredo Cardinal Ottaviani. Negre quoted from Gaudium et Spes's assessment that modern war had become qualitatively different as the result of "[the development of armaments by modern science."66 He noted as well Gaudium et Spes's conclusion that in the light of new military technologies the morality of warfare must be "evaluat[ed] . . . with an entirely new attitude."67 Negre also quoted from Paul VI's 1965 speech at the United Nations: "If you wish to be brother[s], let the weapons fall from your hands . . . . No more war. War never again."68

Other texts Negre relied upon similarly pointed to the extreme difficulty of waging just war in an era dominated by weapons of mass destruction. He began his section on "Revelation" with the commandment of the Decalogue, "You shall not kill."69 He continued with a number of quotations from the New Testament emphasizing Jesus's

62 See Application for Request for Discharge as a Conscientious Objector Under AR 635-20, reprinted in Appendix to Petition for Writ of Certiorari at 10, Negre (No. 325).
63 Id.
64 See id. at 4.
65 Id. at 10.
66 Id. at 8 (citing Gaudium et Spes, supra note 61, ¶ 80); cf. VATICAN COUNCIL II: THE CONCILIAR AND POST CONCILIAR DOCUMENTS 916 (Austin Flannery ed., 1975) (providing text of Gaudium et Spes).
67 Application for Request for Discharge as a Conscientious Objector Under AR 635-20, reprinted in Appendix to Petition for Writ of Certiorari at 8, Negre (No. 325) (citing Gaudium et Spes, supra note 61, ¶ 80).
68 Id. at 7.
69 Id. at 6 (quoting Exodus 20:23).
teachings that one should turn one’s cheek when struck,\textsuperscript{70} that one should love one’s enemies,\textsuperscript{71} and that “all that take the sword shall perish with the sword.”\textsuperscript{72} Alfredo Cardinal Ottaviani’s judgment that modern conditions can never “fulfill [those] conditions which in theory make war lawful and just,”\textsuperscript{73} as well as Pope John XXIII’s conclusion that “in this age of ours which prides itself on its atomic power, it is irrational to believe that war is still an apt means of vindicating violated rights,”\textsuperscript{74} were both quoted by Negre to support his objections. Negre gave relatively little attention to the Church’s continued acknowledgement that just war was possible, although he did refer obliquely to \textit{Gaudium et Spes}’s distinction between wars of self-defense and wars of aggression.\textsuperscript{75}

Negre went on to characterize the war in Vietnam as an act of aggression on the part of the United States. Negre explained the war as an ideological conflict between two sides committed to different belief systems:

In pertaining to the war in Vietnam the North Vietnamese people are fighting for their fundamental beliefs which they were brought up to believe. According to our standards they are wrong in their action, but in reality who is to say which nation is right in their beliefs before God. Sure we can say we are right and they are wrong in their action, but one cannot forget that they too are human beings as ourselves and have the right to form opinions and make decisions as we are capable of doing. Now if they are wrong in their actions, surely they will pay, if not in this life in the world to come, for their misdeeds, just as we will if we are wrong. The fact still remains that

\textsuperscript{70} Id. (quoting \textit{Matthew} 5:38–39).
\textsuperscript{71} Id. (quoting \textit{Matthew} 5:43–44).
\textsuperscript{72} Id. at 7 (quoting \textit{Matthew} 22:52).
\textsuperscript{73} Id. (quoting Mgr. Alfred Cardinal Ottaviani, \textit{The Future of Offensive War}, 30 Blackfriars 415, 419 (1949)).
\textsuperscript{74} Id. (quoting Pope John XXIII, \textit{Pacem in Terris} ¶ 127 (1963)); see also \textit{The Gospel of Peace and Justice: Catholic Social Teaching Since Pope John} 227 (Joseph Gremillion ed., 1976).
\textsuperscript{75} Negre quoted, “But it is one thing to undertake military action for the just defense of the people, and something else again to seek the subjugation of other nations.” Application for Request for Discharge as a Conscientious Objector Under AR635-20, reprinted in Appendix to Petition for Writ of Certiorari at 8, Negre (No. 325) (citing \textit{Gaudium et Spes}, supra note 61, at ¶ 79); see also \textit{Vatican Council II: The Conciliar and Post Conciliar Documents}, supra note 61, at 989 (providing text of \textit{Gaudium et Spes}). Omitted is \textit{Gaudium et Spes}’s assertion that “[w]ar, of course, has not ceased to be part of the human scene. As long as the danger of war persists and there is no international authority with the necessary competence and power, governments cannot be denied the right of lawful self-defense, once all peace efforts have failed.” \textit{Id.} at 988–89.
we have no authority to condemn them in their actions or pressure them by fighting and killing them. . . . [W]ar is no answer to peace. War only solves the point of which country is stronger. Despite the amount of force used on an individual, his basic beliefs will always remain, just as long as he has an ounce of breath in him and he really believes it without doubt.\footnote{Application for Request for Discharge as a Conscientious Objector Under AR 635-20, reprinted in Appendix to Petition for Writ of Certiorari at 11, Negre (No. 325).}

Inexpertly written, heartfelt in its convictions, Negre's condemnation of the Vietnam War as unjust spoke to the impossibility of altering another person's conscience by force of arms. Had Negre chosen to make explicit use of just-war criteria in his analysis, he might have said that American involvement lacked a just cause. The Vietnam Conflict was wrong, on this account, because it was an attempt to win over hearts and minds not by persuasion, but by military superiority.

II. "THE DOMAIN OF POWER AND THE FORUM OF CONSCIENCE": THE STATE OF THE LAW OF CONSCIENTIOUS OBJECTION

The earliest organic documents and laws of the American nation made provision for conscientious objectors. Thus the resolution of July 18, 1775, of the Continental Congress "recommending that the inhabitants of all the united English Colonies in North America"\footnote{2 Journals of the Continental Congress (1774-1789) 187 (1903).} organize militias to resist British forces also admonished the colonies to make appropriate provision for those "who, from religious principles, cannot bear arms in any case."\footnote{Id. at 189. The Resolution continued by asserting that "this Congress intends no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren." Id.} Similarly, revolutionary-era constitutions of several states also provided for the protection of those who could not conscientiously take up arms. Thus the Pennsylvania Constitution of 1776 provided that "[n]o man who is conscientiously scrupulous of bearing arms [can] be justly compelled thereto."\footnote{Pa. Const. of 1776, art. 1, § 8, reprinted in 5 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws 3083 (Francis Newton Thorpe ed., 1909).} The Vermont Constitution of 1777 repeated this language,\footnote{Vt. Const. of 1777, ch. 1, § 9, reprinted in 6 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws, supra note 79, at 3741.} while the New York Constitution of 1777 exempted Quakers from military service.\footnote{N.Y. Const. of 1777, § 40, reprinted in 5 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws, supra note 79, at 2637.} Many of those States that did not constitutionally protect those
objecting to military service did so by statute. The value being protected in these documents was the free religious conscience, even in a war fought on American soil, involving the very survival of the new nation.

The balance struck in favor of the conscientious objector was only imperfectly recognized, however, in eighteenth-century law and practice. The state constitutions that allowed for conscientious objection also required the payment of a "fine" or the recruitment of a replacement who could serve in the objector's stead. Many Mennonites, Moravians, Quakers, and others found this qualification odious, believing that they should not be required to serve personally or even help to finance a war that violated their consciences. Some were jailed or forfeited their property for refusal to comply.

In June 1789, James Madison added to a draft of what would become the Second Amendment a clause stating "no person religiously scrupulous of bearing arms shall be compelled to render military service in person." An amended version of this text was debated on August 17, 1789 and ultimately defeated. The reasons for the defeat were multiple. Elbridge Gerry attacked the proposed language as likely to destroy the integrity of the state militias and thereby undermine the relationship of state and federal power.


83 Ellis West's recent study of conscientious objection in the Revolutionary War era, Ellis M. West, The Right to Religion-based Exemptions in Early America: The Case of Conscientious Objectors to Conscription, 10 J.L. & RELIGION 367 (1994), is flawed because of its essentially presentist concerns. West is preoccupied with demonstrating the correctness of the majority opinion in Employment Division v. Smith, 494 U.S. 872 (1990), and asks the sources a set of essentially anachronistic questions of much greater relevance to twentieth-century jurisprudence than to eighteenth-century reality.

84 See West, supra note 83, at 379.


86 See Brock, supra note 85, at 240–54, 262–65.

87 1 ANNALS OF CONG. 434 (Joseph Gales ed., 1789).

88 The amended version read: "[N]o person religiously scrupulous shall be compelled to bear arms." Id. at 749.

89 Id. at 749–50.

Now, I am apprehensive, sir, that this clause would give an opportunity to the people in power to destroy the Constitution itself. They can declare who are those religiously scrupulous, and prevent them from bearing arms. What, sir, is the use of a militia? It is to prevent the establishment of a stand-
Georgia proposed amending the language to require those exempted by the provision to "pay[] an equivalent," a motion that was opposed by Roger Sherman, who argued that such language was futile, since "those who are religiously scrupulous of bearing arms, are equally scrupulous of getting substitutes or paying an equivalent." Egbert Benson of New York, finally, proposed striking the language altogether, arguing that such exemptions should be left to the determination of the legislature.

These developments in the law occurred against a social backdrop in which conscription, in reality, played a minimal role. The
Continental Army of Revolutionary War fame was at least in its early years largely a volunteer force, recruited by the various States.93 "Difficulties in sustaining the ranks of the Continental Army led many states to augment recruiting efforts with drafts or, more frequently, with draft-induced substitutions," but these efforts were often intended more as a means to raise revenue than supply manpower needs directly.94

Indeed, some politicians and statesmen questioned whether conscription was compatible with a free Republic. In 1787, Edmund Randolph was recorded as stating "Draughts stretch the strings of government too violently to be adopted."95 In reflecting back on the Confederation period, Alexander Hamilton wrote obliquely of conscription as "those oppressive expedients for raising men which were upon several occasions practised."96 The debate over the congressional power to raise armies found in the ratifying conventions centered on the advisability of standing armies, not on conscription.97 When war broke out with Britain in 1812, the subject of conscription

94 Chambers, supra note 93, at 22. Chambers writes, "The widespread use of state drafts to maintain the Continental Army in the late 1770s appears, in practice, to have been New England-style 'quasi-drafts,' in which local militia officers 'drafted' affluent militiamen who then hired substitutes to serve for them in the Continental Army." Id.
95 Papers of Dr. James McHenry on the Federal Convention of 1787, reprinted in Documents Illustrative of the Formation of the Union of American States 923, 924 (Charles C. Tansill ed., 1927). In James Madison's account of this speech, Randolph is recorded as asserting that since "neither militia nor draughts being fit for defence" it was necessary to empower the federal government to raise money to pay for "enlistments." Notes of James Madison, reprinted in 1 The Records of the Federal Convention of 1787, at 17, 19 (Max Farrand ed., 1911); see also Charles A. Lofgren, Compulsory Military Service Under the Constitution: The Original Understanding, 33 Wm. & Mary Q. 61, 68–69 (1976).
96 The Federalist No. 22, at 138 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Although Hamilton spoke of the federal "power to levy troops" in The Federalist No. 23, supra, at 148, Lofgren makes clear that Hamilton did not intend by the word "levy" the power to conscript. See Lofgren, supra note 95, at 69 n.28.
97 See Bernard Donahoe & Marshall Smelser, The Congressional Power to Raise Armies: The Constitutional and Ratifying Conventions, 1787–1788, 33 Rev. Pol. 202, 204–10 (1971). Rhode Island proposed an amendment to the Constitution: "That no person shall be compelled to do military duty otherwise than by voluntary enlistment, except in cases of general invasion." Lofgren, supra note 95, at 84; see also 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 244 (Jonathan Elliot ed., 1836); Arthur A. Ekirch, Jr., The Civilian and the Mil-
was raised and debated seriously.\textsuperscript{98} James Monroe, President Madison’s Secretary of War, proposed “[n]ational conscription [as] an emergency measure, justified by military necessity and the inherent right of government to defend the community”\textsuperscript{99} and was opposed in his efforts by Daniel Webster, who denounced the plan as an unconstitutional act of “despotism.”\textsuperscript{100} The constitutional grant to Congress of the power to raise armies, Webster contended, should be “construed upon free principles,” which exclude the possibility of conscription.\textsuperscript{101} “The nation,” Webster concluded, “is not yet in a temper to submit to conscription. The people have too fresh [and] strong a feeling of the blessings of civil liberty to be willing thus to surrender it.”\textsuperscript{102}

It was only in 1863, at the height of the Civil War, that an effective conscription law was enacted by the federal government.\textsuperscript{103} The 1863

\textsuperscript{98} See \textsc{Chambers}, supra note 93, at 33–34.

\textsuperscript{99} \textit{Id.}

\textsuperscript{100} \textsc{Daniel Webster}, Address to the House of Representatives on the Conscription Bill (Dec. 9, 1814), \textit{in} \textsc{The Letters of Daniel Webster} 56, 61 (C.H. van Tine ed., 1902).

The administration asserts the right to fill the ranks of the regular army by compulsion. It contends that it may now take one out of every twenty-five men, & any part or the whole of the rest, whenever its occasions require. Persons thus taken by force, & put into an army, may be compelled to serve there, during the war, or for life. They may be put on any service, at home or abroad, for defence or for invasion, according to the will & pleasure of Government. This power does not grow out of any invasion of the country, or even out of a state of war. It belongs to Government at all times, in peace as well as in war, & is to be exercised under all circumstances, according to its mere discretion. . . .

Is this, Sir, consistent with the character of a free Government? Is this civil liberty? Is this the real character of our Constitution? No, Sir, indeed it is not. The Constitution is libelled, foully libelled. The people of this country have not established for themselves such a fabric of despotism.

\textsuperscript{101} \textit{Id.} at 63.

\textsuperscript{102} \textit{Id.} at 67. Several competing conscription bills were brought before Congress, but none were enacted. \textit{See} \textsc{Amar}, supra note 89, at 58. \textsc{Amar} reads the Second Amendment debate, together with the debate over conscription in the War of 1812, as denying to Congress, on originalist grounds, the power to conscript, although he asserts that “the Fourteenth Amendment reflected a much more sympathetic view of a national army and a much more skeptical view of state-organized militias.” \textit{Id.} at 59.

\textsuperscript{103} \textit{See} \textsc{Chambers}, supra note 93, at 50–55. \textsc{Chambers} notes that Lincoln’s efforts to institute a draft were opposed not only by northern peace Democrats but also by many Republicans who feared the loss of industrial manpower and the rise of “immense standing armies” that threatened to “undermine all our republican foundations.” \textit{Id.} at 50–51 (quoting Letter from Charles Francis Adams, Jr., to his father
version of the law did not allow for conscientious objection, although it permitted the hiring of substitutes.\footnote{The 1864 amendment provided:}

An 1864 amendment to the Draft Act allowed for conscientious objection.\footnote{That members of religious denominations, who shall by oath or affirmation declare that they are conscientiously opposed to the bearing of arms, and who are prohibited from doing so by the rules and articles of faith and practice of said religious denominations, shall, when drafted into the military service, be considered noncombatants, and shall be assigned by the Secretary of War to duty in the hospitals, or to the care of freedmen, or shall pay the sum of three hundred dollars . . . to be applied to the benefit of the sick and wounded soldiers . . . .}

With the victory of Union forces in 1865, the draft lapsed until the American entry into World War I in 1917, when a Selective Draft Act was passed, which established a program of national conscription on premises that differed from what had gone before.\footnote{Act of Feb. 24, 1864, ch. 13, § 17, 13 Stat. 9 (current version at 50 U.S.C. app. § 456(j) (1994)).}

"Each person subject to the Act was personally and absolutely liable for service with the national forces."\footnote{Nothing in this Act contained shall be construed to require or compel any person to serve in any of the forces herein provided for who is found to be a member of any well-recognized religious sect or organization . . . whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organizations, but no person so exempted shall be exempted from service in any capacity that the President shall declare to be noncombatant . . . .}

One could no longer hire a substitute or pay a commutation fee and thereby avoid one's military obligation. The 1917 Act, like its predecessor Civil War Act, also made allowance for conscientious objection.\footnote{Act of May 18, 1917, ch. 15, § 4, 40 Stat. 76, 78 (current version at 50 U.S.C. app. § 456(j) (1994)).}

Challenged in the courts, the statute was upheld by...
a unanimous Supreme Court, with Chief Justice Edward White authoring the opinion.\textsuperscript{109}

In 1931 the question of selective conscientious objection was presented to the Court in the context of a naturalization case.\textsuperscript{110} Douglas Macintosh was a Canadian national who received a graduate degree in theology from the University of Chicago and taught at Yale Divinity School until shortly after the outbreak of World War I, when he enlisted as a chaplain in the Canadian Army and saw service at the Battle of the Somme.\textsuperscript{111} He resumed his duties at Yale University following the armistice and filed a petition for naturalization that was acted upon in the spring of 1929.\textsuperscript{112} When asked routinely "whether he was willing to take up arms in defense" of the United States, Macintosh responded, "Yes, but I should want to be free to judge of the necessity."\textsuperscript{113} The hearing examiner rejected his application, a decision upheld by the federal district court,\textsuperscript{114} but reversed on appeal to the Second Circuit.\textsuperscript{115}

In a brief signed by John W. Davis, the "lawyer's lawyer" who had been the Democratic nominee for President in 1924, and by Charles E. Clark, the Dean of the Yale Law School, father of the Federal Rules of Civil Procedure and future federal judge, among others,\textsuperscript{116} it was

\textit{Id.} Russell notes, "This strict religious sect requirement was somewhat ameliorated by executive order and administrative regulation." Russell, \textit{supra} note 104, at 421.

