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A Matter of Conscience: *United States v. Seeger* and the Supreme Court’s Historical Failure to Define Conscientious Objector Status Under the First Amendment

by CLAIRE MARBLESTONE*

Protection of religious liberty is an important American value. Even in times of war, Congress has consistently protected religious devotees from participation in military service.¹ The history of conscientious objectors in the United States is unique because the First Amendment prohibits an establishment of religion and guarantees the free exercise of religion.² However, the Supreme Court has yet to address whether the First Amendment affords any protections for conscientious objectors to military service.

The Vietnam War was a pivotal period for conscientious objectors.³ Between 1965 and 1973, a military draft was in full effect, and applications for conscientious objector status significantly increased.⁴ During this time, the leading Supreme Court case addressing conscientious objectors was *United States v. Seeger.*⁵ In

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


4. Id.

5. United States v. Seeger, 380 U.S. 163, 165 (1965). The next Supreme Court decision addressing the qualifications for conscientious objectors was *Welsh v. United*
Seeger, the Court attempted to define the kinds of religious beliefs that qualify for a conscientious objector exemption from military service. Instead of addressing whether conscientious objectors deserve protection under the First Amendment, the Court chose to interpret the applicable conscientious objector statute in an overly broad manner in order to avoid addressing any constitutional issues.

This Note argues that the Court should have confronted the constitutional questions presented in Seeger because the traditional reasons for invoking the doctrine of avoidance did not justify issuing a weak test for lower courts and administrative agencies to administer.

Initially, a discussion of conscientious objectors to military service may appear irrelevant because the draft has ended and the military currently consists of an all volunteer force. However, if the President chose to do so, the draft could quickly be reinstated. In 2003, members of the House of Representatives proposed military conscription legislation if the United States declared war on Iraq. American troops have been in Iraq for seven years, and there is an increased need for troops in Afghanistan. Military recruiters have had a difficult time meeting their recruitment goals since the beginning of the Iraq war. President Barack Obama has not indicated that the draft will be reinstated. However, a fatigued military, extensive U.S. military deployments around the world, and declining military recruits could force Congress to reinstate conscription.


7. Id. at 166. See also Howard R. Lurie, Conscientious Objection: The Constitutional Questions, 73 W. VA. L. REV. 138, 144 (1971); United States v. Levy, 419 F.2d 360, 365 (8th Cir. 1969).


9. Id. The Code of Federal Regulations contains provisions for the induction of registered males to be used in the event that the draft is reinstated. 32 CFR §§ 1624.1-1624.10 (2010). These provisions include conscientious objector exemptions to military service. Id.

10. Lindenbaum, supra note 8, at 239.


13. Id.
service. The prospect of a continuous global war on terror compels a reconsideration of the constitutionality of conscientious objectors.

Supreme Court jurisprudence relating to conscientious objectors is unsettled. The Court has yet to address whether the First Amendment requires or prohibits a conscientious objector exemption from military service.14 Similarly, the Court has not addressed whether providing an exemption for individuals whose opposition to war rests on religious grounds, but not for those who do not profess a belief in religion, violates the Due Process Clause of the Fifth Amendment. While the Court has faced these issues in numerous cases, the Justices have chosen to expand the scope of conscientious objector statutes rather than address the pressing First and Fifth Amendment problems.15 By avoiding these constitutional issues, the Court evades its duty to interpret the law, and leaves open important questions for lower courts and draft boards to decide.

This Note will argue that the Court should have addressed the First Amendment and Due Process issues presented in United States v. Seeger. Part I will discuss the history of conscientious objectors, which provides a background for Seeger. Part II will examine United States v. Seeger, and the unpublished opinions which address the constitutional issues. Part III will argue that the conventional rationale for invoking the doctrine of avoiding constitutional questions did not justify the Court's approach to Seeger. This Note will argue that the omitted concurring and dissenting opinions should have been included in the final opinion. Part IV will attempt to explain why the Justices ultimately decided to withdraw their opinions.

I. A Brief History of Conscientious Objectors

The origins of conscientious objection in America can be traced back to the ratification of the Constitution.16 The ratification debates indicated that the Framers considered “rights of conscience” a part of religious freedom.17 Throughout the debates, the delegates expressed

14. Lurie, supra note 7, at 138, 144. See also In re Weitzman, 426 F.2d 349, 443-44, 453 (8th Cir. 1970) in which then Judge Blackmun criticized the Court's continuously evasive position on conscientious objectors.
15. Id. In Welsh v. United States, Justice Harlan argued that the Court has robbed the Selective Service legislation of all meaning in order to avoid facing the constitutional question. 398 U.S. at 354 (Harlan, J., concurring).
17. Id.
a desire to protect religious peoples' beliefs, and did so by including "rights of conscience" in the amendments. An early draft of the First Amendment stated, "Congress shall pass no law establishing a religion or to prevent the free exercise of, or to infringe upon the rights of consciousness." In the Senate, the provision protecting rights of conscience was deleted, and the final version became what is now known as the religion clauses of the First Amendment.

Conscientious objectors have been exempted from military service since the Revolutionary War. The Selective Service Act of 1917 authorized the first national draft during World War I. Congress provided a limited exemption for conscientious objectors. The first time the Supreme Court reviewed a claim for conscientious objection was in the Selective Draft Law Cases. Petitioners Joseph Arver and Otto Wangerin challenged their convictions for failing to register for the Selective Service. The Court affirmed Congress' power to enact a draft, but dismissed the Petitioners' First Amendment challenge to the clause pertaining to conscientious objectors.

The next time the Court addressed the issue of conscientious objection was in the Naturalization Cases of the 1930s. These cases...

18. BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1107-09 (1971). Additionally, the bill of rights for many states included conscientious objector exemptions. Id. at 262, 277, 319.
19. Id. at 87 (quoting DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 3:159, 3:166 (Linda DePauw et al. eds., 1972)).
23. Selective Service Act of 1917, ch. 15, § 4, 40 Stat. 76, 78 (1917), repealed by Pub. L. No. 89-554, 80 Stat. 643 (1966). The statute provided an exemption for ordained ministers, students in divinity schools, and members of the Quakers, Mennonites, Amish, and other well-recognized religious sects whose tenets forbade its members from participating in war in any form. Id. See also Harlan F. Stone, The Conscientious Objector, 21 COLUMBIA UNIVERSITY QUARTERLY 253, 256 (1919).
26. Selective Draft Law Cases, 245 U.S. at 389-90. In the conclusion of the case, the Court said, "[a]nd we pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of this act to which we at the outset referred, because we think its unsoundness is too apparent to require us to do more." Id.
established significant precedent that the Court relied on in Seeger.\textsuperscript{28} The Naturalization Act of 1906 required an applicant for citizenship to take an oath to “[s]upport and defend the Constitution of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same.”\textsuperscript{29} In \textit{United States v. Schwimmer}, the Court addressed whether a pacifist could be denied citizenship because she could not take this oath in good conscience.\textsuperscript{30} The Court denied Schwimmer’s citizenship application and held that all citizens have a duty to defend the government against all enemies whenever the necessity arose.\textsuperscript{31} Justice Oliver Wendell Holmes dissented, and stated that Schwimmer’s pacifism should not have precluded her from citizenship.\textsuperscript{32} In \textit{United States v. Macintosh}, the Court denied citizenship on similar grounds.\textsuperscript{33} Justices Holmes, Louis Brandeis, and Harlan Stone joined Chief Justice Evan Hughes in a passionate dissent.\textsuperscript{34} Although he did not define religion, Chief Justice Hughes stated, “t[he] essence of religion is belief in a relation to God involving duties superior to those arising from any human relation.”\textsuperscript{35} Chief Justice Hughes believed that in the “forum of conscience, the duty to a moral power higher than the state has always been maintained.”\textsuperscript{36}

