# White: Dissent

MR JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE STEWART join, dissenting.

Whether or not *United States v. Seeger,* 380 U. S. 163 (1965), accurately reflected the intent of Congress in providing draft exemptions for religious conscientious objectors to war, I cannot join today's construction of § 6(j) extending draft exemption to those who disclaim religious objections to war and whose views about war represent a purely personal code arising not from religious training and belief, as the statute requires, but from readings in philosophy, history, and sociology. Our obligation **[p. 368]** in statutory construction cases is to enforce the will of Congress, not our own, and, as MR. JUSTICE HARLAN has demonstrated, construing § 6(j) to include Welsh exempts from the draft a class of persons to whom Congress has expressly denied an exemption.

For me, that conclusion should end this case. Even if Welsh is quite right in asserting that exempting religious believers is an establishment of religion forbidden by the First Amendment, he nevertheless remains one of those persons whom Congress took pains not to relieve from military duty. Whether or not § 6(j) is constitutional, Welsh had no First Amendment excuse for refusing to report for induction. If it is contrary to the express will of Congress to exempt Welsh, as I think it is, then there is no warrant for saving the religious exemption and the statute by redrafting it in this Court to include Welsh and all others like him.

If the Constitution expressly provided that aliens should not be exempt from the draft, but Congress purported to exempt them and no others, Welsh, a citizen, could hardly qualify for exemption by demonstrating that exempting aliens is unconstitutional. By the same token, if the Constitution prohibits Congress from exempting religious believers, but Congress exempts them anyway, why should the invalidity of the exemption create a draft immunity for Welsh? Surely not just because he would otherwise go without a remedy along with all those others not qualifying for exemption under the statute. And not as a reward for seeking a declaration of the invalidity of § 6(j); for as long as Welsh is among those from whom Congress expressly withheld the exemption, he has no standing to raise the establishment issue even if § 6(j) would present no First Amendment problems if it had included Welsh and others like him.

"[O]ne to whom application of a statute is constitutional will not be heard to attack the **[p. 369]** statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional."

*United States v. Raines,* 362 U. S. 17, 362 U. S. 21 (1960). Nothing in the First Amendment prohibits drafting Welsh and other nonreligious objectors to war. Saving § 6(j) by extending it to include Welsh cannot be done in the name of a presumed congressional, will but only by the Court's taking upon itself the power to make draft exemption policy.

If I am wrong in thinking that Welsh cannot benefit from invalidation of 6(j) on Establishment Clause grounds, I would nevertheless affirm his conviction; for I cannot hold that Congress violated the Clause in exempting from the draft all those who oppose war by reason of religious training and belief. In exempting religious conscientious objectors, Congress was making one of two judgments, perhaps both. First, § 6(j) may represent a purely practical judgment that religious objectors, however admirable, would be of no more use in combat than many others unqualified for military service. Exemption was not extended to them to further religious belief or practice, but to limit military service to those who were prepared to undertake the fighting that the armed services have to do. On this basis, the exemption has neither the primary purpose nor the effect of furthering religion. As Mr. Justice Frankfurter, joined by MR. JUSTICE HARLAN, said in a separate opinion in the *Sunday Closing Law Cases,* 366 U. S. 420, 366 U. S. 468 (1961), an establishment contention "can prevail only if the absence of any substantial legislative purpose other than a religious one is made to appear." *See Selective Draft Law Cases,* 245 U. S. 366.

Second, Congress may have granted the exemption because otherwise religious objectors would be forced into conduct that their religions forbid, and because, **[p. 370]** in the view of Congress, to deny the exemption would violate the Free Exercise Clause, or at least raise grave problems in this respect. True, this Court has more than once stated its unwillingness to construe the First Amendment, standing alone, as requiring draft exemptions for religious believers. *Hamilton v. Board of Regents,* 293 U. S. 245, 293 U. S. 263-264 (1934); *United States v. Macintosh,* 283 U. S. 605, 283 U. S. 623-624 (1931). But this Court is not alone in being obliged to construe the Constitution in the course of its work; nor does it even approach having a monopoly on the wisdom and insight appropriate to the task. Legislative exemptions for those with religious convictions against war date from colonial days. As Chief Justice Hughes explained in his dissent in *United States v. Macintosh, supra,* at283 U. S. 633, the importance of giving immunity to those having conscientious scruples against bearing arms has consistently been emphasized in debates in Congress, and such draft exemptions are "*indicative of the actual operation of the principles of the Constitution.'"* However this Court might construe the First Amendment, Congress has regularly steered clear of free exercise problems by granting exemptions to those who conscientiously oppose war on religious grounds.

If there were no statutory exemption for religious objectors to war, and failure to provide it was held by this Court to impair the free exercise of religion contrary to the First Amendment, an exemption reflecting this constitutional command would be no more an establishment of religion than the exemption required for Sabbatarians in *Sherbert v. Verner,* 374 U. S. 398 (1963), or the exemption from the flat tax on book sellers held required for evangelists, *Follett v. McCormick,* 321 U. S. 573 (1944). Surely a statutory exemption for religionists required by the Free Exercise Clause is not an invalid establishment because it fails to include nonreligious believers as well; nor would it be any less an establishment **[p. 371]** if camouflaged by granting additional exemptions for nonreligious, but "moral," objectors to war.

