COMMENT

ROBISON v. JOHNSON: VETERANS' EDUCATIONAL BENEFITS FOR CONSCIENTIOUS OBJECTORS

The use of a conscripted army for the promotion of national defense has raised at least two fundamental questions: (1) how to compensate adequately those who are drafted for the resulting disruption of their lives, and (2) how to deal with those men subject to conscription who are morally or ethically opposed to military service. Congress has responded to the first question by supplementing military pay with programs providing education, training and other benefits to veterans of military service.[1] The second question, a far more controversial one, has been resolved by excusing conscientious objectors from service in the armed forces but requiring them to perform alternate civilian service in the national interest.[2]

In *Robison v. Johnson*,[3] a class action on behalf of all conscientious objectors who have completed alternate service, a federal district court in Massachusetts indicated that the framework constructed by Congress to deal with these two questions is incomplete. Judge W. Arthur Garrity held that the denial of educational benefits under the Veterans' Readjustment Act of 1966[4] to conscientious objectors who have completed alternate service constitutes a denial of equal protection in violation of the due process clause of the fifth amendment.[5] Judge Garrity declared that all conscientious objectors who have satisfactorily completed two years of alternate service or who, after completing 180 days of such service, have been granted hardship releases from such service, shall be eligible to receive veterans' educational benefits.[6]

In extending the statute to include conscientious objectors, the court's holding stands as the ultimate acceptance of the principle of judicial review. It is probably safe to say that no member of Congress

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[1] 38 U.S.C. §§ 101-5228 (1970).

[2] 50 U.S.C. § 456(j) (1970).

[3] 352 F. Supp. 848 (D. Mass.), *prob. juris noted*, 93 S. Ct. 2274 (1973).

[4] 38 U.S.C. §§ 1651-97 (1970).

[5] 352 F. Supp. at 859. *Contra*, Hernandez v. Veterans Administration, 339 F. Supp. 913 (N.D. Cal.), *aff'd per curiam*, 467 F.2d 479 (9th Cir. 1972) *cert. granted*, 93 S. Ct. 2267 (1973).

Although the fifth amendment does not contain an equal protection clause, the courts have employed equal protection analysis under the amendment's due process clause. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 641-42 (1969); Schneider v. Rusk, 377 U.S. 163, 168 (1964); Bolling v. Sharpe, 347 U.S. 497 (1954).

[6] 352 F. Supp. at 861. The court chose this remedy based on its belief that had Congress been confronted with the alternatives of nullification or extension, it would have chosen the latter. *Id.*

contemplated that conscientious objectors would be covered by the Act, and that if the suggestion had been raised it would have been flatly rejected.[7] Judge Garrity's decision might, therefore, be decried as an abuse of power by a fundamentally undemocratic institution, or applauded as the judicial protection of a voiceless minority and the reaffirmation of the fundamental value of equality in the face of legislative abuse or oversight—in the words of Justice Stone, the exercise by the judiciary of "the sober second thought."[8]

Arguing against judicial review is a purely academic exercise at this point in the history of our legal development, but there is continuing debate over the proper restraints on the courts' exercise of their power to declare legislation unconstitutional. Well aware of the dangers of merely substituting their own judgment for the judgment of the legislature, or of appearing to do so, courts have attempted to develop reasoned principles for the constitutional evaluation of challenged legislation. We turn now to an analysis of the *Robison* court's reasoning and alternative approaches to the question of veterans' educational benefits for conscientious objectors.

I. The Denial of Benefits to Conscientious Objectors as a Denial of Free Exercise of Religion

In *Robison*, the plaintiffs claimed that the exclusion of conscientious objectors from eligibility for educational benefits violated not only their right to equal protection, but also their rights of free exercise of religion. Judge Garrity rejected the free exercise claim,[9] indicating that the burden imposed by the exclusion was not substantial enough to merit the application of the principles developed in the two leading free exercise cases decided by the Supreme Court—*Braunfeld v.*

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[7] Although Congress did not restrict veterans' educational benefits to veterans of the armed forces—officers of the Public Health Service and the National Oceanic and Atmospheric Administration were included under the act's terms, 38 U.S.C. §§ 101(21)(B)-(C) (1970)—no mention was made in either committee report of veterans' benefits for conscientious objectors. The act was designed to temper the disruptive effect of the nation's first "peacetime" draft on the lives of the chosen few. *See* Senate Comm. on Labor and Public Welfare, Cold War Veterans' Readjustment Assistance Act, S. Rep. No. 269, 89th Cong., 1st Sess. 7-11 (1965) [hereinafter cited as S. Rep.]. It was intended to provide benefits to post-Korea veterans similar to the benefits provided for veterans of World War II and the Korean conflict. For an account of the programs established for veterans of these earlier wars, see House Comm. on Veterans' Affairs, H.R. Rep. No. 1258, 89th Cong., 2d Sess. 3-4 (1966).

