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The Legal Origins of Catholic Conscientious Objection

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ABSTRACT

This Article traces the origins of Catholic conscientious objection as a theory and practice of American constitutionalism. It argues that Catholic conscientious objection emerged during the 1960s from a confluence of left-wing and right-wing Catholic efforts to participate in American democratic culture more fully. The refusal of the American government to allow legitimate Catholic conscientious objection to the Vietnam War became a cause célèbre for clerical and lay leaders and provided a blueprint for Catholic legal critiques of other forms of federal regulation in the late 1960s and early 1970s—most especially regulations concerning the provision of contraception and abortion.

Over the past two decades, legal scholars have worked to unearth the social movements and constitutional arguments that paved the way for *Roe v. Wade*, as well as post-*Roe* law and politics. These efforts will likely intensify in the wake of *Dobbs v. Jackson Women's Health Organization*. This Article contributes to the existing literature by reconstructing some of the institutional and ideological terrain that shaped the Catholic legal reception of *Roe* as an affront to the Catholic conscience—both coercive of the religious liberty of Catholics and a blow to their equal status as citizens. This history, in turn, helps to clarify the connection between the Roberts Court's religious liberty and reproductive rights jurisprudence.

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INTRODUCTION

Today, Catholic clergy and lay activists—including lawyers, judges, and Justices—play a prominent role in the critique of the American administrative state as a threat to religious liberty. Whether referencing the First Amendment itself, the Religious Freedom Restoration Act, or state constitutional and statutory equivalents, these Catholic voices invoke a long American legal tradition of accommodating the individual conscience when it runs up against inimical regulatory regimes. Recent federal and state regulations motivated by sex egalitarianism—such as the provision of reproductive health care services and the prohibition of discrimination on the basis of sexual orientation, gender identity, or marital status—are characterized as a departure from this tradition, compelling believers to participate in activities that violate their consciences. With few exceptions, however, the idea that conscientious objection—and Catholic conscientious objection in particular—is a legitimate, let alone paradigmatic, form of American constitutionalism is at least as recent as the idea that sexual liberty and equality are core constitutional commitments.[1]

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[1] There is an extensive scholarly debate about the nature and availability of individual religious exemptions from generally applicable laws at the Founding. For the classic texts, see Philip Hamburger, *A Constitutional Right of Religious Exemption: A Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992); Douglas W. Kmiec, *The Original Understanding of the Free Exercise Clause and Religious Diversity*, 59. UMKC L. REV. 591 (1991); Michael McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990). *See also* John Whiteclay Chambers II, *Conscientious Objectors and the American State from Colonial Times to the Present*, *in* THE NEW CONSCIENTIOUS OBJECTION: FROM SACRED TO SECULAR RESISTANCE (Charles Moskos & John Whiteclay Chambers III eds., 1993); Ellis West, *The Right to Religion-Based Exemptions in Early America: The Case of Conscientious Objectors to Conscription*, 10 J.L. & RELIGION 367 (1993). The weight of the evidence demonstrates that the institutionalization—whether by courts or administrators—of such individual exemptions only arose in the middle of the nineteenth century. At that time, the discourse of "conscientious objection" became widespread on both sides of the Atlantic—first, in 1850s Britain, in response to a new regime of compulsory smallpox vaccination; then, in 1860s America, in response to the first national drafts. *See generally* NADJA DURBACH, BODILY MATTERS: THE ANTI-VACCINATION MOVEMENT IN ENGLAND, 1853–1907 (2005); EDWARD NEEDLES WRIGHT, CONSCIENTIOUS OBJECTORS IN THE CIVIL WAR (1931); Jeremy K. Kessler, *A War for Liberty: On the Law of Conscientious Objection*, *in* 3 THE CAMBRIDGE HISTORY OF THE SECOND WORLD WAR (Michael Geyer & Adam Tooze eds., 2015). Even during the American Civil War, however, when the term "conscientious objector" first came into use, the actual accommodation of individual objectors to military conscription was incredibly rare, and a matter of presidential fiat. The normalization of conscientious objection on both sides of the Atlantic awaited World War I. In the United States, this normalization took the form of a system of individual accommodations of conscience created and superintended by War Department administrators. *See* Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 COLUM. L. REV. 1083 (2014) [hereinafter Kessler, *The Administrative Origins of Modern Civil Liberties Law*]. Judicial supervision of this type of administrative regime, and judicial construction of new forms of individual religious accommodation, began in the 1930s and 1940s and flourished

Years before "conscience" became a culture war shibboleth, the word gained cultural prominence and legal respectability in the context of America's shooting war with North Vietnam.[2] A centuries-old belief held by a group of relatively marginal pacifist sects, the idea that conscience might preclude an individual's participation in a national war effort became increasingly popular among mainline Protestants, Jews, Humanists, atheists, and—most notably—Catholics, as the Vietnam War dragged on.[3] While sectarian objection to military service had been recognized in one form or another since colonial times, it was during the 1960s that major religious organizations, the press, and the federal judiciary all came to embrace the individual conscientious objector as a legitimate and even laudable kind of citizen, enforcing the country's constitutional commitment to individual liberty in the face of a heedless war machine.[4] Catholic lawyers and litigants played an especially prominent role in this shift, as they used the legal language of conscience to both criticize the American state and insist upon the compatibility of Catholic and American identity.[5]

Closely associated with a critique of government-authorized killing, this culture of "conscience talk" provided fertile ground for the anti-abortion and anti-contraceptive social movements that emerged during the later years of American involvement in Vietnam.[6] These movements drew on the anti-war movement's rhetoric, political and legal tactics, and even its personnel. Especially in Catholic circles, the shift from anti-war to anti-abortion conscience talk was often seamless.

This Article traces the origins of Catholic conscientious objection as a theory and practice of American constitutionalism. It argues that Catholic conscientious objection emerged during the 1960s from a confluence of left-wing and right-wing Catholic efforts to more fully participate in American democratic culture. The refusal of the American government to allow legitimate Catholic conscientious objection to the Vietnam War became a *cause célèbre* for clerical and lay leaders and provided a blueprint for Catholic legal critiques of other forms of federal regulation in the late 1960s and early 1970s—most especially, regulations governing the provisions of contraception and abortion. This history helps us understand the current wave of Catholic conscientious objection—and Catholic legal critique of the administrative

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in the 1950s. *See* Jeremy K. Kessler, *New Look Constitutionalism: The Cold War Critique of Military Manpower Administration*, 167 U. PA. L. REV. 1749 (2019); Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915 (2016). Until the 1960s, however, American Catholics rarely availed themselves of these new institutions, and American Catholic leaders were highly critical of conscientious objection to military service. *See infra* Part I.

[2] Kessler, *The Administrative Origins of Modern Civil Liberties Law*, *supra* note 1, at 1126–30.

[3] *Id.* at 1128–29.

[4] *Id.* at 1122–29.

[5] Charles J. Reid, Jr., *John T. Noonan, Jr.*, *on the Catholic Conscience and War:* Negre v. Larsen, 76 NOTRE DAME L. REV. 881, 920 (2001).

[6] *See generally* Roe v. Wade, 410 U.S. 959 (1973).

state more generally—as the refinement of a relatively novel legal sensibility, not a more traditional, reactive response to unprecedented exercises of state power or jarring social change.

Over the past two decades, largely in response to the rise of the Roberts Court, legal scholars have worked to unearth the social movements and constitutional arguments that paved the way for *Roe v. Wade*,[7] as well as post-*Roe* law and politics.[8] These efforts will likely intensify in the wake of *Dobbs v. Jackson Women's Health Organization*.[9] This Article contributes to the existing literature by reconstructing some of the institutional and ideological terrain that shaped the Catholic legal reception of *Roe* as an affront to the Catholic conscience—both coercive of the religious liberty of Catholics and a blow to their equal status as citizens.

In the wake of the confirmation of Justice Amy Coney Barrett in October 2020, the Supreme Court finds itself with a majority of Republican-appointed Catholic Justices whose legal and policy preferences echo the discourse of conscientious objection that Catholic legal activists developed in the 1960s and 1970s.[10] While Justice Sonia Sotomayor, who identifies as a lapsed Catholic, typically dissents from this bloc's interpretation of conscience's command, Justice Neil Gorsuch—raised as a Catholic, now a practicing Episcopalian—typically shares in the Republican-appointed Catholic bloc's approach to conscience.[11] Over the past two years, the resulting supermajority has intensified the Roberts Court's constitutional renovation in the domains of public funding of religious education and expression; religious objections to health, safety, and antidiscrimination laws; and the regulation of reproductive health care and fetal life.[12] In each of these domains, the Roberts Court

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[7] *Id.*

[8] *See, e.g.*, MARY ZIEGLER, ABORTION AND THE LAW IN AMERICA: *ROE V. WADE* TO THE PRESENT (2020); REPRODUCTIVE RIGHTS AND JUSTICE STORIES (Melissa Murray, Kate Shaw & Reva Siegel eds., 2019); MARY ZIEGLER, AFTER *ROE*: THE LOST HISTORY OF THE ABORTION DEBATE (2015); LINDA GREENHOUSE & REVA SIEGEL, BEFORE *ROE V. WADE* (2011); Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415 (2011); Deborah Dinner, *Recovering the LaFleur Doctrine*, 22 YALE L.J. & FEMINISM 343 (2010); Neil S. Siegel & Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771 (2010); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323 (2006).

[9] 142 S. Ct. 2228 (2022).

[10] *See* Ronald Brownstein, *How Conservative Catholics Became Supreme on GOP's Court*, CNN (Sept. 27, 2020, 4:39 PM), https://www.cnn.com/2020/09/27/politics/conservative-catholics-gop-supreme-court/index.html [https://perma.cc/P6NK-U4M8].

[11] Catholic World News, *Justice Sotomayor describes herself as 'lapsed Catholic'*, CATH. CULTURE (Jan. 10, 2013), https://www.catholicculture.org/news/headlines/index.cfm?storyid=1676 [https://perma.cc/65UX-C6NA]; Daniel Burke, *What Is Neil Gorsuch's Religion? It's Complicated*, CNN (Mar. 22, 2017, 2:37 PM), https://www.cnn.com/2017/03/18/politics/neil-gorsuch-religion [https://perma.cc/Y6RB-NZ7Z].

[12] *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); Carson v. Makin, 142 S. Ct. 1987 (2022);

has advanced legal arguments and achieved policy outcomes consistent with the vision espoused by the Catholic legal activists who came together in the decade surrounding *Roe v. Wade*.[13]

Part I of the Article sets the stage by describing the religious, cultural, and professional climate in which Catholic legal activists labored during the 1960s. Part II argues that these activists' habit of identifying objectionable federal policies with the coercion of, and discrimination against, the Catholic conscience arose in response to three major initiatives: (a) federal restrictions on religious practice in public schools; (b) federal refusal to recognize Catholic objectors to the Vietnam War as legitimate conscientious objectors; and (c) federal funding of family planning programs. Part III charts how these earlier sites of legal activism inflected the Catholic response to: (a) the Supreme Court's early 1970s decisions concerning public education and compulsory military services; (b) the acceleration of federal involvement in family planning and abortion reform; and (c) *Roe v. Wade* itself. The Article concludes by connecting the culture of Catholic conscientious objection that had formed by the mid-1970s—typified by a tendency to view objectionable federal policies as coercive of and discriminatory against the Catholic conscience—to contemporary legal developments.

I. AMERICAN CATHOLIC LEGAL CULTURE IN THE 1960S

In May 1975, Michigan attorney Stuart Hubbell began his closing address to the annual conference of American diocesan attorneys in Washington, D.C., by "assert-[ing] that Catholics and Catholic institutions, today perhaps more than ever before in the history of this country, are under very concerted pressures, and even to some degree attacked, by private agencies and individuals, government agencies, and the courts."[14] While the Supreme Court's decision two years earlier in *Roe v. Wade* was the focal point of Hubbell's discontent, his speech bore the scars of over a decade of crisis within the American Catholic Church.[15] As Maurice Isserman and Michael Kazin have noted, "During the 1960s, the world of American Catholicism imploded and had to be rebuilt."[16]

Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021); Tandon v. Newsom, 141 S. Ct. 1294 (2021); Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020); Masterpiece Cakeshop v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

[13] *See* Kevin C. Walsh, *Religion and the Law: Addressing Three Problems in Commentary on Catholics at the Supreme Court by Reference to Three Decades of Catholic Bishops' Amicus Briefs*, 26 STAN. L. & POL'Y REV. 411, 428–31 (2015).

[14] Stuart Hubbell, *Civil Rights Impact on the Church*, 21 CATH. L. 339, 339 (1975).

[15] *See id.*

[16] MAURICE ISSERMAN & MICHAEL KAZIN, AMERICA DIVIDED: THE CIVIL WAR OF THE 1960S, at 248 (1999).

The decade had begun on a hopeful note with the election of John F. Kennedy, the country's first Catholic president. While Catholics had long played a crucial role in Democratic Party politics, Kennedy's victory signaled the normalization of Catholic identity in American life.[17] This increasing publicity of American Catholicism coincided with the Church's global *aggiornamento*, or modernization, announced by Pope John XXIII in January 1959 and institutionalized in the Second Vatican Council of 1962–1965.[18] The doctrinal changes ushered in by the Council were legion, but their overarching tendency was clear: increased responsiveness of the Church to contemporary civil society.[19]

This responsiveness at first favored liberal reformers: those who wanted to harmonize the faith's "liturgy, its authority structure, its moral obligations, and its definitions of sin" with an increasingly pluralistic American society.[20] Yet when reform sparked a "vehement backlash"[21] in the late 1960s and 1970s, reaction did not take the form of retreat from the American public sphere.[22] Instead, an assertive group of neo-traditionalists sought to secure hegemony within the American Church by acting as its public advocates, claiming both to defend American Catholics from a mainstream legal culture insensitive to the Catholic conscience, and to offer an interpretation of American legal culture truer to the country's ideals.[23]

These neo-traditionalists were often themselves former reformers.[24] They embraced the Vatican II's celebration of democracy, a celebration that took two forms.[25] On

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[17] Patrick Allitt notes that at this moment, "the U.S. Catholic population in general was gaining in wealth, education, and social status." PATRICK ALLITT, CATHOLIC INTELLECTUALS AND CONSERVATIVE POLITICS IN AMERICA, 1950–1985, at 10 (1993). While a minority religion in comparison to Protestantism writ large, Catholicism was the largest single denomination in 1960s America, reaching forty-eight million adherents by 1970. *See* ISSERMAN & KAZIN, *supra* note 16, at 244. For the relationship between Catholics and the Democratic Party, see ALAN BRINKLEY, VOICES OF PROTEST: HUEY LONG, FATHER COUGHLIN, AND THE GREAT DEPRESSION (1983); JOHN FENTON, THE CATHOLIC VOTE (1960); GEORGE FLYNN, ROOSEVELT AND ROMANISM (1976); MARY HANNA, CATHOLICS AND AMERICAN POLITICS (1967).

[18] ALLITT, *supra* note 17, at 122–25.

[19] Andrew Brown, *How the Second Vatican Council Responded to the Modern World*, THE GUARDIAN (Oct. 11, 2012, 4:00 AM), https://www.theguardian.com/commentisfree/andrewbrown/2012/oct/11/second-vatical-council-50-years-catholicism [https://perma.cc/JNM7-5VP6].

[20] ISSERMAN & KAZIN, *supra* note 16, at 248.

[21] *Id.*

[22] *Id.* at 248–52.

[23] *Id.*

[24] *See* ALLITT, *supra* note 17, at 6 ("Catholic liberals of the 1950s who moved in the opposite direction during the 1960s, reconsidered their political outlook, and belatedly attached themselves to the Catholic conservatives they had once antagonized."). For further analysis of the process of "conversion" from religious reformism to neoconservatism in this period, see DAMON LINKER, THE THEOCONS: SECULAR AMERICA UNDER SIEGE 15–52 (2006).

[25] LINKER, *supra* note 24, at 15–52.

the one hand, the Council "reconceptualized the church as a whole, defining it not by its hierarchy but democratically, as the people of God."[26] On the other hand, the Council's call for greater Catholic involvement in civil society privileged—for the first time in the Church's history—a democratic and pluralistic vision of secular government, in which dialogue between citizens of different religious faiths would shape their respective nation-states.[27] This double-democratization set the terms of debate between liberal reformers and neo-traditionalists in the decade after Vatican II; they disagreed about *how* American Catholic citizens should shape both their church and their state, not *whether* American Catholic citizens had the right and duty to engage in such democratic work.[28]

Patrick Allitt has characterized this proliferation of internal disagreement about Catholic religious practice, politics, and lawmaking "as a stage in the breakdown of 'ghetto' Catholicism or, to state it more positively, as a stage in the assimilation of Catholics into the U.S. mainstream."[29] Catholics of all stripes were shedding their status as an ethnicized—even racialized—minority group, and proclaiming their equal status as full-blooded American citizens.[30] Yet Allitt may go too far when he writes that "by the 1970s Catholicism no longer required the self-distancing actions its adherents had routinely performed twenty years before."[31] While American Catholicism was certainly becoming less marginal, many Catholics were not interested in abandoning practices of "self-distancing" altogether.[32] Rather, they wanted equal citizenship on their own terms, terms that corresponded both with a transnational religious identity and with more local attachments to the ethnic and vocational communities that had long sustained American Catholic life.[33]

Even as they were leaving their "ghetto" to join the "U.S. mainstream," Catholics recognized that this "mainstream" had its own particularistic origins and commitments.[34] Movement into the mainstream not only threatened an attenuation of older religious and ethnic commitments, but also the adoption of what Patchen Markell

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[26] ALLITT, *supra* note 17, at 10.

[27] John Cornwell, Opinion, *The Pope and Pluralism*, N.Y. TIMES (Feb. 10, 2005), https://www.nytimes.com/2005/02/10/opinion/the-pope-and-pluralism.html [https://perma.cc/VK57-WJDQ].

[28] *Id.*

[29] ALLITT, *supra* note 17, at 7.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 13.

[33] *See* JAMES FISHER, COMMUNION OF IMMIGRANTS: A HISTORY OF CATHOLICS IN AMERICA 69–136 (3d ed. 2008). Robert Post and Reva Siegel have raised the possibility that "constitutional commitments" may *only* be "intelligible and compelling" when grounded in such facets of the social field. Robert Post & Reva Siegel, Constitutional Patriotism and Constitutional Culture 13 (unpublished manuscript) (on file with author).

[34] David Carlin, *A New Ghetto for American Catholicism*, THE CATH. THING (Aug. 19, 2022), https://www.thecatholicthing.org/2022/08/19/a-new-ghetto-for-american-catholicism/ [https://perma.cc/R6FV-89HS].

has called a "civic affect,"[35] the embrace of what Jürgen Habermas has identified as the United States' "civil religion rooted in the majority culture."[36] In his reconstruction of Habermas's account of "constitutional patriotism," Markell argues that no matter how dedicated a national "political culture" may be to democratic and universalist principles, that culture will still have a "pre-political" character:

> The content of the constitution and the particular interpretations that constitution has been given over a long history of adjudication; the political history of the country; the symbols, songs, events, dates, and people who capture our political imagination; the patterns and structures of civil society; the vocabularies of political analysis and polemic; the national fantasies' that 'circulate through personal/collective consciousness'—all these and more constitute a cultural inheritance that the *demos* did not choose.[37]

Although this national inheritance can be contested and transmuted by ongoing cultural critique, it will often exhibit the same narcissism that plagues less putatively democratic and universalist ethnic nationalisms, and thus "has the capacity to inspire violence and exclusion."[38]

Even as American Catholics in the 1960s were adopting the United States' national political culture as their own, they registered and resisted its exclusionary tendencies. Engaging in practices of "affiliation"[39] and "disidentification,"[40] American Catholics sought to shape the American legal and political system in the image of their own denominational commitments, and thus make that system their own. Catholic activism in this period was "jurisgenerative" and "iterative" in Seyla Benhabib's sense, inflecting national legal materials with new meanings through repetition and refusal in particular voices and contexts.[41]

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[35] Patchen Markell, *Making Affect Safe for Democracy? On "Constitutional Patriotism"*, 28 POL. THEORY 38, 39 (2000).

[36] Post & Siegel, *supra* note 33, at 12.

[37] Markell, *supra* note 35, at 52.

[38] *Id.* at 53.

[39] *See* Judith Resnik, *Law as Affiliation: "Foreign" Law, Democratic Federalism, and the Sovereigntism of the Nation-State*, 6 INT'L J. CONST. L. 33, 35 (2008) (explaining how the "practice of 'law as affiliation' obliges both individuals and groups through their words and deeds to take ownership of and make connections with a particular legal regime as facets of themselves").