\textsuperscript{109} Selective Draft Law Cases, 245 U.S. 366 (1918). White frontally challenged the old republican tradition of voluntary military service in his reasoning that the power to raise armies entrusted to Congress must have implicit within it the power to draft. "[A] government power which has no sanction to it and which therefore can only be exercised provided the citizen consents to its exertion is in no substantial sense a power." \textit{Id.} at 378.

\textsuperscript{110} United States v. Macintosh, 283 U.S. 605 (1931).

\textsuperscript{111} Brief for Respondent at 4, \textit{Macintosh} (No. 504).

\textsuperscript{112} \textit{Id.} at 4-5.

\textsuperscript{113} \textit{Id.} at 5. Macintosh explained his refusal:

I do not undertake to support "my country right, or wrong" in any dispute which may arise, and 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 be to the government of the day.

\textit{Id.}

\textsuperscript{114} \textit{Id.} at 5–6.

\textsuperscript{115} Macintosh v. United States, 42 F.2d 845, 849 (2d Cir. 1930).

\textsuperscript{116} On the role of John W. Davis and his firm in the handling of the case, see \textsc{William H. Harbaugh, Lawyer's Lawyer: The Life of John W. Davis} 281–97 (1973). The other signatories, in addition to Davis and Clark, were Allen Wardwell, Davis's partner, and W. Charles Poletti, a young associate in Davis's firm, who was principally responsible for drafting the brief. \textit{See id.} at 287–89. Poletti later briefly served as governor of New York. \textit{See id.} at 287.
contended that the question put to Macintosh violated the First Amendment's protection of religious liberty. The Davis-Clark brief quoted Joseph Story for the proposition that "[t]he rights of conscience are, indeed, beyond the just reach of any human power." In proposing a legal test for the Court to follow, the brief considered the Mormon polygamy cases to distinguish between overt acts which threaten "peace and good order"—such as polygamy—and affirmative commands of government that result in the violation of conscience. Such a distinction, the brief asserted, would allow for the possibility of selective conscientious objection, in light of the American tradition of recognizing such claims of conscience and also in light of American treaty obligations, particularly the Kellogg-Briand pact, which acknowledged the possibility of unjust wars. Not only the American government, but her citizens should be allowed to act on their judgment about a given war's morality. After all, the history of the First Amendment and its interpretation by the courts leaves not "the slightest indication" that Congress may "compel a citizen to flout the will of God and commit what in his sincere belief is none other than murder."

The Supreme Court, in an opinion authored by George Sutherland, whose formative years as a lawyer were spent in the Utah Territory during the closing years of the campaign against polygamy,

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117 See generally Brief for Respondent at 4, Macintosh (No. 504).
118 Id. at 37 (quoting 2 Joseph Story, Commentaries on the Constitution § 1876 (1891)).
119 Id. at 35.
120 See id. at 35–36.
121 See id. at 36.
122 See id. at 35.
123 See Hadley Arkes, The Return of George Sutherland: Restoring a Jurisprudence of Natural Rights 40–49 (1994). Sutherland's father had immigrated to the United States from England after converting to Mormonism, but subsequently lapsed. See id. at 40. Sutherland himself was raised outside the Church but attended the Provo Academy, the predecessor to Brigham Young University. He maintained a warm relationship with the Church's leadership and occasionally defended the Church's interest in court, despite his vigorous opposition to polygamy. Id. at 40–45. As a young lawyer in the 1880s and 1890s his views on the relationship of the religious conscience and the law must have been shaped by the campaign against polygamy, the most important constitutional issue of the day.
ruled by a five-to-four margin in favor of the government.\footnote{124} Although his judicial work is now considered an example of natural-rights jurisprudence, Sutherland’s opinion in \textit{Macintosh} can fairly be described as nearly totalistic in the demands the state is empowered to make upon the religious conscience in time of war.\footnote{125} Constitutionally, the war power is “well-nigh limitless.”\footnote{126} “From its very nature the war power, when necessity calls for its exercise, tolerates no qualifications or limitations . . . .”\footnote{127} Against such a power the religious conscience must yield; “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.”\footnote{128} Chief Justice Charles Evans Hughes, joined by Justice Oliver Wendell Holmes, Jr., Justice Louis Brandeis, and Justice Harlan Fiske Stone\footnote{129}—the weightier if not greater part of the Court—dissented. Hughes side-stepped the conflict Sutherland’s majority opinion had set up between an all-powerful state and the individual’s conscience by distinguishing between two realms, “the domain of power” and the “forum of conscience.”\footnote{130} The State is supreme in the domain of power because “government may enforce obedience to laws regardless of scruples,” but “in the forum of conscience, duty to a moral

\begin{footnotes}
\footnote{124} See United States v. Macintosh, 283 U.S. 605 (1931).
\footnote{125} In a work dedicated to Sutherland’s jurisprudence of natural rights, Arkes fails even to cite \textit{Macintosh}. See \textit{Arkes, supra} note 123.
\footnote{126} \textit{Macintosh}, 283 U.S. at 624.
\footnote{127} \textit{Id.} at 622. Sutherland continues: “unless found in the Constitution or in applicable principles of international law. In the words of John Quincy Adams—‘This power is tremendous; it is strictly constitutional; but it breaks down every barrier so anxiously erected for the protection of liberty, property and of life.’” \textit{Id.} Sutherland himself cites to no instance in which the Constitution might restrain the war power.
\footnote{128} \textit{Id.} at 623.
\footnote{129} In his private capacity, Stone had written, the year after World War I ended: “Both morals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital, indeed, is it to the integrity of man’s moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it in the process.” Harlan Fiske Stone, \textit{The Conscientious Objector}, 21 \textit{Colum. Univ. Q.} 233, 269 (1919).
\footnote{130} \textit{Macintosh}, 283 U.S. at 633 (Hughes, C.J., dissenting).
\end{footnotes}
power... has always been maintained." Such a distinction, Hughes continued, reflects the nature of religious liberty guaranteed by the First Amendment. "One cannot speak of religious liberty, with proper appreciation of its essential and historical significance, without assuming the existence of a belief in supreme allegiance to the will of God.... [F]reedom of conscience itself implies respect for an innate conviction of paramount duty." Focusing on the question of the selective conscientious objector, Hughes added:

Nor is there ground, in my opinion, for the exclusion of Professor Macintosh because his conscientious scruples have particular reference to wars believed to be unjust. There is nothing new in such an attitude. Among the most eminent statesmen here and abroad have been those who condemned the action of their country in entering into wars they thought to be unjustified.

By 1940, however, nine years after the decision in Macintosh, with war raging in Europe, the United States reinstated the draft in the Selective Service Act of that year. The Act provided for the protection of conscientious objectors in language far broader than the Civil War or World War I statutes, although in actual operation many more conscientious objectors were imprisoned during World War II than during World War I. The constitutionality of conscription was

131 Id. Hughes added: "The reservation of that supreme obligation, as a matter of principle, would unquestionably be made by many of our conscientious and law-abiding citizens. The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation." Id. at 633–34.

132 Id. at 634.

133 Id. at 635. In noting that there was a long tradition in the United States of respecting conscientious objection, Hughes stated, "The Congress has sought to avoid... conflicts in this country by respecting our happy tradition. In no sphere of legislation has the intention to prevent such clashes been more conspicuous than in relation to the bearing of arms." Id. at 634.


135 "Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." Selective Training and Service Act of 1940, § 4(g), 54 Stat. 885, 889 (current version at 50 U.S.C. app. § 456(j) (1994)).

136 See Mulford Q. Sibley & Philip E. Jacob, Conscription of Conscience: The American State and the Conscientious Objector 1940–1947, at 332 (1952). "About nine times as many objectors were sent to prison during the Second World War as were incarcerated during the First World War; even in proportion to the total numbers conscripted, there were between two and three times as many." Id. Catholics made up a very small subset of the conscientious objector population. It has...
not challenged judicially during the war, although Thomas Reed Powell, Joseph Story Professor of Law at Harvard Law School, writing on the eve of American entry into the war, in 1941, distinguished Macintosh as a naturalization case and asserted, "Notwithstanding all judicial declarations, it has not been actually decided that a conscientious objector, not within any group exempted by Congress, can be put into the front-line trenches or put into the army where certain refusals to obey orders may be punished by death."\(^{137}\)

The Selective Service Act of 1940 was superseded by a new Selective Service Act, enacted in 1948, which also accorded protection to those "who, by reason of religious training and belief [are] conscientiously opposed to participation in war in any form."\(^{138}\) Paraphrasing Hughes's dissent, Congress defined "religious training and belief" as meaning "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation."\(^{139}\) The language of the 1948 Act was retained in the conscientious objector provision of the Military Selective Service Act of 1967,\(^{140}\) which was the statute under which Louis Negre sought protection.

Judicially, substantial development took place in the area of conscientious objection in the period between 1941 and 1970. In United States v. Seeger,\(^{141}\) the Court expanded protection to cover believers outside the Judeo-Christian tradition by exempting from military service those whose objections could be grounded in a sincerely-held system of beliefs that filled in their lives the role played by the Supreme Being in traditional theology.\(^{142}\) In Welsh v. United States,\(^{143}\) the Court

\[^{137}\text{Thomas Reed Powell, }\text{Conscience and the Constitution, in Democracy and National Unity 1, 18 (William T. Hutchinson ed., 1941).}\]


\[^{139}\text{Id. Congress excluded from protection those whose objections arise from "essentially political, sociological, or philosophical views or a merely personal moral code." Id.}\]

\[^{140}\text{See Pub. L. No. 90-40, 81 Stat. 100 (codified as amended at 50 U.S.C. app. § 456(j) (1994)). Missing from the 1967 Act was the sentence grounding religious training on belief in a Supreme Being, although the statute excluded from protection those whose objections were based upon "essentially political, sociological, or philosophical views or a merely personal code." Id.}\]

\[^{141}\text{380 U.S. 163 (1965).}\]

\[^{142}\text{Id. at 173–80.}\]

\[^{143}\text{398 U.S. 333 (1970).}\]
extended protection to "all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become an instrument of war."144

In United States v. Sisson,145 the question of selective conscientious objection to the Vietnam War was squarely presented. John Heffron Sisson, a 1967 graduate of Harvard College, objected on non-theistic, conscientious grounds to induction into the United States Armed Forces.146 Judge Charles Wyzanski commenced his analysis of Sisson's case with Thomas Reed Powell's observation of twenty-eight years earlier that there was, as yet, no firm judicial authority permitting the conscription of conscientious objectors not actually protected by Congress.147 He continued by stressing that the conscientious objector played an important role in society:

[E]very man shares and society as a whole shares an interest in the liberty of the conscientious objector, religious or not. The freedom of all depends on the freedom of each. Free men exist in free societies. Society's own stability and growth, its physical and spiritual prosperity are responsive to the liberties of its citizens, to their deepest insights, to their free choices—"That which opposes, also fits."148

Wyzanski recognized that society's interest in protecting the conscientious objector differed based on the severity of the conflict in which it is involved, citing for authority Sutherland's majority opinion in Macintosh.149 A war for national survival might require the overriding of conscientious scruples, "[b]ut a campaign fought with limited forces for limited objects with no likelihood of a battlefront within this country and without a declaration of war is not a claim of comparable magnitude."150 Grounding his decision on the Free Exercise Clause

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144 Id. at 344 (Black, J., plurality).
146 Id. at 904–05. At trial, Sisson grounded his objections to participation in the Vietnam War on "the U.N. Charter, the charter and judgments of the Nuremberg Tribunal, and other domestic and international matters bearing upon the American involvement in Vietnam." Id. at 905.
147 Id. at 908.
148 Id.
149 Wyzanski proposed that Sutherland's seemingly unrestricted doctrine of the war power be limited by emphasizing that it is in "the last extremity" that Congress may "compel the armed service of any citizen in the land, without regard to his objections or his views in respect of the justice or morality of the particular war or war in general." Id. at 907 (quoting United States v. Macintosh, 283 U.S. 605, 623–24 (1931)).
150 Id. at 909.
of the First Amendment, Wyzanski determined that the balance of interests favored Sisson.\textsuperscript{151} Wyzanski concluded by observing that

\begin{quote}
...the true secret of legal might lies in the habits of conscientious men disciplining themselves to obey the law they respect without the necessity of judicial and administrative orders. When the law treats a reasonable, conscientious act as a crime it subverts its own power. It invites civil disobedience. It so impairs the very habits which nourish and preserve the law.\textsuperscript{152}
\end{quote}

Thus, as Negre’s case made its way in the courts, two alternative constitutional traditions were clearly available. One tradition, firmly grounded in the statist reasoning of the Selective Draft Act Cases and the majority opinion of United States v. Macintosh, stressed the potentially limitless demands the state might make upon each of its citizens. The war power, in Sutherland’s estimation, was “well-nigh limitless”; only congressional grace might protect the conscientious objector. On the other hand, a competing tradition might be traced through the Davis-Clark brief in Macintosh and the dissenting opinion of Charles Evans Hughes in the same case, the Thomas Reed Powell essay, and Judge Wyzanski’s decision in United States v. Sisson. Lacking the authoritative pronouncement of a Supreme Court majority opinion to give it binding force, it nevertheless stood as a strong restatement of principles that might serve to limit governmental overreaching. Both traditions could look back to the early history of the Republic for support. Conscription, although utilized during the Revolutionary War, was viewed with deep suspicion by the Founders. Protection of conscience, in the form of legislative exemptions from military service, was routine in the revolutionary era, but it would be a mistake to read into these protections firm conclusions as to whether they were to be understood to be a matter of legislative grace or constitutional right. The question whether Congress might compel one who had conscientious scruples to kill or to subject him to the alternative of summary punishment remained open.

\textsuperscript{151} “The chief reason for reaching this conclusion after examining the competing interests is the magnitude of Sisson’s interest in not killing in the Vietnam conflict as against the want of magnitude in the country’s present need for him to be so employed.” Id. at 910.

\textsuperscript{152} Id. at 911.
III. "The Moral Right Conscientiously to Object to a Particular War is Incontestable": The Development of Doctrine and the Shaping of Public Opinion

It is in the writings of St. Augustine, the great theologian of fourth- and fifth-century North Africa, that one sees articulated the concepts that would shape just-war thought for succeeding generations. Augustine grounded his theory of justified warfare on humankind's sinfulness: Because of original sin, conflict and strife are inevitable in the world. "[I]n an imperfect world, the just man, no less than the scoundrel, is faced with imperfect choices and with the harsh realities that flow from them." Augustine limited the waging of war to legitimately constituted authority, which alone has power from God to take life, and sought as well strictly to constrain the motives under which the state might act. War should not be waged for reasons of conquest or the desire to dominate (libido dominandi), but should only be waged for defensive reasons and out of love for the other. Practically speaking, Augustine left little room for the individual conscientious objector, although Louis Swift cautions that Augustine did leave room for individual disobedience of unjust laws.

The lawyers and theologians of the twelfth and thirteenth centuries worked these insights into a systematic doctrine known as just-war doctrine.

153 David Lenihan makes the important point that Augustine himself did not propose a unified theory of just war—his admonitions on warfare occur in the context of works on other subjects—and also cautions that Augustine's thought on warfare is quite complex, but that this sense of complexity was lost as succeeding generations mined Augustine for proof-texts supportive of their own arguments. See David A. Lenihan, The Just War Theory in the Work of Saint Augustine, in AUGUSTINIAN STUD. 37 (1988).


155 Id. at 128–31. Augustine went so far as to teach that an individual confronted with deadly force may not kill his attacker, since this amounted to preferring a temporal good—one's life—over virtuous conduct. Id.

156 See Louis J. Swift, Search the Scriptures: Patristic Exegesis and the Ius Belli, in PEACE IN A NUCLEAR AGE: THE BISHOPS' PASTORAL LETTER IN PERSPECTIVE, supra note 11, at 48, 60–67. "[T]he use of force must be motivated by love and carried out for the public good by those charged to do so." Id. at 64.

157 See Swift, supra note 154, at 139.

158 See id. at 140.
theory. Gratian, the twelfth-century father of the systematic study of canon law, cited authorities that justified warfare to recover lost goods, or to repel enemy attack, or to defend "[one]self, [one's] associates, the Church, the patria, or the commonwealth," and he followed these citations by generalizing that "a just war is waged by an authoritative edict to avenge injuries." Gratian followed Augustine in allowing little room for the conscientious objector, although some of his late twelfth-century successors began to open the door slightly in this direction. Thirteenth-century commentators, especially Pope Innocent IV, moved further in the direction of allowing room for individual conscientious scruples by relying on the Roman law of actions to discourage vassals from participating in their lords' unjust wars. A vassal, Innocent argued, could maintain an actio mandati against his lord to obtain compensation for losses suffered in a just war, but he was without remedy should he participate in an unjust conflict. A vassal thus had economic incentive to scrutinize carefully the merits of his lord's cause. The fourteenth-century writer Giovanni da Legnano extended this teaching even further, proposing an entire system of actions that revolved around the question whether the participants fought in a just or unjust conflict.

161 Id. at 64.
162 Writing about some of the principal late twelfth-century legal commentaries, Frederick Russell has recorded:

The Summa: "Imperatorie Maiestati" refused to allow Christians who had formerly fought for an infidel prince to be promoted to higher clerical orders. A more generally applicable opinion was that of Simon of Bisignano, who prohibited subjects from obeying the commands of heretical, schismatic, or excommunicated lords. Huguccio more precisely forbade vassals of an excommunicated lord to perform those obligations stipulated in the feudal contract, including joining the lord's army, going to war with him, and defending him. This position was potentially of crucial importance for the extension of ecclesiastical doctrine and discipline. Yet the construction of a theory of disobedience to orders that were defective as to authority or unjust in cause still lay in the future.

