Conscience and the Courts

Selected Supreme Court and other cases which define conscientious objection to participation in war

by Marian Franz

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" Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof... "

Introduction

The legislative branch of government, Congress, makes the laws; the executive branch enforces and administers them; while the Courts interpret them and judge their constitutionality. This booklet describes the struggle of the citizens who are conscientious objectors to participation in war and who strive to obey both the demands of conscience and the duties of citizenship. The entire First Amendment reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The two clauses on which freedom of religion and conscience are argued in the courts are the first two: the Free Exercise clause and the Establishment clause. (Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; ...) Government cannot establish religion or prohibit its exercise. It can neither aid nor hinder religion. The founding fathers considered freedom of religion a paramount issue. To carefully spell out liberty of conscience and religion was deemed a primary necessity because states with established religions had a history of restriction and persecution of their nonconformists.

James Madison, who wrote and introduced the First Amendment's two religion clauses, believed that obligations of conscience should trump everything else. His version read: "Congress shall make no law establishing religion, or prohibiting the free exercise thereof; *nor shall the rights of conscience be infringed*." The last clause was struck because it was assumed the rights of conscience would be included under the free exercise clause.

The Second Amendment originally read: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Madison added, "*but no person religiously scrupulous of bearing arms shall be compelled to render military service in person*." The added words too were deleted.

Congress has recognized the unique status of those whose religious teachings disallow their participation in certain programs. The Congressional Research Service of the Library of Congress has said:

> Historically and legally, objection to war has held a unique place in our nation. Most of the American colonial governments made special provision for conscientious objectors beginning with Rhode Island in 1662. The first Continental Congress resolved in 1775 that it would recognize the rights of those who would not bear arms because of religious scruples [2 Journals of the Continental Congress 189 (1905)]. By the time of the Civil War numerous states exempted COs from conscription on religious grounds from their militias. ... The Federal Conscription Act of 1863 contained commutation and substitution provisions, and the Draft Act of 1864 extended exemptions to conscientious objectors who were members of certain religious denominations. In the latter year, the Confederacy also exempted certain pacifist sects from military duty.

A World War I draft law exempted from combat service, but not from all military service, those conscripts who came from traditional peace churches. Yet in World War I hundreds of conscientious objectors were imprisoned for their beliefs. Seventeen were sentenced to death, 142 were sentenced to life terms, and served sentences averaging 16.5 years. None of the death sentences were carried out, but 16 conscientious objectors died in prison as a result of mistreatment. Military authorities eventually made some limited and local adjustments to alternative service, but no formal alternative-service program ever developed during World War I.

Anticipating World War II, representatives of the three historic Peace Churches (Quakers, Mennonites, Church of the Brethren) visited President Franklin Roosevelt to state that their young men would not submit to a military draft and, as in World War I, would go to prison instead. Within a year, Congress passed a law to provide conscientious objection to military service resulting from a draft.

By the time the U.S. entered World War II, "alternative service" in lieu of military service was created. Thousands of conscientious objectors provided essential staff for mental hospitals, volunteered as human test subjects for arduous medical experiments, and provided other service for the national health, safety and interest. The alternative service concept recognized that a country needs many kinds of service and that participation in the military is not the only way to contribute to the common good.

In World War II, the Selective Training and Service Act of 1940 broadened the earlier exemption by making it unnecessary that the objector belong to a pacifist religious sect (54 Stat. 889). Following that war, the 1948 Universal Military Training and Service Act (62 Stat. 604), renamed the Military Selective Service Act of 1967, and still later, the Military Selective Service Act, continued the 1940 exemptions.

This booklet contains samples of various cases that have been judged by the Supreme Court of the United States. Conscientious objection to participation in war is permitted in law and has developed over years of time.

I have taken the findings of these cases, and in many cases quoted directly, from books and from the web sites such as Findlaw, Wikipedia, The Religious Freedom Page, etc.

Marian C. Franz
Washington, DC

Contents

United States v. Schwimmer 279 U.S. 644 (1929)

Question: Should pacifist belief hinder an immigrant from U.S. citizenship?

 **The Case:** Schwimmer, a Hungarian, wanted to become a US citizen but said she was unable to take the oath of allegiance. Asked if she would be willing to take up arms in defense of her new country she said she believed in the democratic ideal but asserted that she was an uncompromising pacifist. "My 'cosmic consciousness of belonging to the human family' is shared by all those who believe that all human beings are the children of God."

 **Decision:** Schwimmer's appeal for naturalization was denied. In an 7-2 decision the Court rejected her claim, saying that the pacifism that Schwimmer professes may hinder her ability to develop the nationalism that the country attempts to foster. The reason for her pacifism is immaterial, the Court said, because she is not yet a citizen who possesses the rights of citizenship that allow for conscientious objection.

 **Significance:** The Court held that it is proper for the country to prevent people who espouse feelings contrary to the nation's interests from the privilege of naturalization. The case was not overruled until 1946 (see *Girouard*).

United States v. Macintosh 283 U.S. 605 (1931)

Question: Should citizenship be allowed for a person who pledges only to fight wars the individual considers moral?

The Case: Macintosh, a Canadian citizen, sought to become a naturalized U.S. citizen, but refused to pledge to take up arms in defense of the country. He would fight for his country only if he thought the war was morally justified. On his citizenship application he wrote, "I am willing to do what I judge to be in the best interests of my country, but only in so far as I can believe that this is not going to be against the best interests of humanity in the long run. I do not undertake to support 'my country, right or wrong' in any dispute which may arise, and I am not willing to promise beforehand, and without knowing the cause for which my country may go to war, either that I will or that I will not 'take up arms in defense of this country,' however 'necessary' the war may seem to be to the Government of the day."

