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THE CONSCIENTIOUS OBJECTOR EXEMPTION AS AN ESTABLISHMENT AND AN ACCOMMODATION OF RELIGION*

By RAYMOND B. MARCIN†

"Conscience is a God to all mortals."

—MENANDER, Greek poet, 5th cent. B.C.

The Draft Act of 1917¹ must have been hailed as a progressive bit of legislation. By its terms, the much abused and discredited "substitute-purchase" system² of Civil War days was forbidden. Cowardice and indolence were no longer able to buy exemption from military service. Religious dissent, of course, continued to be recognized as a ground for exemption from combatant service. The religious dissenter, however, in order to be eligible for the exemption, was required to be affiliated with a well-recognized religious sect or organization whose creed or principles forbade its members to participate in war in any form. Visions of industrious Amishmen and resolute Quaker pioneers seemed, at the time, to punctuate the 1917 conscientious objector law with a worthy and self-evident fairness.

A claim under the religion clauses³ of the first amendment was somewhat of a novelty in 1918. Twenty years would pass before the religion clauses were construed as falling

* Author's Note: The conscientious objector exemption is available exclusively to religious consciences. Nonreligious conscientious objectors are excluded from the exemption. This religious favoritism is unfair and, moreover, unconstitutional. This paper presents a re-interpretation of the religious phrases in the conscientious objector exemption, which will preserve their constitutionality, while removing their unfairness.

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¹ 40 Stat. 76 (1917).
³ "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I.
under the protection of the fourteenth amendment, and so, in 1918, there was scant development of the law beyond the usual healthy exchanges over Jeffersonian and Madisonian concepts of religious freedom. In this context, it is no great surprise that, when the Draft Act of 1917\(^4\) received its omnibus constitutional test,\(^5\) the Supreme Court dismissed any first amendment religious claim with an almost by-the-way brevity:

... And we pass without anything but statement the proposition that an establishment of religion or an interference with the free exercise thereof resulted from the exemption clauses of the act to which we at the outset referred, because we think its unsoundness is too apparent to require us to do more.\(^6\)

What is surprising, however, is that this succinct holding remained undefiled for four decades.\(^7\)

Those four decades witnessed the dynamic, if not always consistent, introjection of the first amendment religious guarantees into such varied areas of governmental activity as welfare,\(^8\) commerce,\(^9\) education,\(^10\) public employment\(^11\) and school prayer.\(^12\) That the conscientious objector exemption was able to elude the devastating sweep

\(^4\) Supra note 1.
\(^6\) Id. at 389, 390.
\(^7\) The most recent example of the still forceful influence of Arver's abbreviated religious holding is Echeverry v. United States, 320 F.2d 873 (9th Cir. 1963), cert. denied 375 U.S. 930 (1963). The Echeverry court, in dismissing a first amendment religious attack on the conscientious objector exemption, relied solely on Clark v. United States, 236 F.2d 13, 23, 24 (9th Cir. 1956), and George v. United States, 196 F.2d 445, 449 (9th Cir. 1952), cert. denied 344 U.S. 843 (1952). The Clark court, in its handling of the religious issue, relied solely on the George decision, and the George court, in turn, relied solely on the language in Arver, quoted supra, note 6.
of the religion clauses for over forty years can only be explained by resorting to two propositions of law:

First, Congress could, if it so desired, deny the exemption altogether.\(^{13}\) No provision of the Constitution, not even the revered free exercise clause, compels Congress to recognize or proclaim any "right" to exemption on religious grounds. The granting of an exemption from military or combatant service to religious or conscientious objectors is a matter of "legislative grace."\(^{14}\) This first proposition is a valid reflection of the law today.

