"The incidental burdens felt by persons in petitioners' position are strictly justified by substantial governmental interests that relate directly to the very impacts questioned."—Justice MARSHALL

"The implied First Amendment right of 'conscience' is certainly as high as the 'right of association'. ..."—Justice DOUGLAS

Gillette v. United States; Negre v. Larsen

401 U.S. 437, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971).

Sec. 6(j) of the Selective Service Act of 1967 provided:

> Nothing contained in this title ... shall be construed to require any person to be subject to combatant training and service in the armed forces ... who, by reasons of religious training and belief, is conscientiously opposed to participation in war in any form.

Guy Gillette claimed a draft exemption under § 6(j) not because he was "opposed to participation in war in any form," but because he was opposed to participation in wars, such as that in Vietnam, that violated his conscience. (United States v. Seeger [1965] had interpreted "religious training and belief" to include general considerations of conscience not connected to formal religion.) His draft board denied the exemption, and Gillette refused to report for induction. He was convicted in a U.S. district court for this refusal, and the court of appeals affirmed. He sought and obtained certiorari from the U.S. Supreme Court.

Louis Negre, a Catholic, claimed status as a conscientious objector after his induction in the army, basing his claim on his religion's tenet that to fight in an unjust war is to participate in murder. The Army rejected his application, and he began habeas corpus proceedings in a U.S. district court. The judge denied his petition, and the court of appeals affirmed. The Supreme Court granted certiorari and consolidated Negre's case with Gillette's.

Mr. Justice **MARSHALL** delivered the opinion of the Court. ...

... Petitioners contend that Congress interferes with free exercise of religion by failing to relieve objectors to a particular war from military service, when the objection is religious or conscientious in nature. While the two religious clauses—pertaining to "free exercise" and "establishment" of religion—overlap and interact in many ways, it is best to focus first on petitioners' other contention, that § 6(j) is a law respecting the establishment of religion. For despite free exercise overtones, the gist of the constitutional complaint is that § 6(j) impermissibly discriminates among types of religious belief and affiliation.

... [P]etitioners ask how their claims to relief from military service can be permitted to fail, while other "religious" claims are upheld by the Act. It is a fact that § 6(j), properly construed, has this effect. Yet we cannot conclude in mechanical fashion, or at all, that the

section works an establishment of religion.

An attack founded on disparate treatment of "religious" claims invokes what is perhaps the central purpose of the Establishment Clause—the purpose of ensuring governmental neutrality in matters of religion. See Epperson v. Arkansas (1968); Everson v. Bd. of Educ. (1947). ... And as a general matter it is surely true that the Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization. See Engel v. Vitale (1962); Torcaso v. Watkins (1961). The metaphor of a "wall" or impassable barrier between Church and State, taken too literally, may mislead constitutional analysis, see Walz v. Tax Comm'n [1970]; Zorach v. Clauson (1952), but the Establishment Clause stands at least for the proposition that when Government activities touch on the religious sphere, they must be secular in purpose, evenhanded in operation, and neutral in primary impact. Abington Sch. Dist. v. Schempp [1963].

A

The critical weakness of petitioners' establishment claim arises from the fact that § 6(j), on its face, simply does not discriminate on the basis of religious affiliation or religious belief, apart of course from beliefs concerning war. The section says that anyone who is conscientiously opposed to all war shall be relieved of military service. The specified objection must have a grounding in "religious training and belief," but no particular sectarian affiliation or theological position is required. ... Congress has framed the conscientious objector exemption in broad terms compatible with "its long-established policy of not picking and choosing among religious beliefs." United States v. Seeger [1965]. ... [Sec.] 6(j) does not single out any religious organization or religious creed for special treatment. ...

Properly phrased, petitioners' contention is that the special statutory status accorded conscientious objection to all war, but not objection to a particular war, works a de facto discrimination among religions. ... [T]his contention of de facto religious discrimination, rendering § 6(j) fatally underinclusive, cannot simply be brushed aside. The question of governmental neutrality is not concluded by the observation that § 6(j) on its face makes no discrimination between religions, for the Establishment Clause forbids subtle departures from neutrality, "religious gerrymanders," as well as obvious abuses. Still a claimant alleging "gerrymander" must be able to show the absence of a neutral, secular basis for the lines government has drawn. For the reasons that follow, we believe that petitioners have failed to make the requisite showing with respect to § 6(j).