[8] Stone, *The Common Law in the United States*, 50 Harv. L. Rev. 4, 25 (1936). For discussion of the pros and cons of judicial review, see A. Bickel, The Least Dangerous Branch 1-33, 258 (1962); Judicial Review and the Supreme Court (L. Levy ed. 1967); McCleskey, *Judicial Review in a Democracy: A Dissenting Opinion*, 3 Hous. L. Rev. 354 (1966); Rostow, *The Democratic Character Of Judicial Review*, 66 Harv. L. Rev. 193 (1952); Wright, *The Role Of The Supreme Court In A Democratic Society—Judicial Activism Or Restraint?*, 54 Cornell L. Rev. 1 (1968).

[9] 352 F. Supp. at 859.

Brown[10] and *Sherbert v. Verner*.[11] These two decisions stand for the proposition that a statute which places "*any* incidental burden on the free exercise of . . . religion"[12] is constitutional only if it is justified by some compelling state interest[13] which cannot be served by means which do not impose such a burden.[14] The *Robison* court's decision not to apply this balancing test is a curious one, for the *Sherbert* Court clearly spoke of weighing *any* burden on free exercise against the alleged state interest—not only those burdens which meet some minimum standard of objectionability.[15] While the burdens on free exercise may be substantially less in *Robison* than in *Sherbert*,[16] the weight of the burden should be a factor in determining the outcome of the balancing test, not whether the balancing test should be applied.

Assuming the existence of some incidental burden in *Robison*, the free exercise claim may be difficult to deny, for it is difficult to find any compelling state purpose in the veterans' benefits program which cannot be accomplished by including conscientious objectors. Unlike the situation in *Braunfeld*,[17] granting relief to the *Robison* plaintiffs would not defeat the state's purpose. If that purpose be compensation for military service or making the military more attractive, it can be achieved whether or not conscientious objectors receive veterans' benefits.[18] And if the purpose be treating military servicemen more favorably than alternate servicemen, there would be a serious

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[10] 366 U.S. 599 (1961). In *Braunfeld*, the Court upheld enforcement of a Sunday closing law against the free exercise claim of one who suffered an economic burden by virtue of his religious objection to working on Saturday. The Court found that the state's interest in a uniform day of rest was a compelling one which could be served only by prohibiting exceptions. *Id.* at 608.

[11] 374 U.S. 398 (1963). In *Sherbert*, the Court held that the denial of unemployment compensation for refusal to accept a job which required Saturday work was an unconstitutional denial of free exercise when the refusal was motivated by a religious prohibition.

[12] *Id.* at 403 (emphasis added).

[13] *Id.* at 403, 406.

[14] 366 U.S. at 607.

[15] Text accompanying note 12 *supra*.

[16] The *Robison* court distinguished *Sherbert* in two ways.

> First, the denial [of veterans' benefits] is felt, not immediately, as in *Sherbert*, but at a point in time substantially removed from that when a prospective conscientious objector must consider whether to apply for an exemption from military service. Secondly, the denial does not produce a positive economic injury of the sort effected by a Sunday closing law or ineligibility for unemployment payments.

352 F. Supp. at 860.

[17] Note 10 *supra*.

[18] For the reasons stated below, text accompanying note 37 *infra*, the inclusion of conscientious objectors can be said to have a neutral effect on the purpose of making military service more attractive. Note the different consequences of this neutral effect under the first amendment compelling state interest test and the rational relation test applicable in equal protection cases which involve neither suspect classifications nor fundamental rights, text accompanying notes 37-41 *infra*.

question whether that purpose is compelling enough to justify the burden on free exercise of religion.[19]

But the application of a *Sherbert* balancing test to the question of veterans' benefits for conscientious objectors involves problems which suggest that the *Robison* court's reluctance to treat the case as a free exercise case was not without justification. *Robison* is not simply a case of a state-imposed economic burden attaching to religiously-dictated behavior. Military service, for which alternate service is the substitute, entails its own well-recognized burdens, and, consequently, alternate service might be viewed as bestowing relative benefits as well as imposing burdens. The essential question in *Robison* is one of equal treatment, and the necessary comparison of burdens and benefits is better undertaken within the framework of equal protection than within that of free exercise of religion. Nevertheless, the first amendment aspect of the *Robison* plaintiffs' claim should not be disregarded. The religious nature of the classification should be of central concern to an equal protection analysis.