[40] *See* Markell, *supra* note 35, at 57 (describing how political and legal protest can be "important" not only when it "*express[es] an identity*" but also when it "*resist[s] an identity*," "refus[ing] the claim of the state to be a true or an adequate instantiation of the will" of a national people). Earlier, Markell notes that citizens "once brought together in various spaces of democratic politics" by positive law and the constitutional state "sometimes refuse to confine their encounters and their collective actions to the reiteration of official identities." *Id.* at 55.

[41] *See* SEYLA BENHABIB, THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS

The denominational commitments that liberal reformers within the Church sought to respect and instill through such iterative engagement with American legal culture were especially fluid and open to influence from outside social movements.[42] In particular, liberal Catholic activists championed the civil rights and anti-war movements, claiming the pursuit of peace and racial and economic equality as: central to their religious mission.[43] While neo-traditionalists within the Catholic community were by no means universally opposed to anti-war and civil rights activism, they increasingly focused on matters of religious education and sexual morality, feeling that, in these areas, reformist sentiments within the Church and within the nation at large were conspiring to undermine core Catholic values.[44] On the question of abortion, however, liberal reformers and neo-traditionalists found a fair amount of common ground.

This Article identifies public debates about religious education, military conscription, and federally funded family planning as key sites of Catholic activism in the 1960s and 1970s. By engaging in these debates, American Catholics sought to make the American state their own. All three of these debates implicated central features of national life: the birth, education, and defense of the citizenry. The judges, bureaucrats, and social movement activists who encountered—and often countered—Catholic claim-making in these debates frequently justified their views in terms of the good of the nation as a whole over the beliefs of a particular religious group.[45] In doing so, they implied the existence of a purer form of constitutional patriotism, distinct from the particular attachments that Catholics brought with them into the public sphere.[46] The relative lack of legal success of Catholic activism in this period paved the way for the Catholic reception of *Roe v. Wade* as an

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19–20 (1995). According to Benhabib,

> [d]emocratic iterations are complex processes of public argument, deliberation, and learning through which universalist right claims are contested and contextualized, invoked, and revoked, throughout legal and political institutions as well as in the public sphere of liberal democracies. Democratic iterations not only change established understandings in a polity but they also transform authoritative precedents.

Id. at 19. As Benhabib further explains, democratic iterations are "jurisgenerative" in Robert Cover's sense, enabling a "democratic people [to show] itself to be not only the *subject* but the *author of its laws*." *Id.* at 19–20.

[42] The American Catholic Church was far from the only particularistic group engaged in iterative exchanges with the American state during the 1960s. Such particularized constitutional patriotism was widespread during this period of resistance and reform, and the political and legal projects of American Catholics both overlapped and conflicted with other groups' efforts to make the state their own. *See* ALLITT, *supra* note 17, at 5 ("[C]hurch reforms initiated by the Second Vatican Council . . . coincided with social upheavals—secularization, civil rights, Vietnam, and the 'sexual revolution'—in the United States.").

[43] *See* ISSERMAN & KAZIN, *supra* note 16, at 248–50.

[44] LINKER, *supra* note 24, at 15–52.

[45] *Id.*

[46] *See infra* notes 188–220 and accompanying text.

exclusionary decision, one that not only endangered fetal life but also the equal status of Catholic citizens.[47]

One risk of this narrative is to treat American Catholics as a monolithic block. The 1960s was a decade of "fragmentation" within the Church, featuring a proliferation of Catholic viewpoints, and both liberal reformers and neo-traditionalists played important roles in the debates discussed below. There were also millions of American Catholics who did not fit neatly into either category. So who, exactly, felt excluded by the time *Roe v. Wade* came down? Any answer to this question must remain tentative, awaiting further research, but the markedly legalistic nature of the debates that this Article examines suggests the beginning of a response.

On the one hand, there seems to be nothing special about the legal character of Catholic activism in the 1960s and 1970s. Contests over national belonging in a liberal democratic polity will generally be articulated in terms of legal validity, as particularistic commitments enter into a dialectic with constitutional form. The existence of this dialectic is the critical insight of theories of "constitutional patriotism."[48] Indeed, as was discussed above, Catholic legal activism unfolded alongside a panoply of other social movements asserting their affiliation and disidentification with "mainstream" American legal culture; each of these social movements sought both to adopt and to transform that culture.[49] On the other hand, the special dilemmas of Catholic communal identity in the Vatican II era gave American Catholic legal activism a particular cast.[50]

The Catholic activists discussed in this Article were largely clergy, lawyers, and other intellectual elites who were keenly aware of—and at times threatened by—a collapse of traditional authority within the Church, a collapse that both precipitated Vatican II and was deepened by it. A central feature of this collapse was the declining prestige of natural law.[51] Without the guidance of natural law, it was not even clear how debates about the proper nature of Catholic identity could be adjudicated. In the United States, one way of dealing with this deficit of authority was to turn to American constitutional principles as a new source of religious and communal authority and self-definition. The work of Catholic lawyers such as John Courtney Murray and John Noonan, figures who appear frequently in my story, was central to this Americanization of Catholic identity.[52] At first, this Americanization was

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[47] *Id.*

[48] *Id.*

[49] *Mapping American Social Movements: New Left and Antiwar Movement History and Geography*, UNIV. OF WASH., https://depts.washington.edu/moves/antiwar_intro.shtml [https://perma.cc/LP49-EJQA].

[50] Carlin, *supra* note 34.

[51] *See* ALLITT, *supra* note 17, at 8 ("As disputes over natural law proliferated, Catholics appealed to it less often after the 1950s . . . . Natural law argumentation was unable to unify the Catholic intellectual community in the 1960s, nor did most other Americans recognize it as a reliable basis for moral reasoning.").

[52] *See* Reid, Jr., *supra* note 5, at 884–85; Francis Canavan, S.J., *Religious Freedom: John*

clearly a reformist project, influencing Vatican II's double-democratization—its call for democracy both within the Church and within the increasingly secular states in which the Church dwelled.[53] A high water mark of such reformist Americanization was the conciliar document *Dignitatis Humanae*, drafted by John Courtney Murray, which adopted a notably American conception of individual religious freedom as a core Catholic value.[54]

During the later 1960s, however, as the religious and secular lefts became identified with anti-American, anti-elitist, and postnational politics,[55] the insistence on the sanctity of American law took on a newly conservative character within the Catholic community. This insistence became an important tool for the emerging bloc of former reformers known as neo-traditionalists, who were disturbed by accelerating social and theological experimentation among American Catholics and American citizens of all stripes. Particularly striking in this regard was John Noonan's decision in 1969 to rename the *Natural Law Forum*—a central site for well-pedigreed Catholic intellectual debate—to the *American Journal of Jurisprudence*.[56] Catholic elites' newfound comfort with and access to American legal and political institutions offered a novel way of asserting hegemony over a fractious Catholic cultural field.

In the span of only a few years, the Catholic embrace of American democratic culture thus transformed from an obviously reformist to a potentially neo-traditionalist project.[57] Neo-traditionalists invoked American law to forestall further erosion of traditional Catholic positions on religious instruction and family planning.[58] Yet it was precisely at the moment when these neo-traditionalists were coming to rely on the prestige of American law to pursue their religious and political agenda that they suffered a string of defeats at the Supreme Court—culminating in *Roe v. Wade*.[59] In response, they conjured the specter of the ghetto, casting American Catholics as a newly oppressed minority, marginalized not by American Protestantism but by American secularism and liberalism.[60]

Courtney Murray, S.J. and Vatican II, FAITH & REASON, Summer 1987, https://www.ewtn.com/catholicism/library/religious-freedom-john-courtney-murray-sj-and-vatican-ii-10896 [https://perma.cc/P7JF-AZU2].

[53] *See* Reid, Jr., *supra* note 5, at 920–21; Canavan, *supra* note 52.

[54] *See* Canavan, *supra* note 52.

[55] *See, e.g.*, DANIEL BERRIGAN, AMERICA IS HARD TO FIND (1972) (criticizing the idea of a national civic religion from the Catholic left); DAVID R. SWARTZ, MORAL MINORITY: THE EVANGELICAL LEFT IN AN AGE OF CONSERVATISM 46–67 (2012) (describing the rise of a "Post-American" ethic on the Protestant left); CYNTHIA A. YOUNG, SOUL POWER: CULTURE, RADICALISM, AND THE MAKING OF A U.S. THIRD WORLD LEFT (2006) (describing the formation of a transnational and anti-American left within and beyond the civil rights movement).

[56] ALLITT, *supra* note 17, at 8.

[57] LINKER, *supra* note 24, at 15–52.

[58] *Id.*

[59] *Id.* at 27.

[60] The publication in 1972 of Michael Novak's *The Rise of the Unmeltable Ethnics* was

As Stuart Hubbell concluded his 1975 address to the American Catholic diocesan attorneys, "every other minority in the past history of this country has risen to its own defense, organized and fought with skill within our democratic machinery. We have yet to do so adequately or with determination. But others have been able to do so; surely we should try."[61] This minoritarian rhetoric would, in turn, be adopted by a growing movement of Protestant evangelicals, who were even more intensely committed to religious education and anti-choice reproductive policies.[62] Despite their claims of radical exclusion, however, both of these groups—Catholic neo-traditionalists and Protestant evangelicals—remained within the discursive space of constitutional patriotism, engaging in the iterative work of making American law their own.

II. THE INVENTION OF CATHOLIC CONSCIENTIOUS OBJECTION

In the early 1960s, American Catholic legal activists sought to affiliate themselves with federal judges' and administrators' evolving views on religious liberty and family planning. While there were some worrying signs, the spirit of Vatican II counseled creative engagement with the United States' pluralistic constitutional order. Accordingly, Catholic legal activists sought to interpret new federal doctrines and policies regulating public schools, families, and young men liable for military service as leaving ample space for the assertion of distinctively Catholic identities. As the 1960s wore on, however, judicial and administrative resistance (or indifference) to some of these interpretations raised the specter of a federal bureaucracy uniquely inimical to the Catholic conscience.

A. Public Education

The Supreme Court's early 1960s decisions restricting prayer and religious education in public schools angered both evangelical Protestants and Catholics.[63] Yet while denunciations from fiery evangelical preachers such as Billy Graham were

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the *cri du coeur* of this neo-ghettoization. In it, Novak, a formerly reformist anti-war and pro-contraception Catholic, argued that white ethnic—and largely Catholic—blue-collar culture was anathema to American secular liberalism. MICHAEL NOVAK, THE RISE OF THE UNMELTABLE ETHNICS (1972). Launching a new, and ironically elitist, stage of iterative activism, Novak sought to recast the protest politics of the 1960s in which he had participated as inherently exclusionary and anti-Catholic, writing that "the tactic of demonstration is inherently WASP and inherently offensive to ethnic peoples." *Id.* at 15. Although this Article does not address the law and politics of busing, the contentious process of desegregation in Northern cities was another driver of this neo-ghettoization. *See* LAURA KALMAN, RIGHT STAR RISING: A NEW POLITICS, 1974–1980, at 136–41 (2010).

[61] Hubbell, *supra* note 14, at 349.

[62] *See* KALMAN, *supra* note 60, at 250–74.

[63] *See* Engel v. Vitale, 370 U.S. 421 (1962); Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963).

to be expected,[64] the breadth of Catholic anger was striking, uniting Catholic outlets as diverse as the reformist *Catholic World*, centrist *America*, and neo-traditionalist *National Review*.[65] Whereas once Catholics had opposed religious practice in public schools dominated by Protestant administrators, the normalization of American Catholic identity in the early 1960s meant new opportunities for Catholic beliefs to influence the public sphere, including public schools. Now the Supreme Court appeared to be restricting these opportunities.[66] As James Reichley has noted, "after more than a century of opposition to religious exercises with a Protestant orientation in the public schools, the Catholic Church now favored almost any means that would prevent the schools from becoming completely secularized."[67]

While evangelicals condemned the Court as a godless institution, disidentifying with it altogether, many American Catholic clergy and lay elites pursued a different strategy: affiliating with much of the Court's recent jurisprudence, including *Brown v. Board of Education*,[68] and portraying the public school decisions as a departure from long-standing principles of American legal culture.[69] The constitutional lawyer William Bentley Ball emerged as a leading critic of the decisions in the Catholic press.[70] Ball claimed to articulate steadfast American constitutional principles, while taxing the Court's departure from the nation's long tradition of religious liberty.[71]

As one of Villanova University Law School's first professors, Ball had left academia in 1960 to serve as Executive Director and General Counsel of the Pennsylvania Catholic Welfare Committee, the state-level representative of the Catholic hierarchy.[72] Over the course of the next decade he would find himself at the center of

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[64] ISSERMAN & KAZIN, *supra* note 16, at 209 ("Billy Graham, the nation's most popular preacher, called the rulings part of a 'diabolical scheme' that was 'taking God and moral teaching from the schools' and ushering in a 'deluge of juvenile delinquency.'").

[65] ALLITT, *supra* note 17, at 107.

[66] JAMES REICHLEY, RELIGION IN AMERICAN PUBLIC LIFE 146 (1985).

[67] *Id.*

[68] *See, e.g.*, *After June 25, 1962*, AMERICA, July 14, 1962, at 483–84 (warning that *Engel* would only aid segregationists' radical assaults on the Court's legitimacy); *see also* John Sheerin, *The Ban on Public Prayer*, 195 CATH. WORLD 261, 262 (1962) (arguing that *Engel* "aided the John Birchers' mad campaign against the Court").

[69] *See* Will Herberg, *The "Separation" of Church and State*, NAT'L REV., Oct. 23, 1962, at 315 (arguing that *Engel* erroneously departed from *Zorach v. Clauson* in which Justice Douglas affirmed that "We are a religious people"); ALLITT, *supra* note 17, at 107 (noting that New York's Cardinal Spellman condemned *Engel* for "strik[ing] at the very heart of the godly tradition in which America's children have for so long been raised").

[70] *See infra* notes 74–75 and accompanying text.

[71] *See* William B. Ball, *The School Prayer Case, Part I: Dilemma of Disestablishment*, 8 CATH. L. 182, 195–96 (1962) (arguing that the Supreme Court's recent school prayer decisions intruded upon the constitutional right of religious freedom).

[72] *William Bentley Ball*, CATH. UNIV. AM., https://libraries.catholic.edu/special-collections/archives/collections/finding-aids/finding-aids.html?file=ball [https://perma.cc/349Q-JR8K] (last visited Dec. 8, 2022).

Catholic activism both in the education and family planning contexts, and in 1972, Ball successfully argued *Wisconsin v. Yoder* at the Supreme Court.[73] The next year, he would join with the priest Virgil C. Blum, founder of the Catholic League for Religious and Civil Rights.[74] While the formation of the Catholic League was most immediately a response to *Roe v. Wade*, the outlines of the League's worldview—that the federal government had become the coercive tool of an anti-Christian, and particularly anti-Catholic, secular humanism—can be found in Ball's initial response to *Engel v. Vitale*.[75]

Shortly after the Supreme Court handed down *Engel* in June 1962, Ball published a two-part series on the "The School Prayer Case" in the *Catholic Lawyer*.[76] He began Part I by declaring: "Nothing is more significant about the decision of *Engel v. Vitale* than the substantial step it takes in constricting the free exercise of religion through an expansion of the concept of disestablishment."[77] As his introductory remark made clear, Ball assessed the *Engel* Court's Establishment Clause decision from the perspective of free exercise norms. In doing so, he echoed the interpretation of the First Amendment's Religion Clauses then dominant in Catholic legal circles, an interpretation that held that the antiestablishment norm was derivative of and motivated by the free exercise norm.[78] For Ball, the two norms were linked by the logic of coercion. Establishment was objectionable to the extent that it coerced religious exercise; to the same extent, however, *disestablishment* was objectionable if it coerced religious exercise.[79] What the *Engel* Court had done was shrink the space available for the free exercise of religion: "it is obvious that there is such a thing as the use by a people of their public institutions and of public practices to express their most indigenous sentiments and aspirations, not merely as these pertain to the civil but indeed as they pertain to the sacral."[80]

As to the danger of formal religious education in public schools itself coercing individuals' free exercise of religion, Ball allowed that, if *Engel* could be overturned and formal prayer readmitted to public schools, "no coercion should be exerted upon any person whose beliefs are contradicted or offended by the [religious] program or who for any other reason does not desire to participate."[81] Here, however, the

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[73] Wolfgang Saxon, *William Ball Is Dead at 82; Defended Religious Rights*, N.Y. TIMES, Jan. 18, 1999, at B7.

[74] *Id.*; *Rev. Virgil Blum, 76; Founded Rights Group*, N.Y. TIMES, Apr. 6, 1990, at A21.

[75] At one point, Ball invoked the *bête noire* of "Secular Humanism" directly. *See* William B. Ball, *The School Prayer Case, Part II: What Course for the Future?*, 8 CATH. L. 286, 288 (1962).

[76] Ball, *supra* note 71; Ball, *supra* note 75.

[77] Ball, *supra* note 71, at 182.

[78] This interpretation became standard after the publication of JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS (1960). *See* Canavan, *supra* note 52.

[79] *See* Ball, *supra* note 71, at 182–83.

[80] Ball, *supra* note 71, at 182.

[81] Ball, *supra* note 75, at 287.

definition of coercion should not be overly broad: "legal compulsion should be required to be shown rather than mere subjective embarrassment attendant upon a decision not to participate in a program."[82]

Ball also insisted that nothing in the *Engel* majority opinion—even if it should stand the test of time—could be reasonably interpreted to forbid public aid to religious schools.[83] Noting that Leo Pfeffer, the victorious litigator in *Engel*, had suggested as much to the *New York Times*, Ball argued that "it was the precise holding of the *Everson* case that the providing by a state of reimbursement to parents out of public funds for transportation of their children to *(inter alia)* Catholic parochial schools by public buses was not violative of the no establishment clause."[84] Indeed, such aid fostered the free exercise of religion, which for Ball was clearly the preeminent value protected by the First Amendment's religion clauses.

Even after the Court signaled its commitment to a broad interpretation of establishment in *Abington School District v. Schempp*, Ball remained confident that vital parochial school aid was not at risk. Writing for *Commonweal*, he happily reported that at a recent meeting of the National Council of Churches, "[r]ecognition was widely expressed that the doctrine of the *Engel* and *Schempp* decisions of the Supreme Court was of very limited application and by no means could be stretched to cover all governmental relationships with church-related health, welfare and educational institutions."[85] He did note, however, that some delegates "expressed concern lest a runaway separationism become an established secularism."[86]

B. Military Conscription

While religious education had always been a mainstream Catholic issue, concern about Catholic conscientious objectors to military service arose on the far left of American Catholicism.[87] Yet over the course of the 1960s, the American Catholic hierarchy and elite intellectuals and lawyers, including John Courtney Murray and John Noonan, took up the cause.[88] The initial impetus for this mainstreaming of the issue was Vatican II itself, during which both Pope Paul VI and the Council as a whole

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[82] *Id.* at 288.

[83] Ball, *supra* note 71, at 185–86.

[84] *Id.*

[85] William B. Ball, *Protestants on Church-State*, 79 COMMONWEAL 689, 689 (1964).

[86] *Id.*

[87] *See id.* at 690–91 (expressing concern over the effect of left-wing conscientious objection on the Court's neutrality regarding religious education).

[88] *See* Ralph Potter, *Conscientious Objection to Particular Wars*, 4 RELIGION & PUB. ORD. 44, 83 (1968) (recognizing the surge of Catholic theologians and members of the hierarchy concerned about conscientious objection to military service); *infra* notes 141–47 and accompanying text (discussing John Courtney Murray's advocacy for selective conscientious objection). *See generally* Reid, Jr., *supra* note 5 (discussing the legal efforts of John T. Noonan to protect conscientious objection).

articulated unprecedentedly anti-war views.[89] By insisting on national recognition of Catholic conscientious objectors, Catholic leaders sought to rearticulate American legal culture as to include the transnational norms emerging from Vatican II.[90]

Other reasons for the adoption of the cause of Catholic conscientious objection by American Catholic elites may have lain closer to home. On the one hand, the accommodation of anti-war views within the Church harmonized with growing dissatisfaction about the Vietnam War in the country at large.[91] Support for Catholic conscientious objectors affiliated the Church with non-Catholic cultural, legal and political leaders who were themselves increasingly uncertain about the legitimacy of the war and the draft that fueled it.[92] Indeed, in the later 1960s, secular advocates of selective conscientious objection to the Vietnam War would point to the Catholic anti-war conscience as evidence that selective conscientious objection could be grounded in transcendental commitments.[93] On the other hand, support for Catholic conscientious objectors also reflected growing concern among American Catholic elites about the extent to which American legal culture was threatening core Catholic values in the education and family planning contexts.[94] Criticism of the federal government's failure to recognize the Catholic anti-war conscience offered American Catholic leaders an opportunity to disidentify with the dominant legal culture and articulate a particularistic vision of American Catholic citizenship.