Decision: The Court refused to allow a candidate for naturalization to qualify his oath by pledging only to fight in wars he deemed moral. "..[G]overnment must go forward upon the assumption, and safely can proceed upon no other, that unqualified allegiance to the nation and submission and obedience to the laws of the land, as well those made for war as those made for peace, are not inconsistent with the will of God."

Significance: The Court said that it is the Congress, not the courts, which should decide. This decision reasserted the importance of Congressional authority to dictate the terms for obtaining citizenship. The "slippery slope" argument (once we start down this path there'll be no way to stop) was used to prevent any qualifications to the requirements for naturalization.

Hamilton v. Regents of the University of California

293 U.S. 245 (1934)

1934

Question: May a state force its public college students to participate in the Reserve Officers Training Corps program?

The Case: Students in the University of California system refused to take part in the school's Reserve Officer Training Corps program. They were members of a Methodist Church, and two years earlier a church council had renounced military action as contrary to God's will. They sought exemption from training for, or serving in, the military because they were bound to follow the teachings of the Methodist Church. When the regents refused their request to make military training optional, the students were suspended.

Decision: The Supreme Court unanimously upheld the authority of California to force its university students to take classes in military training. "[Their] position is not constitutionally supportable." Just as states have a duty to protect their citizens, citizens have a reciprocal duty to aid in defending their states.

Significance: This decision followed the principles established earlier in *Schwimmer* and *Macintosh*: the duties of the government to ensure military readiness outweigh the rights of individuals to refuse. In other words, according to the Supreme Court there is not a constitutional right to conscientious objection.

Girouard v. United States 328 U.S. 68 (1946)

Question: Should citizenship be denied to a person who cannot pledge to bear arms?

The Case: Girouard, a Canadian citizen, sought naturalization in the United States. He refused, however, to pledge to bear arms for the military because it was contrary to the teachings of the Seventh Day Adventist Church, of which he was a member. He was willing to serve in the military in a non-combat role, but his faith prevented him from engaging in combat.

Decision: In a 5-3 decision, the Court said the country's history of religious tolerance forces the acceptance of many people whose faiths prevent them from doing certain things and to allow the naturalization of people whose religious faiths prevent them from complying with all the terms of the oath of allegiance.

Significance: Here the Supreme Court of the United States decided for the first time that an alien may be admitted to United States citizenship even though, because of his religious scruples, the applicant refuses to bear arms. It said, "in the domain of conscience there is a moral power higher than the State."

The majority opinion stated, *"The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle... There are numerous other ways a citizen can assist in defending the country in times of war. Those whose religious scruples prevent them from killing are no less patriots than those whose special traits or handicaps result in their assignment to duties far behind the fighting front."*

A. J. Muste v. Commissioner of Internal Revenue 35 T.C. 913 (1961)

Question: Is open failure to pay taxes fraudulent if the failure is based upon principle?

The Case: A. J. Muste, an ordained Presbyterian minister, and also member of the Religious Society of Friends (Quakers), reached the conclusion that since the Federal government's decision to produce hydrogen and other weapons, it would be irrational for him, and against his conscience, to pay money for the production of such weapons. In tax court he argued, "About two years ago, I became convinced that I could no longer recognize the right of this or any other government to tax me in order to obtain the money to produce atomic weapons. In partial discharge of the obligation which accordingly rests upon me as a Christian, a member of the human family and a loyal citizen, I decline to file a Federal income tax return or to pay the tax. ... I have come as the result of long reflection and prayer to the conviction that I at least am in conscience bound, in the present period, under the conditions above set forth, to challenge the right of the government to tax me for waging war. I am impelled to take the course which I am following by my Christian convictions, by conscience, and by my love for my country." Muste had been a member, and frequently an officer, in the Fellowship of Reconciliation. In accord with Muste's request, the Fellowship of Reconciliation did not deduct and withhold Federal income taxes from the years 1948-1952. This was in accord with Muste's request based on the ground that remuneration of an ordained minister is not subject to withholding.

Decision of the Tax Court: Fraud consists of deceitful practices. No part of the deficiency for any of the years 1948 to 1952, inclusive, is due to fraud with intent to evade tax. Willful failure to file returns is not alone sufficient to sustain a conclusion that there was an intent to defraud. For a conviction of fraud, there must be some evil motive and some conduct, the likely effect of which would be to mislead or to conceal. The failure of the petitioner to file Federal income tax returns and declarations of estimated tax for each of the years 1948 through 1952 was not due to reasonable cause, but was due to willful neglect. The IRS request for filing is not contrary to the First Amendment.

Significance: The tax court defined tax evasion, saying that willful failure to pay, based upon principle, is not fraud and that no part of the Muste's deficiencies for any year was due to fraud, cunning or deliberate deceit.

Sherbert v. Verner 374 U.S. 398 (1963)

Question: May a state deny unemployment benefits to a person who voluntarily quits her job for religious reasons, while granting those benefits generally to those who quit for "compelling reasons" ?

The Case: A member of the Seventh Day Adventist Church was fired by her South Carolina employer because she would not work on Saturday, the Sabbath day of her faith. After failing in her attempts to get another job, she filed for unemployment compensation benefits. The South Carolina Employment Security Commission found that her reason for refusing to accept "suitable" work was "not compelling and necessitous," as required under state unemployment law.

Decision: The Supreme Court ruled 7-2 in favor of the woman's right to refuse to work on her Sabbath without losing her right to unemployment benefits. The Court held that incidental infringement of one's free exercise of religion must be justified by "a compelling government interest" carried out by "the least restrictive alternative means." The Court said the door of the Free Exercise Clause stands tightly closed against any governmental regulation of religion as such. "Government may neither compel affirmation, nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities ... nor employ the taxing power to inhibit the dissemination of particular religious views."

Significance: This decision forced states to recognize the unique requirements of various faith traditions. Recognition of these special needs, it noted, does not constitute an endorsement of any of these religions. The Court limited the scope of its opinion by stating, "Nor do we, by our decision today, declare the existence of a constitutional right to unemployment benefits on the part of all persons whose religious convictions are the cause of their unemployment."