II. The Denial of Benefits to Conscientious Objectors as a Denial of Equal Protection

The *Robison* court held that the exclusion of conscientious objectors constitutes a denial of equal protection in violation of the due process clause of the fifth amendment, because the exclusion bears no rational relation to the purpose of the Veterans' Readjustment Act.[20] In so holding, the court departed from the dualistic approach characteristic of the Warren Court era. Under that dualistic approach, a governmental action creating suspect classifications[21] or adversely affecting fundamental interests[22] is subjected to scrutiny which is

[19] Dictum in the recent case of Wisconsin v. Yoder, 406 U.S. 205 (1972), raises an obstacle to the successful advancement of a free exercise claim. Chief Justice Burger, speaking for the Court, indicated that the first amendment protects only "religious" beliefs—not "philosophical" or "personal" beliefs such as those which motivated Thoreau. *Id.* at 215-16. The Supreme Court had previously held that the availability of the conscientious objector exemption could not be limited to those whose beliefs were religious in the traditional sense—that moral or ethical beliefs could qualify a person for conscientious objector status if those beliefs were held with the strength of traditional beliefs. Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965). If the Court were to adopt the somewhat anomalous position that the scope of beliefs protected by the first amendment is narrower than the scope of beliefs which would qualify as religious under 50 U.S.C. § 456(j) (1970), the conscientious objectors' free exercise claim to veterans' benefits could be accepted only in some cases.

[20] 352 F. Supp. at 856-59. This requirement that the exclusion bear a rational relation to the purpose of the Act is a restatement of the definition of a reasonable classification as "one which includes all persons who are similarly situated with respect to the purpose of the law." Tussman & tenBroek, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341, 346 (1949).

[21] *E.g.*, McLaughlin v. Florida, 379 U.S. 184 (1964) (race); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (alienage); Korematsu v. United States, 323 U.S. 214 (1944) (national ancestry).

[22] *E.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (voting); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (procreation).

" 'strict' in theory and fatal in fact" (the compelling state interest test), while other classifications receive "minimal scrutiny in theory and virtually none in fact" (the rational relation test).[23] Gerald Gunther recently suggested that the Burger Court has shown signs of discontent with two-tiered equal protection and has, through a number of decisions upholding equal protection claims on rational relation grounds, laid the foundation for a new, vigorous means-focused equal protection which would be a preferred constitutional ground for a less interventionist Court.[24] The *Robison* court's holding is notable for the rigor of its reasonable means inquiry, but, this Comment will argue,[25] a reasonable means inquiry is inadequate in a case like *Robison*. Some form of stricter scrutiny is appropriate, and perhaps necessary, to justify the *Robison* court's result.

A. *Application of the Rational Relation Test*

Congress specified four purposes in enacting the Veterans' Readjustment Act:

> (1) enhancing and making more attractive service in the Armed Forces of the United States, (2) extending the benefits of a higher education to qualified and deserving young persons who might not otherwise be able to afford such an education, (3) providing vocational readjustment and restoring lost educational opportunities to those service men and women whose careers have been interrupted or impeded by reason of active duty . . . and (4) aiding such persons in attaining the vocational and educational status which they might normally have aspired to and obtained had they not served their country.[26]

The legislative history of this statute clearly indicates that Congress' overriding concern was with the disruptive impact of compulsory military service on an individual's career. The Senate Committee Report noted that the draft has a "depressant effect on young men's employment potential," because employers are generally unwilling to train men with unsatisfied military obligations.[27] In addition, "the draft inject[s] into their lives numerous uncertainties which make it impossible for them to plan ahead" and discourages them from entering advanced training.[28] Most importantly, the Report concluded

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[23] Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). For a discussion of two-tiered equal protection, see Tussman & tenBroek, *supra* note 20, at 343-56; *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076-132 (1969) [hereinafter cited as *Developments*].

[24] Gunther, *supra* note 23, at 18-24.

[25] Text accompanying notes 37-75 *infra*.

[26] 38 U.S.C. § 1651 (1970).

[27] S. REP., *supra* note 7, at 8.