In February 1962, months before the Second Vatican Council began, Thomas Merton took to the pages of *Commonweal* to call upon Catholics to refuse to participate in nuclear warfare.[95] He asked, "How are the conscientious objectors to mass suicide going to register their objection and their refusal to cooperate?"[96] Eight months later, as the Council opened in Rome and the Cuban missile crisis roiled the United States, Eileen Egan and several other lay Catholics responded to Merton's call,

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[89] *See* POPE PAUL VI, PASTORAL CONSTITUTION OF THE CHURCH IN THE MODERN WORLD, GAUDIUM ET SPES, ch. 5, ¶¶ 77–82 (Dec. 7, 1965) [hereinafter GAUDIUM ET SPES], https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651207_gaudium-et-spes_en.html [https://perma.cc/U6C8-L2U7] (expressing the Council's desire for peace and the avoidance of war).

[90] *See* J. Bryan Hehir, *The U.S. Catholic Bishops and Selective Conscientious Objection: History and Logic of the Position*, *in* SELECTIVE CONSCIENTIOUS OBJECTION 72–73 (Michael F. Noone, Jr. ed., 1989) (referring to statements made by U.S. Catholic Bishops supporting GAUDIUM ET SPES); *infra* notes 190–92 and accompanying text (citing a pastoral letter from the U.S. Bishops that endorsed Vatican II's stance on conscientious objection in GAUDIUM ET SPES).

[91] *See infra* notes 110–16 (describing shift in focus of conscientious objectors from nuclear to Vietnam policy and the subsequent support of moderate Catholics).

[92] *See infra* notes 157–62 (discussing support of conscientious objection by Protestants, mainstream news outlets, and the American Civil Liberties Union).

[93] *See infra* notes 205–06, 210.

[94] *See* Thomas Merton, *Nuclear War and Christian Responsibility*, 75 COMMONWEAL 509, 510 (1962).

[95] *Id.* at 511–13.

[96] *Id.* at 513.

forming the American Pax Association (Pax).[97] Pax sought to "awaken the American Catholic community to a deeper awareness of the moral aspects of modern war in the light of Catholic teaching."[98] According to Pax, Catholic just war doctrine demanded active resistance to contemporary military strategy, which contemplated disproportionate and pre-emptive strikes, and the targeting of civilian sites.[99] While Dorothy Day's Catholic Worker movement had represented a pacifist Catholic left since the 1930s, the specter of nuclear annihilation made the anti-war position increasingly mainstream in the Church.[100] Indeed, in 1963, Pope John XXIII issued the encyclical *Pacem in Terris* which condemned the nuclear arms race, demurred from the traditional papal endorsement of a national right to self-defense, and raised the possibility that modern war might be intrinsically immoral.[101] While there was significant disagreement over how pacific the encyclical really was, it certainly signaled increasing sympathy for Catholic critiques of warfare among the Church hierarchy.

In 1965, Egan and her comrades, including Dorothy Day, travelled to Rome to lobby the final session of the Second Vatican Council in support of their pacific interpretation of just war theology.[102] This lobbying found a willing audience, and explicit support for conscientious objection appeared in *Gaudium et Spes*, one of the four constitutions promulgated by the Council.[103] *Gaudium et Spes* called on the Church "to undertake an evaluation of war with an entirely new attitude."[104] As recently as 1956, Pope Pius XII had criticized conscientious objection and pacifism from a just war perspective.[105] The Council, however, wrote that "we cannot fail to praise those who renounce the use of violence in the vindication of their rights" and that "[i]t seems right that laws make humane provisions for the case of those who for reasons of conscience refuse to bear arms, provided however, that they agree to serve the human community."[106] Although milder than Catholic pacifists would have liked, the conciliar endorsement of conscientious objection went a long way to normalizing a Catholic anti-war culture.[107]

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[97] Eileen Egan, *The Struggle of the Small Vehicle, Pax*, *in* AMERICAN CATHOLIC PACIFISM: THE INFLUENCE OF DOROTHY DAY AND THE CATHOLIC WORKER MOVEMENT 123 (Annie Klejment & Nancy L. Roberts eds., 1996).

[98] *Id.* at 125.

[99] *Id.* at 129.

[100] For the position of the Catholic Worker movement in the Church, see generally JAMES FISHER, CATHOLIC COUNTERCULTURE IN AMERICA, 1933–1962 (1989).

[101] *See* Hehir, *supra* note 90, at 66.

[102] Egan, *supra* note 97, at 133.

[103] *Id.* at 133–38.

[104] GAUDIUM ET SPES, *supra* note 89, ¶ 80.

[105] *See* John Courtney Murray, S.J., *Remarks on the Moral Problem of War*, 20 THEOLOGICAL STUD. 53, 53 (1959).

[106] GAUDIUM ET SPES, *supra* note 89, ¶¶ 78–79.

[107] *See supra* notes 89–91 and accompanying text (discussing the effect of GAUDIUM ET SPES on mainstreaming conscientious objection).

By the time *Gaudium et Spes* appeared on December 7, 1965, the focus of American Catholic pacifism had shifted from nuclear policy to Vietnam policy.[108] In February 1965, the Johnson administration launched an air war in North Vietnam.[109] In response, the *Catholic Worker* published a "Declaration of Conscience," whose signatories pledged "conscientious refusal to cooperate" with U.S. Vietnam policy and declared their intention "to stop the flow of American soldiers and munitions to Vietnam."[110] The next month, the Jesuit priest Daniel Berrigan declared himself "in peaceable conflict" with the American state.[111] In October, Berrigan joined with Lutheran minister Richard John Neuhaus and Rabbi Abraham Heschel to form Clergy Concerned About Vietnam.[112]

While the *Worker* and Berrigan represented the far left of Catholic pacifism, by the fall of 1965, the beginning of the American ground war had brought the question of Catholic conscientious objection to the attention of the more moderate *Commonweal*.[113] In September, the editors reported that "[r]ecent court decisions on questions of conscientious objection have tended to extend the meaning of this term" and recommended that "the trend should be continued."[114] They were referring to the Supreme Court case *United States v. Seeger*, in which the Court had extended statutory recognition of conscientious objection to those without a traditional belief in God.[115]

The current draft law exempted from combat duty only "those persons who by reason of their religious training and belief are conscientiously opposed to participation in war in any form."[116] The statute went on to define "religious training and belief" as "an individual's belief in a 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."[117] Several would-be objectors challenged the constitutionality of the exemption, stating that while they had sincere beliefs against participation in all wars, these beliefs were either not religious or religious but not relating to any traditional conception of a "Supreme Being."[118] They attacked both the statute's exclusion of non-religious

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[108] *See infra* notes 111–16 and accompanying text.

[109] CHARLES BENEDETTI, AN AMERICAN ORDEAL: THE ANTIWAR MOVEMENT OF THE VIETNAM ERA 104 (1990).

[110] *Declaration of Conscience*, CATH. WORKER, Feb. 1, 1965, at 2.

[111] Daniel Berrigan, *In Peaceable Conflict*, CATH. WORKER, Mar. 1, 1965, at 1.

[112] MITCHELL K. HALL, BECAUSE OF THEIR FAITH: CALCAV AND RELIGIOUS OPPOSITION TO THE VIETNAM WAR 14 (1990).

[113] *See* Editorial, *Ending the Draft*, 82 COMMONWEAL 680, 681 (1965) (stating the trend of court decisions supporting conscientious objection should continue).

[114] *Id.*

[115] 380 U.S. 163 (1965).

[116] *Id.* at 164–65 (citing Universal Military Training and Service Act, 50 U.S.C. app. § 456(j) (1958 ed.)).

[117] *Id.* at 165.

[118] *Id.*

objectors and its discrimination between different varieties of religion as violations of the First and Fifth Amendments.[119]

Avoiding these constitutional questions, eight Justices interpreted both the "religious training and belief" language and its "Supreme Being" explication as requiring only beliefs that 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."[120] As a result, three heterodox men, who based their objections on a variety of secular and religious texts, received conscientious objector status.[121] Given this liberalization of the draft law, the government's continuing refusal to recognize Catholic men as legitimate conscientious objectors would become only more galling. In October, *Commonweal* bemoaned the fact that "[m]any a Catholic CO has a hair-raising tale of how a skeptical examiner consulted some chancery office or other and thereupon announced the discovery that no Catholic could possibly object to performing military service."[122] As their reference to "chancery officer" makes clear, the editors were particularly anxious that some within the Church continued to equivocate on the propriety of Catholic conscientious objection, only exacerbating the difficulty of young Catholic men.[123] Responding to reports from Rome that Cardinal Spellman had resisted the introduction of language supporting conscientious objection at the Second Vatican Council, they worried about this "puzzling attempt to deny the long Catholic tradition of conscientious objection."[124]

The editors were, in fact, exaggerating the degree to which Catholic conscientious objection was established. Indeed, they went on to speculate that Spellman may have spoken as he did out of concern with "the rising rate of conscientious objection among American Catholics," spurned on by "the 'new' argument for conscientious objection: that in our nuclear age, the conditions for a just war no longer exist."[125] In light of Spellman's diffidence in the face of this trend, the editors concluded that "it is clear that the right of conscientious objection must be underlined with new force."[126]

The actual novelty of Catholic conscientious objection—as a doctrinal matter—was revealed in a November article analyzing the soon-to-be-published text of *Gaudium et Spes*.[127] In it, a theological advisor to the fourth session of the Council, Father Gregory Baum, O.S.A. reported that the constitution's chapter on war and peace "acknowledged the right of conscientious objection" and noted that this

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[119] *Id.*

[120] *Id.* at 184.

[121] *Id.* at 186–88.

[122] Editorial, *Right to Say No?*, 83 COMMONWEAL 7, 7 (1965).

[123] *See id.* (discussing ambiguities in the Catholic Church's stance on conscientious objection).

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *See* Gregory Baum, *Peace, Priests and the Missions*, 83 COMMONWEAL 175, 175 (1965) (discussing the novelty of the acknowledgment of conscientious objection by the Catholic Church in GAUDIUM ET SPES).

acknowledgment was news: "This is something new in the Catholic Church."[128] Indeed, the acknowledgment generated debate:

> A number of bishops from Catholic countries objected to the text; they felt that the declaration went against the ethos of their nations. On the other hand, a much larger number of bishops asked that the present text be strengthened. For men who have this calling, conscientious objection may well be a powerful witness to the Gospel of Christ and the anticipation of a future moral consensus of mankind.[129]

The week after this letter came from Rome, *Commonweal* reported on a draft card burning that had taken place in New York City on November 6, 1965.[130] The magazine's editors walked a fine line in commenting on the protest. They clearly admired the actions of the five men who burnt their draft cards, writing that "[s]eldom does there occur a liturgical ceremony more impressive than the draft-card burning which took place in Manhattan's Union Square."[131] And they published a statement read at the ceremony by one of the five—Thomas Cornell, former managing editor of the *Catholic Worker* and one of the founders of the newly formed Catholic Peace Fellowship.[132] At the same time, the editors distinguished their support for conscientious objection and protest from their own opinions on the justness of American foreign policy.[133] "Our own pronouncements on Vietnam have been uneasy and hesitant," the editors explained, pointing to their concern for the fate of the South Vietnamese if America did not intervene.[134] Where they could praise the draft card burners unequivocally was "in their insistence upon moral judgment. Nothing, absolutely nothing . . . can release the individual from making a conscientious judgment on the particular events occurring in Vietnam."[135] While the Catholic Left would directly condemn and contest the Vietnam War over the next decade, the *Commonweal* editors' attempt to separate their nuanced political evaluation of the war from their absolute support for conscientious dissent would become a leitmotif of *moderate* Catholic thought and practice.[136]

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[128] *Id.*

[129] *Id.*

[130] *See generally* Editorial, *Burning Draft Cards*, 83 COMMONWEAL 203, 203 (1965) (reporting on a draft-card burning on November 6, 1965).

[131] *Id.* at 203.

[132] Thomas C. Cornell, *Why I Am Burning My Draft Card*, *in* Editorial, *Burning Draft Cards*, *supra* note 130, at 205.

[133] Editorial, *Burning Draft Cards*, *supra* note 130, at 204.

[134] *Id.*

[135] *Id.*

[136] *See supra* notes 113–14 and accompanying text (discussing the moderation of *Commonweal* and its views on the Vietnam War and conscientious objection).

A clear indication that conscientious objection was becoming a mainstream Catholic issue came a year after the initial flurry of Vietnam protests. In the summer of 1966, President Lyndon B. Johnson finally consented to his aides' suggestion that he form a National Advisory Commission on Selective Service (NACSS), in order to demonstrate presidential action in the face of proliferating criticisms of the draft.[137] The same day that Johnson issued the Executive Order forming the Commission, his staff was vetting potential members of NACSS, including John Courtney Murray, the prominent Jesuit theologian who represented the modernizing mainstream of the American Catholic laity.[138] Murray had helped draft the Second Vatican Council's *Dignitatis Humanae*, its Declaration on Religious Freedom, *Dignitatis Humanae*, which was published on December 7, 1965, the same day that *Gaudium et Spes* appeared.[139] While interpretations of the Declaration varied, and Murray wished it had gone further in liberalizing traditional teaching on church-state relations, the document did move Church doctrine toward the church-state position for which Murray had long advocated—a position in which national governments would treat all religious groups equally, allowing each to seek to influence society in its own fashion.[140] Murray believed that this position harmonized with both American constitutional history and natural law.[141]

In the fall of 1966, Murray brought his vision of religious egalitarianism to the NACSS. The majority of the Commission wished to leave the current, statutory definition of conscientious objector unchanged: a person who "by reason of religious training and belief, is conscientiously opposed to participation in war in any form," just as long as that "religious training and belief" involved "an individual's belief in a 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."[142] In December, Murray asked that debate on the definition be reopened at the Commission.[143] He argued that this exemption recognized only "absolute pacifism," which—although "occupyi[ng]

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[137] *See* Memorandum from Joe Califano to the President (June 20, 1966) (on file at WHCF Gen. FG 698, Box 390, Lyndon B. Johnson Presidential Library) (recommending Commission).

[138] *Compare* Exec. Order 11,289, 31 Fed. Reg. 9265 (July 2, 1966), *with* Memorandum from Bill Moyers to Joe Califano (July 2, 1966) (on file at WHCF Confidential 282, Box 39, Lyndon B. Johnson Presidential Library).

[139] DECLARATION ON RELIGIOUS FREEDOM, DIGNITATIS HUMANAE, ON THE RIGHT OF THE PERSON AND OF COMMUNITIES TO SOCIAL AND CIVIL FREEDOM IN MATTERS RELIGIOUS, PROMULGATED BY HIS HOLINESS POPE PAUL VI, Dec. 7, 1965 [hereinafter DIGNITATIS HUMANAE]; GAUDIUM ET SPES, *supra* note 89.

[140] *See* Canavan, *supra* note 52.

[141] *Id.*

[142] 50 U.S.C. § 3806(j).

[143] *See* Preliminary Conclusions/Directions of the National Advisory Commission on Selective Services (Dec. 13, 1966) (unsigned) (on file at WHCF ND 9-4, Box 148, Lyndon B. Johnson Presidential Library).

a time-honored place in American society"—was "a sectarian position and d[id] not represent the moral consensus of the American people with regard to the uses of military force."[144] Indeed, he noted that the "classical doctrine on war widely held within the Christian community has been based on the moral premise that not all uses of military force are inherently immoral."[145]

In asserting the ecumenicism of just war theology, Murray was aided by an upsurge of interest in the doctrine within the Protestant as well as the Catholic community.[146] Spurred on by moral and existential anxieties about nuclear warfare, two Protestant theologians in the early 1960s released path-breaking works, claiming just war theology for Christendom as a whole.[147] Then, in February 1966, the Protestant *Christian Century* published an article defending just war objection.[148] Nonetheless, Murray was sensitive of the fact that just war theology was largely associated with Catholicism. To deny the legitimacy of just war conscientious objection would be to deny the legitimacy of those consciences formed by the teachings of the Catholic Church—especially as articulated in the recent pastoral constitution, *Gaudium et Spes*.

Murray's plea—that to recognize only absolute as opposed to just war pacifism was to privilege one sectarian (and specifically non-Catholic) form of conscience—went unheeded by the Commission's majority. The majority insisted that "the status of conscientious objection can properly be applied to only those who are opposed to all killing of human beings under any circumstances."[149] They refused to consider the question of what was or was not "'classical Christian doctrine' on the subject of just and unjust wars," but then essentially decided that question against just war theology by finding that "so-called selective pacifism is essentially a political [not a religious] question of support or nonsupport of a war and cannot be judged in terms of special moral imperatives."[150]

In calling for the recognition of selective conscientious objection at the NACSS, Murray was a step ahead of the U.S. Catholic Bishops, but only a step. As the NACSS debated the question of conscientious objection in November 1966, the

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[144] NAT'L ADVISORY COMM'N ON SELECTIVE SERV., IN PURSUIT OF EQUITY: WHO SERVES WHEN NOT ALL SERVE? 48–49 (1967) [hereinafter NACSS].

[145] *Id.* at 49.

[146] *See generally* PAUL RAMSEY, WAR AND THE CHRISTIAN CONSCIENCE: HOW SHALL MODERN WAR BE CONDUCTED JUSTLY? (1961) (arguing that the contemporary Christian embrace of just-war doctrine was a recovery of an earlier Christian understanding of war); ROLAND H. BAINTON, CHRISTIAN ATTITUDES TOWARD WAR AND PEACE: A HISTORICAL SURVEY AND CULTURAL RE-EVALUATION (1960) (examining how different sects of Christianity have historically approached war).

[147] *See generally* RAMSEY, *supra* note 146; BAINTON, *supra* note 146.

[148] Alan Geyer, *The Just War and the Selective Objector*, THE CHRISTIAN CENTURY, Feb. 16, 1966, at 199.

[149] NACSS, *supra* note 144, at 50.

[150] *Id.*

Bishops issued a pastoral letter on "Peace and Vietnam."[151] In it, they wrote that "while we do not claim to be able to resolve these issues authoritatively, in the light of the facts as they are known to us it is reasonable to argue that our presence in Vietnam is justified."[152] Despite this refusal to condemn the war, the Bishops did acknowledge that their judgment was not authoritative and affirmed each individual's moral responsibility to assess the morality of the conflict: "While we can conscientiously support the position of our country in the present circumstances, it is the duty of everyone to search for other alternatives. And everyone—government leaders, and citizens alike—must be prepared to change our course whenever a change in circumstances warrants it."[153] Not quite an endorsement of selective conscientious objection, the Bishops' letter was still read by liberal Catholics as moving in that direction.[154]

A few months later, further anti-war stirrings among the American Catholic hierarchy caught the attention of the Protestant *Christian Century*.[155] The magazine interpreted Archbishop Paul J. Hallinan of Atlanta's March speech to a meeting of Clergy and Laity Concerned About Vietnam (CALCAV)—Daniel Berrigan's organization—as a possible end to "the silence of high level Roman Catholic clergy in the debate on the morality of the armed conflict in Vietnam."[156] Hallinan had told the CALCAV audience that, "Our conscience and our voice must be raised against the savagery and terror of war."[157] The next month, the *New York Times* published an open letter from Auxiliary Bishop James Shannon and ten Roman Catholic college presidents, "call[ing] for a 'reassessment of American involvement in Vietnam' and not[ing] the incongruity between 'the moral principles enunciated by the Church and the uncritical support of this war by so many Catholics."[158]

The previous winter, while Murray was defending selective conscientious objection at the White House, the American Civil Liberties Union (ACLU) had taken on its first case involving a selective conscientious objector—an Air Force captain, Dale Noyd, who alleged that continued service in the Vietnam conflict violated his conscientious objections—grounded in "Humanism"—to unjust war.[159]

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[151] NAT'L CONF. OF CATH. BISHOPS, *Peace and Vietnam*, *in* QUEST FOR JUSTICE: A COMPENDIUM OF STATEMENTS OF THE UNITED STATES CATHOLIC BISHOPS ON THE POLITICAL AND SOCIAL ORDER, 1996–1980, at 25–29 (Brian Benestad & Francis Butler eds., 1983).

[152] *Id.* at 27–28.

[153] *Id.* at 28.

[154] *See* James O'Gara, *Peace and the Bishops*, 85 COMMONWEAL 338, 338 (1966).

[155] HALL, *supra* note 112, at 39.