The Supreme Court reversed Schwimmer and Macintosh in \textit{Girouard v. United States}.\textsuperscript{37} Girouard was a Canadian citizen whose religious beliefs prevented him from reciting the oath of citizenship.\textsuperscript{38} In the majority opinion by Justice William Douglas, the Court held that Girouard did not need to violate his religious creed and swear to bear arms in order to obtain citizenship.\textsuperscript{39} The Court interpreted

\begin{itemize}
  \item \textsuperscript{28} See discussion \textit{infra} Part II.A.
  \item \textsuperscript{29} Naturalization Act of 1906, ch. 3592, § 4, 34 Stat. 596, 598 (1906) (current version at 8 U.S.C. § 1427(a) (2006)).
  \item \textsuperscript{30} United States v. Schwimmer, 279 U.S. 644, 646 (1929).
  \item \textit{Id.} at 650.
  \item \textsuperscript{32} \textit{Id.} at 655 (Holmes, J., dissenting). Justices Brandeis and Sanford joined in the dissent. \textit{Id.} at 653, 655.
  \item \textsuperscript{33} United States v. Macintosh, 283 U.S. 605, 626 (1931).
  \item \textit{Id.} at 627, 635 (Hughes, J., dissenting).
  \item \textsuperscript{35} \textit{Id.} at 633–34.
  \item \textsuperscript{36} \textit{Id.} at 634.
  \item \textsuperscript{37} Girouard v. United States, 328 U.S. 61 (1946).
  \item \textsuperscript{38} \textit{Id.} at 61–62.
  \item \textsuperscript{39} \textit{Id.} at 64. Throughout the opinion, Justice Douglas repeatedly referred to Justice Holmes’ dissent in Schwimmer, and Chief Justice Hughes’s dissent in Macintosh. \textit{Id.} at 64–66, 68.
\end{itemize}
congressional intent in the Selective Service Act of 1940 to mean "... that even in times of war, one may truly support and defend our institutions though he stops short of using weapons of war."

Congress amended the Selective Service Act in 1948. The Act required every male citizen between the ages of eighteen and twenty-six to register with the Selective Service System. Section 456(j) provided an exemption for conscientious objectors who "by reason of religious training and belief [were] conscientiously opposed to participation in war in any form." Religious training and belief was defined as 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 or moral code." Local draft boards were set up to adjudicate conscientious objector exemption claims. If an individual was denied conscientious objector status, he could bring his claim before an appeal board, which would refer the claim to the Department of Justice. The Department of Justice would hold a hearing on the character of the applicant, investigate the applicant's personal background, and make a recommendation to the appeal board on whether to grant an exemption. The appeal board would then make the final decision on the merits of the claim. If an individual refused to submit to induction into the armed services, he could face criminal prosecution. Upon conviction in federal court, the individual could be imprisoned for up to five years, and/or fined up to ten thousand dollars.

40. Id. at 67.
42. Id. at 605.
47. Id.
48. Id.
50. Id.
Throughout the early twentieth century, the Court gradually recognized the grave dilemma facing the conscientious objector. Initially, the majority of the Court did not view conscientious objectors favorably. Justice Holmes and Chief Justice Hughes sympathized with conscientious objectors, and established sound precedent for the Court's opinion in *Girouard*. The Court's progressively understanding view towards conscientious objectors would become a key factor in *Seeger*.

II. United States v. Seeger

A. The Opinion

*United States v. Seeger* combined the cases of three individuals, Daniel Seeger, Arno Sascha Jakobson, and Forest Britt Peter, convicted of refusing induction into the armed forces under the Selective Service Act of 1948. All three were denied conscientious objector status by their draft boards because the boards believed they did not satisfy the qualifications of Section 456(j). Each professed different religious beliefs, and all asserted different grounds for challenging the statute.

Daniel Seeger claimed that he could not answer whether he believed in a supreme being with a "yes" or "no." Seeger contended that skepticism in the existence of God did not mean he lacked faith in anything whatsoever. Rather, he believed in "goodness and virtue for their own sakes, and a religious faith in a purely ethical creed." Seeger argued that the language of Section 6(j) violated the Free Exercise Clause of the First Amendment because Congress did not provide an exemption for non-religious conscientious objectors. Additionally, Seeger challenged Section 6(j) on Due Process grounds, because the law discriminated between different forms of religious expression. The district court was unsympathetic to Seeger's

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53. *Id.*

54. *Id.* at 166.

55. *Id.*

56. *Id.* Seeger also credited Plato, Aristotle, and Spinoza for support of his beliefs.


58. *Id.*
constitutional claims, and found Seeger guilty of failure to submit to induction. The Second Circuit reversed Seeger's conviction, and the government appealed.

Arno Sascha Jakobson believed in a "Supreme Being" who was a "Creator of Man," and "ultimately responsible for the existence of man." Jakobson believed in a relationship to "Godness," and that it would strain his conscience if he were forced to participate in military service. The Department of Justice concluded that his claim was based on a personal moral code and was insincere. Accordingly, the draft board refused to classify Jakobson as a conscientious objector, but did not indicate the grounds for its decision. The Second Circuit reversed Jakobson's conviction, and the government appealed.

Forest Britt Peter believed that taking a human life was against his personal moral code, and he considered this belief superior to his obligation to the state. He described his religious beliefs as a consciousness about man's harmony with nature. He admitted that one could call his convictions a belief "in a Supreme Being," but those were not the words he chose to use. In sum, Seeger, Jakobson, and Peter's collective grounds for conscientious objector exemption included a belief in "goodness and virtue for their own sakes," a relationship to "Godness," and a belief in a higher moral code superior to that of the state.

The question presented in United States v. Seeger was whether Section 6(j) of the Universal Military Training and Service Act was constitutional under the Establishment Clause, the Free Exercise

60. United States v. Seeger, 826 F.2d 846, 855 (2d Cir. 1984). The Second Circuit addressed the constitutionality of Section 6(j), and whether the Supreme Being requirement could be validly employed to reject Seeger's claim for a conscientious objector exemption. Id. at 851. The court held that the "Supreme Being" requirement created an impermissible classification under the Due Process Clause of the Fifth Amendment. Id. at 854.
62. Id. at 168.
63. Id.
64. Id.
65. United States v. Jakobson, 325 F.2d 409, 417 (2d Cir. 1963). In Jakobson, the Second Circuit invoked the doctrine of constitutional avoidance, and read the definition of "religious training and belief" in Section 6(j) as broadly as possible. Id. at 415.
67. Id.
68. Id.
Clause, and the Due Process Clause. Oral arguments were heard in November of 1964, and the decision was announced on March 8, 1965.