Question: Does one have to claim belief in a Supreme Being to be classified under the Selective Service Act as a conscientious objector to participation in war?

The Case: Several persons made this appeal. Daniel Seeger claimed the law was unfair because it did not exempt non-religious conscientious objectors and that it discriminated between different forms of religious beliefs. The law (under the Universal Military Training and Service Act, Section 6 (j) stated that people could be exempted from military service if their "religious training or belief" is the reason for their opposition to such service. It defined appropriate training or belief as "an individual's belief in relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code." One person involved in the suit believed in a "supreme reality" while another believed in a "universal reality".

Decision: In a unanimous 9-0 opinion, the Court allowed that people with general theistic belief systems could be declared conscientious objectors: "...liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state." The test of religious belief under Section 6 (j) is whether it is "a sincere and meaningful belief occupying in the life of its possessor a place parallel to that filled by the God of those admittedly qualified for the exemption." The Court reversed the judgment of the lower court but added that the belief cannot be extended to "essentially political, sociological, or philosophical views or a merely personal code."

Significance: Belief can be "religious" without belief in a Supreme Being provided that the belief is not strictly personal and the person claims that the beliefs serve the same function as a traditional religious belief. This decision establishes an expansive definition of what constitutes religious-type beliefs.

Congressional Action Following the Case: After the Seeger case the statute was amended, deleting the Supreme Being phrase but retaining the rest.

Welsh v. United States 398 U.S. 333 (1970)

Question: Can qualifying conscientious objection be purely ethical and moral?

The Case: Elliott Welsh of Santa Barbara, California was convicted of refusing to submit to induction into the Armed Forces. He was sentenced to prison for three years despite his claim for conscientious objector status under Section 6 (j) of the Universal Military Training and Service Act. The law unfairly exempted those whose conscientious objection claims were founded on a theistic belief, while not exempting those whose claims are based on a secular belief. On the form Welsh struck the words "my religious training and belief." He said he could not affirm or deny belief in a "Supreme Being". He insisted that his moral opposition to conflict in which people are killed was based on the sincerity of his belief and should therefore qualify him for exemption from military duty. **S**ection 6 (j) of the Universal Military Training and Service Act, read in part: "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

Decision: In a 5-3 decision, the Court allowed Welsh to be declared a conscientious objector even though he claimed that his opposition to war was not based on religious convictions. The Court said: "If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual "a place parallel to that filled by . . . God" in traditionally religious persons. Because his beliefs function as a religion in his life, such an individual is as much entitled to a 'religious' conscientious objector exemption under Section 6 (j) as is someone who derives his conscientious opposition to war from traditional religious convictions."

Significance: Welsh greatly expands the types of beliefs that can be used to obtain conscientious objector status. A registrant's conscientious objection to all war is "religious" even if opposition under the draft law stems from the registrant's moral or ethical beliefs about what is right and wrong, and if these beliefs are held with the strength of traditional religious convictions. The depth and fervency of the beliefs are critical to determining which views exempt an individual from military service. Conscientious objector status is no longer limited to those whose opposition to war is prompted by orthodox or parochial religious beliefs.

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

Question: Can one selectively object to some wars and not others and still qualify for draft exemption or military discharge as a conscientious objector?

The Case: Gillette refused to report for induction but claimed that he would participate in wars of national defense or United Nations peace-keeping wars. His reasons for believing the Vietnam War was unjust were based on his "humanist approach to religion" and his deeply held views concerning the nature of human existence. This case dealt with the issue of whether a person could be exempted from military service because of objection to a particular war rather than war in general. The petitioners stated their freedom to exercise their religion is crippled because some object on religious grounds only to particular wars. Gillette argued that objecting to particular wars is protected because the fifth commandment, "Thou shall not kill," provides a basis for the distinction between just and unjust war. The question became whether exemptions should be granted based on conscientious objection to certain weapons and certain military strategies. In a companion case, Negron applied for discharge from the military as a conscientious objector based on his Catholic "just war" beliefs, which lead him to oppose the Vietnam War.

Decision: The case was denied by an 8-1 decision. "Congress intended to exempt persons who oppose participating in all war ... and that persons who object solely to participation in a particular war are not within the purview of the exempting section." The applications for conscientious objector status under the draft and for discharge from the army, based on selective conscientious objection were not allowed. The Court held that Congress did not act unconstitutionally by limiting objector status to those people who object to all wars.

Significance: This decision limited itself to assessing the constitutionality of the Congressional limitations on conscientious objection. The Court reaffirmed its view that the Constitution does not guarantee the existence of conscientious objection status. Justice Marshall said, "Of course we do not suggest that Congress would have acted irrationally or unreasonably had it decided to exempt those who object to particular wars."

Note: The issue not yet directly answered by the Supreme Court is whether a conflict is legal or whether certain weapons are used at all. The Court has repeatedly avoided addressing such questions, generally denying their "political" nature.

Question: Do certain state statutes which make state financial aid available to church-related educational institutions violate the First Amendment's Establishment Clause?

The Case: Three cases from Pennsylvania and Rhode Island involved public assistance to private schools, some of which were religious. Pennsylvania's law included paying the salaries of teachers in parochial schools, assisting the purchasing of textbooks, and other teaching supplies. In Rhode Island, the State paid 15% of the salaries of private school teachers. A federal court upheld the Pennsylvania law while a District Court ruled that the Rhode Island law fostered "excessive entanglement" in the free exercise of religion.

Decision: The Court determined unanimously (7-0) that the assistance was unconstitutional.