Section 6(j) serves a number of valid purposes having nothing to do with a design to foster or favor any sect, religion, or cluster of religions. There are considerations of a pragmatic nature, such as the hopelessness of converting a sincere conscientious objector into an effective fighting man, but no doubt the section reflects as well the view that "in the forum of conscience, duty to a moral power higher than the State has always been maintained." United States v. Macintosh [1931] (Hughes, C.J., dissenting). See *Seeger.* We have noted that the legislative materials show congressional concern for the hard choice that conscription would impose on conscientious objectors to war, as well as respect for the value of conscientious action and for

the principle of supremacy of conscience.

... The point is that these affirmative purposes are neutral in the sense of the Establishment Clause. Quite apart from the question whether the Free Exercise Clause might require some sort of exemption, it is hardly impermissible for Congress to attempt to accommodate free exercise values, in line with "our happy tradition" of "avoiding unnecessary clashes with the dictates of conscience." *Macintosh.* "Neutrality" in matters of religion is not inconsistent with "benevolence" by way of exemptions from onerous duties, *Walz,* so long as an exemption is tailored broadly enough that it reflects valid secular purposes. In the draft area for 30 years the exempting provision has focused on individual conscientious belief, not on sectarian affiliation. The 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. ...

B

We conclude not only that the affirmative purposes underlying § 6(j) are neutral and secular, but also that valid neutral reasons exist for limiting the exemption to objectors to all war, and that the section therefore cannot be said to reflect a religious preference. Apart from the Government's need for manpower, perhaps the central interest involved in the administration of conscription laws is the interest in maintaining a fair system for determining "who serves when not all serve." When the Government exacts so much, the importance of fair, evenhanded, and uniform decisionmaking is obviously intensified. ...

A virtually limitless variety of beliefs are subsumable under the rubric, "objection to a particular war." All the factors that might go into nonconscientious dissent from policy, also might appear as the concrete basis of an objection that has roots as well in conscience and religion. Indeed, over the realm of possible situations, opposition to a particular war may more likely be political and nonconscientious, than otherwise. ... The difficulties of sorting the two, with a sure hand, are considerable. Moreover, the belief that a particular war at a particular time is unjust is by its nature changeable and subject to nullification by changing events. ...

To view the problem of fairness and evenhanded decisionmaking, in the present context, as merely a commonplace chore of weeding out "spurious claims," is to minimize substantial difficulties of real concern to a responsible legislative body. ...

Ours is a Nation of enormous heterogeneity in respect of political views, moral codes, and religious persuasions. It does not bespeak an establishing of religion for Congress to forgo the enterprise of distinguishing those whose dissent has some conscientious basis from those who simply dissent. ... There is even a danger of unintended religious discrimination—a danger that a claim's chances of success would be greater the more familiar or salient the claim's connection with conventional religiosity could be made to appear. ... While the danger of erratic decisionmaking unfortunately exists in any system of conscription that takes individual differences into account, no doubt the dangers would be enhanced if a conscientious objection of indeterminate scope were honored in theory. ...

Tacit at least in the Government's view of the instant cases is the contention that the limits of § 6(j) serve an overriding interest in protecting the integrity of democratic decisionmaking against claims to individual noncompliance. ...

... [I]t is not inconsistent with orderly democratic government for individuals to be exempted by law, on account of special characteristics, from general duties of a burdensome nature. But real dangers ... might arise if an exemption were made available that in its nature could not be administered fairly and uniformly over the run of relevant fact situations. Should it be thought that those who go to war are chosen unfairly or capriciously, then a mood of bitterness and cynicism might corrode the spirit of public service and the values of willing performance of a citizen's duties that are the very heart of free government.

III

Petitioners' remaining contention is that Congress interferes with the free exercise of religion by conscripting persons who oppose a particular war on grounds of conscience and religion. ... [O]ur analysis of § 6(j) for Establishment Clause purposes has revealed governmental interests of a kind and weight sufficient to justify under the Free Exercise Clause the impact of the conscription laws on those who object to particular wars.

Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government. See Cantwell v. Connecticut (1940); Jacobson v. Massachusetts (1905). To be sure, the Free Exercise Clause bars "governmental regulation of religious *beliefs* as such," Sherbert v. Verner (1963), or interference with the dissemination of religious ideas. See Fowler v. Rhode Island (1953); Follett v. McCormick (1944); Murdock v. Pennsylvania (1943). It prohibits misuse of secular governmental programs "to impede the observance of one or all religions or ... to discriminate invidiously between religions, ... even though the burden may be characterized as being only indirect." Braunfeld v. Brown [1961]. And even as to neutral prohibitory or regulatory laws having secular aims, the Free Exercise Clause may condemn certain applications clashing with imperatives of religion and conscience, when the burden on First Amendment values is not justifiable in terms of the Government's valid aims. See *id.*, *Sherbert*. 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. And more broadly, of course, there is the Government's interest in procuring the manpower necessary for military purposes, pursuant to the constitutional grant of power to Congress to raise and support armies. ...

Affirmed.

Mr. Justice **BLACK** concurs in the Court's judgment and in [portions] of the opinion of the Court.

Mr. Justice **DOUGLAS,** dissenting in Gillette v. United States. ...

The question, Can a conscientious objector, whether his objection be rooted in "religion" or in moral values, be required to kill? has never been answered by the Court. Hamilton v. Regents [1934] did no more than hold that the Fourteenth Amendment did not require a State to make its university available to one who would not take military training. *Macintosh* denied naturalization to a person who "would not promise in advance to bear arms in defense of the United States unless he believed the war to be morally justified." The question of compelling a man to kill against his conscience was not squarely involved. Most of the talk in the majority opinion concerned "serving in the armed forces of the Nation in time of war." Such service can, of course, take place in noncombatant roles. The ruling was that such service is "dependent upon the will of Congress and not upon the scruples of the individual, except as Congress provides." The dicta of the Court in the *Macintosh* case squint towards the denial of Gillette's claim, though as I have said, the issue was not squarely presented.

Yet if dicta are to be our guide, my choice is the dicta of Chief Justice Hughes who, dissenting in *Macintosh,* spoke as well for Justices Holmes, Brandeis, and Stone:

> 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. ... 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. Agreements for the renunciation of war presuppose a preponderant public sentiment against wars of aggression. If ... the mere holding of religious or conscientious scruples against all wars should not disqualify a citizen from holding office in this country, or an applicant otherwise qualified from being admitted to citizenship, there 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. ...

I think the Hughes view is the constitutional view. It is true that the First Amendment speaks of the free exercise of religion, not of the free exercise of conscience or belief. Yet conscience and belief are the main ingredients of First Amendment rights. They are the bedrock of free speech as well as religion. The implied First Amendment right of "conscience" is certainly as high as the "right of association" which we recognized in Shelton v. Tucker [1960]. ...

But the constitutional infirmity in the present Act seems obvious once "conscience" is the guide. As Chief Justice Hughes said in *Macintosh*:

> But, in the forum of conscience, duty to a moral power higher than the State has always been maintained. 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.

The law as written is a species of those which show an invidious discrimination in favor of religious persons and against others with like scruples. Mr. Justice Black once said: "The First Amendment has lost much if the religious follower and the atheist are no longer to be judicially regarded as entitled to equal justice under law." *Zorach* (dissenting). We said as much in our recent decision in *Epperson*, where we struck down as unconstitutional a state law prohibiting the teaching of the doctrine of evolution in the public schools:

> Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion. ...

While there is no Equal Protection Clause in the Fifth Amendment, our decisions are clear that invidious classifications violate due process. Bolling v. Sharpe [1954]. ... 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.

I had assumed that the welfare of the single human soul was the ultimate test of the vitality of the First Amendment. ...

Mr. Justice **DOUGLAS**, dissenting in Negre v. Larsen. ...

Under the doctrines of the Catholic Church a person has a moral duty to take part in wars declared by his government so long as they comply with the tests of his church for just wars. Conversely, a Catholic has a moral duty not to participate in unjust wars. ... The Fifth Commandment, "Thou shall not kill," provides a basis for the distinction. ... In the 16th century Francisco Victoria, Dominican master of the University of Salamanca, ... elaborated on the distinction. "If a subject is convinced of the injustice of a war, he ought not to serve in it, even on the command of his prince. This is clear, for no one can authorize the killing of an innocent person." ... Well over 400 years later, today, the Baltimore Catechism makes an exception to the Fifth Commandment for a "soldier fighting a just war."