Id. at 104–05 (footnotes omitted).
163 See id. at 150–53.
164 See id. at 151.
165 See Giovanni da Legnano, Tractatus de Bello, de Repressalis, et de Duello (Thomas Erskine Holland ed., 1964); see also James A. Brundage, The Limits of the War-making Power: The Contribution of the Medieval Canonists, in Peace in a Nuclear Age:
A few of the medieval theologians also cautiously endorsed the possibility of individual conscientious objection. Peter the Chanter, like the lawyer Innocent IV, made reference to the feudal relations of his day in proposing that knights and vassals were under no duty to serve in their overlord's unjust wars. Similarly, in oblique fashion, Roland of Cremona (ca. 1230) proposed that an armed force that doubted the justness of its cause was obliged to obey God rather than man and to disobey its orders to fight. Other theologians, however, rejected these conclusions, and by the middle and later thirteenth century Alexander of Hales and Thomas Aquinas had moved the terms of debate away from considerations of the justness of the cause and back toward the Augustinian concern with competent authority. Aquinas, however, by emphasizing that one had a general right to disobey the unjust commands of rulers, at least indirectly allowed for conscientious objection to unjust war.

It is in sixteenth-century Spain that these elements were woven together into a consistent theory of conscientious objection. Francisco de Vitoria, working in the context of a Spanish state that was far more unified and hierarchically structured than the feudal kingdoms Innocent IV or Giovanni da Legnano or Peter the Chanter wrote about, grounded his theory of objection on the right to resist tyrannical rule. In his treatise *De Potestate Civili* ("On the Civil Power"), Vitoria maintained that the state was a natural institution and the out-

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166 See *Russell*, supra note 160, at 224–25. Russell explains Peter the Chanter's teaching:

[T]he context [of his statement] suggests that Peter intended to champion a vassal's right to refuse to serve in his lord’s unjust war. Well aware of the tendency of vassals to disobey their lords when it suited their own purposes, Peter probably intended to build upon this practice to deprive princes of manpower for their unjust wars.

167 See *id.* at 228.

168 See *id.* at 233–34.


growth of societies of persons that organized themselves so that their members might bear one another’s burdens.171 Royal power, the most natural form of governance, Vitoria continued, is derived ultimately from divine and natural law, not from the political community.172 But while kingly power is the result of immutable law, particular kings are made by the political community.173 The earliest kings were elected and, Vitoria observed, many rulers in his own day—the Pope, the kings of Venice and Florence—were still elected.174 Hence the power to choose one’s king remained in some residual sense in the people, since it is a part of the natural law.175

Because the political community is responsible for choosing a king, it is equally responsible when that ruler goes astray.176 Vitoria selected the example of unjust war to make his point: Should a king wage unjust war against his neighbors, they may rightly prosecute war against the unjust king and kill his subjects, “even if they are all innocent.”177 Thus the state is obliged to entrust power only to those who rule rightly and, by implication, to remove tyrants from power.178 Furthermore, the ruler’s legislation counts as binding law only insofar as it is in conformity with the requirements of the natural and divine law and actually serves the interest of the state.179

While the right of the individual to object conscientiously to war is implicit in his analysis of state power, Vitoria made the point explicitly in his two treatises on war, De Iure Belli and De Bello.180 Echoing Gratian, Vitoria asserted that there was only one cause for just war: to

171 “Cum itaque humanae societates propter hunc finem constitutae sint, scilicet ut alter alterius onera portaret . . . .” Francisco de Vitoria, De Potestate Civili, in Obras de Francisco de Vitoria: Selecciones Teologicas 156 (Teofilo Urdanoz ed., 1960). Vitoria continued, “Patet ergo fontem et originem civitatum rerumque publicarum non inventum esse hominum neque inter artificiata numerandum, sed tanquam a natura profectum quae ad mortalium tutelam et conservationem hanc rationem mortalius suggestit.” Id. at 157.
172 Id. at 160-61.
173 Id. at 160.
174 Id. at 180.
175 See id. (“Item, quia aliquando genus humanum habuit istam potestatem, scilicet eligendi monarcham . . . . Ergo nunc potest. Cum enim illa potestas esset iuris naturalis, non cessat.”).
176 See id. at 167 (“Quod tota respublica potest puniri licite pro peccato regis.”).
177 Id. “Unde si rex inustum bellum inferret alicui principi, potest ille qui iniuriam accept praedari et alia iure belli persequi, et occidere regis subditos, etiam si omnes sint innocentes.” Id.
178 Id.
179 See id. at 183.
180 See Simmons, supra note 170, at 124–28.
right a wrong.\textsuperscript{181} Not every wrong, furthermore, can be the subject of a just war: warfare entails slaughter, fire, and laying waste, and thus the wrong being vindicated must be of comparable gravity.\textsuperscript{182} No other motivation for warfare—such as differences of religion, or expansion of empire, or princely glory—can make it just.\textsuperscript{183}

Vitoria considered and rejected the proposition that the prince’s belief in the justness of his cause was sufficient to make the war just.\textsuperscript{184} After all, princes rarely wage war in subjective bad faith and routinely believe they are acting justly.\textsuperscript{185} The consequence of relying on the subjective judgment of the prince would be that all belligerents would be innocent, even Turks or Saracens who chose to make war on Christians thinking they were thereby fulfilling their duty to God.\textsuperscript{186} It is essential therefore, Vitoria continued, that the prince carefully scrutinize the propriety of the war and even give an audience to the views of his adversaries.\textsuperscript{187}

Nor is the prince alone in this obligation. Vitoria followed this analysis by asking whether subjects were similarly obliged to scrutinize the justness of a war and by answering in the affirmative.\textsuperscript{188} “If a subject is convinced of the injustice of a war, he is not permitted to fight, even at the command of his prince,”\textsuperscript{189} Vitoria asserted. One who was convinced the cause was wrong but still fought would be engaged in

\textsuperscript{181} Francisco de Vitoria, \textit{De Iure Belli, in De Indis et de Iure Belli Reflectiones} 269, 279 (Ernest Nys ed., 1917) (“Unica est et sola causa iusta inferenda bellum, iniuria accepta.”).

\textsuperscript{182} “Cum ergo quae in bello geruntur, omnia sint gravia et atrocia, ut caedes, incendia, vastationes, non licet pro levibus iniurias bello persequi auctores iniuriarum, quia iuxta mensuram delicti debet esse plagarum modus.” \textit{Id.} at 278.

\textsuperscript{183} “Et primum quidem dubium circa iustitiam belli, utrum ad bellum iustum sufficiat quod princeps credat se habere iustum causam. Ad hoc sit prima propositio: Non semper hoc satis est.” \textit{Id.} at 281.

\textsuperscript{184} “Communiter enim non contingit quod principes gerant bellum mala fide, sed credentes se iustam causam sequi.” \textit{Id.}

\textsuperscript{185} “Et sic omnes bellantes essant innocentes, et per consequens non liceret interficere in bello. Item alias etiam Turcae et Saraceni gererent iusta bella adversus Christianos: putant enim se obsequium praestare Deo.” \textit{Id.} at 281–82.

\textsuperscript{186} “Oportet ad bellum iustum magna diligentia examinare iustitiam et causas belli et audire etiam rationes adversariorum, si velint ex aequo et bono discipere.” \textit{Id.} at 282.

\textsuperscript{187} “Si subdito constat de iniquititia belli, non licet militare, etiam ad imperium principis.” \textit{Id.}
the killing of innocents, which is always wrong. Not even soldiers are to be excused from killing in bad faith.

Vitoria considered all advisors to a prince—senators, petty nobility, and all those admitted to government council—to be obliged independently to scrutinize the justice of a war. Minores—members of the lower orders who are not admitted to council—are not required to examine the justice of the cause, but may ordinarily rely upon the judgment of public authority. But even such lesser folk are not altogether exonerated. The evidence of the injustice of a war might be so overwhelming that ignorance would not excuse even them. Thus, the Roman soldiers who crucified Jesus should be held responsible for following Pilate's command since, presumably, they must have known they were doing wrong.

Vitoria then proceeded to limit the reach of this right of conscientious objection. Only those who are in a state of certainty regarding a war's injustice are to refrain from fighting. Where a subject is in a state of doubt concerning the war, he is obliged to follow his prince. To do otherwise would be to expose the state to the deprivations of the enemy, which is a more serious wrong than fighting in a state of doubt. In this way, Vitoria balanced the requirements of the state with the obligations of conscience.

Vitoria reiterated these views in his De Bello, which is a commentary on Thomas Aquinas's treatment of just war. Subjects who are aware of the injustice of a war are obliged to refrain from fighting, even if their prince attempts to coerce them, since one must place loyalty to God ahead of loyalty to the prince. Elites are further

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190 "Haec patet, quia non licet interficere innocentem quacumque auctoritate. Sed hostes sunt innocentes in eo casu." Id.
191 "Ergo miles etiam mala fide pugnantes non excusantur." Id.
192 See id.
193 Id. at 283.
194 "Nihilominus possent esse talia argumenta et indicia de injustitia belli quod ignorantia non excusaret etiam huiusmodi subditos militantes." Id.
195 Id.
196 Id. at 285.
197 Id.
198 "Sed, si subditi in casu dubii non sequantur principem suum in bellum, exponunt se periculo prodendi hostibus Rempublicam, quod multo gravius est quam pugnare contra hostes cum dubio." Id.
199 This treatise is found in Vitoria's commentary on the Summa Theologiae of Thomas Aquinas. See 2 Francisco de Vitoria, Comentarios a la Segunda Secundae de Santo Tomás q. 40, at 279-93 (Vicente Beltrán de Heredia ed., 1932).
200 "S[i] constat bellum esse injustum vel si scitur vel isti habent conscientiam quod est injustum, non possunt bellare, etiamsi cogantur a principe. Ratio est quia ille peccat mortaliter, et obediendum est Deo potius quam illi." Id. at 282.
obliged to inform themselves independently of the justice of the war and to advise the prince of the impropriety of his proposed course of conduct, although commoners are not under such an obligation. Where there is doubt as to the justice of a war, soldiers may freely participate in combat, but willful ignorance of injustice does not excuse even common footsoldiers. Indeed, even common soldiers who are enriched by participation in a war they know to be unjust are obliged to make restitution.

Alphonsus de Ligouri (1696–1787), the great eighteenth-century lawyer and moralist, founder of the Redemptorist Order, and standard reference for moralists of the next century and a half, reiterated Vitoria’s claims. Placing his treatment of just war under the Fifth Commandment’s prohibition against killing, Ligouri argued that if the subject of a prince is summoned to war, he may fight so long as his conscience is in a state of doubt. But where a soldier understands a war to be unjust, he may not receive absolution for his sin unless he seeks, as quickly as possible, his dismissal from the military and in the interim refrains from hostile acts.

The theological principle of selective conscientious objection was further refined in 1961, on the eve of the American involvement in Vietnam, by Paul Ramsey. Writing in the context of the reformed Protestant tradition, Ramsey acknowledged that historically the competence to determine the justice of a war had belonged to the leaders of states, but that the situation had changed with the advent of mod-

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201 Secundo dico, quod plebei, qui non admittuntur ad consilium principis, non tenentur scire causam belli justam, sed possunt sequi regem. Patet hoc, quia non omnes possunt informari de causa belli. Tertio dico, quod magnates qui ad consilium principis admittuntur, illi tenentur inquirere de causa belli, ad eos enim exspectat hoc.

Id.

202 Verum est quod, ut diximus in materia de ignorantia, si illa est crassa et quasi ignorantia volita, non excusat. Ita dico quod si sunt apparentiae quod bellum non est justum: ego dubito, sed quia habeo affectionem ad regem meum, cludio oculos; quid ego scio? dico quod tunc non excusarer a peccato. Quando ergo dico quod ubi est dubium possunt sequi bellum subdit, intelligitur quando dubium est probable.

Id. at 282–83.

203 Id. at 283.


205 Id. at 260.

206 Id. at 261 ("Miles intelligens bellum esse injustum, in quo est, non potest absolvì, nisi velit, quàm primum potest, curare dimissionem, et intereà abstinère ab actibus hostilitatis.").

ern democracies. Christian citizens, with the responsibility of electing the leaders of states, were now equally responsible with their leaders for seeing to it that warfare remained just and limited with respect to both ends and means. And if individual Christians had the responsibility of judging the justice of their leaders' actions, Ramsey concluded, they must also be accorded the right of selectively objecting to wars they determine to be unjust.

In the same year Ramsey published his book, American military advisers began to arrive in Vietnam in significant, though still limited, numbers. After serving in a subsidiary capacity for several years, Americans became more directly involved in fighting following the Gulf of Tonkin Resolution of August 1964 and the escalation of combat operations by President Lyndon Johnson in the spring of 1965.

By the late spring of 1965, one could find organized opposition to the war, particularly on American university campuses. The beginning of religious opposition to the war is dateable to the same period of time.

In 1964, the Jesuit periodical *America* could editorialize against those who claim "the right to prefer his opinion to the judgment of the law regarding compulsory military service. No government, we think, could take a different attitude and allow everyone who says, 'I am against war,' to escape the draft." By 1965, however, selective

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208 See id. at 126–27.
209 See id. at 127–28.
210 See id. at 128–29.
212 See id. at 380–94, 411–41.
Conscientious objection had begun to emerge as an issue in Christian debate on Vietnam. In an editorial in *Christianity and Crisis*, Roger Shinn raised the question of selective conscientious objection.\(^{216}\) Shinn acknowledged the difficulties involved in granting selective conscientious objector status, but then pointed to the basic dilemma: "[T]he person cannot surrender his conscience to the state. The Christian in particular will always remember the apostolic protest, 'We must obey God rather than men.' And all who believe in the dignity of the person must be reluctant to compel anyone to act against deep conviction."\(^{217}\) In a sermon preached a week later, but published the following April, Shinn elaborated on these themes.\(^{218}\) He conceded that restricting conscientious objector status to strict pacifists superficially made sense,\(^{219}\) but he recognized that there were some whose objection to the war in Vietnam might with equal conscientiousness be grounded on other moral principles.\(^{220}\) Rhetorically, Shinn asked, "Is not the recognition of conscience the difference between a democratic and a totalitarian government?"\(^{221}\)

The next month, in an article published in the *Christian Century*, John Swomley took note of some eighty men who had recently claimed selective conscientious objector status and called upon the churches to defend their rights.\(^{222}\) "The issue of conscientious objection is crucial," Swomley asserted. "[T]he church dare not wait to make up its mind until the war is over or until the 'just-war' objectors are in prison."\(^{223}\)

Advocacy of selective conscientious objection quickened in intensity in 1966. Writing in the *Christian Century* in February 1966, Alan Geyer, the director of international relations of the United Church of Christ, invoked the just-war theory to justify selective conscientious ob-

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217 Id. at 224.
219 See id. at 23. "The basic meaning of the draft is a subjection of the individual judgments to a social judgment. To give individuals freedom to pick and choose their wars might subject the principle of universal obligation to unlimited personal c.i.p. price." Id.
220 Id. at 23–24.
221 Id. at 24.
222 See John M. Swomley, Jr., *The "Limited" Objectors*, 82 *CHRISTIAN CENTURY* 1541–42 (1965). "Now the churches must squarely face up to the fact that there are in our midst conscientious men who object to the war in Vietnam because they believe it is not a just war." Id.
223 Id.
"Just war theory," Geyer asserted, "generates its own implicit demand for conscientious objection to some wars which may be waged by a democratic state." After reviewing the criteria by which a given war is judged to be moral or immoral, Geyer concluded by proposing additional criteria by which the individual objector might demonstrate the basis of his objections.

Writing in April 1966, John Pemberton, Executive Director of the A.C.L.U., asserted that the distinction drawn by the draft laws between protected pacifism and unprotected just-war objection was untenable. The selective objector, Pemberton observed, merely requests the same treatment historically accorded pacifists and should not, on that account, be discriminated against. Furthermore, a draft registrant acting in bad faith to obtain a deferment, Pemberton added, "would be the last person to identify himself as an objector to this particular war, rather than as a pacifist."

In October 1966, the American Lutheran Church issued a statement on the Vietnam War that raised the issue of conscientious objection. Acknowledging that historically the Lutheran Church has taught that "a Christian, as a citizen willingly should assume the duties of citizenship, including the bearing of arms and engaging in 'just
war,"'231 the statement went on to recognize that individuals "following the dictates of . . . conscience" may conclude that "they cannot with good conscience bear arms."232 The Church promised support to such objectors and "respectfully ask[ed] [the federal government] that the pertinent provisions for alternative service be applied to those of its members whose conscience impels them to refuse the bearing of arms and commends to its members who are conscientious objectors those alternatives for fulfilling the responsibility of citizenship."233

In a series of lectures published in February 1966, John C. Bennett, the President of Union Theological Seminary, observed that the Second Vatican Council had called for the protection of those who "object to particular wars" and predicted that Catholics "who conscientiously oppose particular wars" would become "quite a new factor" in opposing the war in Vietnam.234

Official Catholic teaching on the relationship of the individual conscience and just war, in the years between World War II and Vietnam, had undergone substantial development. The revised Baltimore Catechism of 1949, following Alphonus de Ligouri's arrangement, treated just war under the Fifth Commandment—"Thou Shalt Not Kill."235 Killing in war, the Catechism asserted, is permissible only where the conflict satisfies the criteria of a just war—it must be "necessary to defend the rights of the state in a grave matter;"236 it must be "undertaken only as a last resort after all other means have failed;"237 and it must be "conducted in accordance with natural and international law."238 Only then may "[t]he life of another person . . . lawfully be taken."239

In his Christmas Message of 1956, Pope Pius XII, with the Soviet Union's crushing of the Hungarian uprising fresh in his mind,240 sought to contextualize just-war theory to fit the demands of the Cold

231 Id.
232 Id.
233 Id.
236 Id. at 205.
237 Id.
238 Id. The Catechism added that an otherwise just war ceases to be just where it is "continued after due satisfaction has been offered or given by the unjust aggressor nation." Id. at 206.
239 Id. at 205.
War and to respond to the issue of the dissenting conscience. The West, Pius observed, stands "in the face of an enemy determined to impose on all peoples, in one way or another, a special and intolerable way of life . . . [M]ethods which rely on tanks [that] noisily crash over borders," and "the threat of using atomic weapons" create "conditions, which have no counterpart in the past." In these circumstances, Pius asserted, it is lawful for a nation to go to war, "for effective self-defense and with the hope of a favorable outcome." Where the state is democratically constituted and confronted with "a moment of extreme danger," Pius continued, it would not be proper for "a Catholic citizen . . . [to] invoke his own conscience in order to refuse to serve and fulfill those duties the law imposes."