Significance: This case created the "Lemon Test" for establishment clause cases. The "Lemon Test" is a tool for analyzing statutes relating to church-state interaction. Law or government action that is alleged to violate the Free Exercise and Establishment Clauses must meet the three part test in order to be upheld. If law violates any one of those three, the court declares it unconstitutional:

(1) It must have a secular purpose.
(2) It must be neutral. (Whatever the law's purpose, its primary effect must be neutral. Its primary effect can neither advance nor inhibit religion. For example. providing police and fire protection for churches does not have primary effect of advancing religion. Therefore it is constitutional. Teaching about religion in public schools does not advance or inhibit a particular religion).
(3) It must not foster excessive entanglement between church and state. (For example, the requirement for exit signs in places of worship does not involve excessive entanglement in religion. Monitoring of religious organizations and how they spend public funds would constitute entanglement).

Wisconsin v. Yoder 406 U.S. 205 (1972)

Question: Is a state's interest in compulsory education balanced by the right to free exercise of religion? *While this case does not pertain to conscientious objection to war, it is included because it is a landmark religious freedom case.*

The Case: Three parents of the Old Order Amish religion and Conservative Amish Mennonite Church were prosecuted under a Wisconsin law that required all children to attend public schools until age 16. The Amish asserted that their children's attendance at high school, public or private, was contrary to the Amish religion and way of life. If they sent their children to high school, they would not only expose themselves to the danger of the censure of the church community, but also endanger their own salvation and that of their children. The question presented was whether Wisconsin's requirement that all parents send their children to school at least until age 16 violates the First Amendment by criminalizing the conduct of parents who refused to send their children to school for religious reasons. (The Amish are at a disadvantage because they do no believe in going to court and do not easily complain. Without lobbyists or advocates they are frequently misunderstood. The National Committee for Amish Religious Freedom formed to assure their religious freedom is not violated).

Decision: In a 6-1 decision, the Court held that the right to free exercise of religion under the First Amendment outweighs the State's interests in compelling school attendance beyond the eighth grade. The Court held that the values and programs of secondary school were in sharp conflict with the fundamental mode of life mandated by the Amish religion, and that an additional one or two years of high school would not produce the benefits cited by Wisconsin to justify the law. Therefore these Amish cannot be forced to attend regular public high schools, which is against their religious beliefs.

Significance: Amish citizens may practice their religious way of life as long as they pose no grave dangers to themselves or others. The state's interest in compulsory education is balanced by the right of free exercise of religion.

United States v. American Friends Service Committee 419 U.S. 7 (1974)

Question: Must a religious employer withhold taxes from employees who ask that they not be withheld for reasons of conscience against participation in war?

The Case: The American Friends Service Committee (AFSC) is a religious corporation carrying out Quaker missions of service. Upon the request of its employees (conscientious objectors) AFSC agreed to cease withholding (under 26 U.S.C. Section 3402) a portion of wages deemed allocable to military expenditures. It claimed that enforcement deprived them of First Amendment rights to bear witness to their religious beliefs opposing war. A Pennsylvania District Court ruled that the right to free exercise of religion was indeed violated by forcing the AFSC to withhold taxes from conscientious objector employee salaries. They argued that IRS could not constitutionally require Quaker objectors (or their Quaker employers) to make such "voluntary" payments, so long as forced collection, such as by levy, was available to the government as an effective alternative.

Decision: Without dealing with the constitutional issue, the Court, in an 8 to 1 decision, reversed the lower court decision on the ground that the anti-injunction act barred the suit. This Court decision was based on the *procedural* ground that private suits to bar tax collection are not permitted.

Significance: The Court avoided the Free Exercise claim and discussed only the applicability of the Anti-Injunction Act. (An injunction is a court order that requires somebody involved in a legal action to do something or refrain from doing something.) No clear precedent was established in this case. The constitutional question remains to be tested.

Justice Douglas provided a significant voice in his dissenting opinion:

"The Anti-Injunction Act is no barrier. No 'assessment or collection of any tax' is restrained, only one method of collection is barred' the Government being left free to use all other means at its disposal. Moreover, to construe the Act as the Court construes it does not avoid a constitutional question but directly raises one. The Act, read as literally as the Court reads it, plainly violates the First Amendment as applied to the facts of this case, for 'no law' prohibiting the free exercise of religion includes every kind

of law, including a law staying the hand of a judge who enjoins a law for the collection of taxes that trespass on the First Amendment. ...[T]he Constitution gives no such preference to tax laws as to permit them to override religious scruples. ... The religious belief which the government violates here is that the employees must bear witness to their objection to their support of war efforts. ...for these employees, the operation of the withholding tax, which leaves them no option as to the payment of the taxes which they conscientiously question, operates as a deep abridgement of the expression and implementation of deeply cherished religious belief...If we are faithful to the command of the First Amendment we would honor that religious belief. I have not bowed to the majority that 'some compelling state interest' will warrant infringement of Free Exercise Clause. ... The power of Congress to ordain and establish inferior courts has not to this date been assumed or held to mean that Congress could require a federal court to take action in violation of the Constitution."

Fifth Amendment Cases

1975

United States v. Harper (1975), United States v. Haworth (1975), and other cases are among those cases in which the defendants succeeded in preventing the IRS from compelling them to produce records and answer questions in court regarding their financial records. These arguments were based on the Fifth Amendment's provisions against self-incrimination. The courts have said, however, that the Fifth Amendment is not a basis to refuse to pay any portion of the income tax.

Thomas v. Review of Indiana Employment Security Division 450 U.S. 707 (1981)

Question: Can one be denied unemployment compensation for refusing to manufacture weapons?

The Case: A Jehovah's Witness quit his job at a machinery company because it required him to work on armaments used for military purposes. He said that his religious beliefs prevented him from participating in the production of weapons. The Indiana Supreme Court argued that exemptions for those who terminated their employment for religious reasons would create widespread unemployment.