Justice Tom Clark wrote for the majority. Justice Clark phrased the question presented as whether the term “Supreme being” in Section 6(j) meant an orthodox belief in God, or the broader concept of a power “to which all else is subordinate or upon which all else is ultimately dependent.” Justice Clark began by tracing the history of the Universal Military Training and Service Act, and noted that Section 6(j) contained the same language as the conscientious objector exemption in the 1940 Selective Service Act. The definition of “religious training and belief” in the 1940 statute was nearly identical to Chief Justice Hughes’ language in United States v. Macintosh. The only difference between Chief Justice Hughes’ definition of religion and the 1940 statute was that Congress substituted the phrase “Supreme being” for the word “God.” Justice Clark concluded that this substitution indicated Congress’ intent to expand the definition of religion articulated in Macintosh.

With this broad definition of religion in mind, Justice Clark formulated a test to determine whether an individual qualified as a conscientious objector under Section 6(j). In order to qualify for the conscientious objector exemption, an individual must have a “sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualif[ied] for the exemption comes within the statutory definition.” The Court believed that this test would embrace the expanding concept of modern religion. Justice Clark announced that the Court “construed

69. Id. at 165.
71. Seeger, 380 U.S. at 163.
72. Id.
73. Id. at 174.
74. Id. at 175.
76. Seeger, 380 U.S. at 175.
77. Id.
78. Id. at 176.
79. Id. at 180. The Court refers to the writings of Dr. Paul Tillich, John A. T. Robinson, and Dr. David Saville Muzzey in support of the modern religious community’s understanding of religion. Id. at 180–83.
the statutory definition broadly and it follows that any exception to it must be interpreted narrowly."\(^{80}\) However, the conscientious objector exemption would be reserved for those whose opposition to war was based on grounds that can fairly be interpreted as “religious,”\(^ {81}\) and not solely based on a “personal moral code.”\(^ {82}\) Justice Clark believed this test avoided the constitutional questions presented by the Respondents, and therefore declined to address them.\(^ {83}\)

Additionally, the Court believed this test would be easy for lower courts to apply.\(^ {84}\) The trier of fact would need to determine whether “the claimed belief occup[ies] the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption.”\(^ {85}\) However, the validity of the objector’s belief could not be questioned.\(^ {86}\) Rather, local draft boards and lower courts would have to decide “whether the beliefs professed by a registrant are sincerely held and whether they are, in their own scheme of things, religious.”\(^ {87}\)

Applying the new test, the Court reversed the convictions of all three Respondents.\(^ {88}\) Justice Clark noted that the Respondents’ objections were based on religious beliefs, and not on a personal moral code.\(^ {89}\) The Court held that Seeger professed a “religious belief,” did not disavow a relation to a Supreme being, and that his beliefs were sincerely held.\(^ {90}\) The Court concluded Jakobson had demonstrated that his opposition to war was related to a Supreme being.\(^ {91}\) Similarly, the Court reversed Peter’s conviction, because his belief in “some power manifest in nature” which was the “supreme

\(^{80}\) Id. at 186.
\(^{81}\) Id. at 180.
\(^{82}\) Id. at 186.
\(^{83}\) Id.
\(^{84}\) “This construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well-established congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets.” Id. at 176.
\(^{85}\) Id. at 183.
\(^{86}\) Seeger, 380 U.S. at 184.
\(^{87}\) Id.
\(^{88}\) Id. at 185.
\(^{89}\) Id. at 187.
\(^{90}\) Id. at 186.
\(^{91}\) Id.

Seeger, 380 U.S. at 186.
expression” helping “man in ordering his life,” satisfied the Seeger test for conscientious objectors.\(^\text{92}\)

In a concurring opinion, Justice Douglas acknowledged, “[i]f I read the statute differently from the Court, I would have difficulties” because “those who embraced one religious faith rather than another would be subject to penalties . . .”\(^\text{93}\) Additionally, the statute would run afoul of the Due Process Clause of the Fifth Amendment by preferring some religions over others.\(^\text{94}\) Although the legislative history of Section 6(j) “leaves much in the dark,” Justice Douglas argued that the decision was not any more “tour de force” than “other instances where we have gone to extremes to construe an Act of Congress to save it from demise on constitutional grounds.”\(^\text{95}\) Justice Douglas noted that many religions that have taken a stronghold in the United States do not subscribe to a Judeo-Christian idea of God.\(^\text{96}\) Justice Douglas agreed with the Court’s interpretation of supreme being because he believed Congress was cognizant of these kinds of religious beliefs when enacting the statute.\(^\text{97}\)

**B. Unpublished Opinions**

Although a unanimous decision was ultimately reached, the Justices’ papers reveal that in the days leading up to the announcement, there was significant disagreement about the way the Court should decide *Seeger*.\(^\text{98}\) Justice Clark’s opinion avoids the fact that the Respondents challenged the constitutionality of Section 6(j).\(^\text{99}\) Although Justices Clark and Douglas praise the opinion for avoiding

\(^{92}\) *Id.* at 187–88.

\(^{93}\) *Seeger*, 380 U.S. at 188 (Douglas, J., concurring). *Id.* Originally, Justice Douglas wrote his opinion in response to Justice Goldberg’s concurrence. **BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT–A JUDICIAL BIOGRAPHY** 572 (1983); see also discussion infra Part II.B.

\(^{94}\) *Seeger*, 380 U.S. at 188 (Douglas, J., concurring).

\(^{95}\) *Id.*

\(^{96}\) *Id.* at 189–91. Justice Douglas refers to Buddhists, Confucianists, and Taoists. *Id.*

\(^{97}\) *Id.* at 192.

\(^{98}\) Although some scholars have addressed these unpublished opinions, there has been no thorough discussion of all three unpublished opinions. A brief discussion of Justice Black’s opinion can be found in **TINSEY E. YARBROUGH, MR. JUSTICE BLACK AND HIS CRITICS**, 156 (1988). Bernard Schwartz refers to Justice Goldberg’s unpublished opinion in *Super Chief*. Schwartz, *supra* note 93, at 571–72.

\(^{99}\) Namely, whether Section 6(j) runs afoul of the religious clauses of the First Amendment because it limits the conscientious objector exemption to those opposed to war in general because of theistic beliefs. *Welsh*, 398 U.S. at 345 (Harlan J., concurring).
constitutional issues, the Court should have addressed the constitutional questions presented.

A draft of an unpublished concurring opinion by Justice Arthur Goldberg addressed whether Congress had "the constitutional right to limit the exemption by . . . discriminate[ing] between those religious persons who hold theistic beliefs and those who do not." Justice Goldberg criticized the Court for reading out Congress' clear intention to restrict exemption to individuals holding a belief "in relation to a Supreme Being involving duties superior to those arising from any human relation." Justice Goldberg noted that Seeger clearly presented the issue of "whether under the First Amendment Congress had the constitutional right to limit the exemption among religious persons to those who hold theistic beliefs." The Court "granted certiorari to determine this issue, a grave and important one involving the religious clause of the First Amendment." The majority opinion reads out "the clear limitation on the conscientious objector exemption which Congress wrote." Justice Goldberg disagreed with the majority's approach, and believed he was "compelled to face up to the constitutional issue clearly presented by Seeger's case and would hold the limitation in the statute unconstitutional under the First Amendment as preferring theistic over nontheistic religions."