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *See* Letter from Mel Wulf to John Pemberton (Dec. 6, 1966) (on file with author); Feb. 17, 1967; Letter from Ernest Angell, Chairman of the Board of Directors, Am. C.L. Union, to Honorable Harold Brown, Sec'y A.F., 2 (Feb. 17, 1967) (on file at Series IV, Reel 363, ACLU Files, 1950–1989).

By the spring of 1967, the organization was looking for an "exemplary test case of Catholic soldier seeking discharge."[160] In June, Lynn Castner at the Minnesota Civil Liberties Union (MCLU) forwarded to the national office a *Catholic Bulletin* article on a recent commencement speech given by John Courtney Murray in support of selective conscientious objection and the legitimacy of just war theory.[161] Castner had gotten the article from Bernard Casserly, the editor of *Catholic Bulletin* and an MCLU board member, and thought that Father Murray might be a useful contributor to a future SCO brief (Murray, however, died only weeks after giving the commencement speech).[162] By November, the ACLU settled on the case of a draftee, Stephen Spiro, as its Catholic just war objector test case.[163]

Spiro had sought a I-O draft classification, which would have exempted him from both combatant and noncombatant duty within the military, on the grounds that:

> the military policy of the United States involves a conditional willingness to engage in a war which is not 'just' according to the teachings of my church. Since participation in military service would indicate at least a tacit acceptance of his policy, I am morally bound in conscience to remain outside the military service.[164]

Interestingly, Spiro was barely even selective in his objections—he explained that given his understanding of just war theory, and especially its stance on civilian targeting, "[t]he very fact of the existence of a nuclear potential rules out the possibility of assurance of a just war."[165] He could not imagine a future war—given the current state of the world—that would be just.[166]

Nonetheless, Spiro was eventually classified I-A, fit for combat service, on the grounds that he did not object to "participation in war in any form" as the law required of legitimate conscientious objectors.[167] Spiro subsequently refused to report for induction and was convicted of draft evasion.[168] During his trial in district court, Spiro challenged his classification on both procedural and substantive grounds

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[160] *See* Letter from Eleanor Norton, Assistant Legal Dir., to Charles Morgan and Laughlin Macdonald (Apr. 1967) (on file at Series III, Roll 185, ACLU Files, 1950–1989).

[161] Letter from Castner to Alan Reitman (June 23, 1967) (on file at Series III, Roll 185, ACLU Files, 1950–1989).

[162] *Id.*

[163] *See* Letter from Esther Frankel to Marvin Karpatkin (Nov. 22, 1967) (on file at Series IV, Roll 468, ACLU Files, 1950–1989).

[164] Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit, at 31a, United States v. Spiro, 384 F.2d 159 (3d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968) [hereinafter Spiro Petition].

[165] *Id.* at 32a.

[166] *See id.*

[167] *Id.* at 17a.

[168] *Id.* at 4.

and sought to introduce—without success—the recently promulgated *Gaudium et Spes* as evidence of the well-grounded nature of his religious objections.[169]

After the Third Circuit upheld Spiro's conviction, his attorney Esther Frankel, with financial backing and legal advice from the ACLU, asked the Supreme Court to consider the question whether:

> failure or refusal to recognize the Just War Doctrine followed by an adherent of the Roman Catholic Church, whom the Hearing Officer characterized as "a sincere and devout member of the Catholic Church who is sincere in his adherence to his views," constitute religious discrimination and negate the freedom of religion guaranteed by the First Amendment and the Due Process Clause of the Fifth Amendment.[170]

In March 1968, however, the Court denied cert, as it had three months earlier in the case of the humanist selective conscientious objector Dale Noyd.[171]

Meanwhile, another selective conscientious objection case, not under the auspices of the ACLU, was on its way to the Supreme Court. In August 1967, Louis Negre, a devout Catholic born in France and raised in Bakersfield, CA, had been inducted into the army.[172] Throughout his training, he "made clear . . . that he was opposed on religious reasons to the military involvement in Vietnam."[173] Yet the military rejected his applications for conscientious objector status.[174] When Negre's commanding officer ordered him to embark for Vietnam in August 1968, he refused and faced a general court martial for disobedience.[175] At that point, Negre's San Francisco attorney, Richard Harrington, reached out to an old Harvard Law School classmate—John Noonan, who was by then a law professor at Berkeley.[176]

When John Courtney Murray died in August 1967, Noonan had become the most respected Catholic legal thinker in the United States.[177] He had already achieved fame in 1965 with his book *Contraception*, which used careful historical analysis to argue that the Catholic Church's teaching on contraception had been evolving for centuries.[178] At the time, many American Catholics were hoping that

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[169] *See* Esther Frankel, Petition for Writ of Certiorari 6 (Nov. 22, 1967) (unpublished draft petition) (on file at Series IV, Roll 468, ACLU Files, 1950–1989).

[170] Spiro Petition, *supra* note 164, at 3.

[171] *See* Spiro v. United States, 390 U.S. 956 (1968); Noyd v. McNamara, 389 U.S. 1022 (1967).

[172] Reid, Jr., *supra* note 5, at 884–85.

[173] *Id.* at 885.

[174] *Id.* at 885–86.

[175] *Id.*

[176] *Id.* at 886.

[177] *Id.* at 939.

[178] *See generally* CONTRACEPTION: A HISTORY OF ITS TREATMENT BY THE CATHOLIC THEOLOGIANS AND CANONISTS (1965).

the liberal atmosphere of the Second Vatican Council might lead to papal endorsement of the use of the birth control pill by married couples.[179] Noonan, however, was far from a radical. Indeed, in an earlier book, *Usury*, he had deployed his historicist approach to justify the Catholic Church's gradual accommodation of market capitalism.[180] He had also worked at the National Security Council under Eisenhower after law school and later supported America's involvement in Vietnam.[181]

Noonan's intimate knowledge of Church teaching and his moderate reputation made him the perfect authority for Negre's lawyers to reach out to on the question of selective conscientious objection. Noonan offered Harrington advice on the Catholic classics that could shore up Negre's claim to be a sincere, if selective, objector, including Thomas Aquinas.[182] With this help, Harrington was able to convince the court martial to find Negre not guilty of disobedience.[183] Yet the army rejected Negre's request for a discharge and ordered him to Vietnam once again.[184] Harrington then petitioned for a writ of habeas corpus, and Negre's case headed to federal district court and from there the Supreme Court.[185] Facing off against the government's best lawyers, Harrington would again turn to Noonan for help.

As these first selective conscientious objection (SCO) cases made their way through the courts, support for selective conscientious objection was growing within the Church and throughout the country. Legal scholars began to ask in earnest whether recognition of only absolute—as opposed just war—pacifism might violate the First Amendment.[186] In February 1967, the journal *Worldview*, founded by former *Commonweal* editor James Finn, dedicated its monthly issue to the question of selective conscientious objection, with contributions from leading Protestant theologian Paul Ramsey, Yale historian Staughton Lynd, and Princeton rabbi Everett Gendler.[187] That summer, in the speech reported by the *Catholic Bulletin*, John

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[179] ALLITT, *supra* note 17, at 167–68.

[180] *See generally* JOHN T. NOONAN, JR., THE SCHOLASTIC ANALYSIS OF USURY (1957).

[181] Telephone Interview with Judge John T. Noonan, Jr. (Aug. 22, 2012).

[182] Reid, Jr., *supra* note 5, at 886.

[183] *Id.*

[184] *Id.* at 887.

[185] *Id.* at 887, 925.

[186] *See* David M. Cohen & Robert Greenspan, *Conscientious Objection, Democratic Theory, and the Constitution*, 29 U. PITT. L. REV. 389 (1968); Theodore Hochstadt, *The Right to Exemption from Military Service of a Conscientious Objector to a Particular War*, 3 HARV. C.R.-C.L. L. REV. 1 (1967); Hugh C. Macgill, *Selective Conscientious Objection: Divine Will and Legislative Grace*, 54 VA. L. REV. 1355 (1968); William O'Brien, *Selective Conscientious Objection and International Law*, 56 GEO. L.J. 1080 (1968); Norman Redlich & Kenneth R. Feinberg, *Individual Conscience and the Selective Conscientious Objector: The Right Not to Kill*, 44 N.Y.U. L. REV. 875 (1969); Ruth C. Silva, *The Constitution, The Conscientious Objector, and the "Just War"*, 75 DICK. L. REV. 1 (1970); H. Patrick Sweeney, *Selective Conscientious Objection: The Practical Moral Alternative to Killing*, 1 LOY. L.A. L. REV. 113 (1968).

[187] Staughton Lynd, Everett E. Gendler & Paul Ramsey, *Selective Service and Selective Objection*, 10 WORLDVIEW 1, 1 (1967).

Courtney Murray told the graduating class of Western Maryland College that "we begin to witness [just war theology's] revival."[188] A year later, *The New Republic* and *The Nation* both ran articles assessing and defending "The Selective C.O."[189]

Finally, in November 1968, two years after Murray had first taken the case for just war objection to Washington, the U.S. Catholic Bishops brought his arguments to a much wider audience in their pastoral letter "Human Life in Our Day."[190] The Bishops wrote:

> We therefore recommend a modification of the Selective Service Act, making it possible, although not easy, for so-called selective conscientious objectors to refuse—without fear of imprisonment or loss of citizenship—to serve in wars which they consider unjust or in branches of the service (e.g., the strategic nuclear forces) which would subject them to the performance of actions contrary to deeply held moral convictions about indiscriminate killing.[191]

For the first time, the American Catholic hierarchy was calling for a liberalization of selective service laws and endorsing the right of Catholics to object to military service.[192]

The *Catholic Lawyer* responded to the Bishops' endorsement with a wide-ranging article arguing for the legitimacy of selective conscientious objection, especially in the case of Catholic just war objectors.[193] Written by Gaillard Hunt, a recent Columbia Law School graduate, "Selective Conscientious Objection" insisted that the refusal of the Selective Service System to acknowledge Catholic just war objectors was unreasonable given the relevant case law.[194] Hunt's argument rested largely on *Sicurella v. United States*, the 1955 Supreme Court decision in which a Jehovah's Witness was found to be a legitimate conscientious objector even though he did not consider himself pacifist or object to all wars.[195] In keeping with the Witnesses' creed, Sicurella insisted that while he would not fight in any wars on behalf of temporal authorities, he would fight "on the orders of Jehovah . . . in the Armageddon."[196] In

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[188] John Courtney Murray, S.J., *Selective Conscientious Objection*, *in* BRIDGING THE SACRED AND THE SECULAR 89 (J. Leon Hooper, S.J. ed., 1958).

[189] Jeff Greenfield, *The Selective C.O.*, NEW REPUBLIC, July 1, 1967, at 15–16; Carl Cohen, *The Case for Selective Pacifism*, THE NATION, July 8, 1968, at 12.

[190] Statement, National Council of Catholic Bishops, Human Life in Our Day, https://www.priestsforlife.org/magisterium/bishops/68-11-15humanlifeinourdaynccb.htm [https://perma.cc/H62T-VPPC] (last visited Dec. 8, 2022).

[191] *Id.* ¶ 152.

[192] *Id.*

[193] Gaillard Hunt, *Selective Conscientious Objection*, 15 CATH. LAW. 221, 221 (1969).

[194] *Id.*

[195] *Id.* at 230–32; 348 U.S. 385 (1955).

[196] *Sicurella*, 348 U.S. at 390–91.

finding that Sicurella's beliefs satisfied the "participation to war in any form" requirement despite their apparent selectivity, Justice Clark explained that: "we are not able to stretch our imagination to the point of believing that the yardstick of the Congress includes within its measure such spiritual wars between the powers of good and evil where the Jehovah's Witnesses, if they participate, will do so without carnal weapons."[197]

While the Witnesses' distinction between "shooting wars"[198] and disincarnate conflict does seem to make for an exceptional case, Hunt argued in the *Catholic Lawyer* that *Sicurella* clearly stood for the proposition that Congress had not intended to refuse legitimacy to all selective objectors with its "participation to war in any form" language.[199] "[A]n admission that he might at some time fight, or a refusal to say he will never fight in a war," Hunt went on, "need not always bar a registrant from an exemption to which he is otherwise entitled."[200] The only question that remained, then, was why the Justice Department, in *United States v. Spiro*, had decided that "Catholic just war objectors are not entitled to the exemption, *Sicurella* notwithstanding."[201]

Given that Spiro "objected to going into the army because he was sure no future war would be a just war," Hunt reasoned that the only way to distinguish Spiro's objection from Sicurella's was that "Spiro spelled out the characteristics of his just war, whereas the Jehovah's Witnesses speak of their theocratic war only in mythic terms."[202] What the hearing officer in Spiro's case had found was that the Spiro's "minor premise—that the United States was inevitably committed to indiscriminate mass bombing of civilians and use of nuclear weapons—was not a religious belief based on fact but was essentially a historical prediction of a political nature."[203] In other words, even though Spiro's belief—that no future war in which he might participate could possibly be just—was grounded in religious doctrine and was nearly as absolute in its rejection of temporal conflict as Sicurella's, the belief depended on political as opposed to religious judgments.[204] Such a substitution of one's own political judgments for congressional and presidential decision-making had been, since WWI, the hallmark of an unconscientious objection. Yet if the hearing officer was correct, then just war theology, which *insisted upon* a believer's reasoned assessment of the historical and political conditions of a particular conflict, might be de jure unconscientious.[205]

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[197] *Id.* at 391.

[198] *Id.*

[199] Hunt, *supra* note 193, at 233.

[200] *Id.*

[201] *Id.*

[202] *Id.* at 234.

[203] Brief for the United States in Opposition at 6, United States v. Spiro, 384 F.2d 159 (3d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968) [hereinafter Brief in Opposition].

[204] *See id.*; *Sicurella*, 348 U.S. at 406.

[205] *See* Brief in Opposition, *supra* note 203, at 6.

As Hunt sarcastically paraphrased the hearing officer's conclusion: "the registrant may object to wars selectively so long as his basis of selectivity is inarticulated, based on inspiration rather than reason, or does not involve the kind of fact weighing characteristic of a Congressional decision."[206] The implication of Hunt's sarcasm would have been clear to his audience of Catholic lawyers, familiar with the old opposition between Catholic faith, grounded in reason, and Protestant faith, grounded in personal inspiration. In denying legitimacy to Spiro, the U.S. government had endorsed "the notion that religion should speak only in verbal formulas that are thought to represent moral unchangeables—that questions of fact are less holy than questions of true theory, and must be left to Caesar."[207] While such absolutism was a "central thesis of some religions," it was clearly rejected by Catholic just war theology.[208] As long as such a definition of religion held sway among U.S. officials, they would continue to "deny the [conscientious] exemption to men such as Catholic just war objectors."[209]

Ironically, at the same moment that Hunt and other Catholics were coming to the conclusion that the government effectively had ruled Catholic just war objection unreligious, supporters of *secular* selective conscientious objection were invoking the figure of the Catholic just war objector to argue that selective conscientious objection could clearly arise from beliefs that fell within the meaning of religion established by *United States v. Seeger*: beliefs that 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."[210] As a Note in the *Harvard Law Review* argued in December 1969:

> it has been suggested that opposition to a particular war is, at least usually, a political decision. To see that this is not universally true, one has only to look to a Catholic who applies his church's traditional doctrine of the just war in determining that he must not participate in a particular conflict.[211]

This was precisely the argument that the ACLU intended to make in its next selective conscientious objection test case, *Gillette v. United States*, which involved an atheist.[212] Indeed, Gillette's ACLU lawyers quoted extensively from the *HLR* Note in their Supreme Court brief.[213] The legitimacy of Catholic just war theology had

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[206] Hunt, *supra* note 193, at 234.
[207] *Id.* at 236.
[208] *Id.*
[209] *Id.* at 235.
[210] 380 U.S. at 184.
[211] *Recent Cases*, 83 HARV. L. REV. 453, 457 (1969).
[212] Brief for Petitioner at 35–36, Gillette v. United States, 401 U.S. 437 (1970) (No. 85).
[213] *See id.*

thus become the threshold question for all selective conscientious objectors—a rapidly expanding category of men in the wake of the first draft lottery in 1969.[214]

In December 1970, John Noonan filed a brief for Negre at the Supreme Court, defending the legitimacy of the young Catholic's objections on both constitutional and theological grounds.[215] As in the case of Murray's and Hunt's advocacy for the legitimacy of Catholic SCO, at the heart of Noonan's brief was an argument about equality.[216] Noonan's central contention was not that Negre should be free to do whatever his personal faith dictated without consequence.[217] Rather, it was that where the government recognized a public interest in respecting an individual's religious beliefs about killing, it should not discriminate between different *kinds* of religious belief about killing.[218] He wrote that:

> The teaching of the Catholic church has been consistent for nearly two thousand years in affirming the primary duty of man to follow conscience as the voice of God, and to refuse to kill where taking life violates conscience. If in the heat of defense of a much-criticized war the government can prevail with its contention that these teachings of the Catholic church are "political" rather than "religious," one can only wonder what life is left in the freedom of religion guaranteed by the First Amendment . . .[219]

At the time that Noonan wrote these words, he and a host of other Catholic lawyers were embroiled in another legal conflict that they also saw as pitting the government against the Catholic Church's teaching that "the primary duty of man [is] to follow conscience as the voice of God, and to refuse to kill where taking life violates conscience."[220] Although abortion was still largely illegal in 1970, and although most Catholics—including Noonan—thought contraception should be legal, a confluence of factors, including the contemporaneous debates about religious education, selective conscientious objection, and direct federal involvement in family planning, led Catholic social and legal activists to view the liberalization of abortion laws as a threat to the Catholic conscience.[221]

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[214] MICHAEL FOLEY, CONFRONTING THE WAR MACHINE: DRAFT RESISTANCE DURING THE VIETNAM WAR 337–39 (2003).

[215] Reply Brief on Behalf of Petitioner, Negre v. Larsen, 401 U.S. 437 (1970) (No. 325).

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] *Id.* at 15.

[220] *Id.*

[221] DONALD T. CRITCHLOW, INTENDED CONSEQUENCES: BIRTH CONTROL, ABORTION, AND THE FEDERAL GOVERNMENT IN MODERN AMERICA 113–17 (1999).

C. Federally Funded Family Planning and Abortion Reform

Opposition to federally funded family planning and abortion reform is perhaps the most striking example of the iterative nature of Catholic activism in the 1960s and early 1970s. The decade began with widespread Catholic support for liberalization of the Church's prohibition on the use of contraception. Likewise, the Supreme Court's decision in *Griswold v. Connecticut* was hailed as protecting the right of married couples to make conscientious decisions about family planning.[222] Yet American Catholic clergy and legal elites were soon invoking the Court's novel defense of privacy as a reason to limit the further expansion of reproductive healthcare choices. By affiliating with the *Griswold* decision, these Catholic leaders sought to shape its meaning in accordance with what they perceived to be essential Catholic values—transnational religious commitments to a particular vision of family life.[223] But they also insisted that these values were already embodied in American law.[224] In the context of the abortion debate, the American Catholic hierarchy and lay legal activists would present themselves as defenders of long-held American legal and moral commitments to fetal life.[225] Such acts of rearticulating American legal culture in a particularistic, Catholic voice had both external and internal audiences.[226] Not only were Catholic leaders seeking to influence the development of American law and make it more hospitable to American Catholic identity, they were also affiliating themselves with the prestige of American law in order to enforce a particular interpretation of Catholic identity on a fractious religious community.

In the early 1960s, the Catholic press had denounced *Engel* and *Schempp* as a rebuke to increasingly public Catholic religiosity. And the Catholic Press responded with anxiety to the Supreme Court's March 1965 decision in *United States v. Seeger*, wondering why Catholic conscientious objectors still faced an uphill battle before local draft boards, while far more marginal consciences had just been deigned legitimate by the highest court in the land.[227] Yet in June of that same year, American Catholics largely embraced *Griswold v. Connecticut*, which struck down a prohibition on the use of contraceptives as violating the "privacy surrounding the marriage relationship."[228] Concerned about the personal economic hardships that large families

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[222] *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965).

[223] *See generally id.*

[224] Philip Gleason, *Catholicism and Cultural Change in the 1960's*, 34 REV. OF POL. 91, 91–92 (1972).

[225] CRITCHLOW, *supra* note 221, at 114.

[226] *See generally* DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 196–269 (1994).

[227] *See generally* 380 U.S. 163 (1965).