Decision: The U.S. Supreme Court reversed the Indiana judgment, saying that denying unemployment insurance benefits to a claimant for failing to modify his religious beliefs was improper. The Court held that only state interests of the highest order can overbalance legitimate claims to the free exercise of religion. Indiana had not shown a compelling interest. A person's beliefs do not have to be shared by all members of the religious sect. Objections to working conditions may also be based on personal beliefs that might be an integral part of an individual's code of ethics, morals, or philosophy of life without being related to religious beliefs.

Significance: For all cases involving religious conscientious objection, the following factors should be taken into consideration:

(1) The claimant does not have to modify his or her beliefs for work.
(2) The claimant's beliefs do not have to be shared by all members of the religious group or sect.
(3) The work does not have to be forbidden by the religious group or sect.
(4) The claimant's beliefs do not have to be held prior to the job.
(5) The beliefs do not have to be based on an established religion.

United States v. Lee 455 U.S. 252 (1982)

Question: Must an Amish employer of Amish employees withhold social security taxes that violate Amish religious belief?

The Case: An Old Order Amish farmer and carpenter failed to withhold social security taxes from his employees' pay checks and failed to pay the employer's share of social security taxes. He stated that payment of the taxes and receipt of benefits would violate the Amish faith which holds that its members have an obligation to provide for their fellow members the kind of assistance contemplated by the social security system. After the Internal Revenue Service assessed him for the unpaid taxes, the Amishman paid a certain amount and then sued in Federal District Court for a refund, claiming that imposition of the taxes violated both his First Amendment free exercise of religion rights and those of his employees. The District Court ruled in favor, saying the statutes requiring payment of social security taxes were unconstitutional as applied to the Amish sect based on both the First Amendment and the law [26 U.S.C. Section 1402(g)] which exempts from social security taxes, on religious grounds, self-employed Amish and others.

Decision: The claim was denied 9 to 0. The Supreme Court ruled unanimously that the imposition of Social Security taxes does not, in case of sects that object on religious grounds to such taxes, violate the First Amendment as to interfering with the free exercise of religion. It read narrowly Section 1402(g), which exempted self-employed taxpayers on these religious grounds, stating that the exemption did not extend to employers.

The Court found that payment of social security taxes is not fundamentally different from those who state a religious objection to paying a percentage of income taxes that relate to war. As a consequence, it said, "some religious practice yield to the common good."

The Court added: *"If for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax. The tax system could not function if denominations were allowed to*

challenge the tax system because tax payments were spent in a manner that violates their religious belief ... because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax."

Significance: Later opinions (including *Smith*) used the same language in *Lee* to deny claims for religiously based exemptions in both tax and non-tax cases. Later, Congress passed a law providing the very exemption that the Supreme Court said was impossible to grant. If the Courts deem a right is not covered under the Constitution, the Congress can nevertheless enact the right by "legislative grace," which it did in this case. (See Legislation: TAMRA, below).

Tax Equity and Fiscal Responsibility Act of 1982

The Legislation: This legislation institutes a $500 penalty for "frivolous" tax returns. Six months after *Lee*, in Section 6702 of the Internal Revenue Code, Congress imposed a civil penalty for frivolous returns. It was enacted as part of the Tax Equity and Fiscal Responsibility Act (TEFRA) in response to "the rapid growth in deliberate defiance of the tax laws by tax protesters." The new law allowed IRS to assess a $500 penalty to taxpayers who filed "substantially incorrect" returns for "frivolous" reasons. Although the term "frivolous" was not defined, the Senate Finance Committee explicitly cited "war tax deductions for taxes going to the Defense Department budget" as an example of a "clearly unallowable deduction." The $500 was assessed if war tax resisters merely included a letter of protest with their correct tax return. TEFRA increased the tax received but not the tax rates.

Significance: "War tax deductions for taxes going to the Defense Department" are specifically cited for an extra penalty.

Technical Amendments and Miscellaneous Revenues Act

Public Law #L 100-647, Sec. 8007 1988

The Legislation: Here Congress enacted the precise exemption the Supreme Court had denied in *Lee*. TAMRA included a provision that would broaden the Amish exemption from Social Security to overrule the Supreme Court's 1982 Lee decision and extend the special exemption that had applied only to self-employed Amish to also cover Amish employers of Amish workers.

Significance: The Supreme Court said "No." Congress said "Yes." Even though the Supreme Court denies a case, declaring the right is not covered under the Constitution, Congress can nevertheless give the legal right through legislation. In fact, the Supreme Court sometimes suggests that Congress do just that. TAMRA leaves the *U.S. v. Lee* decision's useful Free Exercise analytical framework intact, even without the Court's refusal to apply it fairly.

Note: This legislation offers another argument in favor of Religious Freedom Peace Tax Fund Act against those who say it is impractical and offers special favors.

Employment Division of Oregon v. Smith

494 U.S. 872 (1990)

1990

Question: Under the Free Exercise Clause, are employees, fired for sacramental drug use, entitled to unemployment benefits?

The Case: Alfred Smith and Galen Black were fired from their jobs because they ingested peyote for sacramental purposes at a ceremony of the Native American Church, of which both are members. The two had been employed with a private drug rehabilitation organization and were denied unemployment compensation on the grounds that their dismissal was for work-related "misconduct." The Oregon Supreme Court initially ruled that the two were entitled to benefits because the state's interest in its compensation fund did not outweigh the burden the decision placed on the men's religious beliefs. The State of Oregon had claimed that the ban on peyote and similar substances was a generally applicable rule that applied to everyone. Religious groups argued that if government passed any law that placed "substantial burden" on religious practice, it had to demonstrate a compelling reason, and had to achieve that end by the least restrictive means, requiring that government "should not substantially burden religious exercise without compelling justification."

