Since the earliest days of the republic, though with varying formulations, the selective service law has exempted conscientious objectors from military service. Here is § 6(j) of the Selective Service Act of 1948:

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.

It is the height of the Vietnam War. The Selective Service produces a form to be signed by those seeking "C.O." status under this provision. Tracking the statute, the form states, "I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form." Elliott Ashton Welsh II, who is seeking C.O. status, is given the form and crosses out "my religious training and" before signing it. On being questioned, he states that he has deep moral opposition to war but agnostic religious views. Is Welsh eligible for the exemption?

These are the facts of *Welsh v. United States*, 398 U.S. 333 (1970). Welsh was convicted of failing to submit to induction and sentenced to three years in prison; the lower courts rejected his defense that he qualified as a conscientious objector. In the Supreme Court, a plurality of four Justices (Black, who wrote the opinion, Douglas, Brennan and Marshall) concluded that the statute was not limited to those whose opposition to war is prompted by orthodox or parochial religious beliefs. A registrant's conscientious objection to all war is "religious" if it stems from the registrant's moral, ethical, or religious beliefs about what is right and wrong and these beliefs are held with the strength of traditional religious convictions. There was no dispute over the sincerity or depth of conviction of Welsh's views. For these Justices, what counted was whether the registrant's beliefs are, "in his own scheme of things," religious. "[T]he central consideration in determining whether the registrant's beliefs are religious is whether these beliefs play the role of a religion and function as a religion in the registrant's life." Therefore, "[i]f an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time" he qualifies for the exemption.

Justice Harlan rejected this reading as more than the words of the statute could bear:

> [I]t is one thing to give words a meaning not necessarily envisioned by Congress so as to adapt them to circumstances also uncontemplated by the

> legislature in order to achieve the legislative policy; it is a wholly different matter to define words so as to change policy. The limits of this Court's mandate to stretch concededly elastic congressional language are fixed in all cases by the context of its usage and legislative history, if available, that are the best guides to congressional *purpose* and the lengths to which Congress enacted a policy. The prevailing opinion today snubs both guidelines for it is apparent from a textual analysis of § 6(j) and the legislative history that the words of this section, as used and understood by Congress, fall short of enacting the broad policy of exempting from military service all individuals who in good faith oppose all war.

Reviewing the legislative history as well, Harlan concluded that Congress had extended the exemption only to members of "conventional religions that usually have an organized and formal structure and dogma and a cohesive group identity" who had theistic beliefs in opposition to war. This interpretation posed a new problem, however: so read, the statute violated the First Amendment to the Constitution, which forbids Congress to make laws "respecting the establishment of a religion." What, then, to do in this case? Noting the long history of the conscientious objector statute, Justice Harlan concluded that the court should extend it to people in Welsh's position rather than striking it altogether:

> When a policy has roots so deeply embedded in history, there is a compelling reason for a court to hazard the necessary statutory repairs if they can be made within the administrative framework of the statute and without impairing other legislative goals, even though they entail, not simply eliminating an offending section, but rather building upon it. Thus I am prepared to accept the prevailing opinion's conscientious objector test, not as a reflection of congressional statutory intent but as patchwork of judicial making that cures the defect of underinclusion in § 6(j) and can be administered by local [draft] boards in the usual course of business. Like the prevailing opinion, I also conclude that petitioner's beliefs are held with the required intensity and consequently vote to reverse the judgment of conviction.

Justice White, joined by Chief Justice Burger and Justice Stewart, dissented. They agreed with Justice Harlan that the statute simply would not bear the reading given by the plurality but disagreed that it would violate the Establishment Clause to deny the exemption to nonbelievers. Accordingly, they would have upheld the conviction.

(1) Which of the three opinions would Justice Brewer have joined? Plausible arguments can be made for each.

(2) Which opinion would you have joined?