The Second Vatican Council, however, proposed a reformulation of just-war thought that was sensitive to a different aspect of the Cold War, the consequences of nuclear conflagration. In Gaudium et Spes, the Pastoral Constitution on the Church in the Modern World, the Council asserted that the invention of weapons of mass destruction now threatens "total warfare," the result of which "would be the almost complete reciprocal slaughter of one side by the other." Because of the threat of global destruction, the Council felt itself compelled "to undertake a completely fresh reappraisal of war," condemning as "a crime against God" "[e]very act of war directed to the indiscriminate destruction of whole cities or vast areas with their inhabitants." The Council reminded Christians that the natural law continued to govern the waging of war and admonished those in positions of responsibility that "blind obedience [to orders] cannot excuse those who carry them out." The Council then proposed that "it seems just that laws

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241 See Pope Pius XII, The Contradiction of Our Age, in 3 THE POPE SPEAKS, supra note 240, at 331 342–45.
242 Id. at 342–43.
243 Id. at 343.
244 Id.
245 Id.
246 Id. It must be noted that Pope Pius XII retained as presuppositions of his analysis traditional just-war criteria, that is self-defense and hope of a favorable outcome. Where these criteria were not satisfied, the traditional teaching on conscientious objection presumably remained effective.
247 Gaudium et Spes, supra note 61, ¶ 18, reprinted in VATICAN COUNCIL II: THE CONCILIAR AND POST CONCILIAR DOCUMENTS, supra note 61, at 903, 989.
248 Id.
249 Id. at 990.
250 Id. at 988. The Council continued, "[W]e cannot commend too highly the courage of the men who openly and fearlessly resist those who issue orders of this kind." Id.
should make humane provision for the case of conscientious objectors who refuse to carry arms, provided they accept some other form of community service."\textsuperscript{251}

Pope John XXIII and Pope Paul VI also added to the changing Catholic attitude toward war. Fearful of uncontrolled nuclear exchange, John XXIII wrote in \textit{Pacem in Terris}, "For this reason it is hardly possible to imagine that in the atomic era war could be used as an instrument of justice."\textsuperscript{252} Negotiation, John proposed, should become the means of settling disputes and a means by which "men may come to discover better the bonds that unite them together."\textsuperscript{253} Two years later, addressing the United Nations in October 1965, Pope Paul VI pronounced, "never again one against the other, never, never again!"\textsuperscript{254} Paul VI went on to outline a program for "building peace," which included disarmament, economic justice toward developing nations, and respect for human rights.\textsuperscript{255}

Neither Council nor popes abandoned the just-war theory. Indeed, the Second Vatican Council continued to endorse the possibility of "the right of lawful self-defense."\textsuperscript{256} But one can also locate in these texts a shift in the emphasis of doctrine: while war might still be recognized as an instrument of justice, its indiscriminate character, given the deployment of weapons of mass destruction, meant that the decision to go to war must truly be one of last resort. A set of teachings was put in place that could offer substantial comfort to those who dissented from the decision to wage war.

Official Catholic documents in the mid-1960s addressing specifically the Vietnam War, however, moved only tentatively toward a critical position. In an address to the College of Cardinals in June 1966, Pope Paul VI criticized the "sad spectacle" of war in Vietnam and called on the parties to "achieve a solution through frank and honorable negotiations."\textsuperscript{257} In October, in the encyclical \textit{Christi Matri}, Paul VI returned to the theme of Vietnam, expressing his concern that "the danger of a more serious and extensive calamity hangs over the

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{251}] \textit{Id.}
\item[\textsuperscript{253}] \textit{Id.} at 43.
\item[\textsuperscript{255}] \textit{See id.} at 54–57.
\item[\textsuperscript{256}] \textsc{Vatican Council II, supra note 247, at 989.}
\item[\textsuperscript{257}] \textsc{Pope Paul VI, A Review of World Trouble Spots, Address to the College of Cardinals (June 24, 1966),} \textit{in 11 The Pope Speaks, supra note 254, at 236, 238.}
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human family and has increased, especially in eastern Asia where a bloody and hard-fought war is raging."\(^{258}\)

In June 1966 Lawrence Cardinal Shehan, archbishop of the founding American see of Baltimore, issued a pastoral letter, *Peace and Patriotism*, intended to “recall[] some of the pertinent principles formulated by the Vatican Council concerning modern warfare.”\(^{259}\) Shehan stressed the Vatican Council’s recognition of patriotism as a virtue of citizenship, but also reminded his readers that citizenship entailed the duty to examine the moral choices made by government.\(^{260}\) Supporters as well as opponents of the Vietnam War were equally bound by this obligation.\(^{261}\) Shehan also made it clear that accommodation must be made for the conscientious objector: “[S]ince modern warfare bears within it the seeds of global holocaust, the viewpoint of the sincere conscientious objector merits careful consideration.”\(^{262}\)

In mid-November 1966, the Catholic Bishops’ Conference issued a statement entitled *Peace and Vietnam*.\(^{263}\) Recognizing that nations have the right to defend themselves and further acknowledging that “what a nation can do to defend itself, it may do to help another in its struggle against aggression,”\(^{264}\) the bishops judged that “it is reasonable to argue that our presence in Vietnam is justified.”\(^{265}\) The bishops went on, however, to stress that “[w]hile we can conscientiously support the position of our country in the present circumstances, it is the duty of everyone to search for other alternatives.”\(^{266}\) The bishops stressed as well that “[n]o one is free to evade his personal responsibility by leaving it entirely to others to make moral judgments”\(^{267}\) and that “some provision should be made for those who conscientiously object to bearing arms.”\(^{268}\)

\(^{258}\) Pope Paul VI, *Christi Matris* (Sept. 15, 1966), in 11 THE POPE SPEAKS, supra note 254, at 221, 221.


\(^{260}\) Id.

\(^{261}\) See id.

\(^{262}\) Id. at 2.

\(^{263}\) Peace and Vietnam, Statement Issued by the National Conference of Catholic Bishops (Nov. 18, 1966), reprinted in 3 Pastoral Letters of the United States Catholic Bishops, supra note 9, at 74.

\(^{264}\) Id. at 75.

\(^{265}\) Id. at 76.

\(^{266}\) Id.

\(^{267}\) Id. at 74.

\(^{268}\) Id. at 75.
In 1966, there also appeared a pamphlet issued by the Catholic Peace Fellowship, with the imprimatur of the Archdiocese of New York. Written by James Forest, the pamphlet called attention to the pacifist witness of much of the early Church and also took note of modern Christian martyrs, like Franz Jägerstatter, an Austrian who was beheaded by the Nazis for his refusal to take part, even in a noncombatant role, in a war he considered unjust.

Forest recognized the primary role conscience must play in the Christian’s decision whether to take up arms and also included a section entitled “The Unjust War C.O.,” which recited the major arguments in favor of this option. Forest illustrated the importance of individual moral judgment by reference to the Nuremberg War Crimes Tribunal and to Adolph Eichmann’s subsequent failed defense that he was only following orders in carrying out the Holocaust.

On November 30, 1966, as if to put an end to further discussion of the subject, a full-page advertisement in the New York Times, sponsored by Freedom House and signed by numerous public figures—Dwight Eisenhower, Dean Acheson, Thurman Arnold, Jacob Javits, and others of similar stature—announced in a banner headline that “Extremists Could Delay Vietnam Negotiations.” The text of the advertisement condemned five “fantasies,” including the proposition that “military service in this country’s armed forces is an option exercisable solely at the discretion of the individual.” “No nation anywhere, now or in the past,” the advertisement continued, “has ever recognized that principle. Those who urge individual defiance on moral grounds merely betray the genuine tenets of conscientious objection which our people respect.”


270 Id. at 3–5.

271 Id. at 5.

272 Id. at 8–9.

273 The Nuremberg Tribunal rejected as a defense the claim that the defendant was only following orders. “The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment.” Charter of the Int’l Military Tribunal, Oct. 6, 1945, U.S.–Fr.–U.K.–U.S.S.R., art. 8, reprinted in 1 Office of U.S. Chief of Counsel for Prosecution of Axis Criminality, Nazi Conspiracy and Aggression 4, 6 (1946).

274 See Forest, supra note 269, at 8.


276 Id.

277 Id.
This advertisement was followed in February 1967 by the Report of the National Advisory Commission on Selective Service.278 Chaired by Burke Marshall, vice-president and general counsel of IBM, the Commission comprised leaders from industry, labor, civil rights, the media, and the academy279 and achieved fame for its recommendation that selective service be accomplished through a draft lottery.280 A majority of the Commission rejected the possibility of selective conscientious objection for a series of five reasons that mingled prudential and administrative concerns and betrayed a basic lack of understanding of arguments on behalf of selective objection.281 At the heart of the majority's rejection of selective objection was the belief that total pacifism was a "moral" judgment, while selective objection was "political."282 The Commission's majority failed to appreciate that at the heart of the Catholic analysis of just war was the moral


279 See id. at v.

280 See id. at 37-40.

281 See id. at 50–51.

[The majority believes that the status of conscientious objection can properly be applied only to those who are opposed to all killing of human beings under any circumstances. It is one thing to deal in law with a person who believes he is responding to a moral imperative outside of himself when he opposes all killing. It is another to accord a special status to a person who believes there is a moral imperative which tells him he can kill under some circumstances and not kill under others. Moreover, the question of "classical Christian doctrine" on the subject of just and unjust wars is one which would be interpreted in different ways by different Christian denominations and therefore not a matter upon which the Commission could pass judgment.

Secondly, the majority holds that so-called selective pacifism is essentially a political question of support or nonsupport of a war and cannot be judged in terms of special moral imperatives. . . .

Third, in the majority view, legal recognition of selective pacifism could open the doors to a general theory of selective disobedience to law, which could quickly tear down the fabric of government; the distinction is dim between a person conscientiously opposed to participation in a particular war and one conscientiously opposed to payment of a particular tax.

Fourth, the majority of the Commission was unable to see the morality of a proposition which would permit the selective pacifist to avoid combat service by performing noncombatant service in support of a war which he had theoretically concluded to be unjust.

Finally, the majority felt that a legal recognition of selective pacifism could be disruptive to the morale and effectiveness of the Armed Forces.

Id.

282 See id. at 50.
requirement to judge, according to well-established criteria, the justice of a particular course of conduct.

Far from ending debate, these two documents prompted an outpouring of criticism. In a symposium in *Worldview*, Staughton Lynd challenged the veracity of the Freedom House claim that selective objection lacked historical grounding, while Paul Ramsey, who had been among the signatories of the Freedom House document, sought to reconcile his stance in 1966 with his stance in 1961. The human person, Ramsey argued, is obliged to work for the common good, which may entail military service, but the person is not wholly absorbed by the state. The state's decision to go to war should be taken as presumptively moral, but a certain freedom must nevertheless be accorded mature and informed conscientious judgment. Thus, Ramsey concluded, while the draft ought to be continued, the laws should also take account of the morally responsible selective objector.

John Courtney Murray, defender of religious liberty, advocate on behalf of the compatibility of Catholicism and the American constitutional experiment, proponent of the just-war theory, and dissenting member of the Marshall Commission, also publicly raised his voice on behalf of selective conscientious objection. Speaking at commencement at Western Maryland University in June 1967, two months before his death, Murray implicitly refuted those who would separate politics and morality:

> The essential significance of the traditional [just-war] doctrine is that it insists, first, that military decisions are a species of political decisions, and second, that political decisions must be viewed, not

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286 See id. at 9–11.
287 Id. at 8, 11.
288 See NOONAN, supra note 1, at 340–48.
simply in the perspective of politics as an exercise of power, but of morality and theology in some valid sense. 291

Indeed, Murray continued, just-war thought itself is grounded on the moral insight that "the order of justice and law cannot be left without adequate means for its own defense, including the use of force." 292 Any use of force by the state, however, must satisfy traditional moral criteria. 293 The application of these criteria requires the "consideration of certain political and military factors," but does not thereby "make the judgment purely political. It is a judgment reached within a moral universe, and the final reason for it is of the moral order." 294

Murray chose not to debate the merits of selective objection, finding that "[s]trictly on grounds of moral argument, the right conscientiously to object to participation in a particular war is incontestable." 295 He admonished his listeners that one had to separate the case for selective objection from the war in Vietnam: Murray himself could maintain the justice of the Vietnam War while at the same time advocating that selective objection be recognized legally. 296 Finally, Murray asserted that the burden of proof of any person asserting selective objector status rested with the individual and that the objector must be prepared to accept the consequences of his conscientiously-made decision. 297

The major religious periodicals quickly followed the lead of the theologians in editorializing in favor of selective conscientious objection. Christianity and Crisis proposed that "it is now time for our draft procedures to recognize the rights of conscientious objectors who, although they are not pacifists, nevertheless have moral objections to

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293 Id.

294 Id.


297 Id., reprinted in A Conflict of Loyalties: The Case for Selective Conscientious Objection, supra note 284, at 27 ("When [the objector's] personal conscience clashes with the conscience of the laws, his personal decision is his alone. It is valid for him, and he must follow it. But in doing so he still stands within the community and is subject to its judgment as already declared.").
fighting in some particular war.”

Commonweal, for its part, responded to the Freedom House advertisement by criticizing its historiography—conscription was a recent phenomenon and even nations engaged in modern warfare sometimes respected selective objection—and answered the Marshall Commission’s distinction between morality and politics by observing that “[m]oral decisions . . . overlap with political ones.” America called for a reform of the draft laws declaring, “We believe that the young man who feels he cannot in conscience kill those whom his government has designated ‘enemies’ in Vietnam should not be required to kill.”

Christian churches, in their official documents, also endorsed selective objection. The United Church of Christ recognized that selective objection on the basis of just-war theory “is a valid expression of a Christian’s responsibility to make his daily decisions in the love of God and in obedience to his living Word.” The General Convention of the Episcopal Church declared itself in favor of selective objection in September 1967, an endorsement that was followed by the Episcopal House of Bishops in October 1968. The General Assembly of the United Presbyterian Church declared in 1969 that “individuals who object to particular wars which they judge to be unjust or unconscionable [are] entitled to appeal to the teaching of the church as the foundation of their moral stand.” The World Council of Churches called upon its members to “give spiritual care and support” to those who “object to participation in particular wars.”

In November 1968 the National Conference of Catholic Bishops joined this list when it included a section in its pastoral letter, Human Life in Our Day, that addressed “The Role of Conscience.” Taking account of the Second Vatican Council’s endorsement of conscientious objection and declaring that “the time has come” to modify the

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298 Reappraising the Draft, 27 Christianity & Crisis 73, 73–74 (1967).
300 Id. at 140.
301 The Selective Conscientious Objector, 117 America 73, 73 (1967).
302 Words of Conscience, supra note 230, at 74, 76 (quoting United Church of Christ, Statement of the General Synod of the United Church of Christ (1967)).
303 Id. at 28–29 (quoting House of Bishops, Episcopal Church, Selective Conscientious Objection (1968)).
304 Id. at 62 (quoting The United Presbyterian Church, Statement of the 181st General Assembly on War, Peace, and Conscience (1969)).
305 Id. at 80 (quoting World Council of Churches, Toward Justice and Peace in International Affairs ¶ 21 (1968)).
306 See 3 Pastoral Letters of the United States Catholic Bishops, supra note 9, at 192–94.
draft laws to recognize selective conscientious objection, the bishops went on to urge that "we continue to hope that, in the all-important issue of war and peace, all men will follow their consciences." Articles in the American Ecclesiastical Review and The Priest helped to disseminate this teaching to the clergy.

The agitation in Christian circles soon replicated itself in public policy and legal debates. Carl Cohen, in the Nation, argued that the selective service statute's protection of the pacifist but not the just-war objector was "gravely unjust. It discriminates among citizens, regarding their qualification for an established legal protection, on the basis of the content of their moral principles." Declaring its support for Judge Wyzanski's decision in United States v. Sisson, the New Republic asserted "that democratic governments cannot long carry on wars that violate the conscience of large numbers of its citizens." In the summer of 1969, in an essay declaring that henceforth only volunteers should be used for combat operations, William F. Buckley, the conservative commentator, wrote, "[I]t is uniquely the command to kill, rather than the risk of being killed, that galls the refractory conscience." Against this rising chorus of voices, then-sitting Justice Abe Fortas reiterated the arguments of the Marshall Commission: "From the state's viewpoint, a disagreement about the morality of a particular war is a difference of judgment or policy; it is not and cannot be accepted as stemming from a moral or religious belief."

Legal literature, for the most part, advocated in favor of selective objection. Ralph Potter, Professor of Social Ethics at Harvard Divinity School, relying in part on foreign precedents, such as the British use of "conscientiousness" rather than strict pacifism as the touchstone in conscientious objector cases, argued on behalf of congressional action to confer recognition on selective objection. Michael Tigar, for his part, argued that the Free Exercise Clause required constitu-

307 Id. at 193.
308 See John F. Harvey, Selective Conscientious Objection, 159 Am. Ecclesiastical Rev. 418 (1968).
314 Abe Fortas, Concerning Dissent and Civil Disobedience 88 (1968).
316 See id. at 98–99.
tional recognition of both total and selective objectors. A Comment in the University of Chicago Law Review argued in favor of extending congressional protection to non-religious pacifists but not to selective objectors, while a lead article in the Virginia Law Review cautiously defended the free-exercise rights of selective objectors and called on the Court to take a case to resolve this important outstanding question. An article in the Catholic Lawyer made the case that the judiciary’s protection of Jehovah’s Witnesses but not Catholics amounted to invidious religious discrimination.