[28] *Id.*

that "today's servicemen drop farther and farther behind their civilian contemporaries who generally pursue educational objectives, or enjoy the higher wage scales and other economic advantages of civil life."[29] The Senate Committee specifically refused to limit eligibility to veterans who served in combat zones for the reason that "the philosophy and purpose of the GI Bills is and has been to give readjustment assistance to the veteran returning to civilian life . . . and not to reward him for the risk that he might have been exposed to."[30]

It was this purpose of "compensat[ing] veterans for the deprivation of educational and economic opportunities that inhere in military service"[31] which the *Robison* court found to be the primary one, expressed formally as purposes (2), (3) and (4). The court held that veterans of military service and of alternate service are similarly situated with respect to this purpose:

> [Alternate servicemen] too were burdened at one time by an unsatisfied military obligation that adversely affected their employment potential; were forced, because of the draft law, to forego immediately entering into vocational training or higher education; and were deprived, during the time they performed alternate service, of the opportunity to obtain educational objectives or pursue more rewarding civilian goals.[32]

This conclusion draws particular force from the stringent requirements of satisfactory alternate service. In addition to the statutory requirement that alternate service contribute to the maintenance of the national health, safety or interest,[33] conditions imposed by the Selective Service System limit the range of acceptable work considerably. A Local Board Memorandum issued in 1962 set forth the following policy:

> Whenever possible the work should be performed outside of the community in which the registrant resides. The position should be one that cannot readily be filled from the available competitive labor force, or from civil service or merit registers of the Federal, State or local governments, and *should constitute a disruption of the registrant's normal way of life somewhat comparable to the disruption of a registrant who is inducted into the Armed Forces.*[34]

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[29] *Id.* 10.

[30] *Id.* 19. The Report also listed two other reasons for not limiting benefits to combat veterans. Most servicemen cannot choose the area in which they serve, and many cold war hot spots cannot be considered "areas of hostilities" in light of the United States' foreign policy. *Id.*

[31] 352 F. Supp. at 858.

[32] *Id.* at 858-59.

[33] 50 U.S.C. APP. § 456(i) (1970).

[34] Selective Service System, Local Memorandum No. 64 ¶ 1 (March 1, 1962, rescinded, Feb. 8, 1972), in 4 SEL. SERV. L. REP. 2183 (emphasis added).

A 1969 Memorandum repeated this theme:

> Always there must be an effort to see that the path of the conscientious objector in being processed for and performing civilian work parallels as nearly as possible the path of the I-A man in his processing for and performance of military duty. Under this theory, the conscientious objector's pay should be reasonably comparable to the pay, allowances *and other benefits* received by the man inducted into the Armed Forces; and his assignment should be beyond commuting distance from his home.[35]

In light of these requirements, it is difficult to deny that alternate service disrupts the conscientious objector's career to the same extent that military service disrupts the serviceman's career, and that, at least with respect to the purpose of compensating veterans for interference with their career plans, the two groups are similarly situated.[36]

The goal of making military service more attractive is not so easily disposed of. The *Robison* court claimed that a finding of a rational relation between this goal and the exclusion of conscientious objectors who had performed alternate service would require one of two assumptions: first, that if benefits were available to alternate servicemen, many persons who would enter the military under the statute as written would choose alternate service instead; or, second, that if benefits remained unavailable to alternate servicemen, some persons who were conscientiously opposed to military service would be willing to join the military to obtain educational benefits. The court dismissed both propositions as untenable in light of the safeguards that exist for ensuring that persons seeking conscientious objector status are sincere, and the strength of conviction of those who are in fact conscientious objectors.[37]

It is clear that neither the inclusion nor the exclusion of conscientious objectors affirmatively promotes the government's interest in making military service more attractive. The *Robison* court seemed

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[35] Selective Service System, Local Memorandum No. 98 ¶ 2 (Sep. 11, 1969, rescinded, Nov. 10, 1971), in 4 SEL. SERV. L. REP. 2200:7 (emphasis added). The requirements contained in Memoranda Nos. 64 & 98 are codified in 32 C.F.R. § 1660.6 (1972). As the *Robison* court noted, 352 F. Supp. at 851, the imposition of criteria beyond that of contributing to the national health, safety or interest has been severely criticized by some. *E.g.*, Silard, *Invalid Disruption Rules for CO Alternate Service*, 3 COLUM. SURV. HUM. RIGHTS L. 136 (1971).

[36] It might be objected that the similarity of conditions does not require the inclusion of an excluded group. Courts have often defended underinclusive classifications on the ground that the legislature should be free to remedy part of an evil. *See, e.g.*, Williamson v. Lee Optical, Inc., 348 U.S. 483, 488-89 (1955); Railway Express Agency v. New York, 336 U.S. 106, 110 (1949). But this ground for tolerating underinclusive classifications is absent, or at least weakened, in cases involving the bestowal of benefits, in which the excluded group protests its exclusion. For a discussion of the equal protection treatment of underinclusive legislation, see Tussman & tenBroek, *supra* note 20, at 348-51; *Developments*, *supra* note 23, at 1084-86.