Secondly, what Congress might deny altogether, it might condition, even unreasonably.\(^{15}\) This second, somewhat shaky, proposition, when applied to the conscientious objector exemption, has been called the "legislative grace theory."\(^{16}\) Its long overdue demise is what finally brought

\(^{13}\) This principle, although it may want questioning, has consistently been followed ever since the Supreme Court, in Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905), stated that an individual "... may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense." See Selective Draft Law Cases, supra note 5, at 378; United States v. Schwimmer, 279 U.S. 644, 650 (1929); United States v. Macintosh, 283 U.S. 605, 623, 624 (1931); Hamilton v. Regents, 293 U.S. 245, 264, 265 (1934); In re Summers, 325 U.S. 561, 572, 573 (1945).

\(^{14}\) See cases cited id.; Keene v. United States, 266 F.2d 378, 383 (10th Cir. 1959); Clark v. United States, supra note 7, at 23; Uffelman v. United States, 230 F.2d 297, 298 (9th Cir. 1956); White v. United States, 215 F.2d 782, 785 (9th Cir. 1954), cert. denied 348 U.S. 970 (1955); George v. United States, supra note 7, at 449; Richter v. United States, 181 F.2d 591, 593 (9th Cir. 1950), cert. denied 340 U.S. 892 (1950); Cannon v. United States, 181 F.2d 354, 355, 356 (9th Cir. 1950), cert. denied 340 U.S. 892 (1950); Gara v. United States, 178 F.2d 38, 41 (6th Cir. 1949), aff'd per curiam 340 U.S. 857 (1950); Rase v. United States, 129 F.2d 204, 210 (6th Cir. 1942); Local Draft Board No. 1 v. Connors, 124 F.2d 388, 390 (9th Cir. 1941); United States v. Crawford, 119 F. Supp. 729, 730 (N.D. Calif. 1954); United States v. Alvies, 112 F. Supp. 618, 619 (N.D. Calif. 1953); United States v. Newman, 44 F. Supp. 817, 819 (E.D. Ill. 1942).

\(^{15}\) George v. United States, supra note 7, at 450.

\(^{16}\) The "legislative grace theory" depended for its existence on the proposition that the granting of conscientious objector exemptions is a matter of legislative grace, but the two ought not to be confused. The latter reflects the law today, but the former does not.
the religious issue back from its forty-year exile. It is difficult to believe that merely because Congress was granting a privilege rather than recognizing a right in enacting the conscientious objector exemption, it was not then bound by the strictures of reasonableness and constitutionality, and yet that very argument consistently prevailed.\footnote{17}

That the Supreme Court, in 1965, finally took its first serious step\footnote{18} in considering the constitutionality of the conscientious objector exemption is due less to the pressure of inconsistent lower court decisions,\footnote{19} and more to a chain of events begun in 1958. In that year, the argument that a legislative body may disregard constitutional guarantees in enacting a "privilege" was repudiated in \textit{Speiser v. Randall}.\footnote{20} In \textit{Speiser} the constitutional guarantee which was not allowed to be disregarded was that of free speech. But, in 1963, \textit{Sherbert v. Verner}\footnote{21} extended the \textit{Speiser} holding to the religious situation:

\begin{quote}
It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege. . . . In \textit{Speiser v. Randall}, 357 U.S. 513, we emphasized that conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of first amendment freedoms.\footnote{22}
\end{quote}

Finally, when a would-be conscientious objector, who ac-

$\footnote{17}{\text{The Ninth Circuit Court of Appeals, in George v. United States, supra note 7, at 450, presents a study of the success of this type of argument in cases dealing with the sale of intoxicating liquors, regulation of commerce and waiver of immunity.}}$

$\footnote{18}{\text{United States v. Seeger, 380 U.S. 163 (1965).}}$

$\footnote{19}{\text{A 1948 amendment to the conscientious objector exemption added a definition of "religious training and belief" which seemingly required belief in a "Supreme Being" as a condition of eligibility. Prior to the amendment, Berman v. United States, 156 F.2d 377, 380 (9th Cir. 1946), had interpreted "religious training and belief" as requiring "responsibility to an authority higher and beyond any worldly one," whereas United States v. Kauten, 133 F.2d 703, 708 (2nd Cir. 1943), stressed an inner "compelling voice of conscience" as the religious criterion.}}$

$\footnote{20}{\text{357 U.S. 513 (1958).}}$

$\footnote{21}{\text{374 U.S. 398 (1963).}}$

$\footnote{22}{\text{Id., 404, 405.}}$
knowledgedly failed to meet the present law’s requirement of belief in a Supreme Being, attacked the statute on first amendment religious grounds, the Second Circuit Court of Appeals, in United States v. Seeger, observed that “... it now seems well-established that legislative power to deny a particular privilege altogether does not imply an equivalent power to grant such a privilege on unconstitutional grounds.”