Robert Drinan, however, the future congressman, then a professor at Boston College Law School, pushed the arguments the farthest. Recent ecclesiastical teaching, particularly Pope John XXIII’s Pacem in Terris, called into question the continued vitality of just-war thought. The American intervention in Vietnam, Drinan continued, had “fail[ed] to observe the rules of war.” From this starting point, Drinan moved to the conclusion that pacifism, understood as “a policy of passive resistance or militant nonviolence toward [aggression],” was the practice observed by the early Church and the only reasonable alternative available to Christians in the modern world. Drinan’s radicalism would have obviated the need for selective objection by moving the American Catholic Church away from just-war thought and toward a pacifist witness.

322 See Pope John XXIII, supra note 252.
323 See Drinan, supra note 321, at 38-39.
324 Id. at 135.
325 Id. at 142.
326 See id. at 136-68.
327 See id. at 167.
IV. "The Teaching of the Catholic Church [Affirms] the Primary Duty of Man to Follow Conscience as the Voice of God": Negre’s Case Before the Supreme Court

Following receipt of a second set of orders, delivered verbally, not in writing, to report for transshipment to Vietnam, Negre filed an application for a temporary restraining order and a writ of habeas corpus on February 14, 1969, in order to prevent his transport overseas and to obtain his release from service. The government responded, and on March 6, 1969, the application was argued in federal district court in San Francisco. On March 13, the district court denied the application, agreeing with the Army’s determination that Negre’s opposition to the Vietnam War was based on a personal code and not on religious belief. Negre then filed for a stay from the court’s order with both the district court and the Ninth Circuit Court of Appeals, in order to seek relief from the United States Supreme Court. Justice William O. Douglas, acting in his capacity as Circuit Justice, granted Negre’s stay on April 7, 1969.

On April 21, 1969, the full Supreme Court rejected Negre’s application for a stay, over Justice Douglas’s dissent. Negre had been attempting to go through proper military channels in seeking his release, and Justice Douglas, a World War I veteran, saw the question presented as “whether the federal courts have any oversight over members of the Armed Forces when they are seeking to exhaust their military administrative remedies.” Douglas subsequently rephrased the issue more boldly: “Can a federal court ‘in aid’ of its jurisdiction, 28 U.S.C. § 1651, keep a member of the Armed Services from being spirited out of the country?”

His efforts at obtaining a stay from the courts at an end, Louis Negre shipped out for Vietnam the next day. According to Richard Harrington, the Army “assigned four enlisted personnel to seize his arms and legs and carry him on board the aircraft which carried him

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328 See supra text accompanying note 48.
329 See Brief of the Appellees at 3, Negre v. Larsen, 418 F.2d 908 (9th Cir. 1969) (No. 24067).
330 Id. at 4.
331 See Appellants’ Opening Brief on Appeal at 9–11, Negre (No. 24067).
332 Brief of the Appellees at 4–5, Negre (No. 24067).
334 Id.
335 Id. at 968–69.
336 Id. at 969.
Negre, however, continued to prosecute the merits of his case in the courts by appealing to the Ninth Circuit the district court's denial of habeas corpus. He continued to be represented at both the district court and appellate levels by Richard Harrington.

The Ninth Circuit rejected Negre's claim to selective objection in a per curiam decision issued in November 1969. The court's opinion ignored entirely the just-war tradition—its reasoning amounting to raw judicial fiat.

Our analytical view of the record reveals that appellant has a personal moral code based on his sociological and philosophical views, rather than a conscientious objection to participation in war in any form by reason of religious training and belief. He objects to the war in Vietnam, not to all wars.

In February 1970, in a parallel development, the Northern District of California ruled in favor of a Catholic conscientious objector. Represented by Richard Harrington, James McFadden was a former Catholic seminarian who was then a student of theology at the University of San Francisco. Advised by his spiritual director, John Tracy Ellis, the great church historian, "to follow his conscience," McFadden took the position that "the war in Vietnam [was] an 'unjust' war and that it would therefore violate his conscience to submit to induction."

Judge Alfonso Zirpoli, a Catholic, a graduate of Boalt Hall Law School at the University of California-Berkeley, and an appointee to the federal bench by John F. Kennedy, grounded his decision in McFadden on the Catholic conception of conscience.

338 Letter from Richard Harrington to Dr. Charles J. Reid, Jr., supra note 40, at 3 n.3.
339 Negre v. Larsen, 418 F.2d 908 (9th Cir. 1969).
340 Id.
341 Id. The three judge panel consisted of Richard H. Chambers, an Eisenhower appointee and Chief Judge of the Ninth Circuit; Montgomery Oliver Koelsch, also an Eisenhower appointee; and John F. Kilkenny, then a district court judge sitting by designation, soon to be elevated to the Ninth Circuit Court of Appeals by Richard Nixon. See Judges of the United States 66, 217–18, 223 (1979) (providing biographical information for Chambers, Kilkenny, and Koelsch).
342 Negre, 418 F.2d at 908.
344 See Letter from Richard Harrington to Dr. Charles J. Reid, Jr., supra note 40, at 3.
345 Id.
346 McFadden, 309 F. Supp. at 504.
This doctrine can be capsulized as follows: There exists a divine law. This law is perceived by man through his conscience. When man detects this law of God which is written in his conscience he must obey its commands. If the laws of man are contrary to the law of God, as seen through one's conscience, the individual must obey God.348

Zirpoli determined that McFadden's free exercise of religion was threatened by induction.

The statute in question puts the most direct burden on the Catholic selective objector—a criminal penalty. Direct restrictions on the exercise of one's religion have been upheld in the past, but those cases dealt with the protection of society's health and morals from affirmative acts required by religion. . . . However, in the instant case defendant is not being restrained from doing an affirmative act, rather, the Selective Service Act is commanding him to perform an affirmative act—participation in a war which his conscience tells him is unjust.349

Two weeks prior to the decision in McFadden, in late January of 1970, the Supreme Court heard oral arguments in United States v. Sisson.350 Although counsel for Sisson raised a number of broad challenges to the selective service laws—arguing not only that Congress lacked the power to compel the service of selective objectors, but that it lacked altogether the authority to conscript absent a declaration of war351—a five member majority of the Court avoided the issue of selective objection, deciding the case on jurisdictional grounds.352 In dissent, Justice White chastised the majority: "[T]he issues raised by Sisson are difficult and far-reaching ones, but they should be faced and decided."353 As if to answer White's criticism, the first footnote of the majority opinion indicated that a writ of certiorari had been is-

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348 McFadden, 309 F. Supp. at 504-05.
349 Id. at 505 (citations omitted).
351 See Motion to Affirm 8-13, United States v. Sisson, 399 U.S. 267 (1970) (No. 305); Brief for Appellee, Sisson (No. 305).
352 See Sisson, 399 U.S. at 269-308.
353 Id. at 349 (White, J., dissenting).
sued to hear Negre's case, as well as that of Guy Gillette, "in order to consider the 'selective' conscientious objector issue that underlies the case now before us but which we cannot reach." 354

In the opening brief before the Supreme Court, Harrington, joined on the brief by his law partner Leigh Athearn 355 and by Stuart Land, from the firm of Arnold & Porter, 356 began with a constitutional argument. There was no question that Negre was motivated to seek conscientious objector status because of the teaching of his religious faith. 357 An Army hearing officer had himself reached this conclusion. 358 Reading broadly Seeger v. United States 359 as allowing only in-

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354 Id. at 270 n.1.
355 For Leigh Athearn, see the entry for Athearn, Chandler, and Hoffman, 1 MARTINDALE HUBBELL LAW DIRECTORY 1198B (1970).
356 Land's current entry in Martindale Hubbell characterizes him as a specialist in food and drug and medical device litigation. See 5 MARTINDALE HUBBELL LAW DIRECTORY DC47B (2000).

In an e-mail, Stuart Land recalls that he did not play a direct role in drafting the briefs. He explains the extent of his own involvement.

I don't recall the circumstances but I remember getting involved very late in the case shortly before the briefs were filed. I think I helped Richard in his prepping for the oral and went to the oral argument....

I think I got involved because Richard wanted a Washington law firm to help with the logistics and the firm he originally connected with backed out because of a conflict at the last moment. Presumably, he learned or knew at that time, that I had long been very active in the anti-war movement. Among other things, I was the co-chair [of] the Lawyers Against the War, an ad hoc group of lawyers mostly from D.C. and other parts of the east coast that was actively campaigning against the war.... For what it's worth, during this period, because of my stance, I received a lot of inquiries from young men and their parents seeking my assistance to help them obtain conscientious objector status. As I recall, many of the men involved genuinely opposed the war on moral or "just" war grounds (as I did), but in the absence of a strong religious unselective anti-war justification (e.g. Quakers) faced dimmed prospects of success. Some went to Canada, others joined the National Guard (if they had the right connections) or took their chances with the draft numbers. It was an extremely difficult time to be a young man eligible for military service. I had hoped the Negre case would provide a breakthrough to provide some opening of the extremely narrow limits recognized for conscientious objection, but it was not to be.

E-mail from Stuart Land to Charles Reid (Feb. 9, 2001) (on file with Charles J. Reid, Jr.).

358 Id. at 11–12.
359 380 U.S. 163 (1965). Seeger had involved a petitioner who claimed conscientious objector status not on the basis of traditional religious belief, but on the basis of his philosophical views. See supra text accompanying notes 141–42.
queries into the sincerity of one's conscientious objections to war.\textsuperscript{360} Harrington, Athearn, and Land asserted that, in light of the Army's own conclusions about Negre's beliefs, he should not be subjected to legal disability "because of the particular phraseology or statement of doctrine by Negre's religion as contrasted to the statement or doctrine of other religions such as those of the traditional pacifist sects."\textsuperscript{361} This line of reasoning, if it had been adopted, would have had far-reaching implications, closing off all inquiries into the content of religiously based objection and effectively placing selective objectors and pacifists on an equal footing.

The brief buttressed this argument by relying on \textit{Sherbert v. Verne}\textsuperscript{362} and \textit{McFadden}. \textit{Sherbert} taught that "it was unconstitutional to compel the citizen to abandon one of the precepts of her religion on the one hand or to forego the governmental benefit of unemployment compensation on the other hand."\textsuperscript{363} More emphatically, \textit{McFadden} taught that a believer should not be compelled to choose between his beliefs and imprisonment.\textsuperscript{364} Negre's conduct was identical to that of a traditional pacifist objector.\textsuperscript{365} Against the teaching of \textit{Sherbert} and \textit{McFadden}, the brief alleged that the government sought to impose on Negre a constitutionally unacceptable religious orthodoxy before he could qualify for statutory protection.

The government in the present case seeks to deny Negre the benefit of discharge from military service not because of Negre's conduct, but solely because Negre will not surrender his belief: Namely, his belief that the Catholic statement of theology in respect of war is correct. The Government demands that Negre to qualify for discharge adopt the belief that the statement of theology of some traditional pacifist sect in respect of war is correct. Correspondingly, the

\begin{footnotesize}
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  \item \textsuperscript{360} See Opening Brief for Louis A. Negre, Petitioner at 1–10, \textit{Negre} (No. 325).
  \item \textsuperscript{361} \textit{Id.} at 12.
  \item \textsuperscript{362} 374 U.S. 398 (1963).
  \item \textsuperscript{363} Opening Brief for Louis A. Negre, Petitioner at 14, \textit{Negre} (No. 325).
  \item \textsuperscript{364} \textit{See id.}
  \item \textsuperscript{365} \textit{See id.} at 15.
\end{itemize}
\end{footnotesize}
Government demands that Negre admit that Catholic teaching in respect of service in war is erroneous.\textsuperscript{366}

The remainder of the brief addressed the legislative history and judicial interpretation of the Military Selective Service Act’s protection of conscientious objectors.\textsuperscript{367} Noting that the statutory provision at issue originated in Chief Justice Hughes's dissent in \textit{Macintosh},\textsuperscript{368} the brief maintained that it was clear Congress intended “to recognize religious training and belief and to refrain from imposing any religious test as a condition of disability or benefit imposed by the government.”\textsuperscript{369} The statute at issue protected those “conscientiously opposed to participation in war in any form.”\textsuperscript{370} Parsing this language, the brief asserted that the phrase “in any form” should modify “participation,” not “war.”\textsuperscript{371} They continued by invoking the broad language employed by the Court in \textit{Welsh v. United States},\textsuperscript{372} seeking to establish that religiously motivated objectors were entitled to special consideration.\textsuperscript{373} And once again, the authors returned to the theme of the discrimination Negre would suffer if his right to objector status were denied.

Catholics, like Jehovah’s Witnesses, follow God’s commands over those of man; and Catholics as set out in Negre’s application for discharge explicitly characterize conscience as representing the voice of God. If participation in war violates the Catholic’s conscience, Catholic doctrine is clear that the individual Catholic has a duty to comply with his own conscience and to refuse military service.

Petitioner in this case is no more required to become a Jehovah’s Witness to qualify for exemption from military service than he is required to become a Quaker: The First Amendment affords Petitioner equal protection in the exercise of his religious belief when—in refusing military service which would violate con-

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  \item \textsuperscript{366} \textit{Id.}
  \item \textsuperscript{367} \textit{Id.} at 19–38.
  \item \textsuperscript{368} See \textit{supra} notes 129–33 and accompanying text.
  \item \textsuperscript{369} Opening Brief for Louis A. Negre, Petitioner at 21, \textit{Negre} (No. 325).
  \item \textsuperscript{370} Military Selective Service Act of 1967 § 6(j), 50 U.S.C. app. § 456(j) (1994).
  \item \textsuperscript{371} Opening Brief for Louis A. Negre, Petitioner at 35–36, \textit{Negre} (No. 325).
  \item \textsuperscript{372} 398 U.S. 333 (1970); see \textit{supra} text accompanying notes 143–44.
  \item \textsuperscript{373} See Opening Brief for Louis A. Negre, Petitioner at 28, \textit{Negre} (No. 325). “Whatever may be the limits of Constitutional and Congressional recognition of non-religious conscientious objection, all justices of the Supreme Court found common ground in \textit{Welsh v. United States}, that Congress intended to exempt from military service men who objected based upon their religious training and belief.” \textit{Id.} (citation omitted).
\end{itemize}
science—the Catholic's conduct is the same as that of the Jehovah's Witness's or the Quaker's.374

An amicus brief by the Executive Board of the National Federation of Priests' Councils filed on Negre's behalf made clear the urgency of the priests' interest in the case.

Priests by their vocation are called to counsel, train and guide the faithful in matters pertaining to faith, morals and the formation of conscience. . . .

In counseling draft-aged youth, the priest is often caught in a painful dilemma when confronted with a situation in which the young Catholic feels that his direct or indirect participation in a particular war would be immoral. In guiding the young man to a personal decision on the matter, the priest is placed in the dubious position of having to counsel his subject to disregard the law in order to follow a belief which results from religious training, or to disregard that belief in order to follow the law. . . .

The interest of priests in the present case is particularly sharp because they are in jeopardy of prosecution for counseling Catholic selective objectors to refuse military service, if the selective service laws are construed to disqualify Catholic selective objectors from exemption. For the Catholic religion unequivocally requires priests to counsel the faithful to follow conscience in respect of military service, whether or not civil law makes any provision for following conscience.375

The Priests' Councils' brief stressed "that the Catholic has a religious duty to refuse military service in certain cases; namely in any form in a war which he in conscience has concluded does not meet the tests fixed by his religion to permit participation in war."376 The Catholic conscientious objector "in refusing military service is submitting to the moral power of divine law as he perceives it in conscience under his religion, exactly as is the conscientious objector from a traditional pacifist sect who perceives divine law in his conscience."377 To deny protection to the Catholic while conferring legal status on the traditional peace-church objector would violate the American constitutional order. "Any law or regulation which seeks to impose disability or punishment upon an individual solely for his religious beliefs and

374 Id. at 35.
375 Brief of Executive Board of the National Federation of Priests' Councils—Amicus Curiae at 2–3, Negre (No. 325).
376 Id. at 20.
377 Id. at 21.
not for his conduct is unconstitutional as a violation of the First and Fifth Amendments.\textsuperscript{378}

An amicus brief submitted by the National Council of Churches emphasized the unique position of the Catholic objector, who could not categorically pronounce against all war, but who was rather obliged by the tenets of faith to examine the merits of a particular war before giving or withholding support.