Justice Goldberg acknowledged that constitutionally questionable statutes are to be read so as to avoid constitutional objections, but "this does not mean that the Court is free to rewrite the statute for Congress." In addressing the First Amendment challenges, Justice Goldberg believed that Section 6(j) unconstitutionally discriminates among religions, particularly in light

100. Seeger, 380 U.S. at 186, 188 (Douglas, J., concurring).
102. Id.
103. Id. at 2.
104. Id.
105. Id.
106. Id.
of the Court's recent decisions in Torcaso v. Watkins\textsuperscript{108} and Everson v. Board of Education.\textsuperscript{109} Justice Goldberg further noted that Buddhism, Confucianism, and Taoism are nontheistic religions whose many subscribers living in the United States would not be granted exemption under 6(j).\textsuperscript{110}

Additionally, Justice Goldberg pointed out the practical issues with administering the Seeger test. Under this new test,\textsuperscript{111} draft boards, the Department of Justice, and district courts were vested with determining what constitutes a belief in a "Supreme Being."\textsuperscript{112} The adjudicators also must decide whether an individual has a belief which can be deemed "religious," and whether that belief is "sincerely held."\textsuperscript{113} Justice Goldberg would "have done [away] with this business of judicially examining other people's beliefs."\textsuperscript{114}

While he would have declared Section 6(j) unconstitutional, Justice Goldberg argued that the provision was severable from the rest of the Selective Service Act.\textsuperscript{115} The Selective Service Act included a severability clause, and accordingly, Goldberg concluded that Section 6(j) should be severed from the rest of the Universal Military Training and Service Act.\textsuperscript{116} Goldberg suggested that Congress should do away with religious qualifications for the

\textsuperscript{108} Torcaso v. Watkins, 367 U.S. 488 (1961). In Torcaso, the Court held, "neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.' Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." Id. at 495.

\textsuperscript{109} Goldberg, supra note 101, at 11. See also, Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947). In Everson, the Court found that the First Amendment "requires the state to be neutral in its relations with groups of religious believers and non-believers."

\textsuperscript{110} Goldberg, supra note 101, at 11.

\textsuperscript{111} See discussion supra at Part II.A.

\textsuperscript{112} Goldberg, supra note 101, at 12–13.

\textsuperscript{113} Id.

\textsuperscript{114} Id. at 13 (quoting United States v. Ballard, 322 U.S. 78, 95 (1944)).

\textsuperscript{115} Id. at 14.

\textsuperscript{116} Id. at 14–15. Goldberg quotes the 1951 amendment to the Universal Military Training and Service Act, which stated, "[i]f any provisions of this Act or the application thereof to any person or circumstances is held invalid the validity of the remainder of the Act and of the circumstances of such provision to other persons and circumstances shall not be affected thereby." Universal Military Training and Service Act of 1951, ch. 144, § 5, 65 Stat. 75, 88 (1951).
conscientious objector exemption, and warns that neither "Church nor State may become unduly involved in the affairs of the other."\textsuperscript{117}

The unpublished draft of Justice Hugo Black’s concurring opinion largely echoed Justice Goldberg’s reasoning.\textsuperscript{118} Justice Black agreed that the Court should address the First Amendment challenges to Section 6(j).\textsuperscript{119} In addition to the reasons articulated by Justice Goldberg, Justice Black argued that the statute violates the First Amendment "by choosing between conscientious beliefs which are religious and those which are not."\textsuperscript{120} Justice Black sympathized with the plight of conscientious objectors who, under Section 6(j), must "either offend their conscience by professing a belief they do not have, violate their conscience by going into combat service, or go to jail as draft-dodgers."\textsuperscript{121} Justice Black criticized the statute for making a "broad frontal attack on the individual's right not to be discriminated against by [the] Government because of his beliefs."\textsuperscript{122} Although Justice Black recognized Congress’ authority to conscript citizens, he argued that this did not grant Congress the power to "run roughshod over the First Amendment."\textsuperscript{123} Justice Black criticized the majority from departing from the Court’s recent First Amendment decisions.\textsuperscript{124} Justice Black concluded that the Respondents’ convictions should be reversed because Section 6(j) violates the First Amendment.\textsuperscript{125}

Similarly, a draft of Justice Harlan’s unpublished dissent asserts that "the constitutional issues presented by these cases cannot be avoided."\textsuperscript{126} Justice Harlan argued that the First Amendment does not require a conscientious objector provision in conscription statutes, and that Congress would be entitled to exempt all

\textsuperscript{117} Id. at 16–17. Goldberg points out that in World War I and World War II, Congress exempted all persons who were conscientiously opposed to participating in war without regard to religious qualification. \textit{Id.}


\textsuperscript{119} \textit{Id.} at 2–3.

\textsuperscript{120} \textit{Id.} at 1.

\textsuperscript{121} \textit{Id.} at 2.

\textsuperscript{122} \textit{Id.}

\textsuperscript{123} \textit{Id.} at 2–3.


\textsuperscript{125} \textit{Id.}

conscientious objectors regardless of their religious beliefs. Justice Harlan believed the question presented was "whether the Constitution allows Congress to choose an intermediate position, and if so, whether the intermediate position it has taken in the existing statute is constitutionally permissible." Justice Harlan echoed Justices Goldberg and Black's opinions, and agreed that the Supreme Being clause indicated Congress' intent to draw the line between theistic and nontheistic beliefs. Unlike Justice Goldberg however, Justice Harlan found this classification to be permissible.

Justice Harlan acknowledged that the Court's recent First Amendment cases compelled application of a heightened level of scrutiny in this case. Justice Harlan weighed the infringement upon the Respondents' First Amendment rights against Congress' justification for doing so, and concluded that Congressional power to raise an army, and the magnitude of the conscription problem outweighed the Respondents' establishment clause claims. In his conclusion, Justice Harlan claimed that Seeger's interest "when weighed against the tremendous congressional national interest in accommodating religious free exercise and national defense . . . are not in my opinion sufficient to render the conscientious provision unconstitutional."

III. An Argument Against Avoidance

Although the Court did not articulate the reason for doing so, the Justices used the avoidance canon of statutory construction in *United States v. Seeger*. Instead of addressing the Respondents'
First Amendment concerns, the Court chose to broadly interpret the meaning of “Supreme Being” to include the Respondents’ views.\(^{135}\)

The avoidance canon is a rule of statutory construction for federal courts.\(^{136}\) When a statute “is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [a court’s] duty is to adopt the latter.”\(^{137}\) The roots of the avoidance canon can be traced to the initial justification for judicial review in *Marbury v. Madison*.\(^{138}\) When interpreting a statute, the Court presumes that the legislature acts within its constitutional authority.\(^{139}\) The Court has no power to consider otherwise, unless a case or controversy forces it to.\(^{140}\)

Justice Brandeis articulated the modern approach to the avoidance canon in *Ashwander v. TVA*.\(^{141}\) Brandeis described the avoidance doctrine as consisting of a series of seven rules.\(^{142}\) The rule that crystallizes the avoidance canon states, “[t]he Court will not pass upon a constitutional question, although properly presented by the record, if there is also present some other ground upon which the case may be disposed.”\(^{143}\) Brandeis believed it was fundamental to maintaining separation of powers that the judiciary not exercise judicial review unless all alternative grounds for the decision have been exhausted.\(^{144}\)