When Seeger’s claim reached the Supreme Court, it was joined with two others to become the latest and most comprehensive analysis of the conscientious objector exemption. The constitutional attack was noted in the court’s opinion:

The parties raise the basic question of the constitutionality of the section which defines the term “religious training and belief” ... The constitutional attack is launched under the First Amendment’s Establishment and Free Exercise Clauses and is twofold: (1) The section does not exempt non-religious conscientious objectors; and (2) it discriminates between different forms of religious expression in violation of the Due Process Clause of the Fifth Amendment.

Although the constitutional issue seems to be firmly before the Court, the assertion, in the opinion, that the Court “granted certiorari in each of the cases because of their importance in the administration of the Act,” hints

23 The text of the present law is as follows: “Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.” Selective Service Act of 1948, 62 Stat. 604, 612 (1948); 50 U.S.C.A. app. 456(j).
24 326 F.2d 846 (2nd Cir. 1964).
25 Id. at 404, 405.
26 United States v. Jakobson, 325 F.2d 409 (2nd Cir. 1963); Peter v. United States, 324 F.2d 173 (9th Cir. 1963).
27 United States v. Seeger, supra note 18.
28 Id. at 165.
29 Ibid.
ominously that the decision just might not satiate our constitutional appetites.

Most of our case law regarding the establishment of religion clause owes its genesis and evolution to the proposition that once the establishment issue is raised, the law itself is on trial. In order to raise the establishments issue no aggrievement is necessary. The only standing to sue required is the ability to question. Seeger, unfortunately, is a departure from that proposition. Constitutionality, in the Seeger opinion, is tied to aggrievement, and, when the definition of "religious training and belief" is construed broadly enough to embrace the views of each of the claimants, thereby avoiding aggrievement, constitutionality is reposed.

In short, Seeger is a free exercise decision. The question of whether or not the conscientious objector exemption, couched, as it is, in religious terms, constitutes an establishment of religion is not answered. But, despite its omission to consider the establishment question, the Seeger opinion is of no minor importance.

It prescribes a completely objective standard for determining one's eligibility for the exemption:

... [D]oes the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for the exemption. The effect of admitting a belief which is not in the ordinary sense "religious," but which can be shown to stand in loco religionis, is to deny the possibility of aggrievement. If no entry can be made into the mind of an applicant in order to

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30 "The Establishment Clause . . . is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not." Engel v. Vitale, supra note 12, at 431.

31 "[T]he requirements for standing to challenge state action under the Establishment Clause, unlike those relating to the Free Exercise Clause, do not include proof that particular religious freedoms are infringed." Abington School District v. Schempp, supra note 12, at 224. See also McGowan v. Maryland, supra note 9, at 430, 431; Two Guys v. McGinley, 366 U.S. 582, 592 (1961); Everson v. Board of Education, supra note 8.

32 United States v. Seeger, supra note 18, at 184.
determine if there is any difference between what he claims to be religious and what Congress meant by "religious," then no discrimination, and therefore no aggrievement is possible. The Court points out that the task of the local draft boards, in administering the exemption, is

... to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious.\textsuperscript{33}

It would seem that under the parallel belief test an agnostic, or even an atheist, might qualify for the exemption as long as his reasons "are, in his own scheme of things, religious." If so, we are faced with the enigma that the court prescinds from applying its decision to atheists.