Negre could not, on the basis of his religious belief, claim exemption as a conscientious objector prior to his application for discharge from the Army. His Roman Catholic training compelled no such action until he had an opportunity to examine the factual situation pertaining to the war in Vietnam, to draw a conclusory opinion, on the basis of his training and conscience, as to the justness of that war, and until he was faced with the imminent prospect of direct, personal participation in that war alone.\textsuperscript{379}

"Participation in war," the brief continued, "is an inescapable subject matter for religion and for the human conscience which derives its content from religious training and belief."\textsuperscript{380} By discriminating between Negre's claims and those of other conscientious objectors, the government "was entering upon forbidden inquiries in the field of conscience."\textsuperscript{381}

Other amici briefs made similar points. A brief by the American Friends Service Committee recalled the conscientious dissent of early Quakers like George Fox and William Penn and asserted that Negre, should be protected in his act of conscience.\textsuperscript{382} A brief by the American Jewish Congress stressed that "[l]imiting exemption from military service on the basis of conscientious objection to those whose objection is to all wars constitutes preferential treatment of adherents of some religious or ethical systems over others in violation of the No-Establishment Clause of the First Amendment."\textsuperscript{383} Noting that Judaism, like Catholicism, "is not a religion of traditional pacifism,"\textsuperscript{384} the brief went on to assert that Jews, like Catholics, are bound to examine their consciences on the subject of the justice or injustice of particular

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\item \textsuperscript{378} Id. at 19.
\item \textsuperscript{379} Brief Amicus Curiae by the National Council of the Churches of Christ in the U.S.A. Joined by Eight of Those Churches at 12, \textit{Negre} (No. 325).
\item \textsuperscript{380} Id. at 21.
\item \textsuperscript{381} Id.
\item \textsuperscript{382} Brief of the American Friends Service Committee—Amicus Curiae, \textit{Negre} (No. 325).
\item \textsuperscript{383} Brief of American Jewish Congress Amicus Curiae at 5, \textit{Negre} (No. 325).
\item \textsuperscript{384} Id. at 11.
\end{itemize}
wars and so would be affected by the outcome of Negre.\textsuperscript{385} A brief submitted on behalf of Louis P. Font, a devout Methodist, a West Point honors graduate, and a religious selective objector, drew parallels between Font's situation and Louis Negre's.\textsuperscript{386} A brief by a private attorney, George Altman, whose interest in the case was based on his involvement in similar cases, attacked the Vietnam War as an ideological struggle of an essentially different character than the sort of war contemplated by the statute.\textsuperscript{387}

Representing the government was Erwin Griswold, formerly the dean of Harvard Law School, appointed Solicitor General in 1967 by Lyndon Johnson and now retained in that office by Richard Nixon.\textsuperscript{388} Religiously, Griswold described himself as "at heart a Christian,"\textsuperscript{389} although he also conceded that his skepticism about conventional religious doctrine could lead others to call him "a humanist or some sort of agnostic."\textsuperscript{390} Griswold's early career, prior to joining the Harvard Law School faculty in the fall of 1934, was taken up in public service, and he continued to perform public service in the years of his deanship, from 1946 to 1967.\textsuperscript{391} Appointed to the United States Civil Rights Commission by John Kennedy in the summer of 1961,\textsuperscript{392} Griswold distinguished himself, according to Theodore Hesburgh, who served with him, in breaking the back of the discriminatory use of

\textsuperscript{385} Id. at 11-15.

\textsuperscript{386} See Brief of Louis P. Font, Amicus Curiae at 2-3, Negre (No. 325).

\textsuperscript{387} See Motion for Leave to File a Brief Amicus Curiae at 1, Negre (No. 325). Citing language in Sicurella v. United States, 348 U.S. 385 (1955), Altman asserted: \[ \text{[I]} t \text{ is readily observable that the Vietnam conflict is . . . not "between nations," it is strictly a war against an ideology, a sort of crusade, like those so in fact entitled, the "Crusades" of the 12th and 13th centuries. . . . The "enemy" is not a "nation," nor even the citizens or members of a nation. It is the individuals in and around Vietnam, however organized, who believe in, or are sympathetic to, or support, a given economic ideology.} \]

\[ \text{Id. at 3-4.} \]


\textsuperscript{389} Id. at 31.

\textsuperscript{390} Id. Griswold explains some of the tensions inherent in his view of religion. "I particularly dislike the symbolism of the 'Body and Blood of Christ,' and found, as I learned more about it, that religious strife through the centuries had been useless, inhumane, and essentially irreligious, as I saw it." Id. "[B]affled by the Trinity, and particularly by 'the Holy Ghost,'" Griswold also acknowledged "[finding] much of the teaching of Christ encouraging and inspiring." Id.

\textsuperscript{391} Id. at 195.

\textsuperscript{392} Id. at 245.
It was now Griswold's task to defend the government's position that the selective service laws did not improperly operate to deprive Catholics and other just-war objectors of their rights.

Joining Griswold on the brief were Will Wilson, Assistant Attorney General and Chief of the Criminal Division of the Department of Justice, and William Bradford Reynolds, Assistant to the Solicitor General. Wilson had distinguished himself in World War II, serving in Australia, New Guinea, and Luzon, and had subsequently made a reputation for himself as an aggressive prosecutor in Texas, where in 1960 he was named the nation's leading state attorney general. A "stern moralist," Wilson was forced to resign from the Justice Department a year after Negre when he was implicated in a series of questionable financial dealings. Reynolds, for his part, a descendant on his father's side of the sixteenth-century Pilgrim governor of Massachusetts William Bradford and on his mother's a descendant of the du Pont family, graduated from Yale College and Vanderbilt Law School in the mid-1960s, but did not serve in the military. He would later serve a controversial tenure as assistant attorney general for civil rights in the 1980s. Also on the brief were staff attorneys Beatrice Rosenberg and Richard Rosenfield.

Griswold and his team at an early stage in the process made the decision to treat Negre's case as indistinguishable, legally, from that of Guy Gillette, whose case was joined with his at the time certiorari was granted. Indeed, the Solicitor General's Office submitted identical

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398 Id.

399 See *Reynolds, William Bradford*, *Current Biography Yearbook* 1988, at 476 (Charles Moritz ed., 1988). While a member of the Solicitor General's Office, Reynolds was the principal author of forty Supreme Court briefs. Id.


briefs in response to the very different claims presented by the two parties.\textsuperscript{402}

The two cases, however, were different in significant respects. While Negre's objection was grounded on Catholic principles of just-war thought, Gillette's was based on his belief in a non-religious "Humanism" which stressed love and respect for one's fellow creatures and a confidence in human perfectibility.\textsuperscript{403} While Negre raised important constitutional questions of free exercise and establishment of religion, Gillette relied upon the 1965 decision in \textit{Seeger} extending statutory protection to those who grounded their objections to military service on non-theistic belief systems which filled in their lives a place comparable to the religious believer's faith in God.\textsuperscript{404} While Negre sought to place the legal treatment of Catholics on the same footing as Jehovah's Witnesses or Quakers,\textsuperscript{405} counsel for Gillette invoked notions of equality of treatment between believers and non-believers\textsuperscript{406} and the history of the treatment of conscientious objectors in American law.\textsuperscript{407} By choosing to submit identical briefs in response in these very different cases, the Solicitor in effect asserted that none of these differences was relevant to the outcome of the case. Tactically, this decision had a notable advantage: it allowed the Court to narrow its focus to statutory considerations and to exclude from its frame of reference difficult constitutional challenges raised by Negre's counsel.

The Solicitor's brief proposed two arguments for the Court's consideration.\textsuperscript{408} The first, drawn from analysis of the Selective Service Act, claimed that "[t]he historical evolution of the statutory exemption ... was not intended to reach, and has never been construed so broadly as to reach, the individual who conscientiously opposes the particular war of the moment, no matter how sincere his objection or religious his motivation."\textsuperscript{409} Phrased in this way, the brief took ac-
count of the possibility of a class of religious objectors not covered by the statute, seemingly unaware of the religious-liberty and equal-protection hazards posed by such discrimination.

In its second argument, attacking the basis of Negre’s and Gillette’s constitutional claims, the brief reverted to the distinction made by the Marshall Commission between conscientious objectors to all war, “whose beliefs . . . categorically forbid killing in war,” and those who grounded their objections on “varied personal judgments on national policy based on the same political, sociological and economic factors that the government necessarily considered in reaching its decision to wage a particular war.” Denouncing the petitioners’ free exercise claims, the brief relied without citation on the distinction, made famous in *Reynolds v. United States*, between constitutionally protected beliefs and unprotected acts. “However untrammeled may be the freedom to believe, religious freedom does not require that religious scruples be recognized as justifying disobedience to a valid law.” To allow Negre’s petition would entail an expansion of free exercise “to encompass a general right of conscience to object to and refuse to comply with specific governmental policies,” an outcome that “would logically lead to a situation destructive of orderly government . . . .”

Elaborating upon the statutory argument, Griswold’s brief incorporated by reference the historiography of conscientious objection found in the government’s brief in *Seeger* and reproduced as a supplement to the government’s brief in *Welsh*. An account of the efforts of Congress and the States to exempt from military service traditional religious pacifists, the document was read as supporting the proposition that “[n]ever, in all the years in which Congress has recognized conscientious objection as a basis for exemption from military service has it extended the privilege to persons other than those who were total pacifists—that is, opposed to all forms of war.” The brief went on to argue that the language of the statute—protecting conscientious objectors to “war in any form”—“lends itself to but one inter-

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410 Id. at 11.
411 Id.
412 98 U.S. 145, 164 (1878).
413 Brief for the United States at 11, *Negre* (No. 325).
414 Id. at 12.
415 Id. at 15. Compare id. at 15, with Brief for the United States at 41–60, United States v. Seeger, 380 U.S. 163 (1965) (No. 50).
416 See Brief for the United States at 41–60, *Seeger* (No. 50).
417 Brief for the United States at 15–16, *Negre* (No. 325).
pretation—that exempt status depends on a ‘religious’ conscientious objection to participation in any shooting war in any form.”

In its constitutional analysis, the Griswold brief led with Justice Sutherland’s majority opinion in United States v. Macintosh. Exemption from military obligation is a matter of legislative grace, not constitutional mandate. To be sure, however, Congress must not violate the First Amendment’s teaching on establishment or free exercise. Responding first to establishment concerns, the brief asserted that congressional exemption was intended to accommodate, rather than to establish, religion. It chose to recognize that group of persons who for reasons of conscience reject killing as an instrument of national policy for all situations, and, in deference to their religious beliefs, to spare them the hardship that would result if they were required to perform military service.

The brief then refined and restated the Marshall Commission’s majority report rejecting selective objection without indicating its reliance on that document. The “underlying purpose” of the statute was “to recognize a qualitative difference between general and selective objection without regard to religion.”

Opposition to a particular war necessarily involves a political judgment, an individual conclusion that the policy adopted by the duly elected government is wrong at a certain time in relation to a particular area of operations. While the personal response to that determination may well be religiously and conscientiously motivated, it rests in the first instance on a decision that is political and particular.

Unaddressed in this analysis was the issue of equality of treatment of religious believers of different types. Could the Congress constitutionally relieve Quakers from the obligation of military service while requiring service from Catholics, on the basis of their differing religious beliefs? Instead of answering this concern, the brief considered the policy disaster that would result from judicial recognition of selective objection.

418  Id. at 21.
419  Id. at 22–23 (discussing United States v. Macintosh, 283 U.S. 605 (1931)).
420  Id. at 23 (discussing and quoting Macintosh, 283 U.S. at 623–24).
421  Id. at 22.
422  Id. at 23.
423  See id. at 24.
424  Id.
425  Id. at 24–25 (citation omitted).
Without regard to the source of such a selective objection—whether religious in a narrow or broad sense or otherwise—there are compelling reasons of general policy for not establishing such an exemption from military service. Most fundamentally, any such exemption—based as it would necessarily be upon changeable political judgments of the moment—would be inconsistent with the concept of uniform, and hence, fair, principles of exemption.\footnote{426 Id. at 26.}

A parade of horribles would follow from acceptance of the principle. The absence of a bright line test for exemption would lead to a whole series of problems in determining the appropriateness of a given request for exemption.\footnote{427 See id. at 26–28.} “[A]dministrative problems and delays . . . would necessarily hinder the achievement of the basic objective of the Selective Service System—to raise necessary military manpower for the national defense.”\footnote{428 Id. at 28.} “These considerations, all secular rather than religious . . . provide ample basis for the legislative judgment to excuse only those persons whose beliefs cause them to oppose participation in all wars and not those persons who assert the right to choose the war in which they will fight.”\footnote{429 Id.}

The brief then addressed the free exercise issue.

Most religions (and their humanistic equivalents) recognize that there are areas in which individual conscience governs the application of religious (or humanistic) doctrine to particular circumstances. Accordingly, there are numerous areas in which citizens can state that, as a matter of conscience based in religious principles, they object to political decisions of the government, just as petitioners do here. But that cannot permit such religiously derived views to prevail over national policy and justify non-compliance with the law.\footnote{430 Id. at 30–31.}

The brief acknowledged that \textit{Sherbert v. Verner} might stand against its position, but claimed that the governmental interest asserted was “compelling” for at least three reasons and so should overcome the petitioners’ reliance on that case.\footnote{431 Id. at 32.} The interest at stake was “not merely one of administrative convenience or the need for some degree of certainty in providing necessary military manpower,”\footnote{432 Id.} “[n]or is it limited to the interest in uniform, and hence fair, administration

\footnotesize{\begin{itemize}
\item[426] Id. at 26.
\item[427] See id. at 26–28.
\item[428] Id. at 28.
\item[429] Id.
\item[430] Id. at 30–31.
\item[431] Id. at 32.
\item[432] Id.
\end{itemize}}
of the draft laws."\textsuperscript{433} Even more important than these justifications, "Congress also has a responsibility to preserve the governmental integrity by not allowing political dissent, no matter how sincerely and religiously motivated, to excuse a person from the duties lawfully imposed by the government on all persons in the same class."\textsuperscript{434} The failure to appreciate the religious foundations of Catholic just-war objection could not have been more strikingly put.

Indeed, extension of constitutional protection to religiously-motivated selective objectors, the brief alleged, would have untold devastating consequences on civil society itself.

\textit{[I]f [conscientious objection] is given such a sweeping scope, it would of necessity extend beyond the Selective Service context and reach untold other governmental policies as to which an individual claimed, as a matter of religious motivation, to be conscientiously opposed. Such a construction of the First Amendment would be destructive of the orderly functioning of government and would undermine the essential integrity of the democratic process.} \textsuperscript{435}

On December 4, 1970, a reply brief on behalf of Louis Negre was filed with the Supreme Court, authored by John Noonan.\textsuperscript{436} A Harvard Law School graduate, Noonan had assisted Erwin Griswold in a tax case in the summer of 1953, between his second and third years.\textsuperscript{437} Recently appointed to the faculty of law at Boalt Hall, the law school at the University of California-Berkeley, Noonan had by that time established himself as the foremost scholar in the English-speaking world on the subject of the interaction of history, law, and the development of Catholic doctrine. Influenced during his graduate study by John Courtney Murray's teaching on the freedom of the religious conscience, Noonan would subsequently make religious freedom a focus of his own work.\textsuperscript{438} Noonan's doctoral dissertation, published in substantially expanded form by Harvard University Press in 1957, had examined the means by which Catholic teaching had evolved from moral condemnation of the taking of interest on a loan

\textsuperscript{433} Id. at 33.
\textsuperscript{434} Id.
\textsuperscript{435} Id. at 32.
\textsuperscript{436} See Reply Brief on Behalf of Petitioner, \textit{Negre} (No. 325).
\textsuperscript{437} See Letter from John T. Noonan, United States Circuit Judge, to Dr. Charles J. Reid, Jr., \textit{supra} note 42, at 1. Noonan relates an encounter he had with Griswold at the time of oral argument in \textit{Negre}. "When he encountered me in the corridors of the Supreme Court at the time of the \textit{Negre} argument he said, 'I wish I could cross-examine you.' He was being candid not jocose." \textit{Id}.
\textsuperscript{438} See NOONAN, \textit{supra} note 1, at 26, 28–29.
to acceptance of the practice. His work on contraception, published in the final year of the Second Vatican Council, argued on the basis of history for a modification of the Church’s traditional condemnation of birth control and received the John Gilmary Shea award as the year’s best publication on the subject of Catholic history. In the fall of 1970, Noonan was two years away from completing *Power to Dissolve*, which would earn for him a second John Gilmary Shea award. Noonan would now bring to bear on Negre’s case his training and massive learning as a lawyer and historian.

Noonan’s brief responded to both the statutory and constitutional claims of the government brief. Noonan commenced his statutory analysis by challenging the historiography upon which the government brief relied. The government brief not only misunderstood the founding documents such as the Continental Congress’s admonition to the States to respect the religious objections of those who “cannot bear Arms in any case,” but also failed to appreciate the argument of the *Seeger* brief which it incorporated by reference and made its own. Indeed, the Solicitor’s brief now repudiated what the *Seeger* brief acknowledged was the central value of the conscientious objection statute.

The core of the exemption for conscientious objectors is the unwillingness of the Congress, speaking the true will of the American people, to punish as a criminal a man who refuses to perform military service in obedience to what he believes is the command of God transmitted by divine revelation.

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441 See generally *Noonan, supra* note 16.
444 “The Solicitor General fastens upon the phrase ‘people who from Religious Principles cannot bear Arms in any case’ as evidence of an intent to discriminate against Catholics and other just-war objectors. But he cites no debate, correspondence or evidence to support that interpretation.” *Id.* at 20 (citation omitted).
445 *Id.* at 19.
446 *Id.* (quoting Brief for the United States at 35, United States v. Seeger, 380 U.S. 163 (1965) (No. 50)). The *Seeger* brief continued, “The unwillingness of the American people to compel a man to disobey a divine command and yield to a human obligation imposed by government is older than the Nation.” *Id.* (quoting Brief for the United States at 35, *Seeger* (No. 50)).
The Solicitor's brief, furthermore, failed to appreciate the context of conscientious objection in the founding period. The period was one in which religious intolerance and bigotry might sometimes be openly and frankly expressed. "[T]he colonial assemblies were well aware how to write religious intolerance into law." Persecution of Catholics in the colonial period was often sharp and sometimes bloody. The fact that General George Washington counseled the Protestant troops in his command to avoid insults to Catholics should be the appropriate context in which to read the Continental Congress's resolutions, or, for that matter, the First Amendment.

It was therefore most improbable that the First Amendment drafted just at the time when Catholics first had attained general toleration in the colonies was intended to sanction punishment of Catholics—in the field of military service or any other—merely because the Catholics followed their traditional acceptance of the authority of the teaching of the Pope and the Church in matters of faith and morals.

Subsequent treatment of conscientious objectors, in the Civil War and in World War II, evinced no intention to discriminate against Catholics merely "because their Church taught a just war doctrine rather than total pacifism." Negre's beliefs were judged by the Army "to be very devout," and this should suffice to obtain his discharge.