The avoidance canon has been praised as a way to preserve judicial independence and promote deference to other constitutional decision-makers.\(^{145}\) However, the avoidance canon can frustrate

\(\text{\footnotesize{135. See discussion supra Part II.A.}}\)
\(\text{\footnotesize{138. William K. Kelley, Avoiding Constitutional Questions as a Three-Branch Problem, 86 CORNELL L. REV. 831, 836 (2001). Chief Justice Marshall believed that as a non-lawmaking body, the Court should construe the legislature’s work to avoid constitutional doubt, unless those questions become “indispensably necessary” to the case. Id. at 837 (quoting Ex parte Randolph, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (No. 11, 558)).}}\)
\(\text{\footnotesize{139. Id. at 837.}}\)
\(\text{\footnotesize{140. Id.}}\)
\(\text{\footnotesize{141. Kloppenberg, supra note 136, at 1015.}}\)
\(\text{\footnotesize{142. Ashwander v. TVA, 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring).}}\)
\(\text{\footnotesize{143. Id. at 347.}}\)
\(\text{\footnotesize{144. Id. at 34–48 (outlining several rules the Court developed for avoiding constitutional questions).}}\)
\(\text{\footnotesize{145. See e.g. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962); CASS R. SUNSTEIN, ONE CASE AT A TIME (1999); Ruth Bader Ginsburg, Speaking in a}}\)
constitutional scholars seeking clarification on constitutional questions, and has been subjected to some criticism by scholars and judges. The main critique is that “the avoidance canon allows a court, on the vague ground that a serious constitutional question exists, to rewrite statutes without clear limits on the revising role, and without a clear demonstration that the Constitution compels rejecting the most natural interpretation of the law.” Instead of voiding the statute and returning to the status quo, the avoidance canon “produces a judicially rewritten statute without democratic legitimacy” guaranteed by the legislative process. Although the Court claims to be exercising judicial restraint, in actuality, the avoidance canon results in an extreme flexing of judicial power.

During the early years of the Warren Court, Chief Justice Earl Warren urged his fellow Justices to issue opinions on non-constitutional grounds. The avoidance canon was one way Chief Justice Warren could convince more moderate Justices to join a majority opinion. However, after Justices White and Goldberg joined the Court, a liberal coalition was formed, and the avoidance canon was utilized less.

While the avoidance canon is a valuable judicial tool in many respects, this Note argues that the Court should not have avoided the constitutional questions presented in Seeger. Seeger did not present a situation where the traditional reasons for using the avoidance canon existed. While the result in Seeger was favorable to the specific individuals involved in the case, the Court should have reached this decision on constitutional grounds, and Justices Goldberg, Black, and Harlan should not have withdrawn their respective opinions.

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147. Frickey, supra note 134, at 400.

148. Id. at 400–01.

149. Id.

150. Id. at 401.

151. Id. at 437.

152. Id. After the 1961 term, Justices Whittaker and Frankfurter were replaced by Justices White and Goldberg. Id. Justice Goldberg proved to be a reliable liberal vote, which gave the Court a solid liberal majority. Id.
A. Countermajoritarian Justification

The countermajoritarian justification for the avoidance canon does not support the Court's decision to avoid the constitutional questions in Seeger. In fact, by avoiding the constitutional issues, the Court acted in a countermajoritarian way by dramatically misinterpreting Congressional intent. A fundamental justification for the avoidance canon is that judicial review of legislative acts is a "delicate function," particularly in light of "possible consequences for others stemming also from constitutional roots." Advocates of the avoidance canon claim that when the Court declares a legislative act unconstitutional, it acts in a countermajoritarian way by thwarting the will of the people's representatives.

However, Justice Clark's interpretation of Section 6(j) can hardly be read as a faithful interpretation of Congressional intent. Justice Clark believed that substituting the word "Supreme Being" for "God" indicated Congress' intent to broaden the types of beliefs eligible for conscientious objection. While the Court's analysis of Congressional intent was a noble effort to include the belief systems held by the Respondents, it represents an overly generous conception of what Congress had in mind when writing the statute.

As Justice Harlan pointed out in a subsequent conscientious objector decision, throughout American history, legislators commonly used various synonyms for the concept of a deity. Replacing "God" with "Supreme Being" may indicate that Congress took into account a broader concept of religion when writing the statute. However, in Seeger, the Court interprets this substitution of words to indicate an

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153. For the purposes of the discussion, countermajoritarian means "the tension between the powers exercised by an unelected judiciary and the political primacy of legislative and executive bodies substantially more responsive to the short-term popular will." Frederick Shauer, Ashwander Revisited, 1995 SUP. CT. REV. 71, 71 (1995).

154. Kloppenberg, supra note 136, at 1036 (quoting Rescue Army v. Municipal Court of L.A., 331 U.S. 549, 571 (1947). See also Ashwander, supra note 142, at 345 (Brandeis, J., concurring), referencing other cases to support the claim for the "gravity and delicacy" of this function.


156. See discussion supra Part II.A.

expansive belief system, not all of which could be based on religious creeds with a “belief in a Supreme Being.”

Additionally, the legislative history of Section 6(j) clearly indicates Congressional intent to draw a distinction between theistic and nontheistic religions. The 1940 Selective Service Act did not include the phrase “Supreme Being” in the definition of a conscientious objector. Prior to the amended Selective Service Act in 1948, the Second and Ninth Circuit disagreed on the proper interpretation of the 1940 Act. The Ninth Circuit implied that religion was to be conceived of in theistic terms, but the Second Circuit held that religion should be thought of as one’s conscience. When Congress amended the statute in 1948, it explicitly adopted the Ninth Circuit’s interpretation. Congress’ decision to use the more theistic definition of religion as proffered by the Ninth Circuit, as opposed to a broader concept of “conscience,” indicates that Justice Clark’s expansive reading of congressional intent was misguided. Congress could have chosen to adopt a broader theory of religion and adopted the Second Circuit’s interpretation, but they explicitly decided not to do so. Therefore, the Court’s interpretation of Section 6(j) in Seeger is contrary to the legislative history of the statute.

The Respondents’ beliefs in Seeger could be characterized more accurately as an expression of conscience, and were more akin to the Second Circuit’s definition of religion. Seeger’s grounds for conscientious objection rested on a belief in “the welfare of humanity

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158. See discussion supra Part II.A.
159. See discussion supra Part II.B.
160. Selective Training and Service Act of 1940, ch. 720 § 5(g), 54 Stat. 888 (repealed by the Selective Service Act of 1948, 62 Stat. at 613, ch. 625 § 6(j), (1948)).
161. Berman v. United States, 156 F.2d 377, 380-81 (9th Cir. 1946), and United States v. Kauten, 133 F.2d 703, 708 (2d Cir. 1943).
162. Berman, 156 F.2d at 380-81. The Ninth Circuit’s description of religion discusses “[f]aith in a supreme power above and beyond the law of all creation,” and held that “no matter how pure and admirable [Berman’s] standard may be and no matter how devotedly he adheres to it, his philosophy and morals and social policy without the concept of a deity cannot be said to be religion in the sense of the term as it is used in the statute.” Id.
163. Kauten, 133 F.2d at 708. The Second Circuit held that a “compelling voice of conscience” should be regarded as a religious impulse, and that a conscientious objector’s grounds for exception “may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse.” Id.
165. See Kauten supra note 161.
and the preservation of democratic values." Jakobson professed a complicated belief in relation to "Godness" in a "vertical and horizontal sense." Peter's belief that war violated "moral law" was based on the writings of poets like Blake, Emerson, and Whitman. The "Supreme Being" requirement of Section 6(j) did not include belief systems based on "goodness and virtue for their own sakes," or a vague belief in "Godness."