[228] Griswold v. Connecticut, 381 U.S. 479, 486 (1965); for the political reception of *Griswold*, *see generally* GARROW, *supra* note 226.

faced and about the global danger of "overpopulation," American Catholics had become increasingly open to the use of contraception.[229]

In 1963, the Catholic gynecologist John Rock published *The Time Has Come*, which argued that the use of the birth control pill by married couples did not violate Church teaching.[230] Rock reasoned that since the pill did not interrupt conception but merely prolonged the period of infertility, its use was analogous to the rhythm method rather than the prohibited use of condoms or diaphragms.[231] While even the liberal Catholic press found Rock's bold advocacy for the pill imprudent, the editors of *Commonweal* nonetheless lauded Rock as "one of the few Catholics in America who has had the nerve to say what is on his mind."[232] And in 1964, Michael Novak sought to give further expression to the lay Catholic mind in *The Experience of Marriage*, which chronicled the struggles of Catholic families with many children.[233] Later that same year, *Commonweal* hosted a symposium on contraception that included Novak as well as more established Catholic intellectuals.[234] As Patrick Allitt summarizes, "nearly all participants point[ed] to faults in the current natural law prohibition on contraceptives and propos[ed] significant changes in the teaching."[235]

Although Rock and Novak both sparked significant debate, the man who became most associated with a broad shift in American Catholic consciousness on the issue of contraception was legal scholar John Noonan.[236] Since 1963, Noonan had been participating in the newly established "Conference on Population Problems" at the University of Notre Dame, where he was a law professor.[237] Sponsored by the Ford Foundation and John D. Rockefeller's Population Council, and closely advised by Planned Parenthood for America, the annual Conference brought together Catholic priests, lawyers, politicians, and activists throughout the population control movement.[238] The conference had the full support of Notre Dame's liberal president, Theodore Hesburgh, and was run by his special assistant, the former *Commonweal* editor George Shuster.[239]

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[229] *See, e.g.*, William F. Buckley, *The Birth Rate*, NAT'L REV., Mar. 23, 1965, at 231; Garry Wills, *Catholics and Population: A Defense*, NAT'L REV., Oct. 19, 1965, at 993–94.

[230] *See generally* JOHN ROCK, THE TIME HAS COME: A CATHOLIC DOCTOR'S PROPOSAL TO END THE BATTLE OVER BIRTH CONTROL (1963).

[231] *Id.*

[232] Editorial, *Doctor Rock's Book*, 78 COMMONWEAL 213, 213–14 (1963).

[233] THE EXPERIENCE OF MARRIAGE: THE TESTIMONY OF CATHOLIC LAYMEN (Michael Novak ed., 1964).

[234] Rodger Van Allen, *Commonweal and the Catholic Intellectual Life*, 13 U.S. CATH. HISTORIAN 71, 82 (1995).

[235] ALLITT, *supra* note 17, at 168.

[236] ROCK, *supra* note 230; Novak, *supra* note 233.

[237] Telephone Interview with Judge John T. Noonan, Jr., *supra* note 181.

[238] CRITCHLOW, *supra* note 221, at 62–63.

[239] *Id.* at 62.

It was in this environment that Noonan wrote his instant classic, *Contraception*, which demonstrated that the Church's views on contraception had shifted over the centuries in response to changing social needs.[240] Noonan's research already had brought him to the attention of Church authorities in Rome, and on March 24, 1965, it was Noonan who presided over the opening session of a papal commission established to draft the Church's position on the "population question."[241] There, he told the assembled group of priests and leading intellectuals that "[t]he matter [of contraception] is open enough to deserve the attentive study of the church in light of new scientific, social and historical understanding."[242] Two years later, in April 1967, the *National Catholic Reporter* leaked the commission's nearly finalized proceedings, revealing that a large majority favored papal acceptance of the use of artificial contraception by married couples.[243]

From the perspective of the mid-1970s, the liberal approach to contraception taken by Catholic clergy and powerful Catholic lay intellectuals such as Noonan in this earlier period is striking. While American Catholics would use artificial contraception with increasing frequency from the mid-1960s onward—indeed, use skyrocketed after the Pope rejected the commission's findings and reaffirmed the traditional prohibition on artificial contraception—their spiritual and intellectual leaders would never be as comfortable with the practice again.[244] There are many reasons for the shift—for one, the release of *Humanae Vitae* in 1968 closed the door on papal support for the practice (even as it sparked widespread dissent and disobedience);[245] for another, the decriminalization of abortion in *Roe v. Wade* would link the use of contraception, and the right of privacy that protected it, to a wider reproductive rights movement that conflicted more seriously with both lay and clerical beliefs.[246]

Yet it is important not to overstate the liberalism of either the American Catholic hierarchy or of lay legal activists in the mid-60s. American Catholic clerical and legal leaders interpreted *Griswold* as protecting conscientious family planning decisions made within the privacy of the marriage relation. But they also deployed the case as a weapon against growing support for federally funded family planning programs. It was in their resistance to such programs that Catholic legal activists began to describe the normalization of contraception and abortion as coercive. The 1960s debate about federally funded family planning thus helped to frame the imminent struggle against reproductive rights in terms of coercion, conscience, and religious equality.

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[240] Telephone Interview with Judge John T. Noonan, Jr., *supra* note 181.

[241] CRITCHLOW, *supra* note 221, at 128–29.

[242] *Id.* at 129.

[243] ALLITT, *supra* note 17, at 172.

[244] *Id.* at 174–76.

[245] LESLIE WOODCOCK TENTLER, CATHOLICS AND CONTRACEPTION: AN AMERICAN HISTORY 265–68 (2004).

[246] *See generally* Roe v. Wade, 401 U.S. 113 (1973).

As historian Donald Critchlow has noted, "[t]he Johnson administration made family planning integral to the Great Society's War on Poverty."[247] Between 1964 and 1967, Johnson directed executive-branch agencies to develop and fund family planning initiatives.[248] USAID began to finance sex education and contraceptive services abroad, while HEW increased funding for family planning at home.[249] Military personnel and Native Americans gained access to federally funded family planning services, and the Office for Economic Opportunity under Sargent Shriver approved the provision of family planning services to married women with children through its Community Action Programs.[250] After years of administrative activity and extensive debate, on January 2, 1968, Congress finally amended the Social Security Act to require state recipients of federal welfare funding to develop family planning programs.[251]

The Johnson administration's support for family planning put the American Catholic Church in a bind for at least three reasons. First, significant percentages of the laity—and some of the leadership—approved of at least some forms of family planning.[252] Second, the Church hierarchy actively supported increased federal spending on anti-poverty programs as an aspect of its social justice mission.[253] Third, Catholic hospitals, schools, and other charitable organizations were major beneficiaries of Great Society grants and, in general, depended on public funding at the state and federal level.[254] The Bishops thus "worried that if they criticized family planning programs on religious grounds, opponents would raise the issue of the Catholic Church receiving federal funds as a religious body."[255] At the same time, the hierarchy was anxious not to leave the field of battle altogether, lest indiscriminate funding and use of birth control result.[256] In 1964, William Consedine, director of the National Catholic Welfare Conference's legal department, laid out the situation for his superiors: while Catholics were a "minority" in the American polity, they were "an increasingly effective and articulate one," and it was only "wide recognition of the implacable opposition of the Church" to federally funded family planning programs that had restrained the public provision of contraceptive services up until that point.[257] "[I]f the position of the Church was reversed there is little reason to doubt that affirmative federal support of birth control measures would be enacted reasonably promptly."[258]

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[247] CRITCHLOW, *supra* note 221, at 85.
[248] *Id.* at 51.
[249] *Id.* at 53.
[250] *Id.*
[251] Social Security Act Amendments, Pub. L. No. 90-248, 81 Stat. 821 (1967).
[252] CRITCHLOW, *supra* note 221, at 56–57.
[253] *Id.* at 112.
[254] *Id.* at 118–19.
[255] *Id.* at 119.
[256] *Id.* at 118–19.
[257] *Id.* at 120.
[258] *Id.*

As a result of these obstacles to a frontal assault to federal funding of family planning, leading Catholic clergy and lawyers settled on a strategy tied to *Griswold*'s identification of a "zone of privacy" surrounding marital affairs and its endorsement of marital intimacy as "sacred."[259] According to this approach, while family planning was commendable to the extent that it facilitated the exercise of the intimate rites of marriage, it must remain "noncoercive."[260] On August 26, 1965, Archbishop Patrick O'Boyle, the leader of the National Catholic Welfare Conference, gave an address on family planning in which he argued that since *Griswold* prevented the government from prohibiting the use of birth control, "it logically follows that [the government] should be forbidden to promote it."[261] John Cogley, covering O'Boyle's speech for the *New York Times*, summarized the Mr. Ball's position: "Government could not involve itself in a birth control program without endangering the 'right of privacy'" protected by *Griswold*.[262]

That same month, William Bentley Ball, the general counsel of the Pennsylvania Catholic Welfare Conference, offered a lengthier version of this argument in testimony before the Subcommittee on Foreign Aid Expenditures, which was holding hearings in support of increased federal support for family planning.[263] A few years earlier, as was discussed above, Ball had been a leading critic of *Engel v. Vitale*, arguing that the case amounted to the establishment of a pervasively secular public school regime that "contrict[ed] the free exercise of religion."[264] Now, before the Senate Subcommittee, Ball characterized public family planning programs as "serious dangers to civil liberty," explaining that governmental oversight would impinge upon the privacy and freedom proper to marital relations that the Supreme Court itself had identified as "sacred."[265] Six months later, the NCWC adopted Ball's argument almost verbatim when news broke that the Secretary of Health, Education, and Welfare had issued guidelines permitting state programs funded by the Office of Economic Opportunity to offer family planning services. The NCWC's public statement rebuking the Johnson administration characterized HEW's guidelines as a threat to marital privacy and the free choice of spouses.[266]

That the bishops and their lawyers could invoke the language of "privacy" and "choice" so confidently in defense of the sanctity of marriage was indicative of the

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[259] Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

[260] CRITCHLOW, *supra* note 221, at 112, 117.

[261] *Id.* at 127.

[262] John Cogley, *Bishops and the Court: Both Connect Birth Control Program with the Questions of Civil Liberties,* N.Y. TIMES, Aug. 26, 1995.

[263] CRITCHLOW, *supra* note 221, at 74, 121; *see also* ROBERT DAVID JOHNSON, ERNEST GRUENING AND THE AMERICAN DISSENTING TRADITION, 267–68 (1998).

[264] Ball, *supra* note 71, at 182; *see supra* notes 77–85.

[265] CRITCHLOW, *supra* note 221, at 121.

[266] *See generally* William B. Ball, *Population Control: Civil and Constitutional Concerns*, 7 RELIGION & PUBL. ORD. 129 (1971).

relative infancy of the abortion reform movement.[267] Yet the threat was growing. When Consedine and Ball met with Sargent Shriver in late 1965 to protest the coming HEW guidelines, the Catholic "Shriver replied that he was 'under pressure' from Alan Guttmacher and Planned Parenthood to finance abortion and sterilization projects, and so he was 'adamant' to push ahead with OEOE funding of family planning that specifically excluded abortion and sterilization."[268] At the end of their meeting, Shriver promised to keep in touch with the bishops.[269]

A year later, Shriver reached out not to the NCWC but to John Noonan.[270] At the time, three states were in the process of liberalizing their abortion laws and twenty-two others were considering abortion reform bills.[271] In response, a pro-life movement began to emerge.[272] One center of this activity was Noonan's home state, California, where a small group of Catholic professionals—mainly lawyers and doctors—struggled to organize opposition to a state bill which would liberalize access to abortion.[273] At the national level, the National Conference of Catholic Bishops (which had replaced the NCWC in 1966) allocated $50,000 to the Family Life Bureau "to build a network of persons who could provide information supporting the antiabortion cause"—the seeds of the National Right to Life Committee.[274] As battle lines formed, the Catholic Senator Robert F. Kennedy became worried that his personal opposition to abortion could become a liability in the upcoming Democratic presidential primary.[275] He therefore asked his brother-in-law, Shriver,

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[267] Another reason for Catholic activists' reliance on "privacy" and "free choice" in this context and at this time may have been that the language of "conscience"—ironically enough—was being invoked by some supporters of abortion reform to characterize the sincere decisions made by doctors and women who participated in abortion procedures. *See, e.g.*, E.B. Stason, *The Role of Law in Medical Progress*, 2 L. & CONTEMP. PROBS. 563 (1967); John Noonan, *Amendment of the Abortion Law*, 15 CATH. LAW. 124 (1969). Indeed, as late as 1972, proponents of abortion repeal were debating whether to oppose the "Right to Life" slogan with the phrase "Freedom of Conscience" or "Right to Choose." Jimmye Kimmey, *"Right to Choose" Memorandum*, *reprinted in* BEFORE *ROE V. WADE*: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING 34 (Linda Greenhouse & Reva B. Siegel eds., 2010). This ambiguous interplay between privacy, choice, and conscience would be largely resolved when *Roe* extended *Griswold*'s privacy right to the abortion context.

[268] CRITCHLOW, *supra* note 221, at 123.

[269] *Id.*

[270] Telephone Interview with Judge John T. Noonan, Jr., *supra* note 181.

[271] ABORTION WARS: A HALF CENTURY OF STRUGGLE, 1950–2000, at xii (Rickie Solinger ed., 1998).

[272] *See* GARROW, *supra* note 226, at 317–19; CONNIE PAIGE, THE RIGHT TO LIFERS: WHO THEY ARE, HOW THEY OPERATE, WHERE THEY GET THEIR MONEY 55–57 (1983); Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade*: New Questions About Backlash*, 128 YALE L.J. 2028, 2048–52 (2011).

[273] KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 128 (1984).

[274] Greenhouse & Siegel, *supra* note 272, at 2049.

[275] Telephone Interview with Judge John T. Noonan, Jr., *supra* note 181.

to put together a conference that could provide guidance on how to frame the abortion issue.[276]

Held at Harvard Divinity School and organized by Noonan, who was by then a law professor at Berkeley, the conference was not associated with the Catholic hierarchy.[277] Yet the conclusions Noonan reached in his introductory talk were in line with nascent pro-life movement that the Bishops were actively backing.[278] The somewhat tongue-in-cheek title of Noonan's paper, "An Almost Absolute Value in Human History," indicated the author's awareness of his own historicist tendencies and Noonan did record how abortion restrictions had loosened during the early modern period.[279] Yet Noonan concluded that since the 19th century, an increased respect for human life had returned the Church to the nearly absolute prohibition on abortion first mooted by the early Church fathers.[280] This position, Noonan insisted, was most in harmony with the fundamental biblical injunction to love one's neighbor.[281] Over the next decade, Noonan would become an increasingly vocal opponent of abortion.[282]

Across the country, leading Catholic lawyers and intellectuals were similarly swept up in the abortion issue. At the ACLU, for instance, Catholic members resisted the organization's development of an increasingly pro-abortion stance over the course of 1967. When Notre Dame law professor Thomas Shaffer got word that the Board of Directors had adopted the position that state penal codes should be modified to permit abortion at the mother's request in the first twelve weeks of pregnancy, he wrote a personal letter of concern to the ACLU's executive director John de Pemberton.[283] "The involvement of prominent ACLU people in the movement for liberalized abortion laws, and what is apparently going to be an ACLU position in favor of liberalized abortion laws," Shaffer wrote, "seems to me to put the ACLU on the wrong side."[284]

Shaffer was careful to note that "one of the weaknesses of the defense" of traditional abortion laws was that "it is associated with Roman Catholicism."[285] Yet abortion was not simply prohibited by Catholicism, Shaffer argued: "The first principle of secular ethics is that life is an absolute value."[286] Consequently, "[a]bortion is a betrayal of secular ethics because it solves human problems by the destruction of

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[276] *Id.*

[277] *Id.*

[278] *Id.*

[279] John T. Noonan, Jr., *An Almost Absolute Value in History*, *in* THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES 51, 51–59 (John T. Noonan, Jr. ed., 1970).

[280] *Id.* at 5.

[281] *Id.*

[282] *See* JOHN NOONAN, A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES (1978).

[283] Letter from Shaffer to Pemberton (Mar. 21, 1967) (on file at Series III, Reel 11, ACLU Files, 1950–1989).

[284] *Id.*

[285] *Id.*

[286] *Id.*

life."[287] What was so disturbing to Shaffer about the ACLU's emerging stance on abortion, then, was that "[i]f any group defends secular ethics in our society, it is the ACLU."[288] He cited the "Union's defense of pacifism" as an "ancient example" of the organization's commitment to the "absolute value" of life and its resistance to capital punishment as a "more recent example."[289]

Alongside his letter to Pemberton, Shaffer included a letter-to-the-editor that he had written the day before, on behalf of the anti-abortion faction within the Indiana Civil Liberties Union.[290] In it, Shaffer told the editors of the Indianapolis Star that "[m]any of us in the Indiana Civil Liberties Union opposed the Union's" position on abortion, a position which, Shaffer noted, would have become "the law of Indiana" but for "Governor Branigan's veto."[291]

On March 27, Pemberton wrote to Shaffer that he was "deeply impressed" both by Shaffer's personal letter and his letter-to-the-editor.[292] "I disagree with [the letters]," Pemberton went on, "but I agree that the association of the defense of present abortion laws with religious morality has tended to confuse the issue."[293] In explaining his substantive disagreement, Pemberton first noted that unlike capital punishment or war, "abortion law reform is not state action destroying life, though it contemplates private action which will."[294] Second, Pemberton rejected Shaffer's insistence that "ACLU values . . . place human life in an absolute first principle position," and noted that he did not think support for a "right of suicide" would be "inconsistent" with "our policy positions."[295]

Despite the sharp disagreement between ACLU leadership and Shaffer, the director's office remained in touch with him as the ACLU's position evolved. On October 20, Alan Reitman, the assistant executive director, asked Shaffer to comment on a memorandum which summarized the view of the ACLU's Due Process Committee that the organization's provisional stance on abortion should be changed to support a right to abortion throughout the duration of a woman's pregnancy.[296] Reitman also asked if Shaffer would be able to come to New York for further discussion of the matter with the Due Process Committee.[297]

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[287] *Id.*

[288] *Id.*

[289] *Id.*

[290] Letter From Shaffer to Indianapolis Star (Mar. 20, 1967) (on file at Series III, Reel 11, ACLU Files, 1950–1989).

[291] *Id.*

[292] Letter from Pemberton to Shaffer, at 1 (Mar. 27, 1967) (on file at Series III, Reel 11, ACLU Files, 1950–1989).

[293] *Id.*

[294] *Id.*

[295] *Id.* at 2.

[296] Letter from Reitman to Shaffer (Oct. 20, 1967) (on file at Series III, Reel 11, ACLU Files, 1950–1989).

[297] *Id.*

In response, Shaffer condemned the Committee's proposal and urged Reitman to retain the ACLU's earlier position, "abortion without penal restriction during the first twelve weeks of pregnancy."[298] One of the reasons Shaffer offered for rejecting the new position was that the "reform movement is morally irresponsible because it will not face the possibility that this particular form of birth control is infanticide, that it shatters, therefore, the only certain unity mankind has—its unity against death."[299] Despite the gravity of Shaffer's concerns, he concluded his letter cordially enough, writing that "I see no need for a meeting in New York, but I will try to come if called."[300] He also told Reitman that he was sending a copy of the memorandum to John Noonan, explaining that Noonan was a "historian of no small stature" and "may wish to write you."[301]

On January 25, 1968, the ACLU Board finally arrived at its official position: support for the unrestricted right to abortion prior to viability, and opposition to all criminal penalties for abortion.[302] Ten days earlier, Gerald Johnson a prominent liberal Catholic journalist, had written the national office to protest this emerging stance: "I suggest that it makes it hard for a Catholic to participate in the work of the Union and therefore carries a suggestion of segregation. The fact that it is on religious, as opposed to racial, grounds is immaterial. It is still segregation."[303]

The revolt of men like Shaffer and Johnson was indicative of the way in which the abortion issue cut across pre-existing legal and political commitments in the late 1960s. Relatively liberal Catholics suddenly found themselves aligned with conservative forces they had previously disdained.[304] Abortion reform, then, more than any other single issue, triggered the rise of the neo-traditionalist block within the Catholic laity.[305] This group of reform-minded men and women embraced the double-democratization of Vatican II yet increasingly used the tools of democratic contest to preserve what they saw as American law's harmony with traditional Catholic teachings on abortion.[306] They would bring to this effort the language of conscience honed by post-Vatican-II efforts to persuade federal judges and administrators to recognize the Catholic conscientious objector.[307]

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[298] Letter from Shaffer to Reitman 1 (Oct. 30, 1967) (on file at Series III, Reel 11, ACLU Files, 1950–1989).

[299] *Id.*

[300] *Id.* at 2.

[301] *Id.* at 3.

[302] *See* AM. C.L. UNION, 1976 ACLU POLICY GUIDE 23031 (1976).

[303] Letter from Johnson to ACLU Board (Jan. 15, 1968) (on file at Series III, Reel 13, ACLU Files, 1950–1989).