Having considered the context in which conscientious objection legislation should be understood, Noonan turned to the language of the statute itself and the circumstances that gave rise to the statute's drafting. The statute under consideration, Noonan observed, was the

447 Id. at 20.
448 See id. at 21 (giving the example of Puritan persecutions of Catholics in Maryland, which resulted in the execution of Catholics and the confiscation of Catholic lands).
449 See id. at 22.
450 Id.
451 See id. at 23. Glossing the World War II draft act and its exemption for conscientious objection, Noonan observed:

Again, Congress did not display any intent to compel Catholic objectors to violate their duty of obedience to God as perceived in conscience. Rather Congress was concerned to distinguish the bona fide religious objector "without opening the doors to every slacker who, without any sincere and long-established convictions might declare his so-called conscientious scruples in order to avoid service."

Id. (quoting from 55 Cong. Rec. 1478–79 (1917)).
452 Id.
453 Id.
result of Chief Justice Hughes's dissent in *Macintosh*. The Solicitor's Brief attempted to limit the significance of *Macintosh* by noting that it was an immigration case.\textsuperscript{454} Noonan rejected this attempted distinction.

That Chief Justice Hughes expressed his views in an immigration case, *Macintosh*, is hardly a distinction since Congress saw fit to adopt his views by copying his language in the Selective Service Act of 1948. . . . Chief Justice Hughes’ opinion in *Macintosh* was highly sensitive to the religious issue. The crux of his opinion is the long history of Congressional recognition that “in the forum of conscience, duty to a moral power higher than the state has always been maintained. . . . [T]he essence of religion is belief in a relation to God involving duties superior to those arising from any human relation.”\textsuperscript{455}

Hughes, Noonan observed, endorsed selective conscientious objection in his *Macintosh* opinion.\textsuperscript{456} The government brief, however, attempted to subvert Hughes's analysis, even though the statute being glossed was derived from the language of Hughes's dissent. “The government in the present case thus finds itself making the curious contention that when Congress adopted the language of Chief Justice Hughes in *Macintosh* in the 1948 Act, that Congress was so inept that it intended the result opposite that proposed by Chief Justice Hughes.”\textsuperscript{457}

Noonan closed his statutory analysis by looking to the Report of the Director of Selective Service, dated April 1943, at the height of World War II.\textsuperscript{458} “[A]t the basis of conscientious objection,” the Report read, “[is] the very simple statement of the New Testament: ‘It is better to obey God rather than man.’”\textsuperscript{459} “[I]f the individual regards his acts as his answer to a call from God or as God’s will, in accordance with his religious training and belief, then the Nation in accordance

\textsuperscript{454} Brief for the United States at 19–20 n.12, *Negre* (No. 325).
\textsuperscript{455} Reply Brief on Behalf of Petitioner at 24, *Negre* (No. 325) (quoting United States v. Macintosh, 283 U.S. 605, 633 (1931) (Hughes, C.J., dissenting)).
\textsuperscript{456} Id. at 25. Noonan quoted from Hughes’s dissenting opinion:

Nor is there ground, in my opinion, for the exclusion of Professor Macintosh because his conscientious scruples have particular reference to wars believed to be unjust. . . . [T]here would seem to be no reason why a reservation of religious or conscientious objection to participation in wars believed to be unjust should constitute such a disqualification.

*Id.* (quoting *Macintosh*, 283 U.S. at 635 (Hughes, C.J., dissenting)).
\textsuperscript{457} Id.
\textsuperscript{458} See id. at 25–26.
\textsuperscript{459} Id. at 25 (quoting *Selective Service in Wartime, Second Report of the Director of Selective Service, 1941–1942*, at 256, 258 (1943)).
with its tradition, feels bound to recognize it." Thus the Report rejected the proposition that Catholics lacked any basis for conscientious objection, preferring "a more liberal view, based upon a conclusion that the definitions of religion and the variety of religious experience are so nearly infinite in number as to make futile any attempt to say whether this or that one met the law." Noonan observed,

The generous spirit of religious tolerance recognized by General [Lewis] Hershey and the Selective Service System in 1943 in an hour of supreme national crisis conforms much better to the great American tradition of a free people in a free country, than the rather ungenerous interpretation asserted by the government in the present case.

Noonan contended that this liberality was sorely lacking in the government's treatment of Louis Negre. The Army and the Ninth Circuit both rejected Negre's claim, declaring his position to represent "a personal moral code," rather than "a conscientious objection . . . by reason of religious training and belief." This assertion, repeated in the government's brief, "fails the tests of logic, of history, and of support in the record." Logically, Noonan noted:

[A] total objector equally with a selective objector certainly will make the "judgment, an individual conclusion, that the policy adopted by the duly elected government is wrong at a certain time in relation to a particular area of operations." Any individual who concludes that a war to which his attention is directed violates the commands of God can scarcely be expected to applaud the political decision of his country to participate in the war. . . .

A national decision to go to war is as much a political decision for the total pacifist as it is for the selective objector. Indeed many political decisions have a religious significance. . . . The question under section 6(j) therefore is not whether the government decision to engage in war is political, but whether the individual's objection is based upon his religious training and belief, or arises solely from his politics.

460 Id. (quoting Selective Service in Wartime, Second Report of the Director of Selective Service, 1941–1942, at 256, 258 (1943)).
461 Id. at 26 (quoting Selective Service in Wartime, Second Report of the Director of Selective Service, 1941–1942, at 256, 258 (1943)).
462 Id.
463 Id. at 10 (quoting Negre v. Larsen, 418 F.2d 908, 909 (9th Cir. 1969)).
464 Id. at 10.
465 Id. at 10–11 (quoting Brief for the United States at 24–25, Negre (No. 325)).
Case law, Noonan continued, has recognized that "political, sociological, philosophical or personal moral objections to war do not disqualify the objector who also has a religious basis for his objection to participation in war."466 The Supreme Court should affirm these precedents.

Historically, Noonan asserted, "[t]he Catholic's religious duty to obey conscience is scarcely a new doctrine of the Church."467 Noonan quoted from St. Jerome's admonition to Roman soldiers to obey "[i]f what the emperor and presiding officers command is good .... But if it is evil and against God, answer him with those words from the Acts of the Apostles, 'It is necessary to obey God rather than men.'"468 He then turned to Catholic just-war thought to demonstrate the unanimity of the tradition's opposition to killing in unjust wars. Francisco de Vitoria, in his "classic exposition of just war theory,"469 taught that all persons were conscientiously obliged to refrain from participating in unjust wars "for it is not lawful to kill the innocent by any authority whatsoever."470 "The most influential of all Catholic moral theologians," Alphonsus de Ligouri, taught much the same doctrine, maintaining that a "soldier [who concluded that he was participating in an unjust war] is unable to receive the sacrament of Penance and the sacrament of the Eucharist unless he is attempting 'as quickly as possible' (quamprimum potest) to obtain his release from the army."471 The Baltimore Catechism, by treating just war as an exception to the Fifth Commandment's prohibition on killing, also limited the circumstances in which Catholics may lawfully participate in war.472

Noonan concluded this line of analysis by reminding his readers not only of the deep origins of the Church's just-war tradition but of the Court's obligation to provide Catholics relying upon that tradition with constitutional protection.

The teaching of the Catholic church has been consistent for nearly two thousand years in affirming the primary duty of man to follow conscience as the voice of God, and to refuse to kill where taking life violates conscience. If in the heat of defense of a much-criti-

466 Id. at 11–12.
467 Id. at 12.
468 Id. at 13 (quoting St. Jerome, On Titus, 3:1, in 26 PATROLOGIA LATINA 626 (J.P. Migne ed.)).
469 Id.
470 Id. (quoting Francisco de Vitoria, Relectio VI de Indis, sive De iure belli Hispanorum in barbaros, in THE CLASSICS OF INTERNATIONAL LAW 435–37 (Simon ed., 1917)); see supra notes 170–203 and accompanying text.
471 Reply Brief on Behalf of Petitioner at 14, Negre (No. 325).
472 Id.
cized war the government can prevail with its contention that these teachings of the Catholic church are “political” rather than “religious,” one can only wonder what life is left in the freedom of religion guaranteed by the First Amendment which has been the pride of the American commonwealth for nearly two centuries.\textsuperscript{473}

Noonan also examined the record to lay bare the deep roots of Negre's own belief system in Catholic doctrine.\textsuperscript{474} Noonan commenced by challenging squarely the contention that Negre's position was motivated by politics, not by theological insight.\textsuperscript{475} In fact, as a believing Catholic, Negre was under a moral obligation to follow papal teaching on just war. Pius XII, John XXIII, Paul VI, and the Second Vatican Council all taught that Catholics were obliged to obey the commands of the state in a just war, but that they were equally obliged to refrain from fighting in an unjust conflict.\textsuperscript{476} “The defect in Negre's views,” which exposed him to criminal liability, Noonan crisply observed, is “that Paul VI and the Fathers of the Sacred Council can conceive of just wars and that Negre if he remains a Catholic will have a duty as a Catholic to participate in any such wars if they ever occur.”\textsuperscript{477}

Noonan illustrated the choice that Negre confronted: He was, of course, free to disregard the binding character of the teaching authority of popes and councils, but “[t]he only theological difficulty with doing so is that Negre is no longer a Catholic if he denies that the teaching of the Pope is binding upon his conscience.”\textsuperscript{478} The claim of the Solicitor General that the Selective Service Act is neutral is thus “untenable.”\textsuperscript{479} Noonan put the choice the Court confronted in stark terms.

The blunt fact is that if the Solicitor General's construction [of the statute] is accepted by this court, none of this nation's 44 million odd Catholics is eligible for exemption as a conscientious objector. . . .

\textsuperscript{473} Id. at 15.
\textsuperscript{474} See id. at 8–9.
\textsuperscript{475} See id. at 5–4.
\textsuperscript{476} See id. at 4–7. “[T]he theological gist of the teaching of Paul VI in the Pastoral Constitution [is] that a Catholic has a religious duty to [discriminate between just wars in which he has a religious duty to] participate and unjust wars in which he has a religious duty to refuse to participate.” Id. at 7.
\textsuperscript{477} Id. at 6–7.
\textsuperscript{478} Id. at 8.
\textsuperscript{479} Id. at 9.
It is up to this court to determine whether the First Amend-
ment to the Constitution permits the blatant form of religious dis-
crimination proposed by the government in the present case.\textsuperscript{480}

V. "WE HAVE ON ONE OF PETITIONER'S BRIEFS AN AUTHORITATIVE
LAY CATHOLIC SCHOLAR, DR. JOHN T. NOONAN, JR.": THE JUDGMENT
OF THE SUPREME COURT

The week in which the \textit{Negre} case was argued before the Supreme
Court was understood by contemporaries to have been a quiet week in
Vietnam. Only twenty-seven American servicemen were killed that
week, the second lowest number of the year to that point.\textsuperscript{481} One
hundred ninety-five Americans were wounded, while South
Vietnamese forces lost 390 killed and 937 wounded.\textsuperscript{482} Communist
losses totaled 1425 killed.\textsuperscript{483} Domestically, the great passions of the
1960s were playing out. Although Richard Nixon's program of
Vietnamization would fail militarily, it did succeed in reducing the ex-
posure of American troops to the hazards of combat, thereby relieving
domestic political pressures. By December 31, 1970, only 280,000
American troops remained in Vietnam, down nearly half from the
highpoint reached in 1968.\textsuperscript{484}

Oral argument took place on December 9, 1970.\textsuperscript{485} \textit{Gillette}
was argued first, with Conrad Lynn\textsuperscript{486} representing Guy Gillette and Erwin
Griswold presenting the government's case.\textsuperscript{487} Lynn made the case
that his client, like Negre, would be unfairly disadvantaged if denied
protection by the statute.\textsuperscript{488} "To construe [the statute] as covering
only traditional pacifists," Lynn asserted, violated the Constitution's
prohibition on religious establishments by preferring one sect over
another.\textsuperscript{489} Just-war adherents should be protected, Lynn continued,
and if they are, then protection should also be given to humanists.\textsuperscript{490}

\begin{thebibliography}{9}
\bibitem{480} Id.
\bibitem{482} Id.
\bibitem{483} Id.
\bibitem{484} See KARNow, \textit{supra} note 211, at 697–98 (giving the 1968 and 1970 troop
figures).
\bibitem{486} See Lynn's memoirs, \textit{Conrad Lynn, There is a Fountain: The Autobiography
of a Civil Rights Lawyer} 194–95 (1979), for his recollections of the case.
\bibitem{487} See Arguments Before the Court—Conscientious Objectors: Objections to Vietnam
War; Meaning of "Participating in War in Any Form"; Impact of Free Exercise Clause; Just-war The-
\bibitem{488} See id.
\bibitem{489} Id.
\bibitem{490} See id.
\end{thebibliography}
Attempting to turn the government's policy argument on its head, Lynn "pointed out that the grant of conscientious objector status to individuals such as Gillette would increase the morale and efficiency of the armed services. It is obvious . . . that the presence of sincere objectors create[s] severe discipline and morale problems in the service."\textsuperscript{491}

Solicitor General Griswold followed the presentation of Gillette's counsel by returning oral argument to the language of the statute.\textsuperscript{492} "The clear language of the statute," Griswold asserted, "rejects the idea of selective objection. It states that one must be opposed to participation in war in any form. It is the government's position that the words 'in any form' modify 'war' not 'participation.'"\textsuperscript{493} In discussing the history of conscientious objection, Griswold acknowledged that "all of our early legislation . . . was in terms of numbers of the historic peace churches: the Quakers, the Mennonites and others, all of whom were opposed to war in any circumstance."\textsuperscript{494} Griswold conceded that "[i]n our modern view the exemption cannot be limited to members of particular churches. It must be extended to all those whose views are 'religious' in a broad and deeply-held sense, including humanism."\textsuperscript{495} But, Griswold continued, Congress has plenary power over the decision to confer conscientious objector status under its authority to raise and support armies,\textsuperscript{496} and by deciding to grant exemption to those opposed to all forms of war "Congress is seeking to accommo-

\begin{quote}

The same ethical considerations apply when a just war adherent or a Humanist objector such as Gillette makes a moral decision about a particular war as when a Quaker decides that he cannot fight in any war. The Free Exercise Clause of the First Amendment requires that all individuals be allowed to exercise their religious beliefs freely.

\textit{Id.}
\end{quote}

\textsuperscript{491} \textit{Id.}
\textsuperscript{492} \textit{See id.}
\textsuperscript{493} \textit{Id.}
\textsuperscript{495} \textit{Id.}
\textsuperscript{496} \textit{Id. at 22–27.} Griswold cited as authority for this proposition the majority opinion in \textit{United States v. Macintosh}, 283 U.S. 605 (1931), and the case of \textit{Hamilton v. Regents}, 293 U.S. 245 (1934). \textit{See id.}
date rather than to establish religion.” Rejecting the discrimination argument without engaging it, Griswold stated:

In excluding selective objectors there is no religious difference, no religious discrimination; no one is called because he holds a particular religion; no one is exempted because he holds a particular religion. What the statute does is to recognize a qualitative difference between general and selective objection without regard to religion if the claim is deeply and sincerely held.

Omitted in this analysis was any recognition of the claim that it was precisely because a particular believer was Catholic and an adherent of just-war thought that he would be called to service instead of a Quaker who objected to all war. To be sure, a Catholic would not be drafted simply because he was a Catholic; he would be drafted because his Catholic beliefs were not accorded the same legislative respect as a Quaker’s. Congress, on this interpretation of the statute, was empowered to distinguish between theological perspectives, conferring benefits on one and withholding the same benefits from another.

Griswold, however, did not engage these equal protection or establishment concerns. He closed his argument in *Gillette* by emphasizing the grave dangers in accepting the petitioners’ argument.

Religiously-derived views do not prevail over national policy and justify noncompliance with the law. A contrary view would extend to the paying of taxes, to compliance with laws for the education of children, to health laws and many other aspects of our national life. Indeed, it is not too much to say that to proceed very far down that road leads to a form of anarchy where each person makes up his own mind which of the laws established by the democratic process he feels he can conscientiously comply with. And this is essentially incompatible with democratic government and would undermine the integrity of the democratic process.

Negre’s case followed and was argued by Richard Harrington, with Erwin Griswold again presenting the government side. Harrington made it clear from the outset that Louis Negre, unlike Guy Gillette, was a religious objector to the Vietnam War. Thomas

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498 Id. at 28–29.

499 Id. at 31.

Aquinas, Francisco de Vitoria, Alphonsus de Ligouri, the Baltimore Catechism, the writings of the popes, and the declarations of Church councils all stood on Negre's side.\(^{501}\) War, Harrington made clear, was presumptively sinful in the Catholic tradition, but could be justified by the satisfaction of certain criteria.\(^{502}\) The Solicitor General, Harrington asserted, was wrong in maintaining that because Negre did not object to all war, his objection was personal and political, rather than religious.\(^{503}\) Harrington made clear that Negre sought equal treatment under the law.

Now, I assert . . . our position is quite simple; it's an equal protection position that if the Quaker on my right hand says, "I'm not going to fight in the Vietnam War." You say, "Why not?" "Because of my religion." If you compel the man, the Quaker[, that] would be violating the statute, certainly. Now, my Catholic on my left hand is not going to go. You say, "Why not?" He says, "Because of my religion," but they are both acting under the command in the Bible: "It's better to obey God than man." They're both acting as taught by their religion. But you say, "Well, you're a felon and you have to go because you are Catholic" and to the Quaker they say, "Well, you may stay home." And the only difference is the theological imposition you find out as the hearing officer said, "My client subscribes his beliefs to the Pope and to the Church, and the Church doesn't teach total pacifism." And they say therefore, "you are not exempt. You aren't a total pacifist." We think this is a manifest denial of equal protection. That Congress could abolish all exemptions, I don't purport to say, but I do say that if they can't grant an exemption to members of one religion and deny it to another by picking out of this other man's religion a doctrine of his church. The price is for doctrine; not even for conduct.\(^{504}\)

Under questioning by the justices, Harrington acknowledged that the Catholic believer made the decision to participate in war based on the examination of his own conscience.\(^{505}\) But this sort of conscientious scrutiny, Harrington emphasized, is formed by reference to the

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501 See id. at 7.
502 Id. at 9.
503 Id. at 10–11.
504 Id. at 17–18.
505 Id. at 19.