In attempting to avoid striking down a statute enacted by Congress, the Court acted in a countermajoritarian way by imposing a definition upon the statute that Congress implicitly rejected. The will of the people, expressed through Congress, intended to limit the conscientious objector description to individuals who possessed theistic beliefs in a "Supreme Being." In order to avoid addressing First Amendment questions, the Court supplemented its definition of a "Supreme Being" to include individuals whose religious beliefs were based on the broad idea of conscience. The countermajoritarian rationale for invoking the avoidance canon fails to justify the Court's use of the canon in Seeger.

Occasionally, the Constitution compels the Court to act in a countermajoritarian way and strike down legislation that violates the Constitution. However, neither the avoidance canon nor the Constitution should allow the Court to act in a countermajoritarian manner out of convenience. Justice Clark's opinion in Seeger conveniently rewrites clear Congressional intent in order to avoid addressing the First Amendment question before the Court. Had Justices Goldberg, Black, and Harlan's opinions been included in Seeger, Justice Clark's countermajoritarian approach to Section 6(j) would be made apparent, and the Court's true frustrations with Section 6(j) would be made clear to lower courts.

166. Seeger, 326 F.2d at 848.
167. Jakobson, 325 F.2d at 412.
168. Peter v. United States, 324 F.2d 173, 174 n. 2 (9th Cir. 1963). "Since human life is for me a final value, I consider it a violation of moral law to take human life. I think I have reached this conviction out of my reading of such writings as those of Blake (Christian mystic), Emerson, Whitman, and more modern poets who have touched on the question." Id.
169. See discussion supra Part III.A.
170. See discussion supra Part II.A.
172. Id. at 25.
B. Separation of Power Justification

A related justification for the avoidance canon is that it encourages the proper separation of powers among the three branches of government. By not addressing constitutional questions, the Court preserves a "healthy, cooperative attitude between the Court and Congress by 'remanding' issues for careful congressional deliberation." Invoking the avoidance canon notifies Congress of the constitutional issues in a statute which the legislature is properly suited to address. Furthermore, avoiding constitutional questions provides the Court with some precedent if the Court faces a similar case in the future. The avoidance canon is useful in the sense that the Court can consider how a decision may infringe on the constitutional authority of another branch. If the Court clearly indicates it will not reach the constitutionality of a particular piece of legislation, the other branches (specifically Congress) are free to fulfill their constitutional duties. This view supports a fairly strict adherence to the canon in order to avoid undue intervention into executive or legislative authority.

The separation of powers justification, however, does not support the Court's use of the avoidance canon in Seeger. This justification assumes that the Court explicitly discussed the reasoning for using the canon. Seeger did not explain why the Court avoided the constitutional questions. Instead, Justice Clark chose to discuss Congressional intent in enacting 6(j), and then construed the statute in an excessively broad manner so as to include the Respondents' beliefs in the statute. Although the Court may have had future Congressional actions in mind when deciding Seeger, by not providing an explanation for using the avoidance canon, they left Congress

174. Frickey, supra note 134, at 446.
175. Id.
176. Id.
177. Id.
178. Kloppenberg, supra note 136, at 1050. Kloppenberg refers to Bickel's argument in The Least Dangerous Branch that, "When the Court clearly indicates that it will not reach the constitutionality of the legislative action, the other branches can operate relatively free from countermajoritarian influence." Id.
179. Id.
180. Frickey, supra note 134, at 446. See also Lisa Kloppenberg, Avoiding Serious Constitutional Doubts, supra note 146, at 2223.
181. See discussion supra Part II.A.
without any real guidance as to how to avoid First Amendment issues in future amendments to the statute.

*Seeger* did not provide Congress with any guidance on how to address the First Amendment concerns in Section 6(j). When the Universal Military Service and Training Act was amended in 1967, Congress removed the phrase "Supreme Being," but left the remainder of the statute intact. Perhaps after reading *Seeger*, members of Congress understood the incredible leap the Court took in expanding the meaning of "Supreme Being" to avoid constitutional problems. However, this does not indicate that Congress was made aware of the First Amendment issues in defining who qualifies for conscientious objection. The 1967 amendment still required the grounds for conscientious objection to be based on "religious training and belief." In their concurring opinions, Justices Goldberg and Black criticize this religious training and belief requirement on First Amendment grounds. Had Justices Goldberg and Black not withdrawn their opinions, Congress might have recognized the First Amendment problems with defining conscientious objection in this manner.

Additionally, the Court was no less "informed" on the First Amendment issues the next time conscientious objectors came before the Court. The Court revisited the conscientious objector exemption in *Welsh v. United States*. Once again, the Court invoked the avoidance canon, and interpreted the statute in an expansive manner to include Welsh's beliefs in the exemption. According to the Court's interpretation, the two groups of registrants that do not qualify for the exemption are those whose beliefs are not deeply held, and "those whose objection to war does not rest at all upon moral,

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184. *Id.* The relevant portion of the conscientious objector provision states: "[n]othing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views or a merely personal moral code." *Id.*


187. *Id.* at 343. Interestingly, Justice Black wrote the majority opinion in *Welsh*. This seems to contradict Justice Black's position in his unpublished concurring opinion in *Seeger*, which addressed the First Amendment problems. See discussion *supra* Part II.B.
ethical or religious principle but instead rests solely upon considerations of policy, pragmatism, or expediency."

In a lengthy concurring opinion, Justice Harlan expressed his dissatisfaction with the Court’s interpretation of Section 6(j). Justice Harlan began his concurring opinion by stating that he joined the majority in *Seeger* “with the gravest misgivings as to whether it was a legitimate exercise in statutory construction, and today’s decision convinces me that in doing so I made a mistake which I should now acknowledge.” He further explained that the “liberties taken with the statute both in Seeger and today’s decision cannot be justified” by the avoidance canon, and that there “are limits to the permissible application of that doctrine” which were crossed in *Seeger* and *Welsh*. Justice Harlan claimed that “[u]nless we are to assume an Alice-in-Wonderland world where words have no meaning, I think it is fair to say that Congress’ choice of language cannot fail to convey to the discerning reader the very policy choice that the prevailing opinion today completely obliterates.” While Justice Harlan acknowledged that it is desirable to use the avoidance canon to save a statute from being deemed unconstitutional, “it is not permissible, in my judgment to take a lateral step that robs legislation of all meaning in order to avert the collision between its plainly intended purpose and the commands of the Constitution.”