Decision: Case denied. The U.S. Supreme Court remanded the case back to the state courts of Oregon for them to rule whether it was constitutional to proscribe the use of sacramental peyote. The Oregon Supreme Court ruled that the law was allowable, and the case returned to the U.S. Supreme Court. The Supreme Court held that if laws are neutral and have a general applicability they cannot be challenged under the Free Exercise clause of the First Amendment.

Significance: The Court swept away the strict scrutiny test established in *Sherbert*, saying a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. The Court limited its Sherbert test to cases where religion was treated unequally with other reasons to allow exceptions. In the *Smith* ruling, the Supreme Court repeated it's earlier statement in *Lee*: "If for example, a religious adherent believes war is a sin..." Justice Antonin Scalia, who wrote for the majority in *Smith*, argued that full-blown religious liberty is a "luxury" that the nation can no longer afford.

United States v. Philadelphia Yearly Meeting of Friends

753 F. Supp. 1300
E.D. Pa (1990)

1990

Question: Must a religious corporation enforce levies against its employees who conscientiously object to paying taxes for war?

The Case in District Court: Two months after the *Smith* decision was handed down, the *Smith* rationale was invoked by a Pennsylvania district court in a war tax resistance case. The Philadelphia Yearly Meeting of the Religious Society of Friends (PYM, made up of over 104 Quaker congregations) was charged with refusing to withhold taxes from the salaries of those employees who asked that the tax not be withheld for reasons of conscientious objection to financial participation in war.

Decision of District Court: A district court in Pennsylvania ruled that PYM must enforce levies against its employees who conscientiously object to paying war taxes. In making its decision the court noted the disparity between what they might have expected from the Supreme Court and what it decided in *Smith*.

The court said: *"It is ironic that here in Pennsylvania, the woods to which Penn led the Religious Society of Friends to enjoy the blessings of religious liberty, neither the Constitution nor its Bill of Rights protects the policy of that society not to coerce or violate the consciences of its employees and members with respect to their religious principles, or to act as an agent for our government in doing so. More than three hundred years after their founding of Philadelphia, and almost two hundred years after the adoption of the First Amendment, it would be a 'constitutional anomaly' to the Supreme Court [citing* Smith*] if the Religious Society of Friends were allowed to respect decisions of its employee-members bearing witness to their faith."*

Significance: During the late 1980's, a series of rulings by the U.S. Supreme Court upheld the right of governments to restrict religious freedom, as long as the limitations applied equally to all faiths. Under *Smith* there was no question the government could limit religious freedom. Note that the judiciary's most sympathetic ruling toward war tax protester's Free Exercise claim came after the *Smith* decision and before the Religious Freedom Restoration Act (RFRA) was enacted.

Religious Freedom Restoration Act of 1993

Public Law #103-171 (1993)

1993

The Legislation: This legislation was a direct response to *Smith*. Until 1990 courts interpreted the Free Exercise Clause to mandate an exemption from a generally applicable law (which burdened the free exercise of religion) unless the law was supported by a government interest of the highest order which was effected by a legislative program which had the least possible burden on the free exercise of religion. Under *Smith* there was no question the government could limit religious freedom. Dismay over this *Smith* ruling was expressed by a broad variety of religious and civic groups who promptly formed a group called the Coalition for the Free Exercise of Religion. This amazing coalition of over 70 religious and civic groups that had not worked together previously flocked to the cause and joined the effort to support the Religious Freedom Restoration Act which would restore the compelling government interest and least restrictive means tests. The coalition includes organizations from the political and religious left and right, including Baptists, Roman Catholics, Jews, Hindus, Humanists, Ethical Centralists, Lutherans, Episcopalians, Muslims, Presbyterians, new age sects, Scientologists, Unitarians, the Traditional Values Coalition, American Civil Liberties Union, Americans United for the Separation of Church and State, and People for the American Way.

Congress responded by passing the Religious Freedom Restoration Act of 1993. RFRA restored the 30-year standard whereby the government must prove a compelling state interest before restricting religious freedom and must use the least restrictive means available when doing so. RFRA passed the House unanimously and the Senate by a vote of 97-3.

Significance: Under *Smith* there was no question the government could limit religious freedom. With RFRA, the compelling government interest standard was back in place. The way was open for the issue of free exercise of religion and taxes to come before the judiciary once again.

Three Cases Appealed to the Supreme Court

These cases, filed by Quaker conscientious objectors to military taxes, were appealed to the Supreme court under the Religious Freedom Restoration Act (RFRA).

The Cases: Priscilla Adams asked that her employer, Philadelphia Yearly Meeting (PYM, an organization of 104 Quaker congregations), put the military portion of her taxes into an escrow account. Many times the IRS had taken the taxes, plus interest and penalties, from PYM's bank account. In 1997 Adams appealed to the tax court from the IRS assessment of taxes and penalties and then carried her appeal to the US Court of Appeals in Philadelphia (Third Circuit) on the basis of RFRA and the First Amendment. She asked the courts to require the IRS to (1) remove financial penalties imposed on pacifists who do not pay for the military and (2) to establish an accommodation for conscientious objectors to allow them to pay their taxes for non-military programs. **Gordon and Edith Browne** of New Hampshire filed a similar case that year. They argued that religious beliefs constituted "reasonable cause" under Section 6651 for their failure to pay income taxes. After losing in lower courts they too appealed to the Supreme Court. **Rosa Packard** of Connecticut cited RFRA and the First Amendment, and challenged the authority of the Internal Revenue Service to penalize her for her religiously based non-payment of war-related federal income taxes. She insisted the federal government should waive the discretionary penalties imposed on account of her conscientious inability to pay.

Significance: These petitioners argued that, contrary to the findings of the lower courts, the government -- not the taxpayer -- bears the burden of proof under RFRA in a case involving an infringement of free exercise of religion. The lower courts should have required the IRS to prove that the tax system could not accommodate this religious practice when it has discretion to refrain from penalizing other individuals, based on their non-religious reasons for failure to pay taxes. Lower courts have argued that should these cases succeed, it would open the floodgates for a variety of other tax resisters.