No party claims to be an atheist or attacks the statute on this ground. The question is not therefore between theistic and atheistic beliefs. We do not deal with or intimate any decision on that situation in these cases.\textsuperscript{34}

Douglas, concurring, also points out that none of the claimants was an avowedly irreligious person or an atheist, and muses, in a footnote: "If he was an atheist, quite different problems would be presented. Cf. Torcaso v. Watkins, 367 U.S. 488."\textsuperscript{35}

The Torcaso, of \textit{Torcaso v. Watkins},\textsuperscript{36} may or may not have been an atheist. No mention of Torcaso's personal religious beliefs or lack of them appears in the Court's opinion. A reading of the opinion makes us aware only that he refused to take an oath of belief in \textit{God} as required by Maryland law of applicants for public office. \textit{Torcaso v. Watkins} \textsuperscript{37} stands for the proposition that the requiring of a religious test for public office constitutes an establishment of religion.\textsuperscript{38}

\textsuperscript{33} \textit{Id.} at 185. (Emphasis supplied.)
\textsuperscript{34} \textit{Id.} at 173, 174.
\textsuperscript{35} \textit{Id.} at 193.
\textsuperscript{36} \textit{Supra} note 11.
\textsuperscript{37} \textit{Ibid.}
\textsuperscript{38} Despite its obvious applicability, the Supreme Court was careful to avoid a decision on article VI of the United States Constitution, and chose instead to pitch its decision in \textit{Torcaso} squarely on the establishment clause. \textit{Id.} at 491, 496.
The fact that we are not aware whether or not Torcaso was an atheist is not simply a minor annoyance. It is a fact of key urgency to a complete understanding of United States v. Seeger.\(^{39}\)

Although the Seeger court expressly prescinds from extending its holding to cover atheists, its parallel belief, or substitute belief, or belief \textit{in loco religionis} doctrine would seem to render the appellation “atheist” quite irrelevant. The person whom the Seeger court really excludes from the purview of its decision is, as Douglas hints, a “Torcaso,” \textit{i.e.}, a person, be he atheist or Anglican, be he Mennonite or Methodist, who simply objects to the requiring of a religious test for the securing of a public benefit. The very existence of a religious test, albeit a test cleansed of aggrievement, places the prestige of government behind religion and places irreligion as well as nonreligion at a governmentally created disadvantage. The issue left undecided by the Seeger court has substance.

There is one caveat for those who would raise the establishment of religion issue in order to “liberalize” the conscientious objector exemption. An establishment of religion claim must presuppose the severability of the words “religious training and belief” and their definition from the exemption itself. A severability provision was added to the exemption in 1951.\(^{40}\)

Does the religious test\(^{41}\) in the conscientious objector exemption establish a religion contrary to the provisions of the first amendment? The Supreme Court, with admirable fortitude, has provided us with a test for determining what types of enactments violate the establishment clause:

The test may be stated as follows: What are the purpose

\(^{39}\) \textit{Supra} note 18.

\(^{40}\) Universal Military Training and Service Act, sec. 5; 65 Stat. 75, 88 (1951).

\(^{41}\) The Seeger court assumed, and we are at this point assuming that the words “by reason of religious training and belief” and their definition (\textit{supra} note 23) are a test, \textit{i.e.}, an eligibility requirement. We shall have reason to question this assumption \textit{infra}, and shall consider an alternative.
and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.42

Although the legislative purpose in enacting the conscientious objector exemption can quite validly be held to be secular,43 it is difficult to argue that the primary effect of a provision which confines the dispensing of a public benefit or privilege to religious individuals does not advance religion. And, we are told, in Torcaso v. Watkins,44 that the federal government can not “constitutionally pass laws or impose requirements which aid all religions as against non-believers.”45 It is difficult to argue that the Supreme Court, which, in Torcaso v. Watkins, held a state religious test for public office to be an establishment of religion, ought not to render an identical holding regarding a federal religious test for a public benefit.