No one can tell a Catholic that this or that war is either just or unjust. This is a personal decision that an individual must make on the basis of his own conscience after studying the facts. Like the distinction between just and unjust wars, the duty to obey conscience is not a new doctrine in the Catholic Church. When told to stop preaching by the Sanhedrin, to which they were subordinate by law, "Peter and the apostles answered and said, 'We must obey God rather than men.' " That duty has not changed. Pope Paul VI has expressed it as follows: "On his part, man perceives and acknowledges the imperatives of the divine law through the mediation of conscience. In all his activity a man is bound to follow his conscience, in order that he may come to God, the end and purpose of life." ...

... The full impact of the horrors of modern war were emphasized in the *Pastoral*

Constitution announced by Vatican II:

> The development of armaments by modern science has immeasurably magnified the horrors and wickedness of war. Warfare conducted with these weapons can inflict immense and indiscriminate havoc which goes far beyond the bounds of legitimate defense. Indeed, if the kind of weapons now stocked in the arsenals of the great powers were to be employed to the fullest, the result would be the almost complete reciprocal slaughter of one side by the other, not to speak of the widespread devastation that would follow in the world and the deadly after-effects resulting from the use of such arms. ...
>
> [I]t is one thing to wage a war of self-defense; it is quite another to seek to impose domination on another nation. ...

The *Pastoral Constitution* announced that "[e]very act of war directed to the indiscriminate destruction of whole cities or vast areas with their inhabitants is a crime against God and man which merits firm and unequivocal condemnation." ...

For the reasons I have stated in my dissent in the *Gillette* case ... I would reverse the judgment.

Editors' Notes

(1) **Query:** To what extent did the Court in *Gillette* treat religious freedom as a fundamental right? Did the Court require government to show that the draft act's exemptions were "narrowly tailored" to justify the intrusion on free exercise?

(2) **Query**: To what extent did either Marshall or Douglas follow a *structuralist approach* to constitutional interpretation? Did these two cases present serious problems of equal protection? Do the establishment and free exercise clauses function as guarantees of equal protection as far as religious matters are concerned? If so, can interpreters address the first two clauses without considering the equal protection clause? Do all variations on the strict-scrutiny/compelling-interest test require judges to treat classifications by religion as suspect? Given Marshall's views about racial discrimination in American life – see, e.g., his concurrence in Regents of the University of California v. Bakke (1978; reprinted above, p. ___) and his dissent in City of Richmond v. Croson (1989; reprinted above, p. ___), would he have been likely to vote to sustain draft legislation, apparently neutral on its face, that imposed heavier burdens on African Americans than on Caucasians?

(3) **Query**: But was the problem here wider than it first appears? Is it possible for a person affiliated with the Judeo–Christian ethic or who considers him/herself to be a humanitarian (or a "secular humanist") *not* to be at least a selective conscientious objector? To what extent did the fear that we are all selective CO's cause Marshall and his colleagues to put such heavy emphasis on problems of administration, a consideration that the Court has often said in equal protection cases is not compelling when it affects a fundamental right or employs a suspect classification? (See, for example, Brennan's plurality opinion in Frontiero v. Richardson

[1973; reprinted above, p. 986], which Marshall joined.) Do we have here another shift of the question to WHO shall interpret, with the Court giving way to Congress and the President on matters falling under the war powers?

(4) The Veterans' Readjustment Act of 1966 (the GI Bill) limited its benefits to those who had served on active duty in the armed forces. **Query:** Is there a rational basis for the differential treatment afforded veterans who served on active duty and conscientious objectors who completed two years of alternate, non-military service required by the draft act? If so, is that enough to pass constitutional muster under the First Amendment's free exercise clause and the Fifth Amendment's implicit guarantee of equal protection? In Johnson v. Robison (1974), the Court in an opinion by Justice Brennan upheld the differential treatment under that test. But Justice Douglas in dissent wrote: "Where Government places a price on the free exercise of one's religious scruples it crosses the forbidden line."