The Catholic Church doesn't make the decision in any particular case . . . [I]f I kill somebody the church doesn't tell me it's self-defense or murder. The church sets a moral standard. I must decide whether I've committed murder or self-defense and I'm judged by God in the Catholic church, whether I'm correct in my decision. 

Id.
teaching of the Church. "He must decide in each case whether it meets the standards fixed by his church. It's not up to him what the standards are. He's bound by the church standards and the church teaching..."506 The Church, Harrington continued, "isn't an anarchic institution; it teaches obedience to the faith and morals, and it teaches obedience to the state except in the rare and exceptional case where the commands of the state violate God's commands."507

Griswold followed Harrington and began his oral argument by insisting on the parallels between Negre and Gillette.508 The Catholic just-war doctrine, Griswold insisted, was not "relevant."509 The fact that just-war teaching left the determination of the justice of a conflict to the individual conscience was enough for Griswold to assert that Catholics were outside the protection of the statute.

I'm not an expert on it, but it is, insofar as I understand it, it is the doctrine of the Catholic Church that there is a distinction between just and unjust wars which has theological significance. However, the church, as I understand it, does not make that choice for the individual. And that choice, I suggest, is on a different level than the determination of the church between just and unjust wars. That choice is a personal choice and if the individual choice is a selective conscientious objection he is not covered by the statute any more than is a Quaker who might make the same choice.510

Negre, Griswold now conceded, was religiously motivated,511 but his religious motivation was insufficient to gain the protection of the statute.

Congress has said, "is opposed to participating in war in any form." And the issue is whether he is opposed to all participation in all wars and he may evidence religion as a reason for supporting the sincerity of his view that he is opposed to all wars; but if he asserts, as Mr. Negre does, that he is not opposed to all wars, but is opposed to this war, then he does not come within the statute, whether he is religiously motivated or not.512

506 Id.
507 Id. at 22.
508 See id. at 28. "Now, turning to this case, I think, though it is in some ways, more complicated, it presents essentially the same legal issue as the preceding case." Id.
509 Id. at 29.
510 Id.
511 Reversing the position taken in the government brief, Griswold asserted, "There is no doubt whatever in my mind that Mr. Negre is religiously motivated." Id. at 30.
512 Id.
When pressed, Griswold denied that the statute discriminated between theological perspectives. "I think we are discriminating between one belief which is opposed to participation in war in any form, whether it is supported by conventional religion or not, and on the other hand, an opposition to participation in this particular war, whether it is supported by conventional religion or not."\footnote{Id. at 33.} Griswold asserted, without argument, that neither the First Amendment nor Equal Protection covered Negre’s case.\footnote{Id.} Griswold finally questioned the relevance of the Noonan reply brief and insisted again on the irrelevance of Catholic teaching to the outcome of the case.\footnote{Id. at 39.} To Griswold, the matter was one of simple statutory interpretation.

In an eight-to-one decision announced on March 8, 1971, the Supreme Court rejected the claims of Gillette and Negre.\footnote{See Gillette v. United States, 401 U.S. 437 (1971).} Justice Thurgood Marshall, who had himself avoided military service during World War II in order to continue his civil-rights work,\footnote{See Juan Williams, Thurgood Marshall: American Revolutionary 123 (1998).} authored a
majority opinion that illustrated the limits of the legal liberalism of the time.518

Following the lead of the Solicitor General's brief, the majority opinion chose not to address Gillette's and Negre's claims individually. Marshall also chose to follow the Solicitor's lead in choosing to analyze the statutory grounds of relief first.519 The plain language of the statute, Marshall began, can "bear but one meaning; that conscientious scruples relating to war and military service must amount to conscientious opposition to participating personally in any war and all war."520 Legislative history, Marshall continued, supported this conclusion.521 Marshall conceded that the historical record evinced strong support for recognizing "that fundamental principles of conscience and religious duty may sometimes override the demands of the secular state," but he also acknowledged "countervailing considerations" may override this support.522

In a footnote, Marshall attempted to restrict the apparent applicability of Chief Justice Hughes's dissent in Macintosh, asserting that it should be seen strictly as a naturalization case, even though language from the dissent was subsequently used to craft the statutory language at issue.523 Concluding his statutory analysis, Marshall observed that "there is an obvious difference between . . . sincere objection to all war, and . . . opposition to participation in a particular conflict only."524 Marshall declared that the holding of the Court was that Congress intended to exempt persons who oppose participating in all war—"participation in war in any form"—and that persons who object solely to participation in a particular war are not within the purview of the exempting section, even though the latter objection

520 Id. at 443.
521 Id. at 443–45.
522 Id. at 444.
523 Noting that "the very most that can be said about congressional reliance on the Macintosh dissent is that Congress used it in fashioning a definition of the words 'religious training and belief.'" Marshall continued, "The claimant in Macintosh did not seek relief from military service—his contention, and that of the dissent, was that conscientious unwillingness to bear arms is not a disqualifying factor, under the language of the applicable loyalty oath, in a naturalization proceeding." Id. at 444–45 n.9.
524 Id. at 448.
may have such roots in a claimant's conscience and personality that it is "religious" in character.\(^5\)

Thus Negre's objection, grounded on a Catholic just-war tradition of ancient lineage, was reduced to a set of quotation marks around the word "religious." Marshall's analysis of the constitutional issues, expressing the opinion of seven members of the Court,\(^5\) was similarly perfunctory. Premising his establishment analysis on the doctrine of "neutrality," Marshall reached the conclusion that the discrimination effected by the statute was really no discrimination at all.\(^5\) The statute, Marshall noted, did not, "on its face, . . . discriminate on the basis of religious affiliation or religious belief, apart of course from beliefs concerning war."\(^5\) The statute "does not single out any religious organization or religious creed for special treatment," Marshall opined.\(^5\)

Marshall then considered the contention that the statute's conferment of exempt status on theologically-based pacifists as opposed to just-war adherents amounted to "a de facto discrimination among religions."\(^5\) Such a contention, Marshall asserted, "cannot simply be brushed aside," but Negre and Gillette failed to "make the requisite showing" of impermissible discrimination.\(^5\) The statute, he noted, served "valid purposes having nothing to do with a design to foster or favor any sect, religion, or cluster of religions."\(^5\) Quoting from Hughes's dissent in Macintosh, he observed that a principal concern of the statute was legal recognition "that 'in the forum of conscience, duty to a moral power higher than the State has always been maintained.'\(^5\) This "affirmative purpose" of the statute, Marshall asserted, "[is] neutral in the sense of the Establishment Clause."\(^5\)

Marshall, however, subverted this claim of neutrality by giving the Court's endorsement to the theological preference enshrined in the statute.

In the draft area for 30 years the exempting provision has focused on individual conscientious belief, not on sectarian affiliation. The

\(^5\) Id. at 447.
\(^5\) Hugo Black concurred only as to the statutory analysis and did not reach the constitutional question. Id. at 463 (Black, J., concurring).
\(^5\) Id. at 449–50.
\(^5\) Id. at 450.
\(^5\) Id. at 451.
\(^5\) Id. at 452.
\(^5\) Id.
\(^5\) Id.
\(^5\) Id. at 453 (citation omitted).
\(^5\) Id.
relevant individual belief is simply objection to all war, not adherence to any extraneous theological viewpoint. And while the objection must have roots in conscience and personality that are "religious" in nature, this requirement has never been construed to elevate conventional piety or religiosity of any kind above the imperatives of a personal faith.\textsuperscript{535}

In this assertion, the Court demonstrated its failure to understand that Negre’s case did not turn on issues of conventional piety, but on real issues of theological difference with deep roots in Christian history.

Marshall went on to treat the religious liberty claims dismissively, failing to take account of the arguments made by counsel.

\textit{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 conscription laws, applied to such persons as to others, are not designed to interfere with any religious ritual or practice, and do not work a penalty against any theological position. The incidental burdens felt by persons in petitioners’ position are strictly justified by substantial governmental interests that relate directly to the very impacts questioned.}\textsuperscript{536}

In the course of its constitutional analysis, the majority opinion offered a series of policy justifications for upholding the statute against Gillette’s and Negre’s claims.\textsuperscript{537} It is in this section of the opinion that a legal realist might see the real reason for the Court’s decision. The difficulties in distinguishing between religious dissenters to a particular war and those dissenting on political grounds, the Court suggested, “are considerable.”\textsuperscript{538} “[F]airness and even-handed decisionmaking” are thereby threatened.\textsuperscript{539} Objection to a particular war, furthermore, based on the individual’s application of subjective moral principles to inherently fluid circumstances, is “subject to nullification by changing events.”\textsuperscript{540} Citing to the Marshall Commission’s majority report, the Court saw in the petitioners’ claims a threat to democratic institutions.\textsuperscript{541} The “nature of conscription” and of “war

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 454.
\item \textit{Id.} at 462 (citations omitted).
\item \textit{See id.} at 454–60.
\item \textit{Id.} at 456.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{See id.} at 459–60.
\end{enumerate}
\end{footnotesize}
itself," the Court concluded, "require[] the personal desires and perhaps the dissenting views of those who must serve to be subordinated to some degree to the pursuit of public purposes."

Only Justice William Douglas dissented from the majority opinion. Douglas, the son of a Presbyterian minister, had himself fallen from active practice of his faith, but continued to derive spiritual satisfaction from his intense love of the outdoors. Douglas's judicial thought was sometimes influenced by his religious upbringing, as when he wrote, "[w]e are a religious people whose institutions presuppose a Supreme Being."

A World War I veteran, Douglas left college after his freshman year in 1917 with a strong desire to enlist in some branch of the armed forces. Although the Marines and the embryonic naval aviation program both turned him down because of health reasons—Douglas had had polio as a child and was also color-blind—his persistence paid off and he was allowed to enlist in the Army, although he never served overseas. By 1970, however, he had come to be a strong opponent of the Vietnam War. In a book published that year Douglas saw in Vietnam "the lack of any apparent threat to American interests" and sided with the youthful "dissenters" who questioned the American involvement.

In his judicial opinions as well, Douglas questioned the constitutionality of the war effort.

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542 Id. at 459. Richard Harrington continues to object to the outcome.

543 Thurgood Marshall spent much of his career arguing that it was unconstitutional to discriminate against citizens on the basis of race. I find it intellectually indefensible that Justice Marshall and the Supreme Court in Negre found no objection to discrimination against Catholics on the basis of theological doctrine—slight doctrinal differences at best because the Quakers deny the existence of doctrine, and Catholics like Quakers view conscience as light from God regardless of doctrine.

544 See Gillette, 401 U.S. at 463-75 (Douglas, J., dissenting).


547 See William O. Douglas, Go East Young Man: The Early Years 89-95 (1974) (discussing his military career and World War I).

548 See id. at 91-93.


Douglas's opinion alone fully engaged the issues raised by counsel for Gillette and Negre. Hearkening back to his old professor Thomas Reed Powell, Douglas saw the question presented as, "Can a conscientious objector, whether his objection be rooted in 'religion' or in moral values, be required to kill?" Douglas, unlike the Court's majority, recognized the important differences in the cases presented by Gillette and Negre and addressed each of the cases in turn.

Douglas grounded his dissent in Gillette on a concern with identifying the fundamental value at stake, which, in his estimation, was individual freedom of conscience.

[C]onscience and belief are the main ingredients of First Amendment rights. They are the bedrock of free speech as well as religion. ... Conscience is often the echo of religious faith. But ... it may also be the product of travail, meditation, or sudden revelation related to a moral comprehension of the dimensions of a problem, not to a religion in the ordinary sense.

This commitment to judicial protection of the forum of conscience, Douglas asserted, was the foundation of Hughes's dissent in Macintosh and it should govern in Gillette's case as well.

Turning his attention to Negre's case, Douglas confessed his own ignorance of Catholic belief and his consequent reliance on John Noonan's reply brief. "I approach the facts of this case with some diffidence, as they involve doctrines of the Catholic Church in which I was not raised. But we have on one of petitioner's briefs an authoritative lay Catholic scholar, Dr. John T. Noonan, Jr. ..."

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552 Id. at 465–66.
553 Id. at 465, 468. Douglas continued:
A classification of "conscience" based on a "religion" and a "conscience" based on more generalized, philosophical grounds is equally invidious by reason of our First Amendment standards. ... This is an appropriate occasion to give content to our dictum in Bd. of Educ. v. Barnette "[F]reedom to differ is not limited to things that do not matter much. ... The test of its substance is the right to differ as to things that touch the heart of the existing order."
Id. at 469–70 (citation omitted).
554 Id. at 470.
Borrowing from the Noonan brief, Douglas proceeded to explicate Catholic doctrine on the subject of the Catholic conscience and war. A Catholic, Douglas noted, is morally obliged to participate in the defense of the state in just wars, but is equally obliged to refrain from participating in unjust conflicts. This determination, incumbent on all Catholics, is to be made “on the basis of [one’s] own conscience after studying the facts.”

Echoing Noonan’s brief and Negre’s application for conscientious objector status, Douglas acknowledged that obedience to conscience was a cornerstone of Catholic teaching, as articulated by Pope Paul VI and the Second Vatican Council.

The obligation to follow conscience has been a part of the Church’s teaching since the Acts of the Apostles, Douglas stated, and the “duty has not changed.” On the matter of participation in warfare, Douglas noted, “[T]he Church has provided guides.” Francisco de Vitoria forbade the killing of innocents, and Alfredo Cardinal Ottaviani, in the aftermath of World War II, questioned whether war could ever again fulfill the conditions required to be just. The Second Vatican Council was especially emphatic in its condemnation of indiscriminate warfare against populations.

These were the principal guides Louis Negre followed in forming his conscience. Negre himself was a devout Catholic, who submitted to induction because he “wanted . . . to be sure of his convictions” before refusing service in Vietnam. It was only when faced with direct participation in Vietnam that he felt compelled to seek conscientious objector status. His requests were denied and Negre was kept in the service, Douglas concluded, “because his religious training and beliefs led him to oppose only a particular war which according to his

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555 See id. at 470–73.
556 See id. at 470.
557 Id. at 471.
558 Id. at 471 n.5. Douglas quoted from Gaudium et Spes:

Deep within his conscience man discovers a law which he has not laid upon himself but which he must obey. Its voice, ever calling him to love and to do what is good and avoid evil, tells him inwardly at the right moment to do this or to shun that. For man has in his heart a law inscribed by God. His dignity lies in observing this law, and by it he will be judged.

Id. (quoting Gaudium et Spes, supra note 61, § 16).
559 Id. at 472.
560 Id.
561 See id.
562 See id. at 472–73.
563 See id. at 473.
564 Id. at 474.
conscience was unjust."\textsuperscript{565} Thus mediated in a dissenting opinion of
the Supreme Court by a lapsed Presbyterian who valued the power of
religion in the life of the nation, John Noonan’s reply brief came to
shape judicial teaching and vindicate the primacy of the Catholic con-
science in time of war.

VI. "NO PERSON RELIGIOUSLY SCRUPULOUS OF BEARING ARMS SHALL
BE COMPELLED TO RENDER MILITARY SERVICE IN PERSON":
NOONAN’S MADISONIAN FAITH

Writing in dissent in 1988, Judge John Noonan expressed his re-
gret that “when Congress has found a national interest to be of suffi-
cient importance to be incorporated into federal legislation and that
legislation has conflicted with the free exercise of religion, the Su-
preme Court of the United States has uniformly found the national
interest to outweigh the claims of conscience.”\textsuperscript{566} “Conscientious ob-
jectors to war,” Noonan noted, “have been compelled to serve in the
armed forces contrary to their most deeply held principles.”\textsuperscript{567} Noon-
an continued:

Secular men and women take secular values seriously. Men and wo-
men of the world believe that the world’s business is important.
When Congress elevates this business to a national priority it has
been all too easy for officers of the government and even judges to
ignore the countervailing command of the Constitution. In the Su-
preme Court the Constitution has been no shield for the spirit
when Congress has ordained that the spirit must yield to secular
needs.\textsuperscript{568}

The result in \textit{Negre} is thus held up as an example of a type of secular
overreach, Congress and the Court yielding to the demands of state
and failing to comprehend the primacy of the First Amendment.

The rejoinder of the secular world to Noonan’s criticism is the
statist reasoning of the majority opinion in \textit{Macintosh}. The war power,
on this understanding is “well-nigh limitless.”\textsuperscript{569} “[I]ts exercise [] tol-
erates no qualifications or limitations.”\textsuperscript{570}

This may be the answer of the world, but it is a decidedly non-
Madisonian understanding of religious freedom. It was, after all,

\textsuperscript{565} \textit{Id.} at 475.

\textsuperscript{566} Equal Employment Opportunity Comm’n v. Townley Eng’g & Mfg. Co., 859

\textsuperscript{567} \textit{Id.} (citing Negre v. Larsen, 401 U.S. 437 (1971)).

\textsuperscript{568} \textit{Id.}

\textsuperscript{569} United States v. Macintosh, 283 U.S. 605, 624 (1931); see text accompanying
note 126.

\textsuperscript{570} \textit{Macintosh}, 283 U.S. at 622; see also text accompanying note 127.
James Madison who proposed as an amendment to the Constitution that "no person religiously scrupulous of bearing arms shall be compelled to render military service in person." Madison believed that conscience was to be protected, even in the limit case of war, that it is not inconsistent for a free people to conserve its freedoms even while seeing to its national survival. John Noonan, it is evident, shares this Madisonian faith.

571 1 ANNALS OF CONG. 434 (Joseph Gales ed., 1789); see also text accompanying note 83.