These cases were appealed to the Supreme Court which did not hear them. More than 7,000 cases are appealed to our highest court each year, but the Court agrees to decide fewer than 100 of them. The Supreme Court's approval of the lower courts' decision cannot be inferred from the Court's refusal to hear a case. If a higher court chooses not to hear the case, the lower court ruling stands.

The Court declares RFRA to be unconstitutional at state and local levels, but not at the federal level.

The Case: Archbishop Flores of San Antonio wanted to build an addition to a church which had become too small for the congregation. The local zoning authorities responded that the church was located in a historic preservation district that disallowed new construction and refused a permit. The Archdiocese argued in court that these restrictions violated the 1993 Religious Freedom Restoration Act (RFRA), and constituted an excessive burden on a religious organization.

Decision: The Supreme Court in a 6-3 decision declared the Religious Freedom Restoration Act unconstitutional to the extent that it is applied against state and local laws. Most of the opinion centered on whether Congress had the authority to enact such legislation, and may have exceeded its authority in interpreting the Constitution. The Court held that section five of the Fourteenth Amendment does not authorize congress to interpret the scope of constitutional rights more broadly than the Supreme Court has defined those rights.

Significance: While the Supreme Court found RFRA unconstitutional at the state and local level, it is important to note that it left open its provisions at the federal level. It has continuing force and effect against federal statutes and regulations.

Note: The Coalition for the Free Exercise of Religion promotes RFRA-like laws at the state level. Many states have passed statutes which to one degree or another restore pre-*Smith* protections for the free exercise of religion. Some states have passed laws which promise even greater protections.

Religious Land Use and Institutionalized Persons Act

The Legislation: The Religious Freedom Restoration Act (RFRA) had been passed by Congress to repair the damage done by *Smith*. When the Supreme Court in *Boerne* declared RFRA to be unconstitutional at the state and local level, Congress (urged by the Coalition for the Free Exercise of Religion) passed RLUIPA. This legislation prohibits some laws (zoning/landmarking) that substantially burden the religious exercise of churches or other religious assemblies or institutions absent the least restrictive means of furthering a compelling government interest.

This federal statute employed Congress' power under the Commerce Clause and the Spending Clause. The intent of Congress was to restore the standard of compelling government interest carried out by the least restrictive means. Congress found that religious assemblies cannot function without a physical space adequate to their needs and consistent with their theological requirements.

Congress found that the right to assemble for worship is at the very core of the free exercise of religion. It said that religious assemblies, especially new, small, or unfamiliar ones, may be illegally discriminated against by zoning codes, land use regulation, and restrictions on religious freedom of institutionalized persons.

Significance: RLUIPA prohibits zoning and landmarking laws that: (1) treat churches or other religious assemblies or institutions on less than equal terms with nonreligious institutions; (2) discriminate against any assemblies or institutions on the basis of religion or religious denomination; (3) totally exclude religious assemblies from a jurisdiction; or (4) unreasonably limit religious assemblies, institutions, or structures within a jurisdiction.

RLUIPA prohibits zoning and landmarking laws that substantially burden the religious exercise of churches or other religious assemblies or institutions absent the least restrictive means of furthering a compelling governmental interest.

Question: Does a federal law which prohibits government from burdening prisoners' religious exercise violate the First Amendment's Establishment Clause?

 **The Case:** Cutter and its two companion cases involved prison inmates with unconventional and "non-mainstream" religious beliefs who claimed they were denied access to religious literature and worship services in violation of RLUIPA. The prison officials argued that the act improperly advances religion and thus violates the First Amendment's establishment clause (which prohibited government from making laws "respecting an establishment of religion").

 In a unanimous opinion the Court held that RLUIPA's institutionalized persons provision is constitutional under the Spending Clause and does not violate the First Amendment against establishing religion.

 **Significance:** In the circumstances to which it applies, RLIUPA re-establishes the earlier Supreme Court tests that any infringement on religion must have a "compelling government interest" and be carried out by the "least restrictive means". The Supreme Court strongly upheld the authority of Congress, acting within its Constitutional powers, to impose that stricter test.

"We would always have gladly paid"

 **The Case in District Court:** Kevin McKee, Joe Donato and Inge Donato are members of the Restored Israel of Yahweh, a small Bible study-based religious society (with less than 50 members), located in Mays Landing, New Jersey. Their founder left the Jehovah's Witnesses to teach a gospel of pacifism that includes refusal to participate financially in the military. He served a 4-month jail term in 1983 for failure to file returns. The government did not pursue the small group again until December of 2004 when McKee and the Donatos were convicted by a jury in federal court in New Jersey on the charges of "conspiring to defraud the United States," attempted evasion of employment taxes, and failure to file personal income tax returns.

 **Decision of District Court:** Despite the fact they are not tax evaders (they were open about their action), the judge treated this faith-based action as ordinary criminal conduct, albeit with a good rather than a bad motive. During the sentencing hearing the U.S. Federal District Judge proposed a compromise: that the government erase the defendants' past tax liability and allow them to pay a substantial fine equal to that amount or more into the Crime Victim's Assistance Fund. The defendants agreed to this compromise, as it would ensure their money would not go toward military purposes. The IRS, however, rejected the proposal.

Sentencing: In February 2006, Inge Donato completed her six-month prison sentence. The other two defendants, Joe Donato (Inge's husband) and Kevin McKee, began their prison terms of 27 months and 24 months, respectively, in February, 2006. The Donatos, after 25 years of marriage, will be separated from each other for over two years. At the end of their prison terms, McKee and the Donatos have been sentenced to supervised release during which they must file overdue returns and pay all federal taxes.