Justice Harlan then addressed whether Congress could enact a conscientious objector exemption which defers to an individual’s conscience only when his views emanate from theistic religious beliefs. Contrary to his unpublished dissent in *Seeger*, Justice Harlan concluded that Congress could not draw a line between theistic and non theistic religious beliefs for the purpose of conscientious objector exemption because it would violate the Establishment Clause. If Congress wished to include an exemption from military service for conscientious objectors, the common

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190. *Id.*
191. *Id.* at 345.
192. *Id.* at 354.
193. *Id.*
194. *Id.* at 356.
195. *Id.* at 356.
denominator must be the intensity of moral conviction with which a belief is held, not the nature of one’s beliefs.\textsuperscript{196}

If one of the purposes of avoiding constitutional concerns is to provide guidance to future Congressional deliberations and Court opinions, \textit{Seeger} did not adequately address this concern. Justice Clark did not address why the avoidance canon should be used in \textit{Seeger}, which left Congress with no guidance on the First Amendment problems with Section 6(j). By excluding “Supreme Being” from the 1967 amendment to the Universal Military Training Act, Congress acknowledged the disposition of \textit{Seeger}, but provided no further guidance on First Amendment issues inherent in the conscientious objector exemption.\textsuperscript{197} While it is possible that Congress understood the potential Establishment and Free Exercise problems inherent in a conscientious objector exemption, the fact that the “religious training and belief” requirement was included in the revised statute makes this possibility less likely. Five years after \textit{Seeger}, the Court again avoided the constitutional issues in a similar conscientious objector claim.\textsuperscript{198} The separation of power justification does not adequately address why the avoidance canon was proper in \textit{Seeger}.

C. Judicial Restraint Justification

The \textit{Seeger} Court acted in an activist manner by not addressing the constitutional questions presented. The primary justification of the avoidance canon is that it is an exercise in judicial restraint.\textsuperscript{199} Advocates of the avoidance canon claim that the Court should avoid constitutional issues to prevent itself making doctrine which may have dangerous implications for the future development of law.\textsuperscript{200} However, invoking this canon in \textit{Seeger} created exactly what it was designed to preclude. The Court’s reasoning in \textit{Seeger} represents a

\textsuperscript{196} \textit{Id.} at 358.
\textsuperscript{198} \textit{Welsh}, 398 U.S. at 343.
\textsuperscript{199} Frickey, \textit{supra} note 134, at 446.
\textsuperscript{200} Lisa Kloppenberg, \textit{Avoiding Serious Constitutional Doubts}, \textit{supra} note 146, at 58, 74–75, 93 (discussing the effect of Supreme Court’s use of the avoidance canon on lower courts). \textit{See also} John Hart Ely \textit{to Chief Justice Warren, Memorandum, Jan. 28, 1965, 2, Box 526, Folder 2, Library of Congress, Papers of Earl Warren.} Warren’s clerk warned the Chief Justice that the doctrine of avoidance “should be invoked only when doing so will keep the Court from getting into areas and making doctrine which may have dangerous implications for the future development of law.” \textit{Id.}
complete rewriting of the exemption, and misinterprets Congressional intent; hardly an “exercise in judicial restraint.” The Seeger test produced an unworkable standard, which the Court could have reasonably anticipated would be difficult for draft boards to administer.\(^{201}\)

When the Court avoids constitutional pronouncements and distorts the meaning of Congressional statutes, lower courts and administrative agencies are forced to apply the distorted law.\(^{202}\) For conscientious objectors, this meant that the magnitude of their First Amendment concerns were not clearly conveyed to the lower courts, which can lead to nonuniformity in protection of these rights.\(^{203}\) As a result, conscientious objectors suffer a loss of liberty because their First Amendment rights are not fully protected by the Court’s evasive opinion. Since one of the Court’s primary functions is to guard individual liberties and minority interests,\(^{204}\) the use of the avoidance canon in Seeger meant that the constitutional liberties of conscientious objectors were left unprotected.\(^{205}\)

In his concurring opinion in Welsh, Justice Harlan noted that the Court should refrain from deciding constitutional questions when there is good reason to believe the case before them presents an unintended unconstitutional consequence.\(^{206}\) Nevertheless, it is impermissible “to take a lateral step that robs legislation of all meaning in order to avert the collisions between its plainly intended purpose and the commands of the Constitution.”\(^{207}\) In an earlier opinion outlining the avoidance canon, Justice Benjamin Cardozo noted that “avoidance of a difficulty will not be pressed to the point of disingenuous evasion.”\(^{208}\) While judges should use the canon to

\(^{201}\) The “Seeger test” refers to Justice Clark’s command that the trier of fact (and local draft boards) in conscientious objector cases determine whether “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 exemption.” Seeger, 380 U.S. at 184.

\(^{202}\) See discussion supra Part II.A, and infra Part III.C.

\(^{203}\) Kloppenberg, supra note 136, at 1034. Dean Kloppenberg argues, “It is not obvious, however, that rights are more secure under a flexible system in which the Court can determine the necessity of reaching a constitutional issue in a particular case. In fact, a system in which federal courts reject the last resort rule to render more constitutional decisions may better secure federal rights.” Id.


\(^{205}\) Id. See also, Kloppenberg, supra note 136, at 1066.


\(^{207}\) Id.

\(^{208}\) Moore Ice Cream Co. v. Rose, 289 U.S. 373, 379 (1933).
restrain themselves from addressing issues not before them, the canon becomes ineffective when the Supreme Court appears to be running from a reoccurring constitutional problem.

Justice Clark's opinion in Seeger is an example of the Court avoiding a difficult issue to the point of "disingenuous evasion." The Court completely misinterprets Congressional intent in order to avoid reaching First and Fifth Amendment issues. Justice Clark's definition of religion is nowhere near what Congress had in mind when writing Section 6(j), but the Court overlooks this in order to dodge addressing constitutional questions presented.

According to the Seeger test, when draft boards review a conscientious objector's application, they are to determine "whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption." Seeger asked draft boards to embark on a nearly impossible task. First, draft boards must determine the "place" a belief in God occupies in the mind of an individual who would clearly qualify as a conscientious objector. Then, the board must determine the "place" an opposition to participation in war occupies in the life of the applicant. Finally, the Seeger test asks draft boards to compare the role these beliefs occupy in the lives of an unambiguous conscientious objector and the applicant before them. What standards are draft boards to use in making these determinations? How, exactly, does one compare the role a belief system occupies in the lives of two individuals? Justice Clark did not provide any guidance on these issues.

Additionally, the Court almost certainly understood that draft boards were comprised of a wide range of individuals. Studies on the makeup of local boards revealed that the majority of them were white, middle-class conservatives, and many members were military veterans. The Court acknowledged that defining a religious belief is

209. See discussion supra Part II.A, and Part III.A.
210. Seeger, 380 U.S. at 166.
211. Id. at 184. Justice Clark most likely meant conscientious objectors who were historically exempt from service, like the Quakers, Amish, and Mennonites. See Stone, supra note 23.
212. Seeger, 380 U.S. at 184.
213. Id. Although the Seeger test does not explicitly require lower courts and draft boards to compare these beliefs, the Seeger test implies such a requirement.
a difficult task for religious scholars.\textsuperscript{215} Despite this difficulty, the Seeger test asks draft board members—who were generally not religious scholars—to engage in the nearly impossible task of defining and comparing individual’s belief systems.