On the assumption, however, that the Free Exercise Clause of the First Amendment does not, by its own force, require exempting devout objectors from military service, it does not follow that § 6(j) is a law respecting an establishment of religion within the meaning of the First Amendment. It is very likely that § 6(j) is a recognition by Congress of free exercise values and its view of desirable or required policy in implementing the Free Exercise Clause. That judgment is entitled to respect. Congress has the power "To raise and support Armies" and "To make all Laws which shall be necessary and proper for carrying into Execution" that power. Art. I, § 8. The power to raise armies must be exercised consistently with the First Amendment, which, among other things, forbids laws prohibiting the free exercise of religion. It is surely essential therefore -- surely "necessary and proper" -- in enacting laws for the raising of armies to take account of the First Amendment and to avoid possible violations of the Free Exercise Clause. If this was the course Congress took, then just as in *Katzenbach v. Morgan,* 384 U. S. 641 (1966), where we accepted the judgment of Congress as to what legislation was appropriate to enforce the Equal Protection Clause of the Fourteenth Amendment, here we should respect congressional judgment accommodating the Free Exercise Clause and the power to raise armies. This involves no surrender of the Court's function as ultimate arbiter in disputes over interpretation of the Constitution. But it was enough in *Katzenbach* "to perceive a basis upon which the Congress might resolve the conflict as it did," 384 U.S. at 384 U. S. 653, and plainly, in the case before us, there is an arguable basis for § 6(j) in the Free Exercise Clause, since, without the exemption, the law would compel some members of the public to engage in combat **[p. 372]** operations contrary to their religious convictions. Indeed, one federal court has recently held that to draft a man for combat service contrary to his conscientious beliefs would violate the First Amendment. *United States v. Sisson,* 297 F.Supp. 902 (1969). There being substantial roots in the Free Exercise Clause for § 6(j), I would not frustrate congressional will by construing the Establishment Clause to condition the exemption for religionists upon extending the exemption also to those who object to war on nonreligious grounds.

We have said that neither support nor hostility, but neutrality, is the goal of the religion clauses of the First Amendment. "Neutrality," however, is not self-defining. If it is "favoritism" and not "neutrality" to exempt religious believers from the draft, is it "neutrality," and not "inhibition" of religion, to compel religious believers to fight when they have special reasons for not doing so, reasons to which the Constitution gives particular recognition? It cannot be ignored that the First Amendment itself contains a religious classification. The Amendment protects belief and speech, but, as a general proposition, the free speech provisions stop short of immunizing conduct from official regulation. The Free Exercise Clause, however, has a deeper cut: it protects conduct, as well as religious belief and speech.

"[I]t safeguards the free exercise of the chosen form of religion. Thus, the Amendment embraces two concepts, -- freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be."

*Cantwell v. Connecticut,* 310 U. S. 296, 310 U. S. 303-304 (1940). Although socially harmful acts may, as a rule, be banned despite the Free Exercise Clause even where religiously motivated, there is an area of conduct that cannot be forbidden to religious practitioners but that may be forbidden to others. *See United States v. Ballard,* 322 U. S. 78 (1944); *Follett v.* **[p. 373]** *McCormick,* 321 U. S. 573 (1944). We should thus not labor to find a violation of the Establishment Clause when free exercise values prompt Congress to relieve religious believers from the burdens of the law, at least in those instances where the law is not merely prohibitory, but commands the performance of military duties that are forbidden by a man's religion.

In *Braunfeld v. Brown,* 366 U. S. 599 (1961), and *Gallagher v. Crown Kosher Market,* 366 U. S. 617 (1961), a majority of the Court rejected claims that Sunday closing laws placed unacceptable burdens on Sabbatarians' religious observances. It was not suggested, however, that the Sunday closing laws in 21 States exempting Sabbatarians and others violated the Establishment Clause because no provision was made for others who claimed nonreligious reasons for not working on some particular day of the week. Nor was it intimated in *Zorach v. Clauson,* 343 U. S. 306 (1952), that the nonestablishment holding might be infirm because only those pursuing religious studies for designated periods were released from the public school routine; neither was it hinted that a public school's refusal to institute a released-time program would violate the Free Exercise Clause. The Court in *Sherbert v. Verner, supra,* construed the Free Exercise Clause to require special treatment for Sabbatarians under the State's unemployment compensation law. But the State could deal specially with Sabbatarians whether the Free Exercise Clause required it or not, for, as MR. JUSTICE HARLAN then said -- and I agreed with him -- the Establishment Clause would not forbid an exemption for Sabbatarians who otherwise could not qualify for unemployment benefits.

The Establishment Clause, as construed by this Court, unquestionably has independent significance; its function is not wholly auxiliary to the Free Exercise Clause. It bans some involvements of the State with religion that **[p. 374]** otherwise might be consistent with the Free Exercise Clause. But when, in the rationally based judgment of Congress, free exercise of religion calls for shielding religious objectors from compulsory combat duty, I am reluctant to frustrate the legislative will by striking down the statutory exemption because it does not also reach those to whom the Free Exercise Clause offers no protection whatsoever.

I would affirm the judgment below.