[37] 352 F. Supp. at 857.

to require that the exclusion affirmatively promote Congress' purpose. But no such requirement is included in the rational relation test of the validity of a classification; that test is met if the classification "includes all who are similarly situated" with respect to the purpose of the law.[38] If the inclusion of one group promotes a purpose and the inclusion of a second group does not, the two groups can hardly be said to be similarly situated with respect to that purpose.[39] To insist on the inclusion of the second group would be to require that Congress include not only all groups whose inclusion would promote the legislative purpose, but also all groups whose inclusion would not obstruct that purpose. The unreasonableness of such an approach to equal protection is self-evident; it might require in this case that not only conscientious objectors but also the physically unfit be included, because the inclusion of the physically unfit would not obstruct any of Congress' goals.

Limiting the availability of educational benefits to veterans of military service does bear a rational relation to the goal of making the military service more attractive,[40] and a classification which is valid with respect to one of several permissible purposes of an act does not fall, according to traditional rational relation analysis.[41] If the exclusion of alternate servicemen is to fall, it must do so by virtue of the application of some stricter standard of review.

B. *The Appropriateness of Heightened Scrutiny*

As has been suggested, an equal protection analysis which fails to consider the religious nature of the classification in question is inadequate.[42] The preferred position traditionally accorded the first amendment's guarantee of freedom of religion suggests that classifications based on religion should be subjected to a higher standard of review than the rational relation test. As the Supreme Court recently noted, "The Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives."[43] The case for some form of heightened scrutiny—whether in the form of the compelling state interest test applied to classifications

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[38] Tussman & tenBroek, *supra* note 20, at 345.

[39] *See* Tussman & tenBroek, *supra* note 20, at 343-46; *Developments*, *supra* note 23, at 1076.

[40] It is arguable that the inclusion of veterans of the Public Health Service and the National Oceanic and Atmospheric Administration supports the contention that Congress' purpose was not to make the military service more attractive. But the inclusion of these groups probably indicates that Congress intended to make these services more attractive as well. The challenged classification bears no stronger relation to this supplemental purpose than it did to the purpose as it was originally stated.

[41] *See* Gunther, *supra* note 23, at 47 ("subsidiary purposes may also support the rationality of a means"); *Developments*, *supra* note 23, at 1077-84.

[42] Text accompanying note 19 *supra*.

[43] Police Dept. v. Mosley, 408 U.S. 92, 101 (1972).

involving fundamental interests or suspect classifications,[44] or some other standard—is particularly strong in a case which, like *Robison*, involves the distribution of important benefits.

The *Robison* court expressed doubts about the application of the compelling state interest test,[45] but concluded that some "form of heightened, if not strict, scrutiny" may be justified by the fact that "the undeniable effect of this legislation is to deny important benefits to a discrete minority."[46] The court suggested two possible approaches: "some form of balancing of the interests involved," or "plac[ing] on the defendants the burden of showing a high degree of relevancy between the exclusion . . . and the stated purpose . . . ."[47] But the court added that "the fashioning of such rules is better left to appellate courts" and found it "unnecessary to attempt the exercise" because it held the exclusion did not even bear a rational relation to the legislative purpose.[48] Since, as this Comment has suggested,[49] the exclusion of conscientious objectors does withstand challenge under the rational relationship standard of review, the Supreme Court is faced with the task of deciding which heightened standard of review may be appropriate.

1. The Compelling State Interest Test: Suspect Classifications

The starting point for this task is an evaluation of the *Robison* court's unwillingness to apply the compelling state interest test. The exclusion of conscientious objectors cannot withstand this test because the exclusion is not necessary[50] to the accomplishment of the state's purpose. However, this test is reserved for cases involving fundamental interests or suspect classifications, and the *Robison* court failed to find either of these in the denial of veterans' benefits to alternate servicemen.[51]

Although the denial or granting of veterans' educational benefits is clearly of great significance to an individual, the court's refusal to

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[44] This test must still be considered in any equal protection case, because the expanded rational relation standard, which Gunther suggests was the approach being adopted by the Burger court, was not intended to replace strict scrutiny in cases involving fundamental interests or suspect classifications. Gunther, *supra* note 23, at 24.

[45] 352 F. Supp. at 854-55.

[46] *Id.* at 856.

[47] *Id.*

[48] *Id.*

[49] Text accompanying notes 26-41 *supra*.

[50] *See* Loving v. Virginia, 388 U.S. 1, 9 (1967); McLaughlin v. Florida, 379 U.S. 184, 196 (1964).