If Justices Goldberg, Black, and Harlan had not withdrawn their opinions in Seeger, the majority’s judicial activism would have been apparent. The Justices’ opinions draw attention to Justice Clark’s overly aggressive interpretation of Section 6(j), and the flaws of the Seeger test.\textsuperscript{216} Justices Goldberg and Black’s concurring opinions stress the delicacy of evaluating an individual’s religious beliefs. Including these opinions would have acknowledged the tremendous First Amendment issues that arise when draft boards consider conscientious objector applications. Justices Goldberg, Black, and Harlan’s opinions demonstrate that the Court could have approached this constitutional issue in a restrained manner because the Justices’ opinions did not misconstrue Congressional intent or announce a faulty test. Including Justices Goldberg, Black, and Harlan’s opinions would have demonstrated that addressing the constitutional questions was a more restrained method of statutory interpretation, protected the liberty interest of conscientious objectors, and provided guidance to the lower courts in future conscientious objector cases.

IV. Potential Reason for Withdrawal: The Political Realities of Vietnam

The Justices’ papers reveal that in the days leading up to the announcement of Seeger, Justices Goldberg, Harlan, and Black’s opinions were still part of the decision. On Thursday March 4, 1965, Justice Douglas received a note from Justice Clark, which stated that if Justice Black were to join or concur in Justice Clark’s most recent draft, Justices Goldberg and Harlan would also concur.\textsuperscript{217} On March 5, Justice Goldberg circulated a memo to the Court, withdrawing his

\textsuperscript{215} The Court discusses the various ways religious scholars define religion. Seeger, 380 U.S. at 180–84.

\textsuperscript{216} See discussion supra Part II. B.

\textsuperscript{217} Justice Thomas Clark, Memorandum to Justice William O. Douglas, Mar. 4, 1965, Box 1342, Folder 10, Library of Congress, Papers of William O. Douglas. The memo stated, “If Hugo [Black] joins or concurs in the newest Author [Goldberg] and John [Harlan] say they will join me.” Id.
concurring opinion, and siding with Justice Clark. Justice Black must have joined with Justice Clark in his March 4 opinion, which made the decision unanimous. Justice Black appears to have been the key vote which resulted in the Seeger opinion. A unanimous opinion, with Justice Douglas concurring, was announced on March 8, 1965.

Predicting why Supreme Court Justices vote the way they do is far from an exact science, and this Note does not attempt to provide a complete explanation of the Justices' voting behavior. However, American involvement in Vietnam during March of 1965 may provide some insight to the Justices' thought processes.

On February 27, 1965, the State Department released a White Paper, which addressed North Vietnam's involvement in South Vietnam. The report stated that the United States had an obligation to assist South Vietnam, and discussed the State Department's position on the increasingly violent conflict. Behind closed doors, the State Department decided to implement the first offensive attack on North Vietnam. Operation Rolling Thunder was a series of sustained fire bombings on North Vietnam, which began on March 2, 1965. While the public remained in the dark about Operation Rolling Thunder, on March 6, 1965, the New York Times reported that 3,500 U.S. Marines had been deployed to South Vietnam. American military advisers were already stationed in South Vietnam, but this was the first time American combat troops were sent to South Vietnam.

There is no direct evidence that the Supreme Court Justices were aware of the combat troops in South Vietnam before the announcement was made public. However, the Justices were

221. Id.
223. Id.
225. Logevall, supra note 222, at 363.
226. That is to say, there were not any articles about the deployment of U.S. troops, or notes between Justices about the incident in any of their papers.
undoubtedly aware of United States’ foreign affairs, and one can reasonably assume they read major newspapers like the New York Times. Furthermore, the Justices were very well-connected in Washington, so it is possible that they knew of President Lyndon Johnson’s military plans before they were made public.

One reason why Justices Goldberg, Black, and Harlan may have agreed with Justice Clark’s opinion in Seeger could be the fear of declaring conscientious objection unconstitutional in light of recent events. With combat troops going into South Vietnam, and the White Paper exposing the State Departments’ increasingly aggressive position, the Justices may have anticipated an escalating conflict in Southeast Asia. An increased American involvement in South Vietnam could require the Selective Service to draft more citizens, and possibly handle more applications for conscientious objector exemption. Justices Goldberg, Black, and Harlan discuss the constitutionality of Section 6(j), which could potentially result in Congress doing away with the conscientious objector exemption altogether. Based on the Court’s historically accommodating treatment of conscientious objectors, the risk of eliminating the exemption might have been an uneasy proposal for the Justices. Justices Goldberg, Black, and Harlan’s opinions regarded the position of conscientious objectors with great respect, and there is little indication that the Justices wanted to do away with conscientious objection entirely. The three Justices may have chosen to withdraw their opinions and side with Justice Clark for fear that conscientious objectors may no longer have the opportunity to apply for exemption from military service.

Another reason Justices Goldberg, Black, and Harlan may have chosen to withdraw their opinions is the potential public backlash against a seemingly anti-military opinion. Historically, the Supreme Court expressed great deference to the military, particularly during wartime. At the time, some critics of the exemption claimed that conscientious objectors were traitors who negated their patriotic duty by opting out of military service. While the members of the Court

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228. See discussion supra Part II.B.
may not have agreed with this appraisal, Justices Goldberg, Black, and Harlan’s opinions were sympathetic to the plight of the conscientious objector. If Seeger included these other opinions, which expressed sympathy towards conscientious objectors during a time of increased support of the military, the Court might have faced harsh criticism. Although by 1965 the Warren Court was certainly used to criticism, perhaps the issue of conscientious objection was not considered a significant concern which warranted a constitutionally grounded opinion. While these explanations may not have actually played a role in the Justices’ thought processes, they are possible reasons why the Court’s opinion changed over the course of four days.

The increasingly aggressive U.S. military position in March of 1965 does not, by itself, support Justice Clark’s evasive decision in Seeger. The political realities of war occasionally force the Court to issue decisions which are heavily criticized by future generations. Despite the potential political backlash, Justices Goldberg, Black, and Harlan should have included their respective opinions in Seeger because it would have fulfilled the Court’s role in protecting individual liberties. If the Justices feared a potential increase in conscientious objector applicants, the religious liberties of those applicants would, in fact, be threatened by the Seeger test. As Justice Black pointed out in his concurring opinion, “[f]reedom to believe cannot, I fear, survive such sophisticated tests.” The Justices recognized that the malleable Seeger test would be applied inconsistently among lower federal courts and draft boards, which could result in diminished First Amendment protections for conscientious objectors. Although including these opinions may have subjected the Court to criticism, the importance of defending the rights of conscientious objectors should have overridden these concerns.

234. See discussion supra Part III.C.
Conclusion

The majority opinion in *Seeger* represented a deceptively united front in favor of Justice Clark's opinion. Justices Goldberg, Black, and Harlan wrote thorough concurring and dissenting opinions that reached the pressing First Amendment issues that the majority avoided. The customary reasoning for invoking the canon of constitutional avoidance does not support the Court's decision in *Seeger*. Justice Clark's opinion represented an activist, countermajoritarian decision which negated separation of power concerns in an attempt to avoid addressing constitutional issues. Including Justices Goldberg, Black, and Harlan's opinions would have alerted the public to the delicate First and Fifth Amendment issues at stake in *Seeger*, and provided a more accurate depiction of the Court's decisionmaking process.
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