However, those who would save the religious test in the conscientious objector exemption are not without authority. Brennan, concurring in Abington School District v. Schempp,46 states that

... nothing in the Establishment Clause forbids the application of legislation having purely secular ends in such a way as to alleviate burdens upon the free exercise of an individual’s religious beliefs ... Such a principle might support, for example, the constitutionality of draft exemptions for ministers and divinity students ...47

And again, with reference to the majority opinion’s require-

43 "All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes its worthy of preservation at the hands of the state.” Stone, The Conscientious Objector, 21 COL. UNIV. Q. 253, 269 (1919). Quoted in United States v. Seeger, supra note 18, at 170.
44 Supra note 11.
45 Id. at 495.
46 Supra note 12.
47 Id. at 295, 298.
ment of neutrality in religious matters, Brennan goes on to state: "On the other hand, hostility, not neutrality, would characterize . . . the withholding of draft exemptions for ministers and conscientious objectors . . ." There is a small but oft-quoted body of law on the proposition that the religious needs of the people may be accommodated where no stronger state interest intervenes. The New York State released time for religious education program was upheld in Zorach v. Clauson under that proposition.

We follow the McCollum case. But we cannot expand it to cover the present released time program unless separation of Church and State means that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people.

The New York law upheld in Zorach was, and is, religious in subject matter and legislative purpose. Evidently a "legislative purpose" and a "primary effect" which accommodate religion without advancing it pass the Supreme Court's test as set down in Abington School District v. Schempp. This is true because of the fact that the Schempp court expressly considered the Zorach holding and left it intact, contenting itself with distinguishing Zorach on its facts.

The accommodation of religion doctrine, raised to the status of a Supreme Court holding in the Zorach case, is the strongest and soundest justification for the religious phrases in the conscientious objector exemption. The Seeger decision presages this justification by its broad, almost all-inclusive construction of what Congress meant in using the term "religious." The point is this: If conscientious objection is held to be a "religious need" of conscientious objectors, then the religious phrases in the exemption lose their defining and restricting sense entirely. What Congress

48 Id. at 299.
49 Supra note 10.
50 McCollum v. Board of Education, ibid.
51 Zorach v. Clauson, supra note 10, at 315.
52 Supra note 12.
has done is to identify conscientious objection as a “religious need” and to provide, permissibly, for its accommodation. The “religious training and belief” phrase in the exemption ceases to be a religious test and becomes instead an affirmation that Congress considered conscientious opposition to war to be religious in nature. The identification of all conscientious opposition to war as being religious would complement the Seeger, highly generalized construction of religion, and relieve its somewhat artificial strain.

The accommodation of religion rationale requires, of course, a complete re-reading of the words of the exemption and a complete re-analysis of Congress’s intent in enacting it. The words “by reason of religious training and belief” in the exemption serve, not to exclude a class of individuals whose opposition is other than by reason of religious training and belief, but to identify conscientious objection, whatever manifestation it may assume in the mental apparatus of the objector, as a religious phenomenon. In other words, in enacting the exemption, Congress was seeking to accommodate that religious phenomenon known as conscientious objection, and not religious conscientious objection. Under this rationale conscientious objection is, by legislative identification, a religious phenomenon even though it may manifest itself as part of an atheistic or irreligious system of belief. Admittedly, we are hard put to justify the statutory definition of religious training and belief,53 under the accommodation rationale. We must assume that the definition was Congress’s attempt to describe, for purposes of clarification, the religious phenomenon whereby opposition to participation in war in any form becomes conscientious. The exclusion of “essentially political, sociological, or philosophical views”54 is an exclusion of those things which are not truly matters of conscience. In the exclusion of “a merely personal moral code”55 from the description of the

53 Supra note 23.
54 Id.
55 Id.
religious phenomenon of conscientious objection, we do encounter some strain. A merely personal moral code must be construed as an entirely personal set of rules of conduct, e.g., good manners, which involves no concept of duty. Once the higher duty of conscience enters the personal moral code, it is no longer "merely" personal. It becomes what Congress has identified as a religious phenomenon.