[304] In opposing the ACLU's abortion position, for instance, Shaffer had bemoaned his Church's "medieval" views on contraception and marriage. Letter from Shaffer to Pemberton (Mar. 21, 1967) (on file at Series III, Reel 11, ACLU Files, 1950–1989).

[305] JAMES RISEN & JUDY L. THOMAS, WRATH OF ANGELS: THE AMERICAN ABORTION WAR 56–57 (1998).

[306] *Id.*

[307] *Id.* at 57.

John Noonan's contemporaneous defense of Negre and condemnation of abortion reform exemplified the entanglement of conscientious objection and abortion activism in the late 1960s and early 1970s, but there were other important crossovers. The same pastoral letter that called for a right of selective conscientious objection in 1968, "Human Life in Our Day," also referred to "[s]tepped-up pressures for moral and legal acceptance of directly procured abortion" as a "threat to the right to life."[308] The first organizations dedicated to the use of civil disobedience to shut down abortion clinics, such as Pro-Lifers for Survival and Pro-Life Nonviolent Action Project, were founded by Catholic veterans of the anti-war movement.[309] Similarly, Daniel Berrigan, co-founder of Clergy Concerned About Vietnam and militant anti-war activist, would go on to become a vocal opponent of abortion in the 1970s.[310]

Catholic anti-abortion and pro-conscientious objection activists shared a concern for the value of "life," to be sure. But they also shared a concern that the public sphere was imposing a set of uniquely anti-Catholic beliefs on the American citizenry.[311] This concern was sounded in both libertarian and egalitarian values, as state coercion inevitably singled out a conscientious minority who struggled to resist it. This legal and ideological complex would receive its purest expression in the coming decade when American Catholic clergy and lay legal activists mobilized around the passage of federal and state conscience clauses in response to *Roe v. Wade*.[312]

At the end of the 1960s, however, *Roe* was still barely imaginable to Catholic activists. In summing up church-state issues for the *Catholic Lawyer* in 1970, William Ball was relatively unconcerned about the possibility of further abortion liberalization,[313] an attitude attributable in part to the setbacks that abortion reform had recently suffered at the state level.[314] His survey of the judicial landscape also revealed no signs of a constitutional threat. Indeed, he concluded:

> The trend of recent decisions of the Supreme Court of the United States is emphatically in favor of protecting the right to life. For 30 years we have seen this in the area of those decisions which dealt with such subjects as the power of the Government to protect women and children under sound labor laws and in many decisions affecting the working man in his right to earn a decent living . . . While there has been a great hue and cry against the

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[308] National Council of Catholic Bishops, *supra* note 190.

[309] RISEN & THOMAS, *supra* note 305, at 63–64.

[310] *Id.* at 64–65.

[311] Greenhouse & Siegel, *supra* note 272, at 2047–48.

[312] *Id.* at 2028.

[313] William B. Ball, *Law and Religion in America: The New Picture*, 16 CATH. LAW. 3 (1970).

[314] *See* CRITCHLOW, *supra* note 221, at 146–47.

> Supreme Court on account of its decisions in the area of criminal due process, there can be no doubt that, taken as a whole, these decisions are protective of the rights of individuals helpless against the state.[315]

In general, Ball's essay on law and religion in modern America characterized the proper aim of Catholic lawyering as the protection of vulnerable individuals and minority groups from government coercion. In reiterating his mid-60s denunciation of federally funded "population control" programs, Ball took "particular note of the fact that the population control movement is aimed precisely at *control.* Let there be no doubt about that. The general theory which lies behind this movement may be expressed as follows: 'Voluntary, if voluntary works—otherwise coercion.'"[316] And on the education front, Ball expanded upon the approach he had first developed in response to *Engel*.[317] This approach transformed all religious education questions—including concerns about establishment violations arising from public funding or preferential treatment—into free exercise questions:

> It is very clear that, in an economy in which massive governmental welfare spending is supplanting most forms of private spending for education, and in which taxation and inflation have risen to radical new levels, a new look has to be taken at the free exercise clause—and, indeed, at the equal protection clause—when we come to discuss the constitutionality of programs to aid education in religiously affiliated schools. It is very clear that people exercise religious liberty by sending their children to religiously affiliated schools. If that is an exercise of religious liberty, then the state may not, either directly *or indirectly,* interfere with that exercise of religious liberty. The manipulation of the taxing and spending powers to deny to any person or any parent a free educational choice based on religious conscience—where the education sought meets reasonable state requirements—is not only a denial of the free exercise of religion and of the equal protection of the laws but indeed may be viewed as a taking of property, through taxation, without due process of law. These constitutional positions are now in the exploratory stage, but it is not unlikely that they will be advanced as elements in the defense of some of the current litigations.[318]

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[315] Ball, *supra* note 313, at 12–13.
[316] *Id.* at 13.
[317] *Id.* at 10–11.
[318] *Id.* at 8–9.

Thus, in addressing *Waltz v. Tax Commission of the City of New York*—a challenge to the tax-exempt status granted to church-owned property by New York state law then before the Supreme Court—Ball: "hoped that the defense of this case will be rested . . . on the free exercise clause. The theory here should be that there can be *no* exercise of religion in any form in which it now has clearly vested rights, without tax exemption of places of religious worship."[319]

As to the free exercise doctrine itself, Ball was particularly excited at the possibility that *Wisconsin v. Yoder*—a case then at the Wisconsin Supreme Court—would push the Supreme Court to affirm a newly expansive approach to religious liberty: "Obviously, this case has implications respecting other minority religious groups, some of which have very little protection."[320] Finally, turning to the topic of conscientious objection to military service, Ball quoted with approval a recent district judge's finding that Congress's bar on non-religious, selective objection was unconstitutional: "When the state through its laws seeks to override reasonable moral commitments it makes a dangerously uncharacteristic choice. The law grows from the deposits of morality. . . . When the law treats a reasonable, conscientious act as a crime it subverts its own power."[321] In general, the tone of Ball's review was upbeat. Neither he nor his readers were prepared for the setbacks soon to come.

III. CATHOLIC CONSCIENTIOUS OBJECTION IN CRISIS

In the early 1970s, American Catholic efforts to affiliate with—and thereby transform—federal judicial and administrative decisions concerning public education, conscientious objection to military service, and family planning experienced setback after setback. The optimism of the Vatican II moment, according to which engagement with the American legal and political system would help that system become more welcoming of the Catholic conscience, receded. What followed was not disengagement but active disidentification, as Catholic legal activists drew on the discourse of conscientious objection to characterize unwelcome judicial and administrative decisions as coercive of and discriminatory against the Catholic conscience.

A. Education and Conscription

American Catholic efforts to make the law of education and conscription their own faltered in 1971. In the wake of Vatican II, liberal reformers and neo-traditionalists had spoken with one voice in insisting that long-standing American legal values favored federal accommodation of Catholic students and conscientious objectors.[322]

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[319] *Id.* at 11.

[320] *Id.* at 9–10.

[321] *Id.* at 11 (citing United States v. Sisson, 297 F. Supp. 902, 910–11 (D. Mass. 1969), *appeal dismissed for lack of jurisdiction* 390 U.S. 267 (1970)).

[322] *See* Geyer, *supra* 148; Hehir, *supra* note 90; Reid, Jr., *supra* note 5, at 915–17.

When the Supreme Court disagreed, opposing the particularistic demands of Catholic litigants to the integrity of democratic citizenship, the specter of the ghetto haunted Catholic reactions. Even as evangelical Protestants were becoming ever more vocal in their own commitment to public support for religious education, the mainstream Protestant and secular press, and the Supreme Court itself, still associated the education issue with a Catholic minority. And while support for selective conscientious objection was growing throughout the country due to dissatisfaction with American foreign policy, by imputing such purely political motivations to the Catholic conscience, the Supreme Court associated American Catholic citizenship with potentially anti-democratic and anti-American social forces.[323]

On March 8, 1971, the Court handed down its decision in *Negre v. Larsen* and its companion case, *Gillette v. United States*.[324] While Negre was a Catholic selective objector, Gillette posited secular grounds for his selective objection.[325] The Court decided to hear both cases together—a foretaste of the majority's conclusion that there was no constitutional difference between the selective objections of Catholics and purely political objectors.[326] In the event, eight of nine Justices agreed with the government—and against John Noonan—that the draft law's exclusion of sincere selective conscientious objectors from exemption was "not designed to interfere with any religious ritual or practice, and do[es] not work a penalty against any theological position. The incidental burdens felt by persons in petitioners' position are strictly justified by substantial governmental interests that relate directly to the very impacts questioned."[327] As to the petitioners' establishment clause challenge, the Court found that in the restriction of exemption, only absolute pacifists severed a purely secular purpose.[328] In passing, however, the majority went further, accusing the petitioners of "ask[ing] for greater 'entanglement' [between government and religion] by judicial expansion of the exemption to cover objectors to particular wars."[329]

The *Gillette* Court also associated selective conscientious objection, no matter how religious in origin, with anti-democratic values.[330] Citing the decision of the National Advisory Commission on Selective Service, which had rejected John Courtney Murray's plea for the democratic integrity of just war objection, the Court noted that "some have perceived a danger that exempting persons who dissent from a particular war, albeit on grounds of conscience and religion in part, would 'open the doors to a general theory of selective disobedience to law' and jeopardize the binding quality of democratic decisions."[331] Denying that just war objection could

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[323] Reid, Jr., *supra* note 5, at 891–920, 953.
[324] 401 U.S. 437 (1971) (Nos. 85, 325).
[325] *Id.* at 439, 440–41.
[326] *Id.* at 439.
[327] *Id.* at 462.
[328] *Id.* at 450.
[329] *Id.*
[330] *Id.* at 459–60.
[331] *Id.* at 459.

be distinguished from purely political objection, the *Gillette* Court also insisted "that opposition to a particular war does depend, inter alia, upon particularistic factual beliefs and policy assessments, beliefs and assessments that presumably were overridden by the government that decides to commit lives and resources to a trial of arms."[332] Finally, the majority opposed selective conscientious objection to conscientious participation, a form of citizenship more attuned to the civic religion of democracy:

> it is not unreasonable to suppose that some persons who are not prepared to assert a conscientious objection, and instead accept the hardships and risks of military service, may well agree at all points with the objector, yet conclude, as a matter of conscience, that they are personally bound by the decision of the democratic process.[333]

The lone dissenter, Justice Douglas, rejected the majority's opposition of selective conscientious objection and America's democratic faith.[334] He argued that the draft law had violated both Gillette and Negre's free exercise of religion and imposed an "invidious discrimination" between belief in absolute pacifism and their beliefs in selective pacifism, whether on humanist or Catholic grounds.[335] As to the foundations of Negre's particular beliefs, Douglas relied on the brief submitted by the "authoritative lay Catholic scholar, Dr. John T. Noonan, Jr."[336] The Justice noted that Vatican II's Pastoral Constitution held that "[e]very act of war directed to the indiscriminate destruction of whole cities or vast areas with their inhabitants is a crime against God and man which merits firm and unequivocal condemnation."[337] And finding that Negre was a "devout Catholic," Douglas stated that "a Catholic has a moral duty not to participate in unjust wars."[338] "No one can tell a Catholic that this or that war is either just or unjust," Douglas went on.[339] "This is a personal decision that an individual must make on the basis of his own conscience after studying the facts."[340] The only reason that Negre's application for a discharge had been denied, Douglas concluded, was because his "religious training and beliefs led him to oppose only a particular war which according to his conscience was unjust."[341] This was an impermissible ground for government action under the First and Fifth Amendments.[342]

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[332] *Id.*
[333] *Id.*
[334] *Id.* at 469.
[335] *Id.* at 468, 475 (Douglas, J., dissenting).
[336] *Id.* at 470.
[337] *Id.* at 473.
[338] *Id.* at 470, 475.
[339] *Id.* at 471.
[340] *Id.*
[341] *Id.* at 475.
[342] *Id.* at 469, 475.

The American Bishops responded to *Gillette* with their "Declaration on Conscientious Objection and Selective Conscientious Objection."[343] In it, they came out explicitly against the war effort in Vietnam, and called for the incorporation of selective conscientious objection into U.S. law, explaining that "it is clear that a Catholic can be a conscientious objector to war in general or to a particular war because of religious training and belief."[344] But before the Church hierarchy even had time to respond to what it saw as the government's exclusion of Catholics from the hallowed right of conscientious objection, the Supreme Court landed another blow. In June 1971, *Lemon v. Kurtzman* declared public funding of secular instructors trained and employed by parochial schools to be a violation of the First Amendment.[345] Writing in the *Harvard Law Review*, Harry Kalven described the decision as "a devastating limitation on public aid to parochial education."[346] *Lemon* was the final act in a decade of Supreme Court jurisprudence seeking to secularize education, a jurisprudence which much of the American Catholic community vocally resisted.

In the early 1960s, the Court declared prayer and Bible instruction in public schools unconstitutional.[347] These decisions were handed down precisely at the moment when Catholic institutions were moving into the public square and Catholic individuals onto public school boards.[348] While Cardinal Spellman of New York denounced the Court as "strik[ing] at the heart of the godly tradition in which America's children have for so long been raised,"[349] the mainstream Catholic press condemned the decisions and worried that they would only serve to radicalize conservative contempt for the Court.[350] In response to the elimination of religious instruction in public schools, parochial school attendance would likely increase, among both Catholics and Protestants.[351] Many states offered these schools—which took students off the hands of the public system—financial aid in the form of teacher or textbook support.[352] At the time, Catholics worried that the Court's increasingly strict interpretation of the First Amendment raised the possibility that such aid might also be found unconstitutional.[353] *Lemon* finally confirmed these fears.[354]

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[343] *See* Statement, United States Conference of Catholic Bishops, Declaration on Conscientious Objection and Selective Conscientious Objection, October 21, 1971, https://www.usccb.org/resources/declaration-conscientious-objection-and-seletive-conscientious-objection-october-21-1971 [https://perma.cc/6NPY-2KM7].

[344] *Id.*

[345] 403 U.S. 602 (1971).

[346] Harry Kalven, *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 168 (1971).

[347] Ball, *supra* note 75, at 183–84.

[348] *Id.*

[349] ALLITT, *supra* note 17, at 107.

[350] *Id.*

[351] *Id.*

[352] Thomas Klein, *Constitutional Barriers to Public Assistance for Parochial Schools*, 17 CATH. LAW. 189, 191 (1971) (discussing state aid to parochial schools).

[353] *See* Ball, *supra* note 85, at 689–90.

[354] Klein, *supra* note 352, at 201.

In reaching the conclusion that state funding of secular instruction in religious schools violated the Establishment Clause, the *Lemon* Court relied heavily on District Court findings of fact as to the predominantly Catholic nature of the private educational institutions funded by Rhode Island and Pennsylvania statutes.[355] The Court acknowledged that "religious values did not necessarily affect the content of the secular instruction" in such schools, but nonetheless cited "the potential, if not actual, hazards of this form of state aid."[356] Strikingly, the Court pointed to the fact that "most of the lay teachers [we]re of the Catholic faith" as a constitutional risk factor:

> We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral.[357]

Thus, the constitutional danger arose not simply from the fact that the institutions receiving and disbursing state aid were affiliated with the Catholic Church; rather, the Catholic faith of the individual instructors created an organic obstacle to their constitutional obligations: "With the best of intentions, such a teacher would find it hard to make a total separation between secular teaching and religious doctrine. What would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion."[358] The *Lemon* Court's language admitted the possibility that American Catholic citizenship might be inherently unstable or ambiguous, such that not even the American Catholic herself could distinguish between her religious and political obligations.[359]

When the decision came down, the *Catholic Lawyer* scored the Court for "present[ing] a somewhat obsolete picture" of the Catholic educational system and

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[355] *See* Lemon v. Kurtzman, 403 U.S. 602, 608–10 (1971) ("[The District Court] found that Rhode Island's nonpublic elementary schools accommodated approximately 25% of the State's pupils. About 95% of these pupils attended schools affiliated with the Roman Catholic church. To date, some 250 teachers have applied for benefits under the Act. All of them are employed by Roman Catholic schools. . . . [Pennsylvania] has now entered into contracts with some 1,181 nonpublic elementary and secondary schools with a student population of some 535,215 pupils—more than 20% of the total number of students in the State. More than 96% of these pupils attend church-related schools, and most of these schools are affiliated with the Roman Catholic church.").

[356] *Id.* at 618.

[357] *Id.*

[358] *Id.* at 618–19.

[359] *Id.* at 619, 636.

for "engag[ing] in conjectures concerning the stereotyped characterizations of church related schools. . . ."[360] While U.S. Catholic Bishops reaffirmed "the religious mission of the Catholic schools to teach doctrine, build community, and serve all humankind,"[361] a representative from the National Catholic Educational Association told the U.S. Senate that this mission was threatened by decreasing enrolments and funding crises.[362] The next spring, Edward Fagan, the editor of the *Catholic Lawyer*, acknowledged the "bleakness of the present situation" that had been ushered in by *Lemon*.[363] Pointing to some local victories, however, he urged his fellow Catholic lawyers that the "fight . . . continues to be waged."[364] Meanwhile, in April 1972, thirty thousand Catholic school children protested the elimination of state aid to parochial schools by parading through New York City chanting "Save Our Schools!"[365]

The dilemmas of Catholic conscientious objection and religious education converged in the form of the 1972 case *Wisconsin v. Yoder*.[366] Arriving at the Supreme Court a year after majorities had dealt a double-blow to the Catholic conscience in *Gillette* and *Lemon*, *Yoder* offered a muted counter-attack, the stakes for Catholics being camouflaged by the Amish petitioners.[367] In *Yoder*, the state of Wisconsin argued that Amish parents' refusal to send their children to public schools raised the question of "whether one has the constitutional right to conscientiously object to education by refusing to send his children to school in violation of compulsory school attendance laws."[368] As an article in *Commonweal* noted in the wake of Wisconsin's defeat at the Supreme Court: "[o]nce the state had defined the issue as one of conscientious objection, Catholics and others who had backed the right of selective conscientious objection in the case of *U.S. vs. Gillette*, really had no choice but to take a similar position in defense of conscience in the *Yoder* case."[369] In fact, the *Yoder* case had been handpicked by William Ball to test the boundaries of free exercise doctrine.[370]

Ball was still general counsel for the Pennsylvania Catholic Welfare Committee, and the *Yoder* case offered an attractive vehicle for the legal worldview that he had been advocating for the past decade. For one, the case squarely presented a secular institution, the Wisconsin public school system, as a threat to the free exercise of

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[360] Klein, *supra* note 352, at 201.

[361] 1 ENCYCLOPEDIA OF THE SOCIAL AND CULTURAL FOUNDATIONS OF EDUCATION 109 (Eugene F. Provenzo, Jr. ed., 2009).

[362] Thomas R. Mullaney, *Tax Credits and Parochial Schools*, 98 COMMONWEAL 185, 185 (1973).

[363] Edward Fagan, *Editorial Comment*, 18 CATH. LAW. 173, 173 (1972).

[364] *Id.*

[365] Neil A. Nowick, *"Save Our Schools"—A Challenge Beyond the Courts*, 18 CATH. LAW. 173, 174 (1972).

[366] Jim Castelli, *Catholics and the Amish*, 96 COMMONWEAL 331, 331–32 (1972).

[367] Editorial, *Using the Amish*, CHRISTIANITY TODAY, Jan. 7, 1972, at 26–27.

[368] Castelli, *supra* note 366, at 332 (quoting Assistant Attorney General James Calhoun).

[369] *Id.*

[370] SHAWN FRANCIS PETERS, THE *YODER* CASE 42–43 (2003).

religion.[371] Since *Engel*, Ball had conceived of "disestablishment" as coercive of religious liberty; the unique situation of the Amish enabled him to make this case free of the complicated establishment clause issues that arose in the context of religious practice within public schools.[372] For another, the case was free of the gravity of governmental interest that haunted the military conscientious objection context.[373] And finally, precisely because the case did not involve Catholics, it might be free of the stigma that Ball and other Catholic lawyers felt attached to their particular vision of religious freedom.[374] Indeed, this sort of substitution is just what the Protestant press accused Ball and his supporters of pursuing.[375] In "Using the Amish," the editors at *Christianity Today* asked, "why is this sudden supposedly humanitarian concern being imposed on the Amish against their will?"[376] While demurring from giving an explicit answer, they thought it "relevant to point out that the arguments [presented by Ball] seek to enhance the stature of nonpublic education in such a way that might make it seem deserving of government financial support," implying that securing public aid for Catholic schools was the ultimate end of Ball's advocacy.[377]

B. Family Planning and Abortion Reform

Christianity Today's reaction to Catholic support for the Amish in *Yoder* indicates the ubiquitous and controversial nature of Catholic activism in this period. Such activism was no more ubiquitous or controversial than in the areas of federally funded family planning and abortion legalization, as defeats on other fronts only focused Catholic attention on reproductive issues. As Ball was waiting for the Supreme Court's decision in *Yoder*, the release of the federal Commission on Population Growth and the American Future's final report in March 1972 set off a new phase of Catholic anti-abortion mobilization.[378] With the Vietnam War winding down and the religious education fight stalled if not altogether lost, jurisgenerative Catholic activism bore down on the issues of federally funded family planning and abortion legalization.[379] In the early 1970s, many Catholic lay leaders who had led reformist efforts in the Vatican II period, including John Noonan and Daniel Berrigan, dedicated themselves to ensuring that American law would not endorse—or further facilitate—abortion.[380]

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[371] *Id.* at 43–45.
[372] *Id.* at 42.
[373] Castelli, *supra* note 366, at 332.
[374] *Id.* at 331.
[375] *Id.*
[376] Editorial, *supra* note 367, at 26.
[377] *Id.* at 27.
[378] CRITCHLOW, *supra* note 221, at 166–67.
[379] *Id.* at 121–23, 137–39.
[380] *Id.* at 190–91.