"We would always have gladly paid our full share of taxes if only the government could assure us that the amount we paid would not go to fund war making," said Joe Donato. "The lack of any provision like that forced us to either violate our religion or risk being branded as criminals. At that point, we saw no choice but to honor our beliefs."

Significance: Criminal prosecution of religious pacifist tax resisters on felony charges is almost unheard of over the last 55 years, and prison sentences are exceedingly rare, according to an affidavit submitted to the federal court at the Donatos' sentencing by Scott H. Bennett, a professor and historian of 20th century pacifism. Peter Goldberger, the attorney for Inge Donato, said, "I am deeply saddened that these gentle folks wound up being the first pacifist tax resisters to be prosecuted and jailed -- possibly ever -- for felony conspiracy to defraud the U.S. and attempted tax evasion, the most serious criminal charges in the Internal Revenue Code. The IRS has plenty of power to collect taxes without resorting to criminal prosecution."

Appeal: Goldberger will appeal this court decision on the grounds that it violates the Religious Freedom Restoration Act which ensures that the government must use the least restrictive means possible to further its interests when its power infringes on sincere religious exercise. Goldberger states, "I look to our government to show more respect for sincere expressions of religious beliefs."

Concluding Remarks

Recently, it appears, courts have made it more difficult for those claimants who seek freedom of religion and conscience to prevail under the Free Exercise Clause, leaving the law regarding accommodations to religion and conscience mainly to the legislative branches of government. Congress has twice accommodated the Amish in the Social Security Act, and has accommodated a wide range of beliefs in Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act.

Federal Courts have not held that conscientious objection to military service is a constitutional right under the First Amendment, though they have upheld it in many decisions. Congress has provided recognition of conscientious objection to military service at the time of a draft. The courts have scrutinized the provision under the First Amendment.

If the Courts judge that a right is not covered under the Constitution, the Congress can, and often does, enact and establish the right through legislation. In fact, in a given case, the Supreme Court may say that it is Congress, not the courts, which should decide. Legislative efforts often offer greater protection than the courts provide.

That is precisely why proponents of the Religious Freedom Peace Tax Fund Bill (RFPTF) ask constituents to urge their members of Congress to pass this legislation. The RFPTF bill reads, "It is the policy of Congress to allow conscientious objectors to pay their full tax liability without violating their moral, ethical, or religious beliefs...." Under the Bill none of the federal taxes of those claiming to be conscientious objectors to military taxes would fund war. Instead their taxes would to go anything else for which the government appropriates money.

James Madison, in presenting the First Amendment, believed that obligations of conscience should trump other governmental concerns. "The religion then of every person must be left to the conviction and conscience of each; and it is the right of everyone to exercise it as these may dictate. This right is in its nature an unalienable right ....."

The inalienable right of each person to freedom of conscience is the central affirmation of the National Campaign for a Peace Tax Fund and the Peace Tax Foundation. These two organizations work to create a society in which each individual has the right not to be coerced into participation of killing another human being -- whether that participation is physical or financial. Ultimately this right is based in the freedom to exercise religion according to the dictates of conscience.

Since 1972, the **National Campaign for a Peace Tax Fund** has advocated for the Religious Freedom Peace Tax Fund Bill. Based in Washington, DC, Campaign staff lobby, mobilize members nationwide, and network with other organizations. Fifty national religious, peace, and civil liberties organizations have formally endorsed this campaign.

The **Peace Tax Foundation** was founded in 1985 as a tax-exempt educational organization to inform the public about the concept of conscientious objection and alternative tax payment programs. It conducts research, produces publications, and leads workshops and conferences. The Foundation serves as a liaison to Conscience and Peace Tax International (www.cpti.ws).

For more information, please visit: **www.peacetaxfund.org**

Appendix

U.S. Constitution
Bill of Rights

Amendment I
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment II
A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

Amendment III
No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously

ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

About the Author

Marian Franz has experience in areas theologically, socially and politically diverse. Her journey has taken her from Kansas wheat fields to the crowded poverty of inner city Chicago, to one of the world's power centers and to work with international organizations and the UN.

Born and raised in Kansas, Marian received degrees from Bethel College and Mennonite Biblical Seminary. She and her husband, Delton, were active in the civil rights movement in Chicago where, for over a decade, Delton co-pastored the inter-racial Woodlawn Mennonite Church. They lived and worked in an impoverished overcrowded community.

The Franz family moved to Washington, DC, in 1968, to open the Washington office of Mennonite Central Committee. Marian became the director of the Dunamis Institute, an organization whose members developed relationships with members of Congress which were defined as both pastoral and prophetic. She served for many years on the board of the Faith and Politics Institute, which calls for conscience in politics and provides settings for moral reflection for political leaders and provides exposure to those problem areas that need healing.

From 1982 through 2005, Marian served as Executive Director of the National Campaign for a Peace Tax Fund (NCPTF) and the Peace Tax Foundation. In this role she interpreted to members of Congress the conscience-driven request of citizens who seek to have their tax money used for non-military purposes only. She has represented the Campaign at a dozen international conferences, and has been very active in Conscience and Peace Tax International (CPTI). CPTI calls for recognition of the human right to "freedom of thought, conscience and religion," as outlined in the United Nations Declaration of Human Rights.

Marian continues her work for the rights of conscientious objectors as lobbyist for NCPTF and chair of the board of CPTI.

The rights of conscience we could not submit [to the state]. We are answerable for them to our God.

~ Thomas Jefferson

"The religion then of every person must be left to the conviction and conscience of each; and it is the right of everyone to exercise it as these may dictate. The right is in its nature an unalienable right..."

~ James Madison

"It is well known that those who are religiously scrupulous of bearing arms are equally scrupulous of getting substitutes or paying for equivalent. Many of them would rather die than do either one or the other."

~ Roger Sherman

"In the realm of conscience, there is a higher moral power than the state."

~ Supreme Court, *Girouard v. United States*, 1946

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