Zorach, though by far the strongest, is not the only authority for the accommodation of religion doctrine. Harlan's dissent in *Sherbert v. Verner*[^58] challenged the majority on its holding that the free exercise clause required North Carolina to grant unemployment compensation benefits to a sabbatarian even though the sabbatarian was unavailable for Saturday work. However, in an example of the exemption technique, Harlan wandered into a clear recognition of the accommodation of religion doctrine:

> My own view, however, is that at least under the circumstances of this case it would be a permissible accommodation of religion for the State, if it chose to do so, to create an exception to its eligibility requirements for persons like the appellant.[^57]

It will be obvious that, in saving the religious phrases of the conscientious objector exemption under the accommodation of religion doctrine, we are also taking away from them all substantive meaning. To save the religious phrases under the accommodation rationale, to hold that the religious phrases are in fact unconstitutional or to rewrite the exemption deleting any reference to religion — all are one and the same in effect. The accommodation rationale has, on its side, only the virtue of palatability.

Nor is the accommodation of religion doctrine the only justification for the religious phrases in the exemption. *Fellowship of Humanity v. County of Alameda*,[^58] a California case which may have provided the Seeger court with the

[^56]: *Supra* note 21.
[^57]: *Id.* at 422. (Italics in original.)
basis for its decision, dealing with the constitutionality of property tax exemptions for religious organizations. After stating its rule of objectivity and nondiscrimination in the administering of tax exemptions, the California court went on to consider whether or not the very existence of such a tax exemption is an establishment of religion.

Direct tax subsidies of any church or sect or of all churches and sects are undoubtedly prohibited by the First Amendment to the United States Constitution. A tax exemption is, obviously, an indirect subsidy...

The theory is that in an area where the state has an interest it may legislate, and the legislation will not be held to be an establishment of religion merely because it incidentally or indirectly benefits religion.

The area of conscientious objection is an area in which the state authority has a legitimate interest. The desirability of a clear conscientious citizenry within a nation which prizes freedom and individuality is well understood. Seeger recognizes it. If the means which Congress employed to foster and encourage a clear conscientious citizenry were nonreligious, then the incidental benefit theory of Everson and the California tax case might apply. But Congress has

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59 The Fellowship of Humanity case held firmly and unequivocally for the proposition that no governmental inquiry into the content or validity of any religious belief can ever be permitted. The only permissible inquiry is the purely objective one of whether or not the claimed belief occupies the same place in the lives of its holders as is occupied by more orthodox beliefs in the lives of believing majorities. See also United States v. Ballard, 322 U.S. 78, 86 (1944).

60 Supra note 58, at 406, 407.

61 Everson v. Board of Education, supra note 8, held that providing bus service to parochial as well as public school children was justified as a "welfare" measure, even though religion was incidentally benefited thereby. And, in McGowan v. Maryland, supra note 9, the Supreme Court advises us that "...the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions." Supra note 9, at 442.

62 See note 43.

63 If the exemption from combatant service were based only on sincere conscientious training and belief, religious consciences, of course, would benefit, but any benefit would be so incidental as to be accidental.
used the words "religious training and belief" as a requirement and therefore has drawn a religious periphery enclosing favored religious consciences, not incidentally, but by design.\(^6^4\)

It is better to face the evident fact that Congress, when it enacted the conscientious objector exemption, was legislating directly and expressly on the subject of religion. It is better to assume that Congress sought, not the advancement of religion, rather its accommodation.

The Supreme Court has deftly and wisely eliminated aggrievement by its parallel belief holding in \textit{Seeger}. It has removed the advantage and preference of religion from the administration of the exemption. Fairness requires the removal of the religious preference and advantage inherent in the religious phrases of the exemption themselves. Only then may the conscientious objector exemption be justly hailed as a progressive bit of legislation.

\(^{64}\) See note 41. Even if we assume that the words "religious training and belief" are \textit{not} an eligibility requirement (if we assume that they are Congress's way of identifying all conscientious objection as a religious phenomenon), it is clear that Congress was acting, not incidentally, but by design.