[51] Significantly, the court did not conclude that no fundamental interest or suspect classification was involved. Rather, it said that it could not "conclude that education is, for purposes of selecting the standard of review, a so-called fundamental interest." 352 F. Supp. at 854. And it spoke of its "hesitancy" to find a suspect classification, concluding simply that it was "not *fully* persuaded that the legislation results in a 'suspect classification.'" *Id.* (emphasis added).

find a fundamental interest in the claimed benefits is sound. Even though, as the Supreme Court has unanimously recognized, "education is perhaps the most important function of state and local governments,"[52] it is not a fundamental interest for purposes of examination under the equal protection clause.[53]

The *Robison* court's hesitancy to characterize the classification as suspect is less supportable. While the Supreme Court has not extended the suspect classification doctrine beyond classifications based on race, alienage, and national ancestry, several commentators have suggested that religious classifications might be so characterized.[54] That suggestion receives strong support from first amendment principles and from the policy considerations which form the basis of the suspect classification doctrine.

The first amendment commits the government to a policy of neutrality with respect to religion,[55] and the courts have depended upon that commitment to require that a compelling state interest be shown to justify any burden on the free exercise of religion.[56] In some cases of unequal treatment of religious groups, courts have found it more appropriate to implement the policy of neutrality under the guarantee of equal protection than under that of free exercise.[57] The religious nature of the claim, of course, remains the same under either analysis. It is only reasonable, therefore, that any inequality of treatment of religious groups, which would constitute a "burden" in first amendment language, should be held to the same compelling state interest standard when it is scrutinized in equal protection terms.[58]

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[52] Brown v. Board of Educ., 347 U.S. 483, 493 (1954). It should be noted, however, that *Brown* dealt only with lower education, which the court noted plays a special role in the development of good citizens. *Id.*

[53] San Antonio Independent School Dist. v. Rodriguez, 93 S. Ct. 1278, 1298 (1973). "Education . . . is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected." *Id.* at 1297.

[54] Tussman & tenBroek, *supra* note 20, at 356; *Developments*, *supra* note 23, at 1127.

[55] *See* Abington School Dist. v. Schempp, 374 U.S. 203, 215-16 (1962); *id.* at 305-06 (Goldberg, J., concurring).

[56] *See* text accompanying notes 12-13 *supra.*

[57] *E.g.*, Fowler v. Rhode Island, 345 U.S. 67 (1953) (An ordinance was applied to penalize a minister of the Jehovah's Witnesses for holding a religious meeting in a public park, but to allow other religious groups to conduct services there. Justice Frankfurter, concurring, took the position that the equal protection clause of the fourteenth amendment, not the first amendment, condemned the application of the ordinance. *Id.* at 70); Niemotko v. Maryland, 340 U.S. 268 (1951) (the denial of Jehovah's Witnesses' application for permits to use a city park was a violation of the "right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments . . . ." *Id.* at 272). In these cases of unequal treatment, plaintiffs alleged that they were denied access to a particular privilege on an equal basis with other religious groups. In those cases which can best be viewed only as free exercise (burden) cases, on the other hand, claimants did not allege unequal treatment; rather, they claimed that conditions imposed on the general populace constituted unfair burdens on them because of their religious beliefs.

[58] In Police Dept. v. Mosley, 408 U.S. 92 (1972), which involved a freedom of speech-equal protection claim, the Court applied a test of "substantial governmental interest." *See* text accompanying notes 68-73 *infra.* It is unclear from Justice Marshall's opinion for the Court how the test differs from the compelling state interest test.

The policies behind strict scrutiny of some classifications were set forth most clearly by Judge Skelly Wright in *Hobson v. Hansen:*

> Judicial deference to [legislative and administrative] judgments is predicated in the confidence courts have that they are just resolutions of conflicting interests. This confidence is often misplaced when the vital interests of the poor and of racial minorities are involved. For these groups are not always assured of a full and fair hearing through the ordinary political processes, not so much because of outright bias, but because of the abiding danger that the power structure—a term which need carry no disparaging or abusive overtones—may incline to pay little heed to even the deserving interests of a politically voiceless and invisible minority.[59]

Justice Stone, in setting forth these same considerations in his footnote in *United States v. Carolene Products Co.,* mentioned religious minorities as one of the "discrete and insular minorities" possibly deserving of extra protection through "more searching judicial inquiry."[60] As long as willingness to fight in a nation's wars is seen as the ultimate expression of patriotism, it is difficult to imagine a religious minority more in need of such protection than one which holds the unorthodox view that participation in any war is immoral.