Congress had established the Commission on Population Growth and the American Future in 1970 at Richard Nixon's request.[381] After two years' work, a majority of the Commission was ready to recommend a woman's right to abortion throughout her pregnancy, the availability of contraceptives to minors, and sex education in public schools.[382] Two members, however, filed a minority report.[383] Paul Connerly, a Howard University professor, warned that "[a]bortion on demand . . . will provide our society with an easy way to eliminate the black and the poor," and Grace Olivarez, a Catholic and the first Hispanic woman to graduate from Notre Dame Law School, remarked that, "The poor cry out for justice and equality and we respond by giving them legalized abortion."[384]

Unsurprisingly, the National Conference of Catholic Bishops (NCCB) had a similar perspective. The day before the abortion portion of the Commission's findings were released, the director of the NCCB's Family Life Division, Monsignor James McHugh, called a press conference.[385] Warning that the Commission had "entered the Ideological Valley of Death," he told the assembled reporters that the Commission's recommendations paved the way for the "killing [of] the aged, the sick, the mentally or physical disadvantaged, [and] members of objectionable minority groups when their lives become a burden to others."[386]

The NCCB's outrage put significant pressure on President Nixon. Although he had entered office as an advocate of population control and federal involvement in family planning, Nixon had spent the last year moderating his position in an effort to lure Catholic voters into his camp.[387] George Wallace's success with Catholics in 1968 had led Nixon to believe such a gambit was possible, and his advisor Charles Colson had settled on a "Catholic strategy" focused on supporting the Church's stance on abortion and religious education.[388] At first, Nixon responded to the release of the Commission's report with silence.[389] A distraught John Rockefeller, Chairman of the Commission and a major financial backer of the population control movement, wrote to Nixon asking him to support the report openly.[390] Well-versed in traditional Catholic objections to public family planning, Rockefeller stressed the noncoercive nature of the Commission's recommendations, which only sought to enhance "individual freedom of choice and the quality of life."[391] But the Commission's open

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[381] *Id.* at 91,148.
[382] *Id.* at 165–66.
[383] *Id.*
[384] *Id.*
[385] *Id.* at 167.
[386] *Id.*
[387] *Id.* at 169–70.
[388] *Id.* at 170.
[389] *Id.* at 169.
[390] *Id.*
[391] *Id.*

support for full abortion legalization was a deal breaker for Catholics, and Nixon knew it.[392]

Still silent on the report, Nixon paid a visit to the Annual Convention of the National Catholic Education Association on April 6.[393] Standing next to the hardline Archbishop of Philadelphia, John Krol, Nixon praised the work of Catholic schools in creating stable communities, opposing "impersonal materialism", and inculcating a "moral code" in their charges.[394] He looked forward to announcing "specific measures designed to preserve the nonpublic school system in the United States," and noting the "grave constitutional questions that have arisen in the past" about school aid, promised "to take the extra time required to guarantee that the legislative recommendations which we finally submit will be equitable, will be workable, will be constitutional and so held by the Supreme Court."[395]

One month later, on May 5, Nixon finally addressed the Commission's report.[396] After thanking the Commission for its hard work, Nixon announced that he would not comment on the report's details but did want to clarify his "views on some of the issues raised."[397] "I consider abortion an unacceptable form of population control," Nixon explained.[398] "In my judgment," he went on, "unrestricted abortion policies would demean human life."[399] He also wanted "to make it clear that I do not support the unrestricted distribution of family planning services and devices to minors."[400] In keeping with the qualified lay Catholic stance on contraception as a private question for the marital sphere, Nixon explained that such "unrestricted distribution . . . would do nothing to preserve and strengthen close family relationships. I have a basic faith that the American people themselves will make sound judgments regarding family size and frequency of births. . . . I believe in the right of married couples to make these judgments for themselves."[401]

Nixon's 1972 move toward the Catholic leadership's position on abortion and federally funded family planning may also help explain a U.S. Air Force decision to waive the discharges of three female Roman Catholic officers who had carried pregnancies to term while in the service.[402] These women challenged the constitutionality

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[392] *Id.*

[393] Remarks at the Annual Convention of the National Catholic Education Association in Philadelphia, Pennsylvania, PUB. PAPERS 516 (Apr. 6, 1972) (statements of Richard Nixon).

[394] *Id.* at 521.

[395] *Id.*

[396] Statement of the President on the Report of the Commission on Population Growth, PUB. PAPERS 576 (May 5, 1972).

[397] *Id.*

[398] *Id.* at 576–77.

[399] *Id.* at 577.

[400] *Id.*

[401] *Id.*

[402] *See* Memorandum for the Director, Department of the Air Force, Re: Gloria Robinson (Dec. 1, 1972) (on file at Series IV, Roll 199, ACLU Files, 1950–1989); Memorandum for the

of Air Force regulations that required the discharge of female personnel who became pregnant.[403] The ACLU represented two of them—Susan Struck and Mary Gutierrez—and attacked the Air Force regulations on equal protection, privacy, and free exercise grounds.[404]

As to the free exercise claim, the petitioner's brief in *Struck* charged that "the regulations pitted [Struck's] Air Force career against . . . her religious conscience."[405] A draft of an appeal from the district court's decision in *Gutierrez* expanded slightly on the point: "plaintiff is a Roman Catholic whose religious beliefs prevent her from obtaining an abortion. The effect of the regulatory arrangement is to compel her to choose between the dictates of her conscience and her continued career in the Air Force."[406]

In bringing this claim, Gutierrez was forced confront the Supreme Court's recent decision in *United States v. Gillette*. Analogizing Gutierrez's claim that the pregnancy regulation impermissibly burdened her religious beliefs to Gillette and Negre's challenge to the draft law's exclusion of selective conscientious objectors, the district court held the "[t]he Supreme Court has established that where a military administrative classification is not designed to interfere with any religious beliefs and does not penalize any theological position, it does not violate the free exercise clause."[407] As the ACLU pointed out in both *Struck* and *Gutierrez*, however, *Gillette* did not reject the principle that, "even as to neutral prohibitory or regulatory laws having secular aims, the Free Exercise may condemn certain applications clashing with imperatives of religion and conscience, when the burden of First Amendment values is not justifiable in terms of the Government's valid aims."[408]

Director, Department of the Air Force, Re: Mary Gutierrez (Dec. 1, 1972) (on file at Series IV, Roll 199, ACLU Files, 1950–1989); Letter from Jeff Gora, Am. C.L. Union Staff Couns., to Mary Gutierrez (Dec. 18, 1972) (reporting the revocation of Struck's discharge) (on file at Series IV, Roll 199, ACLU Files, 1950–1989*). See generally* Harry C. Beans, *Sex Discrimination in the Military*, 67 MIL. L. REV. 19, 23, 26–27 (1975); Ruth Bader Ginsburg, *Remarks for the Celebration of 75 Years of Women's Enrollment at Columbia Law School*, 102 COLUM. L. REV. 1441, 1447 (2002); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1200–02 (1992) (Madison Lecture delivered in March 1993); Deborah Dinner, *Recovering the* LaFleur *Doctrine*, 22 YALE J. L. & FEMINISM 343, 382–84 (2010); Neil S. Siegel & Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771, 777–78 (2010); Note, *Pregnancy Discharges in the Military: The Air Force Experience*, 86 HARV. L. REV. 568, 571, 574–76 (1973).

[403] Struck v. Sec'y of Def., 460 F.2d 1372 (9th Cir. 1971), *vacated and remanded for consideration of the issue of mootness*, 409 U.S. 1071 (1972); Gutierrez v. Laird, 346 F. Supp. 289 (D.D.C. 1972); Robinson v. Rand, 340 F. Supp. 37, 38 (D. Colo. 1972).

[404] Brief for Petitioner at i, Struck v. Sec'y of Def., 409 U.S. 947 (1972) (No. 72-178); *Gutierrez*, 346 F. Supp. at 290 [hereinafter Brief for Petitioner, *Struck*].

[405] Brief for Petitioner, *Struck*, *supra* note 404, at 56.

[406] *Gutierrez*, Appellant's Brief at 37 (undated) (on file at Series IV, Roll 199, ACLU Files, 1950–1989).

[407] *Gutierrez*, 346 F. Supp. at 293.

[408] *Gutierrez*, Appellant's Brief at 39 (undated) (on file at Series IV, Roll 199, ACLU

In any event, just over a month after the Supreme Court granted certiorari in *Struck*,[409] the Air Force rescinded the discharges of Struck, Gutierrez, and Robinson and introduced a new waiver system, allowing at least some pregnant women to serve.[410] Commenting on *Struck*, in which she was the lead attorney, Justice Ruth Bader Ginsburg said that "Solicitor General Erwin Griswold saw loss potential for the Government," and thus "recommended that the Air Force waive Captain Struck's discharge and abandon its policy of automatically discharging women for pregnancy."[411] As to why Griswold might have "feared a Supreme Court decision on the merits in *Struck*," Niel Siegel and Reva Siegel have suggested that he "perceived governmental coercion of abortion as an inadvisable context in which to vindicate the federal government's asserted interests in the area of pregnancy discrimination."[412]

As discussed above, one reason why "governmental coercion of abortion" may have seemed a particularly "inadvisable context" to the Nixon administration is that governmental coercion of abortion—indeed, governmental coercion of *Catholic* abortion—was the Catholic hierarchy's absolute nightmare scenario.[413] Since *Griswold*, the Church and its legal activists had pursued a strategy of associating *any* affirmative federal involvement in contraception and abortion with coercion.[414] Here, the coercion of Catholic bodies and consciences was alleged in detail.[415] Further research would be necessary to confirm the hypothesis that Nixon's outreach to Catholics in this period influenced Griswold and the Air Force's decision-making. We do know, however, that the Nixon administration already had acknowledged the issue of abortion in the military as both a political problem and a political opportunity.[416] On April 3, 1971, the President publicly announced that he had directed Secretary of Defense Melvin Laird to reverse an earlier order liberalizing abortion regulations in military hospitals.[417] Going forward, the availability of abortions on-base would

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Files, 1950–1989) (citing Gillette v. United States, 401 U.S. 437 (1971)); Brief for Petitioner, *Struck*, *supra* note 404, at 57.

[409] Struck v. Sec'y of Def., 460 F.2d 1372 (9th Cir. 1971), *cert. granted*, 409 U.S. 947 (1972).

[410] Note, *Pregnancy Discharges in the Military: The Air Force Experience*, 86 HARV. L. REV. 568, 570–71 (1973).

[411] Ruth Bader Ginsburg, Assoc. Justice, Supreme Court of the United States, Advocating the Elimination of Gender-Based Discrimination: The 1970s New Look at the Equality Principle (Feb. 10, 2006), http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_02-10-06.html [https://perma.cc/TL5B-YAE9].

[412] Siegel & Siegel, *supra* note 8, at 778 n.34.

[413] *Statements of National Conference of Catholic Bishops*, 19 CATH. LAW. 29, 30–32 (1973).

[414] Ball, *supra* note 266, at 129.

[415] Brief for Petitioner, *Struck*, *supra* note 404, at 10–11.

[416] Lawrence J. McAndrews, *Before* Roe*: Catholics, Nixon, and the Changing Politics of Birth Control*, 47 FIDES ET HISTORIA 24, 37 (2015).

[417] Richard Nixon, President of the United States, Statement About Policy on Abortions at Military Base Hospitals in the United States, April 3, 1971, *in The American Presidency Project*, U.C. SANTA BARBARA, http://www.presidency.ucsb.edu/ws/index.php?pid=2963 [https://perma.cc/S5G6-5MZV].

depend on the applicable state law, which was where "decisions [about abortion] should be made."[418]

C. Roe *and the Conscience Paradigm*

Setting the Air Force cases to one side, Nixon's newfound solicitation of Catholics did little to put the growing right-to-life movement at ease. By the middle of 1972, the National Right to Life Committee, funded by the National Conference of Catholic Bishop's Family Life Division, oversaw over 250 local and state groups.[419] One of the first concerted campaigns organized by the Committee was a lobbying effort on behalf of a legislative "conscience clause" that would protect doctors, nurses, and religiously affiliated institutions from prosecution if they refused to provide certain medical services on conscientious grounds.[420] This campaign would intersect with the Supreme Court's decision in *Roe v. Wade* and lay the groundwork for a critique of *Roe* as an affront to conscience. Having been unsuccessful in their efforts to restrict the scope of the legal language of privacy, Catholic activists sought to inflect the legal language of conscience with an anti-abortion valence.[421] This new phase of jurisgenerative Catholic political activism drew on the precedent of Vietnam-era conscientious objection, while ignoring the actual setbacks that Catholic activism in the conscientious objection context had suffered in *Negre* and *Gillette*.[422]

The campaign for the first federal conscience clause began when a woman sued a Catholic hospital for refusing to perform a tubal ligation procedure in the wake of a pregnancy.[423] On October 27, 1972 (three days after the Supreme Court granted certiorari in *Struck*), a federal district court in Montana "issued a temporary injunction on October 27, 1972, requiring the hospital to perform a tubal ligation on the plaintiff despite the hospital's protest that such a procedure was contrary to its religious conviction."[424] Although the Catholic hospital was privately owned, the court found that the hospital's refusal to perform the ligation constituted state action

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[418] *Id.*

[419] Constance Balide, Barbara Danziger & Deborah Spitz, *The Abortion Issue: Major Groups, Organizations, and Funding Sources*, *in* THE ABORTION EXPERIENCE 516–17 (Howard Osofsky & Joy Osofsky eds., 1973). *See also* FREDERICK S. JAFFE, BARBARA L. LINDHEIM & PHILIP R. LEE, ABORTION POLITICS 74 (1981); CRITCHLOW, *supra* note 221, at 138.

[420] Robert N. Karrer, *The Pro-Life Movement and Its First Years Under* Roe, 122 AM. CATH. STUD. 47, 56–57, 62–67, 71 (2011) (describing NRLC's early debates about lobbying and other activism).

[421] Dennis J. Horan, *Abortion and the Conscience Clause: Current Status*, 20 CATH. LAW. 289, 289–91 (1974).

[422] *See* notes 478–84 and accompanying text.

[423] Kimberly Parr, *Beyond Politics: A Social and Cultural History of Federal Healthcare Conscience Protections*, 35 AM. J.L. & MED. 620, 630–31 (2009).

[424] Leora Eisenstadt, *Separation of Church and Hospital: Strategies to Protect Pro-Choice Physicians in Religiously Affiliated Hospitals*, 15 YALE J.L. & FEMINISM 135, 146 (2003).

because of the hospital's receipt of federal Hill-Burton funds.[425] The court's temporary injunction sparked a panic across the nation that Catholic hospitals would either have to provide sterilizations and other doctrinally forbidden reproductive healthcare, or renounce the public funds on which they relied.[426] Here was the coercion about which men like William Ball had long warned. An increasingly permissive approach on the part of the government to matters of reproduction did not just mean increasingly permissive practices on the part of its citizenry: it meant the coercion of those whose beliefs prohibited such practices.[427]

As Senator Frank Church of Idaho remarked while explaining his initial motive for drafting legislation to protect the consciences of Catholic hospitals and doctors: "Already in my own state, where the people have been made aware of the Montana decision . . . there has been a striking outcry. The Catholic bishop in Spokane has spoken of civil disobedience. There is open conjecture in the press that obstetrics divisions of catholic hospitals might be closed. . . ."[428] Before Church's amendment to the bill to extend the Public Health Service Act could be taken up for consideration by the Senate, the Supreme Court announced a constitutional right to abortion in *Roe v. Wade*.[429]

While the early, outraged responses from Catholic authorities focused on *Roe* as a violation of the right to life, another popular topic was the danger that had been raised the previous fall in *Taylor*.[430] Only now the threat of government coercion to Catholic doctors and hospitals would be many times greater. The winter issue of the *Catholic Lawyer* published all of the official statements released by the National Conference of Catholic Bishops in response to the *Roe* decision, and most of them touched on this issue.[431] The Pastoral Message from NCCB's Administrative Committee announced that "we reject this decision of the Court because, as John XXIII says, 'if any government does not acknowledge the rights of man or violates them, . . . its orders completely lack juridical force.'"[432] More positively, the letter insisted that:

> As tragic and sweeping as the Supreme Court decision is, it is still possible to create a pro-life atmosphere in which all, and notably

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[425] Taylor v. St. Vincent's Hosp., 369 F. Supp. 948, 949–50 (D. Mont. 1973) (referring to its finding of jurisdiction on Oct. 26, 1972).

[426] *See, e.g.*, 119 Cong. Rec. at 9595 (1973) (statement of Sen. Frank Church).

[427] *See supra* notes 77–85.

[428] *Supra* note 426, at 9595.

[429] 410 U.S. 959 (1973).

[430] *See, e.g.*, National Conference of Catholic Bishops, *Statements of National Conference of Catholic Bishops*, 19 CATH. LAW. 29 (1973); Note, *The Right to Abortion: Expansion of the Right to Privacy Through the Fourteenth Amendment*, 19 CATH. LAW. 36 (1973) [hereinafter *The Right to Abortion*]; Martin McKernan, *Compelling Hospitals to Provide Abortion Services*, 20 CATH. LAW. 317 (1974).

[431] *See* National Conference of Catholic Bishops, *supra* note 430, at 31–32, 34–35.

[432] *Id.* at 29.

> physicians and health care personnel, will influence their peers to see a value in all human life, including that of the unborn child during the entire course of pregnancy. We hope that doctors will retain an ethical concern for the welfare of both the mother and the unborn child, and will not succumb to social pressure in performing abortions.[433]

To that end, the Administrative Committee called on Catholics everywhere to "[p]ursue protection for institutions and individuals to refuse on the basis of conscience to engage in abortion procedures."[434] Likewise the Committee on Pro-Life Affairs warned that:

> Hospitals and health facilities under Catholic auspices will not find this judgment of the Court compatible with their faith and moral convictions. . . . We are also confident that our hospitals and health care personnel will be identified by a dedication to the sanctity of life, and by an acceptance of their conscientious responsibility to protect the lives of both mother and child.[435]

Additionally, the Most Reverend Edward D. Head announced that Committee on Health Affairs "stand[s] unalterably opposed to providing abortion service in Catholic hospitals and to anything which might require health care personnel anywhere to participate in abortion procedures in violation of their consciences."[436]

The first article that the *Catholic Lawyer* ran on *Roe*, "The Right to Abortion: Expansion of the Right to Privacy Through the Fourteenth Amendment," set out to reconstruct how the *Griswold* right to privacy had led to *Roe*.[437] The last section of the article, however, addressed "The Ramifications of the Abortion Decision."[438] Here, the author noted that "[p]hysicians will play an important role in the acceptance and implementation of this sweeping reform" and that "[h]ospitals are, of course, an integral part of any meaningful freedom to procure an abortion."[439] In this regard, *Roe* "raised the issue of the legal status of a hospital refusing to perform an abortion."[440] "The Office of Legal Affairs of the American Hospitals Association," the author explained, "has taken the position that hospitals (as well as physicians) are not compelled to participate in abortions which are not performed to preserve the

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[433] *Id.* at 31.
[434] *Id.*
[435] *Id.* at 32.
[436] *Id.* at 35.
[437] *The Right to Abortion*, *supra* note 430, at 37–39, 42, 44.
[438] *Id.* at 51–55.
[439] *Id.* at 53–54.
[440] *Id.* at 54.

mother's health."[441] But what did health mean? "[T]he legal answer is uncertain where it is alleged that the mother's health, either physical or emotional, is involved."[442] Furthermore, "[t]he constitutional questions may be compounded in the case of a hospital which is receiving government funds."[443] A year later, the tenth annual meeting of the Diocesan Attorneys in Washington, D.C., dedicated extensive discussion to the "the compulsion of health care facilities to provide abortion services."[444]

In March 1973, both the House and the Senate considered a raft of amendments seeking to respond to this perceived threat to the Catholic conscience. On March 15, Rep. Margaret Heckler of Massachusetts introduced her own version of the Church Amendment in the House, explaining that "conscientious objection to the taking of unborn life deserves as much consideration and respect as does conscientious objection to warfare. The Federal Government should never be party to forcing hospital personnel to perform tasks which they find morally abhorrent."[445] John Noonan would echo this analogy five years later in his response to charge that anti-abortion activism was largely an untoward imposition of a minority's religious beliefs on a pluralistic population: "Christian opposition to genocide, to urban air raids, and to the Vietnam War was no more and no less theological than the Christian opposition to abortion."[446]

On April 3, Virginia Schwager, the Director of the Catholic Conference's Division of Health Affairs testified in support of Heckler's bill to the House's Subcommittee on Public Health and Environment, which was holding hearings on the Public Health Programs Extension, the vehicle for the first federal conscience clause legislation.[447] Noting that "Senator Church's amendment . . . which we commend, was adopted in the Senate on March 27 by a vote of 92–1," Schwager assured the Subcommittee that Heckler's language paralleled the Church Amendment.[448] She also underscored the importance of these amendments, raising the specter of coercion:

> A bill in the Oregon legislature would force all hospitals to provide abortion services. Another bill in the Wisconsin legislature would

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[441] *Id.*

[442] *Id.*

[443] *Id.*

[444] McKernan, *supra* note 430, at 317. *See also* Dennis J. Horan, *Abortion and the Conscience Clause: Current Status*, 20 CATH. LAW. 289 (1974) (arguing that *Roe v. Wade* and other Court rulings do not compel hospitals to perform abortions); Eugene Schulte, *The Catholic Health Care Facility: Its Identity, Ownership and Control*, 20 CATH. LAW. 328 (1974) (discussing the implications of current doctrine for the characteristics of a Catholic health care facility).