The *Robison* court gave essentially two reasons for its refusal to find a suspect classification. First, explaining that it found no violation of free exercise, the court was "hesita[nt] to give an essentially religious group special treatment at the back door of equal protection."[61] Once the court's misapplication of free exercise principles is recognized,[62] however, it becomes clear that the application of a compelling state interest standard to any inequality of treatment does not constitute special treatment. The choice of equal protection over free exercise doctrine reflects a belief that the former offers a more convenient framework of analysis than does the latter, not that the interests involved are any less important or likely to be disregarded. The compelling state interest test is appropriate under either analysis.

Second, the court felt that the application of a doctrine based on possible prejudice against or voicelessness of a minority was inapposite to a case in which Congress carved out for that minority an exemption from military service which was not constitutionally required.[63] Ac-

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[59] 269 F. Supp. 401, 507-08 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

[60] 304 U.S. 144, 152 n.4 (1938).

[61] 352 F. Supp. at 855.

[62] *See* text accompanying notes 15-16 *supra.*

[63] 352 F. Supp. at 855. A tenable argument can be made that the exemption of conscientious objectors from military service is required. *See, e.g.,* Brodie & Southerland, *Conscience, the Constitution, and the Supreme Court: The Riddle of United States v. Seeger,* 1966 WIS. L. REV. 306, 319-27; Freeman, *Exemption from Civil Responsibilities,*

knowledging that the exemption may have reflected a legislative judgment that conscientious objectors could not be trained for military duty, the court believed it "equally plausible that the exemption reflects a congressional determination to respect individual conscience."[64] The latter suggestion may be true, but it does not follow that a Congress unwilling to force an individual to violate the dictates of his conscience would distribute benefits to that individual on an equal basis with an otherwise similarly situated individual whose beliefs are more orthodox. Therefore, it may be appropriate to treat conscientious objectors as a voiceless minority deserving of special judicial protection.[65]

2. Heightened Scrutiny under a Sliding Scale Approach to Equal Protection

The suspect classification argument is a convincing one, but the Court may be hesitant to add to the list of suspect classifications, possibly because of its preference for a multifactor sliding scale approach to equal protection. Even so, this statute's effect of "deny[ing] important benefits to a discrete minority"[66] "characterized by their firm beliefs in opposition to war"[67] should lead the Court to impose some heightened standard of review.

In striking down an antipicketing ordinance which excepted only peaceful labor picketing from its ban, Justice Marshall's opinion for the Court in *Police Department v. Mosley*[68] presented a test designed for "all equal protection cases:" "whether there is an appropriate governmental interest suitably furthered by the differential treatment.[69]

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20 OHIO ST. L.J. 437, 444-53 (1959); Hochstadt, *The Right to Exemption From Military Service of a Conscientious Objector to a Particular War*, 3 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 1, 37-50 (1967); Macgill, *Selective Conscientious Objection: Divine Will and Legislative Grace*, 54 VA. L. REV. 1355, 1389-93 (1968). But the Supreme Court has consistently indicated that the exemption is not constitutionally required. *See* Hamilton v. Regents, 293 U.S. 245, 266-68 (1934) (Cardozo, J., concurring); United States v. Macintosh, 283 U.S. 605, 623-24 (1931), *overruled on other grounds*, Girouard v. United States, 328 U.S. 61 (1946); Selective Draft Law Cases, 245 U.S. 366, 389-90 (1918).

[64] 352 F. Supp. at 855.

[65] An additional reason for the court's hesitation to employ strict scrutiny was the fact that the equal protection claim was asserted under the fifth amendment, not the fourteenth amendment. The court was "loathe to adopt the simplistic compelling interest approach" developed in fourteenth amendment cases to legislation "one of whose stated purposes stems from the explicit constitutional power to raise armies." *Id.* But the suggestion that federal legislation should not be held to the same standard of equal protection scrutiny is untenable. The importance of Congress' purpose is a factor which will clearly influence the outcome of compelling interest analysis, but it should not be a factor in determining whether or not that analysis should be applied. This argument of the court reflects the same misunderstanding of compelling interest analysis as did the court's argument against applying the *Sherbert* test, *see* text accompanying notes 15-16 *supra*.

[66] 352 F. Supp. at 856.

[67] *Id.* at 855.

[68] 408 U.S. 92 (1972).

[69] *Id.* at 95.

But the Justice noted that the equal protection claim in *Mosley* was "closely intertwined with First Amendment interests"[70] and concluded that the state's justifications for the differential treatment "must be carefully scrutinized."[71] When referring specifically to the case at hand, he required that any discrimination among pickets "be tailored to serve a *substantial* governmental interest."[72] Whether or not Justice Marshall considered the "substantial governmental interest" standard as a particularized, heightened form of the general "appropriate governmental interest" standard is not clear. But the opinion seemed to contemplate some form of heightened scrutiny in equal protection cases involving first amendment interests, and the shift in language (from "appropriate" to "substantial") suggests that the interest served by a classification involving first amendment rights must be more important than the minimal interest which would justify non-first amendment classifications. This particular form of heightened scrutiny would be of no help to the *Robison* plaintiffs, since the governmental interest which saves the classification under rational relation analysis—to make military service more attractive—is certainly a substantial one.

Any equal protection analysis, however, requires a twofold examination of the nature of the alleged state interest and the relationship of the classification to that interest; under heightened scrutiny, this latter examination should be intensified. Both the *Mosley* Court and the *Robison* court acknowledged this aspect of heightened scrutiny—Justice Marshall requiring that the ordinance be "narrowly tailored" to its objectives,[73] and Judge Garrity suggesting that "the court could place on the defendants the burden of showing a high degree of relevancy between the exclusion . . . and the stated purpose of the legislation."[74] In considering multipurpose statutes, a court applying this type of heightened scrutiny might require that the relationship between the classification and at least one of its purposes be stronger than merely "rational," or that the purpose to which the classification is related (rationally or otherwise) be the primary one. More specifically, the general requirement that classifications, such as the one in *Robison*, bear a high degree of relevancy to some legitimate purpose could be formulated in any one of four ways: (1) the classification must bear a rational relation to the primary purpose; (2) the classification must affirmatively promote the primary purpose; (3) if the classification is not rationally related to one of the purposes, it must affirmatively promote at least one of the other purposes; (4) if the

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[70] *Id.*

[71] *Id.* at 99.

[72] *Id.* (emphasis added); *see id.* at 102.

[73] *Id.* at 101.

[74] 352 F. Supp. at 856.

classification is not rationally related to the primary purpose, it must affirmatively promote at least one of the secondary purposes.

The first of these alternatives, that the classification bear a rational relation to the primary purpose, removes from Congress the option of excluding, on the basis of some secondary purpose, some of those who are similarly situated with respect to the primary purpose; that is, it forbids classifications which are underinclusive with respect to the primary goal. Such a restriction on legislative action would be reasonable in some situations, but its requirement that a court inquire into which of several purposes was the primary one may render the first formulation unworkable as a general rule.[75] The second formulation, that the classification affirmatively promote the primary purpose, is overly broad, because it eliminates the requirement that all those included in a class be similarly situated. The third and fourth alternatives offer the legislature the opportunity to justify the exclusion of some of those who are similarly situated with respect to one purpose, if their exclusion affirmatively promotes some other purpose. The fourth approach, which requires stronger justification only for those exclusions which are not rationally related to the primary purpose is the least demanding of the four forms of heightened scrutiny. As with the first alternative, the problem of uncertainty as to the primary goal is not insurmountable.

The district court opinion in *Robison* can be affirmed under any of the four approaches. The narrowest ground on which *Robison* can rest is that, in cases involving the distribution of important benefits, the equal protection guarantee prohibits religious classifications which are not rationally related to the primary statutory purpose (compensation for interference with career plans) and which do not affirmatively promote the secondary purpose (making military service more attractive). This statement of the holding indicates that although the *Robison* court purported to apply a rational relation test, it actually adopted the fourth formulation of heightened scrutiny.

III. Conclusion

Because of the *Robison* court's misapplication of the traditional rational relationship test, its acknowledgment that some form of heightened scrutiny may be appropriate in evaluating the exclusion of alternate servicemen from eligibility for veterans' benefits becomes significant. This Comment has suggested that the religious nature of the exclusion demands stricter scrutiny—whether in the form of the com-

[75] However, the primary goal is usually evident, and in cases in which a court is uncertain as to which purpose is primary, the classification could be required to bear a rational relationship to any or all of the "primary" goals.

pelling state interest test required to sustain suspect classifications, or some rigorous test which reflects the significance of the classification's distinguishing characteristic (religious belief) on a sliding scale of equal protection.

Under either of these approaches, it is quite reasonable to conclude that the exclusion of alternate servicemen constitutes a denial of equal protection. Given the similarity of the two classes of servicemen with respect to the conditions which the benefits were designed to remedy, any other conclusion would be a denial of the principles of government neutrality toward religion and equal treatment of those who are similarly situated.