[445] *Supra* note 426, at 9595.

[446] NOONAN, *supra* note 282, at 53–54.

[447] *See Health Programs Extension Act of 1973: Hearings on H.R. 5608 and S. 1136 Before the Subcomm. on Pub. Health and Env't of the Comm. on Interstate and Foreign Com.*, 93d Cong. 429 (1973) (statement of Virginia Schwager, Dir., Catholic Conference's Division of Health Affairs).

[448] *Id.*

> punish doctors who refused on conscientious grounds to perform such operations. Recently, a district court judge in Montana enjoined a denominational hospital to provide services contrary to the ethical convictions of the group sponsoring the hospital. Moreover, there have been strong urgings in states such as New York and Maryland to require all hospitals to provide abortion services, despite the fact that such operations violate the religious convictions of those sponsoring or administering the hospital.[449]

Later that spring, James McHugh, Director of the Catholic Conference's Family Life Division, testified at a Senate hearing on family planning services and population research amendments attached to the Public Health Services Extension Act.[450] Hammering on an old theme, McHugh warned of the "subtle coercion" created by family planning programs, especially when targeted at "poor, minority, or ethnic groups."[451] He also expressed concern about "a very determined effort . . . being made to obstruct the passage" of the modified Church/Heckler amendment, "providing protection for hospitals and health care workers who refuse, on rounds of conscience and ethical convictions, to provide or participate in abortion services."[452] He noted that "[t]his amendment is consistent with the emphasis on voluntary participation that has been a part of Public Law 91-572," the Population Research and Voluntary Family Planning Programs Act, since its inception in 1970.[453]

A string of the other right-to-life organizations also addressed the Senate hearings.[454] All characterized *Roe* as part of a larger effort to impose a particular version of family planning on the general population.[455] Randy Engel, Director of the U.S. Coalition for Life, alleged:

> at least two cases of abortion carried out without the full consent or knowledge of the patients. In each case the physicians base their action on the recent Supreme Court decision of *Roe v. Wade*, which provides that a women's attending physician shall make the determining decision on abortion. . . . [O]ther violations include the use of social security numbers to identify, and

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[449] *Id.*

[450] *Family Planning Services and Population Research Amendments of 1973: Hearings on S. 1708 and S. 1632 Before the Spec. Subcomm. on Human Res. Of the Comm. on Lab. and Pub. Welfare*, 93d Cong. 186 (1973) [hereinafter *Hearings on Family Planning Services*] (statement of James McHugh, Dir., Family Life Division, U.S. Catholic Conference).

[451] *Id.* at 190.

[452] *Id.* at 191.

[453] *Id.*

[454] *See generally Hearings on Family Planning Services*, *supra* note 450.

[455] *Id.*

> continually monitor the family planning activities of patients including home visitations by social workers when clinic patients fail to respond promptly to the second call of the computers of the State welfare agency. It includes attempts by Federal agencies to cajole private physicians into revealing for the public record the sexual patterns and contraceptive habits of the patient.[456]

In a striking gambit, John Short, editor of the ultra-orthodox Catholic magazine *Triumph*, tried to extend the argument that Catholic clergy and legal activists had developed in response to *Griswold* to *Roe*.[457] This argument, which maintained that a right to privacy in the reproductive context prohibited all manner of state involvement in reproductive health, may well have been inspired by frustrations at the Supreme Court's "entanglement" doctrine in the school aid context.[458] But, whether ironic or not, the argument sought to affiliate with the emerging right to privacy while lodging within it a sort of secular establishment clause.[459] Addressing Senator Alan Cranston, who was conducting the hearings on behalf of the Committee on Labor and Public Welfare, Short warned that:

> [t]he U.S. Supreme Court decision rendered January 22, 1973, in the case of *Roe v. Wade* dealt with the subject of procreation and held that, prior to a new life beginning, the right tantamount to absolute privacy prevails, and that subsequent to a new life beginning this right to privacy becomes a qualified right, based on a compelling State interest. . . . [T]he Court held that in decisions going back as far as 1891 the Court has recognized that prior to new life coming into existence a right of personal privacy or zones of privacy hold and that these are applicable in the areas of marital rights and procreation, and furthermore such rights do exist under the Constitution. . . . It further holds that these decisions make it clear that marital rights relating to procreation are personal rights, fundamental and implicit, in the concept of ordered liberty, and protected by the guarantee of personal privacy. It further states that the basic decision of one's life respecting procreation comes within the blessings of liberty found in the preamble of the Constitution and that this right is so fundamental that, in order to support legislative action, the statute must be narrowly and precisely drawn and that a compelling State

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[456] *Id.* at 198–99 (statement of Randy Engel, Exec. Dir., U.S. Coal. for Life).
[457] *Id.* at 204 (statement of John Short, Publisher, Triumph Mag.).
[458] *Id.* at 211–12; *see supra* Section III.A.
[459] *Hearings on Family Planning Services*, *supra* note 450, at 211–12.

> interest must be shown in order to remove these rights such as protection of parental rights. Further, the Court holds that the freedom of personal choice in marriage, family life and procreation is one of the liberties protected by the due process clause and must be free from unwarranted governmental intrusion. Finally, the right of privacy was held to be above rational inquiry, was held to be the right to be left alone, the right that in a constitution of free people the meaning of liberty must be broad indeed, and that the constitution did not even permit Congress, let alone the State, the general power to inquire into the private affairs of a citizen and the right to privacy in matters of procreation is guaranteed absolutely against deprivation, as the State lacks a compelling interest to make inquiry into the area of marital relations and procreation. . . . I suggest you and every member of the committee and everyone who is going to vote on the bill read those decisions and see if you are not [supporting] unconstitutional law.[460]

In addition to Short's extensive attack on the federal family planning legislation on privacy grounds, he also argued that (unnamed) Supreme Court precedent prohibited "tax-supported or mandated inquiry by the State into the private and personal religious beliefs and practices concerning marital relations and intentions toward procreation."[461] John Sargent, a legislative attorney for the Congressional Research Service, rejected this latter argument on May 17.[462] Ironically, the only case he cited for the proposition that the First Amendment did permit "legislation concerning private decisions which are based on religious beliefs and convictions" was *Gillette v. United States*.[463]

Throughout the 1970s, the past of Catholic conscientious objection to war and the present and future of Catholic conscientious objection to government regulations involving reproductive health care, continued to intersect.[464] Indicative of this conscientious conjuncture was the presence of an article analyzing whether Vietnam conscientious objectors should receive veteran's benefits in the same issue of the *Catholic Lawyer* that first responded to *Roe* with extensive discussion of conscience

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[460] *Id.*

[461] *Id.* at 211.

[462] Memorandum from John D. Sargent, Legis. Att'y, Cong. Rsch. Serv., to the Hum. Res. Special Subcomm. (May 17, 1973), *in Hearings on Family Planning Services*, *supra* note 450, at 555–56.

[463] *Id.* at 555–56.

[464] *See, e.g.*, Note, *Benefits for Conscientious Objectors?*, 19 CATH. LAW. 62 (1973); National Conference of Catholic Bishops, *supra* note 430; *The Right to Abortion*, *supra* note 430; RISEN & THOMAS, *supra* note 305.

clauses.[465] As the last U.S. troops left Vietnam, former anti-war Catholics reunited under the pro-life banner.[466] On August 2, 1975, a group of pro-life, anti-war Catholics who had heard a Quaker speak out against abortion, organized the first abortion clinic sit-in.[467] Veterans of this action formed Pro-Lifers for Survival in 1976 and the Pro-Life Non-Violent Action Project in 1977.[468] The latter, led by the former conscientious objector John O'Keefe, organized abortion clinic sit-ins across the country.[469] In 1978, the Catholic Peace Fellowship organized a conference at the University of Massachusetts on "Nuclear Disarmament and Right to Life: A Day for Dialogue." There, the radical anti-war priest Daniel Berrigan was "stunned" when a feminist group protested his comparison of "abortion to nuclear bombs."[470]

In the post-Vietnam period, despite a revived anti-nuclear movement, conscience would score its greatest victories in the context of reproductive healthcare. In 1974, the Church Amendment was extended by the National Service Award Act, which mandated that "[n]o individual shall be required to perform or assist in the performance of any part of a health services program or research activity [receiving federal funds]"[471] and prohibited entities involved in "'biomedical or behavior research' . . . from discriminating against individuals for invoking conscience protections."[472] Two years later, the Hyde Amendment barred federal dollars from being used to fund abortion, except where the life of the mother was at risk.[473] And between 1977 and 1979, the National Conference of Catholic Bishops waged a battle in both Congress and the federal courts to ensure that pro-life employers would not have to pay for abortions or abortion-related disability leave in their insurance coverage.[474] Throughout the debate, the Church's representatives argued that all government regulations should respect the objections of employers who could not conscientiously pay for abortion or abortion-related services.[475] A compromise was eventually struck in Congress according to which employers would decide whether or not to cover abortions, but could not refuse to cover medical complications arising from abortion.[476] Nonetheless, the National Conference went to federal court in order to enjoin the Justice Department from enforcing this limited coverage

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[465] *Benefits for Conscientious Objectors?*, *supra* note 464.

[466] *See* RISEN & THOMAS, *supra* note 305, at 49, 53–57, 60.

[467] *Id.* at 60–62.

[468] *Id.* at 62–64.

[469] *Id.* at 64.

[470] *Id.* at 64–65.

[471] *See* National Service Award Act of 1974, Pub. L. No. 93-348, § 214(b), 88 Stat. 342, 353 (1974).

[472] Parr, *supra* note 423, at 631.

[473] JAFFE, LINDHEIM & LEE, *supra* note 419, at 128–29.

[474] *Id.* at 150–51.

[475] *Id.*

[476] *Id.* at 150.

provision.[477] The suit failed on a technicality but thirty years later such suits would become commonplace.[478]

Laying the groundwork for these future campaigns on behalf of the Catholic conscience were new organizations such as the Catholic League for Religious and Civil Rights, which fused clerical leadership, Church funding, and lay legal activism. Here, neo-traditionalists such as John Noonan, William Ball, and Stuart Hubbell fought to combat what they saw as discrimination against and coercion of the Catholic conscience[479]: Speaking to the diocesan attorneys in 1975, Hubbell asked his colleagues to confront the "grave political truth . . . that ours is not the favored position in today's world."[480] Reviewing the threat that new health, welfare, and tax regulations posed to Catholic hospitals, schools, and families, Hubbell exhorted his fellow Catholic lawyers to join the Catholic League: "every other minority in the past history of this country has risen to its own defense, organized and fought with skill within our democratic machinery. We have yet to do so adequately or with determination. But others have been able to do so; surely we should try."[481]

CONCLUSION

While the Catholic League was formed in 1973 in response to *Roe*, its worldview, as articulated by Stuart Hubbell, had been developing for over a decade.[482] Conflicts over religious education, conscription, and federally funded family planning had convinced many Catholic clerical and lay leaders that American law discriminated against Catholics, and had taught these clergy, lawyers, and intellectuals a language of conscience and coercion with which to oppose this discrimination.[483]

These activists largely had begun in the reformist camp, welcoming the double-democratization ushered in by Vatican II—democratic contest within the Church and the Church's increasing involvement in democratic contest within American society at large.[484] They were happy to rearticulate Catholic values both affirmed and

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[477] *Id.* at 151.

[478] *See* Louise Melling, *ACLU Highlights from the Campaign to End Using Religion to Discriminate*, CAMPAIGN TO END THE USE OF RELIGION TO DISCRIMINATE MONTHLY NEWSL. (ACLU, New York, N.Y.), Dec. 2012; JAFFE, LINDHEIM & LEE, *supra* note 419, at 151. *See also* Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015) (warning of the implications of expansive conceptions of conscientious objection).

[479] *See, e.g.*, Reid, Jr., *supra* note 5, at 881, 958; Ball, *supra* note 313, at 13–14; Hubbell, *supra* note 14, at 339, 344.

[480] Hubbell, *supra* note 14, at 344.

[481] *Id.* at 348–49.

[482] *See* notes 59–63 and accompanying text.

[483] *See supra* Sections II.A–II.C and notes 77, 174, 220, 330.

[484] *See supra* notes 26–30 and accompanying text.

updated by Vatican II in the language of American law, and argued that American law harmonized with these values.[485] Indeed, this legalization and Americanization of religious values secured the place of Catholic professionals within an increasingly fluid and fractious Church community.

Yet as their own experiments with jurisgenerative politics met with frustration, Catholic legal activists adopted an increasingly defensive posture, deploying the language of discrimination against and coercion of conscience to describe American law's relationship to the Catholic citizen. While this language invoked the specter of a Catholic ghetto that Vatican II reformers had hoped to leave behind, the neo-traditionalists who most prominently raised the cry of discrimination and coercion of conscience remained within the democratic framework that they themselves had helped established during the Vatican II period. Thus, John Noonan's immediate response to *Roe* was to frame it as a departure from a religiosity integral to American law: "The authority of the courts as oracles of justice, the sovereignty of government as a power ordained by God, the sanctity of the human person created in the image of God[—]all these vital presuppositions of our system of law[—]have religious roots; all express mythic-moral perceptions."[486] While at times disidentifying with an American state they saw as opposed to religious freedom and life itself, Catholic legal activists did not abandon the iterative process of democratic legal reform.[487] Instead, they struggled to harmonize American law with their particularistic commitments, while rearticulating those commitments in legal terms.[488] They continue to do so today.[489]

Bolstered by the appointments of Justices Brett Kavanaugh and Amy Coney Barrett, the Roberts Court has recently intensified its own conscientious critique of the legal order ushered in by the 1960s, transforming the doctrinal status quo in the domains of public funding of religious education and expression, religious objections to health, safety, and antidiscrimination laws, and the regulation of reproductive health care and fetal life.[490] In each of these domains, the Roberts Court has

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[485] *See supra* notes 21–22 and accompanying text.

[486] John Noonan, *The Family and the Supreme Court*, 23 CATH. UNIV. L. REV. 255, 271 (1973).

[487] *See, e.g.*, Hubbell, *supra* note 14, at 339, 344 (explaining that the Catholic positions are not popular in the United States and that religious freedom is under attack). *See* National Conference of Catholic Bishops, *supra* note 430, at 31–32, 34–35.

[488] *See, e.g.*, *Hearings on Family Planning Services*, *supra* note 450.

[489] *See* Melling, *supra* note 478.

[490] *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); Carson v. Makin, 142 S. Ct. 1987 (2022); Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021); Tandon v. Newsom, 141 S. Ct. 1294 (2021); Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020); Masterpiece Cakeshop v. Colorado C.R. Comm'n, 138 S. Ct. 1719 (2018); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

advanced legal arguments and achieved policy outcomes consistent with the vision espoused by the Catholic legal activists who came together in the decade surrounding *Roe v. Wade*.[491]

During those early years, Catholic conscientious objection to compulsory military service provided a kind of paradigm and *cause célèbre* for a new generation of Catholic legal activists, a paradigm that they then applied to other contexts, such as federal family planning and education policy. In the absence of a draft, neither the Roberts Court nor its immediate predecessors have had the occasion to revisit the paradigm case itself—the boundaries of legitimate conscientious objection to compulsory military service. For the first time in decades, however, the return of conscription seems like a plausible prospect, partly due to bipartisan interest in establishing a regime of national service for college-aged men and women, partly due to U.S. policymakers' increasingly aggressive stance toward Russia, China, and, at times, Iran.[492]

Should the Roberts Court be forced to confront a new era of conscientious objection to compulsory national service, this confrontation would illuminate the uncertain relationship between American Catholic legal thought and nationalism. Perhaps the most peculiar aspect of the current Catholic majority is the avowed nationalism of several of its members.[493] That avowal, as Adrian Vermeule has recently noted, sits awkwardly with the broader—and insistently transnational—tradition of Catholic legal thought.[494] But this nationalist tendency is consistent with, and illuminated by, the particularly patriotic and democratic aspirations of American Catholic legal culture as it reconstituted itself in the years following the election of

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[491] *See, e.g.*, *Dobbs*, 142 S. Ct. 2228; *Kennedy*, 142 S. Ct. 2407.

[492] *See* NAT'L COMM'N ON MIL., NATIONAL, AND PUBLIC SERVICE, INSPIRED TO SERVE 34, 39, 50 (2020); Chelsey Cox, *What Is the Draft? And Can It Ever Be Reinstated? Here's What to Know*, USA TODAY (Feb. 25, 2022, 1:01 PM), https://www.usatoday.com/story/news/2022/02/24/u-s-reinstate-draft-russia-ukraine-invasion/6928740001/ [https://perma.cc/4YKE-TKSJ]; Sarah Mervosh, *Will There Be a Draft? Young People Worry After Military Strike*, N.Y. TIMES (Jan. 8, 2020), https://www.nytimes.com/2020/01/03/us/military-draft-world-war-3.html [https://perma.cc/8K8A-PAK3]; Brandon J. Weichert, *The Next World War Is Coming—and So Is the Draft*, REAL CLEAR DEF. (Jan. 7, 2020), https://www.realcleardefense.com/articles/2020/01/07/the_next_world_war_is_comingand_so_is_the_draft_114963.html [https://perma.cc/3QXV-UPPB].

[493] *See, e.g.*, Austen L. Parrish, *Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law*, 2007 ILL. L. REV. 637 (2007); Adam Liptak, *Conservatives, Often Wary of Foreign Law, Embrace It in Census Case*, N.Y. TIMES (Apr. 29, 2019), https://www.nytimes.com/2019/04/29/us/politics/foreign-law-census.html [https://perma.cc/R4WG-WWWR]; Justice Stephen Breyer, *America's Courts Can't Ignore the World*, THE ATLANTIC (Oct. 2018), https://www.theatlantic.com/magazine/archive/2018/10/stephen-breyer-supreme-court-world/568360/ [https://perma.cc/Z8HN-3YKC].

[494] Adrian Vermeule, *The Common Good as a Universal Framework*, BALKINIZATION (July 27, 2022), https://balkin.blogspot.com/2022/07/the-common-good-as-universal-framework.html [https://perma.cc/B7ZN-RUY7].

President Kennedy and the convocation of Vatican II. The culture of Catholic conscientious objection that emerged from this period flourished in the wake of both the constitutionalization of abortion and the abolition of conscription in the early 1970s. Fifty years later, abortion has lost its constitutional standing, eliminating one threat to the Catholic conscience as articulated by pro-life legal activists.[495] Whether a new regime of compulsory national service would present another such threat, as it did in the decade prior to *Roe*, remains to be seen.

[495] *See* Dobbs v. Jackson Women's Health Center, 142 S. Ct. 2228 (2022).